

# Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection

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*Padilla v. Kentucky was a watershed in the U.S. Supreme Court's turn to regulating plea bargaining. For decades, the Court had focused on jury trials as the central subject of criminal procedure, with only modest and ineffective procedural regulation of guilty pleas. This older view treated trials as the norm, was indifferent to sentencing, trusted judges and juries to protect innocence, and drew clean lines excluding civil proceedings and collateral consequences from its purview. In United States v. Ruiz in 2002, the Court began to focus on the realities of the plea process itself, but did so only halfway. Not until Padilla last year did the Court regulate plea bargaining's substantive calculus, its attendant sentencing decisions, the lawyers who run it, and related collateral civil consequences. Padilla marks the eclipse of Justice Scalia's formalist originalism, the parting triumph of Justice Stevens's common-law incrementalism, and the rise of the two realistic ex-prosecutors on the Court, Justices Alito and Sotomayor. To complete Padilla's unfinished business, the Court and legislatures should look to consumer protection law to regulate at least the process if not the substance of plea bargaining.*

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## INTRODUCTION

The U.S. Supreme Court's decision last year in *Padilla v. Kentucky* marks a watershed in the Court's approach to regulating plea bargains. *Padilla* held that, before a guilty plea, criminal defense counsel must advise clients not only about the plea's direct criminal consequences, but also about one of its chief collateral civil consequences, deportation.<sup>1</sup> While *Padilla*'s holding is limited to deportation, its reasoning could reach much further. *Padilla* is a landmark interpretation of the Sixth Amendment's right to effective assistance of counsel, but it is much more than that. The Court began to move beyond its fixation upon the handful of cases that go to jury trials. It recognized that the other 95 percent of adjudicated cases resolved by guilty pleas matter greatly, and began in earnest

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1. 130 S. Ct. 1473, 1486 (2010).

to regulate plea bargains the way it has long regulated jury trials.<sup>2</sup> Though the Court's shift in emphasis is nascent, it is long overdue and welcome.

To understand *Padilla*'s grand implications, one must first appreciate the Court's historical focus on jury trials. In recent decades, the Supreme Court has promulgated exacting procedures to regulate jury trials. For example, prosecutors must now produce live witnesses in court (instead of routine lab reports) and prove aggravating facts to juries beyond a reasonable doubt.<sup>3</sup> But even as trial procedures hypertrophied, plea bargaining remained all but unregulated, a free market that sometimes resembled a Turkish bazaar.

The Court's indifference to pleas reflected both practicality and principle. The judicial system had grown addicted to plea bargaining, relying on guilty pleas to resolve the vast majority of criminal cases, and could not afford to stifle this trade.<sup>4</sup> Courts, assuming that innocent defendants would not plead guilty and that parties plea bargain in the shadows of expected trial outcomes, counted on jury trials as backstops to protect defendants. Additionally, the Bill of Rights provided no explicit protections for plea bargaining.

Much criminal procedure thus resembled a Potemkin village, a fine-looking facade inhabited by few. The Court trusted the shadows cast by trials to regulate plea outcomes, even though few defendants dared risk the huge penalties for going to trial. And because most guilty pleas waive defendants' rights to appeal, few typical guilty-plea cases ever reached the Supreme Court. The Court continued to filigree procedures for atypical jury trials, heedless of their effects on the overwhelming majority of cases resolved by plea.

The last decade has seen its continuing share of anachronistic formalism focused on jury trials.<sup>5</sup> But the Court has slowly begun to scrutinize bargaining in the real world of guilty pleas, beginning with *United States v. Ruiz* in 2002.<sup>6</sup>

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2. In 2004, of 582,480 felony convictions in state courts, 95 percent resulted from guilty pleas. Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics Online*, tbl.5.46.2004, <http://www.albany.edu/sourcebook/pdf/t5462004.pdf>. In fiscal year 2009, of 86,798 criminal cases disposed of in federal district court by trial or plea (thus excluding dismissals), 96.4 percent were disposed of by pleas of guilty or nolo contendere. *Id.* at tbl.5.24.2009, <http://www.albany.edu/sourcebook/pdf/t5242009.pdf>. Though it is impossible to be sure, most of these pleas probably resulted from plea bargains.

3. See *infra* notes 60–61 and accompanying text; *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2542 (2009).

4. As Chief Justice Burger remarked in a 1970 speech to the American Bar Association, even a small reduction in guilty-plea rates would have immense consequences. "A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities—judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand." Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970). See also *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."). See generally GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003) (arguing that plea bargaining has grown inexorably to handle crushing caseloads).

5. See, e.g., *infra* notes 57–58 and accompanying text.

6. 536 U.S. 622 (2002).

*Ruiz* held that prosecutors need not disclose impeachment or affirmative-defense evidence during plea bargaining, but its reasoning appreciated somewhat how plea bargains differ from trials.<sup>7</sup> With *Padilla*, the Court has now begun to interpret due process and the Sixth Amendment right to counsel to impose meaningful safeguards on the plea process.

*Padilla* is the Court's first case to treat plea bargaining as a subject worthy of constitutional regulation in its own right and on its own terms. By heeding plea-bargaining realities and evolving professional norms, the seven-Justice majority began to drag the law into the twenty-first century. The academy and the bar grasped the complexity of the plea process first, and the Court then recognized the consensus they had developed.<sup>8</sup> *Padilla* represents the eclipse of Justice Scalia's eighteenth-century formalism in criminal procedure, the parting triumph of Justice Stevens's common-law incrementalism, and the emergence of Justices Alito and Sotomayor's prosecutorial pragmatism. One can at least hope that the Court will persist in this new direction. Plea bargaining is no longer an insignificant corner of the market reserved for indisputably guilty people who need no protection beyond caveat emptor. Over the protests of Justices Scalia and Thomas, a solid majority of the Court at last sees that plea bargaining is the norm; sets the going rate; and needs consumer regulation and competent counsel to make it intelligent, voluntary, and just. That is a welcome first step, but it will also require rulemaking and legislation to complete the consumer-protection analogy.

Part I of this Essay sketches the Court's laissez-faire approach from roughly 1970 to 2000. It explores the assumptions underlying the Court's hands-off approach to plea bargaining even as the Court hypertrophied trial procedures.

Part II then discusses *Ruiz* as a transitional moment on the Court, in which the Justices began to assess the realities of bargaining, albeit incompletely.

Part III explains how *Padilla* at last recognizes that plea bargaining is now the norm and thus deserves tailored protection in its own right. I connect the dominance of bargaining to broader notions of innocence and injustice. I then explore how *Padilla* reconceives the roles of institutional actors and looks beyond simplistic bright-line dichotomies. I also weigh the concurring and dissenting Justices' objections to the Court's rule. *Padilla*, I conclude, reflects the eclipse of Justice Scalia's formalist originalism, the parting triumph of Justice Stevens's common-law incrementalism, and the rise of Justices Alito and Sotomayor's prosecutorial realism.

Part IV steps back to consider what broader reforms would help to complete the *Padilla* project. Since the criminal process is far too complicated and opaque to leave defendants at the mercy of caveat emptor, it is time to

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7. *Id.* at 633. See also *infra* notes 82–87 and accompanying text (explaining *Ruiz*'s reasoning).

8. See *infra* notes 122–125 and accompanying text.

consider regulations modeled on consumer protection law. *Padilla* may prompt legislatures, rules committees, and bar authorities to complement the Court's work. Finally, I conclude that the prosecutorial outlook of Justices Sotomayor and Alito, rather than traditional ideological divides, helps to explain the Court's new plea-bargaining realism.

## I.

### THE TRIAL MODEL AND THE INVISIBILITY OF PLEAS

From the 1970s through the early 2000s, plea bargains resolved the vast majority of criminal cases in the United States. But the Supreme Court's case law remained stuck in the eighteenth century. Even as the Court noted and blessed the prevalence of pleas, its frame of reference remained the self-contained criminal jury trial, uncluttered by sentencing or civil considerations.

#### *A. Efficiency, Originalism, and Formalism*

The Court adopted its hands-off approach to plea bargaining for an odd blend of reasons, ranging from sheer efficiency to anachronistic originalism. The seminal plea-bargaining cases, from around 1970, speak the technocratic language of efficiency. As Chief Justice Burger once wrote, plea bargaining "is an essential component of the administration of justice. Properly administered, it is to be encouraged."<sup>9</sup> Plea bargaining, he reasoned, handles large caseloads with a minimum of judicial and court resources.<sup>10</sup> It has the added virtues of being prompt, final, and increasing rehabilitation and incapacitation.<sup>11</sup> Justice White praised plea bargaining's efficiency in similar terms in *Brady v. United States*, which upheld the use of promises of leniency to induce plea bargains.<sup>12</sup>

Over the past decade or so, the Court's originalist decisions have reached roughly the same result for very different reasons. They have declined to regulate plea bargaining because it is not a jury trial protected by the Sixth Amendment. Though *Apprendi v. New Jersey* held that the Sixth Amendment guarantees jury findings of all facts that aggravate maximum sentences, it exempted facts admitted by defendants.<sup>13</sup> In his ringing originalist opinion in *Blakely v. Washington*, which extended *Apprendi* to facts that aggravate sentences under sentencing guidelines, Justice Scalia emphasized that defendants can freely waive *Apprendi* rights in plea bargaining.<sup>14</sup> (Set aside the anachronism that Article III's jury right was meant to be a nonwaivable

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9. *Santobello v. New York*, 404 U.S. 257, 260 (1971) (vacating and remanding because a prosecutor failed to honor an earlier prosecutor's commitment, as part of a plea bargain, to make no sentence recommendation).

10. *See id.*

11. *Id.* at 261.

12. 397 U.S. 742, 752–53 (1970).

13. *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000).

14. *Blakely v. Washington*, 542 U.S. 296, 310 (2004).

structural check, so plea bargaining did not and could not exist in the eighteenth century.)<sup>15</sup>

These holdings are not only originalist, but also formalist. Jury trials enjoy bright-line protection, while defendants who plead guilty can easily waive all of their rights. Twice, Justice Scalia has emphasized the need for a bright-line rule to protect jury trials (unless defendants choose to waive them).<sup>16</sup> More generally, Justice Thomas has emphasized a strong presumption that all rights are waivable in plea bargaining as part of the *laissez-faire* give-and-take.<sup>17</sup> Criminal procedure thus becomes a binary on/off switch, fully enforced at jury trials but simply inapplicable in plea bargaining. The problem with bright-line rules such as *Apprendi* is that their edges are clear and so easy to evade, particularly when the rule is freely waivable.<sup>18</sup>

These themes of efficiency, originalism, and formalism are evident in the parts that follow. As Parts I.B and I.C discuss, the Court's focus on trials and lack of concern with sentencing tracked eighteenth-century procedures. This focus also reflected the practical difficulties of regulating off-the-record plea negotiations and advice. The Court's faith in neutral judges and juries, noted in Part I.D, reflected the same considerations. And by dividing pleas from trials, civil collateral consequences from criminal sentences, and omissions from commission, the Court avoided thorny line-drawing issues. As Part I.E explains, the Court's blinders blocked out factors beyond those characterizing the historical jury trial.

### B. Trials as the Norm

The most notable feature of the pre-*Padilla* landscape is that trials remained the norm, the touchstone guiding the Court. Though the Court occasionally acknowledged the prevalence of pleas, until *Padilla* it did not cultivate rules tailored to make bargaining fair and substantively just.<sup>19</sup> The focus of its criminal procedure regulation has long been ensuring fair trial

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15. U.S. CONST. art. III, § 2, cl. 3 (“The Trial of *all Crimes* . . . shall be by Jury” (emphases added)); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196–99 (1991).

16. *Blakely*, 542 U.S. at 306–08, 310. See also *Apprendi*, 530 U.S. at 498–99 (Scalia, J., concurring) (“What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury *does* guarantee if [not *Apprendi*’s bright-line rule]. They provide no coherent alternative.”). I have argued elsewhere that Justice Scalia’s originalism and formalism have powerfully shaped criminal procedure in recent years, particularly in the *Apprendi* and *Blakely* lines of cases. See Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005).

17. *United States v. Mezzanatto*, 513 U.S. 196, 200–03 (1995) (adopting a presumption of waivability, and holding that defendants may waive rules that exclude from evidence statements made during plea negotiations).

18. See Bibas, *supra* note 16, at 198.

19. For early Supreme Court cases acknowledging the prevalence or importance of guilty pleas or plea bargains, see *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello v. New York*, 404 U.S. 257, 260 (1971); *Brady v. United States*, 397 U.S. 742, 752 (1970).

procedures. A wide variety of doctrines reflect that trial emphasis. The Court has long required neutral decision makers at trial and steadily restricted discrimination in jury selection.<sup>20</sup> Rules of evidence and motions in limine structure the presentation of proof for the jury's consideration. *Brady v. Maryland* and *Giglio v. United States* require turning over exculpatory and impeachment evidence that jurors would likely find material in time for its effective use at trial.<sup>21</sup> The requirements of confrontation and cross-examination of witnesses ensure live, adversarial testing of the prosecution's case in front of the jury.<sup>22</sup> The privilege against compelled self-incrimination is so robust that it prevents even adverse comments on defendants' silence at trial.<sup>23</sup> The Court's cases on proof beyond a reasonable doubt shape instructions to juries about when there is enough evidence to convict.<sup>24</sup> And, in 2000, *Apprendi* read the Sixth Amendment's jury-trial guarantee to require jury findings beyond a reasonable doubt of all facts that aggravate maximum sentences.<sup>25</sup> The law of criminal procedure is primarily a law of trials and preparation for trials.

The Court's perspective reflected its criminal docket, which was (and still is) skewed toward reviewing convictions at trial. Most guilty pleas forfeit most rights that defendants could otherwise appeal.<sup>26</sup> Defendants often waive many other rights in plea bargaining, even the right to appeal itself, so disproportionately few plea issues reach the Court.<sup>27</sup>

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20. *E.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927) (forbidding judges to have direct monetary interests in the outcomes of cases); *Batson v. Kentucky*, 476 U.S. 79 (1986) (forbidding race discrimination in criminal jury selection); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (extending *Batson* to sex discrimination).

21. *Brady v. Maryland*, 373 U.S. 83 (1963) (exculpatory material); *Giglio v. United States*, 405 U.S. 150 (1972) (impeachment material).

22. *E.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004) (forbidding the use at trial of testimonial hearsay by nontestifying declarants); *Bruton v. United States*, 391 U.S. 123 (1968) (forbidding admission at joint trials of confessions implicating the accused by nontestifying codefendants).

23. *Griffin v. California*, 380 U.S. 609 (1965).

24. *E.g.*, *In re Winship*, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt for criminal convictions); *see also* *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam) (reversing a criminal conviction because defective reasonable-doubt instruction permitted jury to convict based on insufficient proof).

25. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *See also* *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004) (applying *Apprendi* to facts aggravating maxima under sentencing guidelines).

26. *See, e.g.*, *United States v. Broce*, 488 U.S. 563, 575–76 (1989) (holding that a guilty plea barred a later double jeopardy claim that relied on additional evidence); *Tollett v. Henderson*, 411 U.S. 258, 266–67 (1973) (same, for claim of race discrimination in selecting grand jury); *McMann v. Richardson*, 397 U.S. 759, 768–71 (1970) (same, for coerced-confession claim). A few types of claims are not automatically forfeited by a plea. *See* *Menna v. New York*, 423 U.S. 61, 62 (1975) (per curiam) (double jeopardy claim); *Blackledge v. Perry*, 417 U.S. 21, 30 (1974) (vindictive prosecutorial charging; describing these claims as exceptional because they undercut “the very power of the State” to charge the defendant).

27. *See, e.g.*, *Cowan v. Superior Court*, 926 P.2d 438, 441–43 (Cal. 1996) (allowing waiver

When the Court has reviewed guilty pleas, it has usually considered only the amount of knowledge defendants must have before waiving procedural trial rights.<sup>28</sup> On this view, the plea process can remain effectively unregulated so long as the trial remains a regulated backstop. Plea bargaining supposedly takes place in the shadow of expected trial outcomes, so regulation of trials should theoretically protect plea-bargaining defendants as well.<sup>29</sup> For the shadow of trial to work, defendants need know only that they are giving up their trial rights. Thus, plea colloquies must warn defendants that they are waiving their rights to jury trials, confrontation, and protection against self-incrimination.<sup>30</sup> The intricacies of the Rule 11 plea process, built upon this constitutional minimum, are almost exclusively procedural.<sup>31</sup> The judge need mention only the rights being waived, the nature of the charges, the maximum and minimum penalties, and the vague existence of sentencing guidelines, and elicit a minimal factual basis for the plea.<sup>32</sup> Judges need not opine on the likelihood of conviction, the probable sentence within the range, or the advisability of the bargain. On the contrary, the majority of jurisdictions forbid judges to take any part in bargaining.<sup>33</sup>

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of statute of limitations); *People v. Allen*, 658 N.E.2d 1012, 1014–15 (N.Y. 1995) (same, for double jeopardy); *People v. Seaberg*, 541 N.E.2d 1022, 1024–26 (N.Y. 1989) (same, for waivers of the right to appeal); see also Nancy J. King, *Priceless Process: Non-Negotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999) (noting trend towards allowing waiver of all rights except constitutional claims that affect third parties). The Court has accelerated this trend by itself blessing plea-bargained waivers. *E.g.*, *United States v. Mezzanatto*, 513 U.S. 196, 200–02, 210 (1995) (adopting a presumption of waivability and enforcing a waiver of the inadmissibility of statements a defendant made during plea negotiations).

The existence of appeal waivers, however, does not entirely explain the dearth of plea-bargaining case law. Defendants can enter conditional guilty pleas, expressly reserving their rights to appeal specified pretrial issues. *E.g.*, FED. R. CRIM. P. 11(a)(2). And it does not explain the paucity of case law on issues that go to the validity of the plea, such as the *Ruiz* issues of when and how prosecutors' *Brady* obligations attach.

28. *E.g.*, *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (holding that, at guilty-plea colloquies, judges need not advise defendants of the specific risks of waiving counsel and proceeding pro se); *McMann*, 397 U.S. at 770–71 (1970) (holding that “a defendant’s plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant’s confession”); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (holding that, to demonstrate that a guilty plea is voluntary, the record must reflect that the defendant affirmatively waived his rights to a jury trial and to confront his accusers, as well as his privilege against compelled self-incrimination).

29. I have critiqued this widespread assumption. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

30. *Boykin*, 395 U.S. at 242–43.

31. FED. R. CRIM. P. 11. Rule 11 establishes the federal procedures for plea bargaining and has served as a model for many states. *E.g.*, HAW. R. PEN. P. 11; TENN. R. CRIM. P. 11; VT. R. CRIM. P. 11; W. VA. R. CRIM. P. 11.

32. FED. R. CRIM. P. 11(b)(1), (b)(3).

33. *E.g.*, FED. R. CRIM. P. 11(c)(1); COLO. REV. STAT. § 16-7-302(1) (2006); GA. UNIF. SUPER. CT. R. 33.5(A). For cogent criticism of this judicial reticence, see Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1123–34 (1976).

Anecdotal evidence suggests that judges do on occasion participate in plea bargaining, sometimes in violation of local rules. One study found that about a third of judges nationwide



The underlying justification for this laissez-faire approach is that plea bargaining is a positive good and that defendants can decide for themselves when bargains serve their interests.<sup>34</sup> In 1970, in *Brady v. United States*, Justice White explained that plea bargains serve everybody's interests: defendants who stand little chance of acquittal get reduced sentences, avoid burdensome trials, and get their cases over with.<sup>35</sup> In theory, by admitting guilt, they show that they are more open to rehabilitation and so need less punishment. The government saves time and money for cases that need it and increases the swiftness of punishment. This "mutuality of advantage" supposedly makes plea bargaining rational, fair, and efficient.<sup>36</sup> Trials remain as benchmarks against which both sides can measure their mutual advantages and as fallbacks against bargaining coercion.

On this account, defendants can freely and voluntarily choose to plead guilty. The only limitations are that they must face no threats, misrepresentations, or bribes, and have competent counsel and time to weigh the pros and cons of trial.<sup>37</sup> While recognizing that the plea process "is no more foolproof than full trials," the Court expressed confidence that judges at plea hearings would ensure the accuracy and reliability of convictions to prevent convictions of the innocent.<sup>38</sup> But that judicial oversight need not screen out many pleas. Even a defendant who protests his own innocence can plead guilty, so long as the prosecutor and defense lawyer furnish a "strong factual basis" by articulating the facts they would prove at trial.<sup>39</sup> And the ban on threats and promises conveniently exempts those threats and promises integral to the plea process, such as promises of leniency and threats of heavier charges.<sup>40</sup>

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attended plea negotiations, most often reviewing the parties' recommendations but occasionally making their own. Where rules clearly forbade participation in plea bargaining, judges were much less likely to attend, but some still did. John Paul Ryan & James J. Alfani, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 LAW & SOC'Y REV. 479, 484–90 (1979). Cf. Allen Anderson, *Judicial Participation in the Plea Negotiation Process: Some Frequencies and Disposing Factors*, 10 HAMLINE J.L. & PUB. POL'Y 39, 43–49, 57 (1990) (reporting that "[j]udicial participation in the plea negotiation process, in varying forms, is widespread," based on a study of North Carolina, which expressly authorizes judges to participate).

34. Frank Easterbrook has made this free-market argument powerfully several times. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309–17 (1983); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1974–75 (1992).

35. 397 U.S. 742, 752 (1970).

36. *Id.* at 752–53. See also Santobello v. New York, 404 U.S. 257, 260–61 (1971).

37. *Brady*, 397 U.S. at 752, 754–55.

38. *Id.* at 758.

39. North Carolina v. Alford, 400 U.S. 25, 37–38 (1970).

40. The landmark approval of lawful threats as part of the rough-and-tumble of plea bargaining is *Bordenkircher v. Hayes*, 434 U.S. 357, 362–65. For a cogent critique of *Bordenkircher's* opening the floodgates to unfettered plea bargaining, see William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in CRIMINAL PROCEDURE STORIES 351 (Carol Steiker ed., 2006).

The Court put great faith in competent defense counsel as the only substantial safeguard.<sup>41</sup> As long as lawyers offered competent advice, even if they turned out to be wrong in hindsight, defendants supposedly could forecast whether pleas served their self-interests.<sup>42</sup> That romanticized vision, however, ignored the workloads, underfunding, and agency costs that beset defense lawyers and the difficulties of proving incompetence on undeveloped plea records.<sup>43</sup>

Also, like many economists, the Court's account assumed that the parties had good information and treated uncertainty as a mere matter of rationally forecasting probabilities of conviction.<sup>44</sup> The Court seemed to presume that most defendants know their own guilt and the evidence likely to be marshaled against them at trial.<sup>45</sup> That stylized assumption collided with the reality that criminal discovery is far less expansive than civil discovery, even though

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41. Here and over the next several pages, I discuss more generally the Court's tacit assumptions for more than three decades, from the 1970s through the early 2000s. One cannot rigorously prove such generalizations, particularly when it comes to proving negatives, such as the Court's failure to advert to the realities of plea bargaining. For a concrete example, however, of an opinion that would have been written differently had the Court not made these assumptions and instead assessed plea bargaining more realistically, see my discussion of *United States v. Ruiz*. *Infra* Part II.

42. *McMann v. Richardson*, 397 U.S. 759, 769–71 (1970). *See also* *Libretti v. United States*, 516 U.S. 29, 50–51 (1995) (“Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo.”).

43. Albert Alschuler's classic examination of defense lawyers remains the best study of their role in plea bargaining. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *YALE L.J.* 1179, 1180 (1975) (describing the assumption that defense counsel will adequately safeguard their clients' interests in plea bargaining as “often more romanticized than real”). I have contributed to this literature, in particular by discussing the problems of gauging ineffectiveness in hindsight. Bibas, *supra* note 29, at 2476–86; Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2003 *UTAH L. REV.* 1.

44. *See, e.g.*, Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 *J.L. & ECON.* 353, 361–62 (2006) (“In most cases, key evidence, including the defendant's statement to the police and the identity of the main witnesses, is common knowledge. In many jurisdictions, law or prosecutorial practice guarantees that defendants receive the most significant information collected by the prosecution, thus minimizing private information on the prosecution side.”); *see also* *Brady v. United States*, 397 U.S. 742, 756–58 (1970) (treating the decision to plead guilty as “intelligently made” because it is based on “the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency”); *McMann*, 397 U.S. at 770–71 (suggesting that “uncertainty is inherent in predicting court decisions” and that predicting likely outcomes is a normal part of defense counsel's job).

45. *See, e.g.*, *North Carolina v. Alford*, 400 U.S. 25, 37–39 (1970) (stressing that “[w]hether [Alford] realized or disbelieved his guilt,” upon his lawyer's advice he had rationally decided to plead guilty “[b]ecause of the overwhelming evidence against him”). *Cf.* Bar-Gill & Ayal, *supra* note 44, at 361 (economic model assuming good information through common knowledge and discovery, particularly defendant's knowledge of his own guilt); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1936–37 (1992) (stressing that defendant's knowledge of his own guilt gives him “a major piece of information that” the prosecutor lacks).

criminal defendants have far more at stake.<sup>46</sup> It also ignored the many psychological biases and heuristics that color defendants' assessments of their own cases in plea bargaining.<sup>47</sup>

The Court's view of trial-based plea bargaining was thus rather idealized and static. It focused on the law on the books, such as the elements of the crime, the statutory punishments, and especially the procedural rights exercised or waived. The Court did not consider or did not care that plea bargaining would likely undercut or pervert trial regulations in practice.<sup>48</sup> And it assumed that good information and competent counsel would suffice to ensure rational, orderly, trial-based bargaining within these boundaries. That assumption was far too rosy.

### *C. Guilt Without a Sense of Sentencing*

Until the early 2000s, the Court's world was binary: defendants were either guilty or not guilty. It ignored the varieties of possible charges and the gradations of sentences that might fit a crime. It assumed that guilt alone matters and that defendants know their own guilt. Innocent, intoxicated, and insane defendants, however, may not know the evidence against themselves. The Court may also have assumed that innocent defendants would not confess or plead guilty, but DNA exonerations show that a fraction do, especially mentally retarded and juvenile defendants.<sup>49</sup> Even typical defendants may not know or be able to use potentially mitigating sentencing facts. Poor lawyering, for example, can impede defendants' efforts to cooperate with government investigations.<sup>50</sup> And lack of discovery can prevent them from showing at sentencing that their victims suffered little lasting harm.

In this vein, the Court also neglected the importance of sentencing to plea bargaining. It took trials as the norm and thus post-trial punishments as the normative baseline. Prosecutors can lawfully threaten any charges and

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46. *See* *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to discovery in a criminal case . . .”); *Bibas, supra* note 29, at 2493–96.

47. I have explored this problem at length elsewhere. *Bibas, supra* note 29, at 2496–2519.

48. I have argued at length that the Court erred by writing criminal procedure decisions such as *Apprendi* for the 5 percent of cases that go to trial, heedless of how the parties would circumvent or pervert these rules in the 95 percent of cases that plead guilty. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 *YALE L.J.* 1097, 1148–51 (2001).

49. *Compare, e.g.,* *Brady v. United States*, 397 U.S. 742, 757–58 (1970) (doubting that inducements to plead guilty “substantially increased the likelihood that” innocent defendants would plead guilty), with Brandon L. Garrett, *The Substance of False Confessions*, 62 *STAN. L. REV.* 1051, 1064 (2010) (reporting that mentally ill, mentally retarded, and borderline mentally retarded defendants composed 43 percent of DNA exonerees who had falsely confessed; 65 percent of false confessors were mentally disabled, under eighteen at the time of the crime, or both), and Samuel R. Gross, *Convicting the Innocent*, 4 *ANN. REV. L. & SOC. SCI.* 173, 181 (2008) (discussing a study of 340 nonrandomly selected defendants who pled guilty, finding that 6 percent were later exonerated).

50. *Bibas, supra* note 29, at 2485–86.

sentences which they have probable cause to bring. Against this backdrop, plea offers look like favorable discounts. Hence, some courts hold that a defendant can never be prejudiced by an attorney's error that causes him to go to trial, because he has not been deprived of his constitutional right to a fair trial.<sup>51</sup> That static picture misses an important fact: now that bargaining is the norm, its existence warps the baseline penalties. Legislatures multiply overlapping criminal statutes and inflate sentences to give prosecutors extra plea-bargaining chips.<sup>52</sup> Charges are not exogenously specified by natural law, but endogenous to the criminal process. A range of possible overlapping charges can fit a single transaction or episode, and prosecutors have discretion to choose among them to reflect their own senses of justice, their desires to achieve pleas, or any number of reasons. When prosecutors threaten inflated post-trial sentences to induce pleas, defendants are less free to test their guilt at trial.<sup>53</sup> Defendants may be better off if they play the game well but much worse off if they do not.

Ignoring sentencing was at least understandable in the older world of indeterminate or unstructured sentencing. Through most of the twentieth century, most statutes set only broad punishment ranges. Judges enjoyed almost unfettered discretion within those ranges, so lawyers could not confidently predict eventual sentences or the facts that would influence them. Much was left to the discretion of parole authorities, who made their rehabilitative decisions much later, on the back end.<sup>54</sup> But over the last four decades, the truth-in-sentencing movement has abolished or greatly restricted parole in many states.<sup>55</sup> At the same time, the federal and many state systems have adopted mandatory minimum penalties and structured sentencing guidelines. Particularly in the federal system, specific facts trigger predictable sentencing consequences, as do charge bargains, sentence bargains, and decisions to cooperate with police and prosecutors.<sup>56</sup> Investigation and negotiation over

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51. *E.g.*, *United States v. Springs*, 988 F.2d 746, 749 (7th Cir. 1993) (Easterbrook, J.); *State v. Greuber*, 165 P.3d 1185, 1190 (Utah 2007); *Bryan v. State*, 134 S.W.3d 795, 802 (Mo. Ct. App. 2004) (finding no prejudice); *State v. Monroe*, 757 So.2d 895, 898 (La. Ct. App. 2000) (same). See also *infra* note 116 for information about next Term's cases, *Lefler v. Cooper* and *Missouri v. Frye*.

52. Bill Stuntz beautifully exposed this phenomenon in William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534–38, 546–52 (2001).

53. Studying plea and conviction statistics across the second half of the twentieth century, Ronald Wright concludes that many federal defendants who would otherwise have been acquitted at trial have increasingly pleaded guilty instead. He blames this development in substantial part on increased prosecutorial power. Federal prosecutors, he notes, have become increasingly able to threaten large penalties for going to trial and to promise large rewards for pleading guilty. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84–86, 100–12, 129–37, 150–54 (2005).

54. See generally LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 159–63, 304–06 (1993); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9–10, 18–21 (1998).

55. See PAULA M. DITTON & DORIS JAMES WILSON, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 170032, TRUTH IN SENTENCING IN STATES PRISONS 1, 3 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tssp.pdf>.

56. Bibas, *supra* note 29, at 2483–91.

these factors predictably influence whether sentences track what defendants deserve.<sup>57</sup> And, increasingly, certain convictions trigger automatic collateral consequences, such as deportation or sex-offender residency restrictions.<sup>58</sup> By the start of the twenty-first century, the Court's blindness to sentencing and related consequences had grown antiquated.

#### D. Faith in Neutral Arbiters

The Court's preoccupation with trials had another important component. It trusted that public trials run by neutral judges and juries would discipline both sides, develop factual records for appellate scrutiny, and ensure justice. It assumed that trial judges remained informed overseers who could referee disputes between prosecutors and defense counsel. They could do so knowledgeably, based on their first-hand exposure to the evidence at motions hearings and trials. There was little sense that judges usually played reactive roles, dependent on the parties' representations about the facts and pressured to rubber-stamp plea bargains as *faits accomplis*.

Likewise, the Court has traditionally seen protecting juries as a central part of its mission. It has elaborated the *Batson* line of cases to protect the representative jury as the conscience of the community.<sup>59</sup> It interpreted the Confrontation Clause in *Crawford* to ensure that jurors hear live witnesses and can gauge their reliability.<sup>60</sup> And it has protected juries' role in authorizing maximum sentences under the Sixth Amendment's Jury Trial Clause. *Apprendi* and its progeny emphasized that juries must check judges' and prosecutors' decisions to punish defendants for aggravated crimes.<sup>61</sup>

The Court appears to have understood these arbiters as fairly simple, static, and unitary. The vision was one of strict, static separation of powers, not of fluid checks and balances; there was little sense of a dialogue among the various actors or branches, let alone the kind of game that characterizes plea bargaining. The *Apprendi* dissenters would have preserved more leeway for legislatures and sentencing commissions to experiment by, for instance, adopting sentencing guidelines.<sup>62</sup> The *Blakely* dissenters argued for flexible, dynamic judicial discretion to counteract prosecutors' charge-bargaining power

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57. *Id.*

58. *See, e.g.,* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (deportation); Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101 (2007) (sex offender residency restrictions).

59. *E.g.,* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); Powers v. Ohio, 499 U.S. 400 (1991); *Batson* v. Kentucky, 476 U.S. 79 (1986).

60. *Crawford* v. Washington, 541 U.S. 36 (2004).

61. *E.g.,* *Blakely* v. Washington, 542 U.S. 296 (2004); *Apprendi* v. New Jersey, 530 U.S. 466, 490 (2000).

62. *Apprendi*, 530 U.S. at 550–52 (O'Connor, J., dissenting); *id.* at 560–66 (Breyer, J., dissenting). Concurring, Justice Scalia mocked these “admirably fair and efficient” reforms as a “bureaucratic realm of perfect equity” divorced from the Sixth Amendment's guarantee of trial by jury. *Id.* at 498 (Scalia, J., concurring).

and Procrustean sentences.<sup>63</sup> The majorities in both cases, however, rejected these functionalist arguments for fairness and cooperation among the branches. Instead, they placed their faith in juries as a brake on judges and prosecutors. That faith assumed, of course, that there were still meaningful numbers of jury trials left to save. The majorities also assumed that juries authorize punishments in some meaningful sense, even though they cannot be told and must not consider the likely sentences.<sup>64</sup>

### *E. Clean Dichotomies*

Finally, the Court's traditional approach to plea bargaining assumed several neat categories dividing various areas of law. It assumed clear lines between guilty pleas and jury trials, and between the guilt phase and sentencing proceedings. It focused on regulating guilt verdicts at trial. It thus trusted that forecasted trial verdicts would cast shadows on the substance of plea bargaining, obviating much procedural regulation of pleas. It put its faith in proceedings on the record, easily subject to review by trial and appellate judges.

An even bigger oversight was the artificial separation of criminal from civil and, in particular, of direct criminal consequences from collateral civil ones. The criminal proceeding was a self-contained unit with well-defined aims: the prosecution sought a verdict of guilty on the exogenously specified charge, while the defense sought a complete acquittal on the same single charge. Judges and criminal lawyers could control and had to explain only those consequences labeled criminal, not civil. Thus, for example, the protections of double jeopardy do not apply to civil penalties.<sup>65</sup> At plea colloquies, judges had to explain only the direct consequences of a plea, such as the minimum and maximum sentences and any fine, forfeiture, or probation.<sup>66</sup> Other consequences fell beyond the sentencing judge's purview.

The neat walls between criminal and civil, and between direct and collateral consequences, have steadily eroded in recent years. Statutory reforms have increasingly specified that certain crimes trigger deportation and have made it automatic.<sup>67</sup> Other laws have mandated registration, housing and job restrictions, and even civil commitment of those convicted of certain sex-related crimes, even minor ones such as consensual teenage sex.<sup>68</sup> Drug crimes

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63. *Blakely*, 542 U.S. at 330–40 (Breyer, J., dissenting).

64. *Compare Apprendi*, 530 U.S. at 494 (asking whether an enhancement “expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict”), *with Shannon v. United States*, 512 U.S. 573, 587 (1994) (reiterating “the rule against informing jurors of the consequences of their verdicts” and rejecting a proposed exception).

65. *Hudson v. United States*, 522 U.S. 93, 101–03 (1997).

66. *Brady v. United States*, 397 U.S. 742, 755 (1970); FED. R. CRIM. P. 11 (b)(1)(H)–(M).

67. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478–80 (2010).

68. *See, e.g., WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* 49–84 (2009); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea*

likewise carry many collateral consequences.<sup>69</sup> The distinction between a three-day prison sentence and the deportation or civil confinement triggered by that sentence has become increasingly arbitrary. Defendants might care much more about the latter, and the lawyers might well trade off criminal against civil consequences via plea bargaining to make the overall penalties fit the crime.

Finally, the Court's laissez-faire approach assumed a sharp line between sins of commission and mere omissions. The state could not misrepresent the facts or affirmatively conceal evidence.<sup>70</sup> But judges and prosecutors had little responsibility to assist the defense.<sup>71</sup> The state's obligation was simply to avoid obstructing the defense and to provide minimal procedural information at the plea colloquy. It had no obligation to offer any substantive guidance on the merits of a proposed disposition. Defense lawyers might offer sound advice, poor advice, or simply tell their clients to take pleas without much explanation. Often, defendants were largely on their own in discerning whether a proposed plea deal was favorable, had strings attached, or was a bluff to hide a prosecutor's weak hand.

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By roughly the turn of the millennium, the Court's criminal procedure jurisprudence had grown quite lopsided. It focused on unrepresentative Cadillac jury trials, embellished with cumbersome procedures, to protect defendants against overbearing state power. The Court reviewed disproportionately fewer guilty pleas, and when it did it took a hands-off approach. The very same state against which defendants needed to be protected at trial could issue any number of lawful threats in bargaining. It could thus induce most defendants to surrender their Cadillac trials in exchange for scooter plea bargains. Prosecutors easily circumvented the hypertrophied protections for 5 percent of cases in the remaining, lightly regulated 95 percent. Plea waivers had to follow elaborate scripted procedures to ensure that defendants knew they were waiving a host of procedural rights of little interest to them. Yet the waiver process was oddly silent about the substantive advisability of the sentences and consequences being offered, and it required far less than proof of guilt beyond a reasonable doubt. The plea process trusted defendants and their lawyers to figure out their interests with little help or safeguard. Given the chronic

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*Process*, 95 IOWA L. REV. 119, 176, 179–80, 182–83 (2009); Yung, *supra* note 58; *Sex Laws: Unjust and Ineffective*, ECONOMIST, Aug. 6, 2009, at 21 (giving example of a seventeen-year-old girl who had to register publicly as a sex offender for performing fellatio on a boy aged fifteen years, eleven months).

69. Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002).

70. *E.g.*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Mooney v. Holohan*, 294 U.S. 103 (1935).

71. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 693 (1984) (“The government is not responsible for, and hence not able to prevent, [defense] attorney errors . . . .”); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to discovery in a criminal case . . . .”).

problems of overworked, underfunded, incompetent, and conflicted defense counsel, that assumption was myopic.<sup>72</sup>

## II.

### *RUIZ AND A DAWNING APPRECIATION OF PLEA REALITIES*

So matters stood until about a decade ago. In 2002, the Court in *Ruiz* had to grapple with a new plea-bargaining phenomenon: the rise of fast-track guilty pleas, which waive even more rights than usual in exchange for steep discounts. In many ways, as Part II.A notes, *Ruiz* extended the Court's previous incomprehension of plea bargaining. In approving fast-track pleas, the Court continued to focus on fair trials and trusted defendants to know their own guilt. Yet, as Part II.B explains, some of *Ruiz*'s reasoning evinced a greater appreciation of both the benefits and pitfalls of plea negotiations. Ultimately, *Ruiz* was unclear on just how much the Court would modify its hands-off faith in plea bargaining.

#### *A. Continued Emphasis on Proof of Guilt at Trial*

Judicial districts in southwestern America, near the Mexican border, have been overwhelmed with far more immigration and drug cases than they can handle. In response, federal prosecutors in many of those districts developed fast-track plea-bargaining programs. The seminal program required defendants to waive indictment, forego motions, plead guilty immediately, waive presentence reports, stipulate to a particular sentence, agree to immediate sentencing, consent to deportation, and waive all sentencing and deportation appeals. In exchange, prosecutors stipulated to sentences substantially below what defendants would have received after trial.<sup>73</sup>

Angela Ruiz was caught smuggling thirty kilograms of marijuana into the United States. As part of a fast-track program, prosecutors offered Ruiz a six-month discount, reducing her sentencing guidelines range from eighteen-to-twenty-four months down to twelve-to-eighteen months. They represented that the government had already turned over and would continue to turn over any known information showing the defendant's factual innocence. The proposed plea agreement, however, asked defendants to waive their rights to impeachment information and evidence supporting affirmative defenses, in addition to many of the other waivers listed above.<sup>74</sup> The questions for the Court were whether *Brady* and *Giglio* entitled defendants to impeachment and

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72. See generally, e.g., AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004).

73. Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 301 (1998).

74. *United States v. Ruiz*, 536 U.S. 622, 625 (2002).



affirmative-defense information during plea bargaining and, if so, whether these discovery rights were waivable.<sup>75</sup>

The Court held that there is no constitutional right to this discovery before a plea, for several reasons.<sup>76</sup> First, *Brady* and its progeny recognized a due process right to a fair trial. When the government lays its cards down on the table at trial, the Court implied, the jury needs to see impeachment information to complete the picture.<sup>77</sup> But during plea bargaining the government need not reveal the incriminating evidence, so there is no need to disclose prematurely the impeachment evidence or affirmative defenses undercutting it.<sup>78</sup> Concurring, Justice Thomas went further, saying that *Brady* was limited to ensuring fair trials, not providing helpful information in time for a plea.<sup>79</sup> The Court evinced little appreciation of the need to guide defendants in making informed, reasoned decisions.

Second, voluntariness does not require full discovery or knowledge of all incriminating evidence. Defendants can waive rights if they understand them generally, even if they cannot foresee the specific detailed consequences of invoking those rights. They have no right to full discovery or full information. Indeed, they may plead guilty even if they misunderstand the evidence against them or the law likely to apply to them.<sup>80</sup> And the importance of impeachment information will vary depending on how much defendants independently know about the prosecution's case,<sup>81</sup> not based on how likely they are to be innocent.

Third, the Court dismissed the fear that poor information might harm innocent defendants. At trial, failure to reveal impeachment evidence could lead a jury to convict erroneously. But innocent defendants are very unlikely to plead guilty, the Court assumed. It reasoned that the prosecution's continuing promise to turn over exculpatory evidence and the procedural safeguards of Rule 11 diminish the risk of a false guilty plea.<sup>82</sup>

At oral argument, several Justices showed even less concern about the justice of plea-bargaining outcomes. Justice Scalia assumed that defendants would know their own defenses,<sup>83</sup> which is often true of self-defense but less true of entrapment and the like. Justices Souter and Ginsburg stressed that Ruiz had admitted guilt, suggesting that she had no need for discovery to know her

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75. *Id.* at 628.

76. *Id.* at 625.

77. *Id.* at 629–30.

78. *Id.* at 629–30, 633.

79. *Id.* at 633–34 (Thomas, J., concurring).

80. *Id.* at 629–31 (majority opinion).

81. *Id.* at 630.

82. *Id.* at 631 (stating that the factors noted in the text allay the fear “that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty”).

83. Transcript of Oral Argument at 32–33, *United States v. Ruiz*, 536 U.S. 622 (2002) (No. 01-595) (“[I]t’s impossible for [a defendant] not to know whether he was acting in self-defense.” (Scalia, J.)). See [http://www.oyez.org/cases/2000-2009/2001/2001\\_01\\_595/argument](http://www.oyez.org/cases/2000-2009/2001/2001_01_595/argument).

own guilt.<sup>84</sup> Justice Scalia went further, stressing that our system never permits or encourages innocent defendants to plead guilty. On his view, more discovery would merely tell a defendant “what the house odds are . . . before he rolls the dice by pleading guilty.”<sup>85</sup> At best, he implied, this discovery would encourage tactical gamesmanship by the guilty; at worst, it would encourage innocent defendants to enter false pleas of guilty.<sup>86</sup>

Note here the continuing impact of the classic trial model. The game is a static one, in which defendants know their guilt and the likely sentences after trial versus plea. They are rational and well informed, able to weigh probabilities and uncertainties. Trials set normative baselines, which plea bargains simply sweeten. Innocent defendants know their innocence and will not be tempted to plead, and the categories of guilt or innocence are black and white.

It did not help that Ruiz’s case, like many of the fast-track cases, was open and shut, with an unequivocal admission of guilt and no apparent defense.<sup>87</sup> That setting only sharpened the Court’s dichotomy between the guilty and the innocent. It also stripped away any justification other than gamesmanship for discovery.

Even so, a couple of Justices saw beyond the dichotomy between guilt and innocence. At oral argument, Justice Breyer stressed that prosecutors wield overwhelming power in plea bargaining, which could tempt innocent defendants to plead guilty. Providing more information, he noted, could help to counterbalance prosecutors.<sup>88</sup> And Justice Souter disagreed with Justice Scalia, noting that innocent defendants might indeed enter *Alford* guilty pleas, but that more information about weaknesses in the prosecution’s case might thus steel their resolve to vindicate themselves at trial.<sup>89</sup>

These few caveats expressed at oral argument were not reflected in the *Ruiz* opinions. Nor did the Court evince much appreciation for the different types of information at issue. The Court spent most of its opinion discussing impeachment information, which is tangential to the evidence of guilt. Only in one paragraph at the end did it extend the same reasoning to evidence of affirmative defenses.<sup>90</sup> But affirmative-defense evidence can be far more central to blameworthiness and guilt than impeachment information. Evidence

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84. *Id.* at 28–29.

85. *Id.* at 12.

86. *Id.* at 19–20 (“I mean, there’s something wrong with a legal system that . . . is even contemplating [encouraging innocent defendants to plead guilty.]”); *id.* at 26 (“There is nothing in our system that encourages or even allows an innocent person to—to plead guilty. And I would be horrified if—if there were something like that.”); *id.* at 32–33 (“Other provisions of our laws make it very clear that we are not to accept guilty pleas from innocent people,” and defendants do not need discovery to know if they have a possible self-defense claim or the like).

87. *Id.* at 38–39 (noting the oddity of considering the issue in a case with no suggestion of innocence).

88. *Id.* at 17–18.

89. *Id.* at 34–35. See [http://www.oyez.org/cases/2000-2009/2001/2001\\_01\\_595/argument](http://www.oyez.org/cases/2000-2009/2001/2001_01_595/argument).

90. *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

of a murder victim's history of aggression, for example, could be highly relevant to self-defense. Yet murder defendants may not have access to rap sheets and other evidence documenting past violence. Drug defendants are even less likely to know that their suppliers were government agents who entrapped them. *Ruiz's* rule will apply to many cases where evidence of guilt is less clear and more important to innocent or less blameworthy defendants.

### *B. A Dawning Awareness of the Plea Process*

Alongside *Ruiz's* old-style thinking, however, were passages reflecting a more modern, nuanced understanding of pleas, one that weighed the need for discovery against its costs. The majority opinion stressed that the Government had not sought waiver of its bedrock obligation to disclose classic exculpatory evidence. As noted, the Court took comfort in the prosecution's representations that it had and would continue to disclose exculpatory evidence.<sup>91</sup>

Given the backstop of the prosecution's promise of disclosure, the Court felt more secure trading off the need for additional discovery against other goals. Defendants have some interest in gathering enough information to make informed decisions and guard against bluffing. But, on the other side of the scales, the Court accorded substantial weight to the Government's countervailing reasons for nondisclosure.<sup>92</sup> As the Court recognized, the Government has a strong interest in securing efficient guilty pleas by factually guilty defendants who are willing to plead.<sup>93</sup> Discovery of impeachment information risks revealing undercover officers and confidential informants, as well as exposing prospective witnesses to tampering, threats, and violence. Congress and Federal Rules Committees have thus drawn existing witness-disclosure requirements carefully to minimize these risks.<sup>94</sup>

#### *1. Impeachment Evidence*

The Court saw that it would be too burdensome to force the Government to turn over all impeachment evidence in time for plea bargaining.<sup>95</sup> It should also have emphasized the costs to defendants of fettering free trade. Plea bargaining expands the pie by freeing the government to seek more convictions at a lower cost per case. In exchange, the government splits the gains from trade, rewarding individual defendants with lower sentences. Reducing the

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91. *Id.* at 631; *supra* text accompanying note 82.

92. *Ruiz*, 536 U.S. at 631 (noting that due process balances a defendant's interest and need for information against the Government's interest in not disclosing information). Justice Thomas disclaimed even this modest, pragmatic balancing. *Id.* at 633–34 (Thomas, J., concurring in the judgment) (declining to join majority opinion because he drew a bright line between the plea and trial stages, irrespective of how important the information might be to defendants before pleading guilty).

93. *Id.* at 631 (majority opinion).

94. *Id.* at 631–32.

95. *Id.* at 632.

ability to keep undercover officers and cooperating witnesses confidential greatly decreases their future usefulness. Exposing witnesses to tampering and threats harms innocent witnesses and reduces their willingness to come forward. These are entirely legitimate reasons why the government bargains for nondisclosure, not nefarious ones aimed at hiding a weak case. If the government cannot save these costs, it will be much less willing to bargain and will offer correspondingly less generous terms. Defendants, as well as the government, would be worse off if they could not bargain away their right to inflict these costs.

## 2. *Affirmative Defense Evidence*

It is not at all clear that the same analysis applies to evidence of affirmative defenses, which need not come from a protected witness. A vestigial paragraph at the end of *Ruiz* quickly analogized this evidence to impeachment material, without considering whether the costs and benefits are comparable.<sup>96</sup> Perhaps much of this information ought to be waivable, but that would require subtler analysis of the costs of disclosure and the relevance of the information to a defendant's just deserts. Evidence relevant to a statute of limitations or entrapment defense is largely divorced from a defendant's blameworthiness. Evidence of excuses such as duress and insanity is somewhat more relevant. Classic justifications such as necessity and self-defense are central to blameworthiness and guilt, so the costs of nondisclosure for these defenses would be highest, but on the other hand defendants may be likely to know the evidence that would help them.

Unfortunately, the facts in *Ruiz* did not raise these issues in any concrete way. Angela Ruiz was caught red-handed and had no possible defense. It was hard to imagine a credible claim of self-defense or insanity bearing on her guilt of drug smuggling, so the affirmative-defense waiver was entirely theoretical. Perhaps *Ruiz* inverts the famous maxim and shows how easy cases can make bad law. How will *Ruiz* apply when the withheld evidence is highly relevant to the grade of crime or the sentence deserved?

For several years after *Ruiz*, the Court did not return to consider these issues again in earnest.<sup>97</sup> Not until the end of the decade did the Court focus on

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96. *Id.*

97. The Court touched on them only in passing in 2004 in *Blakely*. There, Justice Breyer worried about how the Court's jury-trial guarantee for sentencing facts would play out in practice, given the prevalence of plea bargaining. *Blakely v. Washington*, 542 U.S. 296, 337–38 (2004) (Breyer, J., dissenting) (quoting *Bibas*, *supra* note 48, at 1100, 1150–51 & n.330). Writing for the majority, Justice Scalia's originalist opinion simply assumed that bargained-for waivers would allow plea bargaining to go on undisturbed. *Id.* at 310–11 (majority opinion). He evinced substantial concern for the fairness of indictments and jury trials but little for plea bargaining, because any metric of the fairness of plea bargaining "is not the one the Framers left us with." *Id.* at 312.

In 2005, the Court held that defendants who plead guilty need appointed lawyers to help them navigate appellate complexities, but did not express a broader appreciation of plea bargaining.

how its criminal procedure rules could and should influence the dynamics of guilty pleas.

### III.

#### *PADILLA* CONFRONTS THE REAL WORLD OF GUILTY PLEAS

Until 2010, the Supreme Court had never focused on collateral consequences of guilty pleas or defense lawyers' duty to advise clients about them. In *Padilla*, the Court squarely confronted the issue. Jose Padilla, a Honduran and U.S. permanent resident for decades, was charged with felony trafficking in marijuana. He asked his lawyer whether pleading guilty would expose him to deportation. His lawyer erroneously assured him that he "did not have to worry about immigration status since he had been in the country so long."<sup>98</sup> That advice was flatly wrong; the drug-trafficking crime qualified as an aggravated felony and so triggered automatic deportation under federal law.<sup>99</sup> Relying on the misadvice, Padilla pleaded guilty. When he learned of the lawyer's mistake, he collaterally attacked his plea in state court, alleging that he would have gone to trial but for his lawyer's mistaken advice.<sup>100</sup> The Supreme Court held that a lawyer's failure to advise a noncitizen defendant about deportation can violate the Sixth Amendment's guarantee of effective assistance of counsel if it prejudices his decision.<sup>101</sup>

This Part analyzes the large shifts in landscape wrought by the *Padilla* tremor, which may develop into an earthquake. Part III.A notes that the Court's frame of reference now treats bargaining as the norm, not the eighteenth-century jury trial enjoyed by only a few percent of defendants. Part III.B considers the Court's broader definitions of innocence and injustice, which incorporate sentencing and other substantive considerations rather than just procedural trial rights. Part III.C emphasizes *Padilla*'s shift in focus away from trial judges and juries towards the prosecutors, defense lawyers, and rulemaking bodies who bargain or regulate plea bargains. The Court should include sentencing commissions within its ken as well. Part III.D praises the erosion of the neat analytical compartments that had walled off on-the-record from off-the-record proceedings, criminal from civil, direct from collateral consequences, and acts from omissions. Part III.E argues that the better objections to *Padilla* are not Justice Scalia's eighteenth-century formalistic ones, but Justice Alito's twenty-first-century practical concerns. It appraises *Padilla* as the eclipse of Justice Scalia's formalist originalism, the ascendancy of Justices Alito and Sotomayor's prosecutorial pragmatism, and the parting

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Halbert v. Michigan, 545 U.S. 605 (2005).

98. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477–78 (2010) (internal quotation marks omitted).

99. 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii), (B)(i) (2006).

100. *Padilla*, 130 S. Ct. at 1478.

101. *Id.*

triumph of Justice Stevens's common-law incrementalism. The key, open question is whether the new prosecutorial pragmatism will sustain its traction as Justice Kagan and other new Justices join the Court.

*A. Recognizing Plea Bargaining as the Norm*

One of the most important points in *Padilla* is not highlighted in the Court's opinion but largely implicit. Justice Stevens's majority opinion mentions only in passing that today, 95 percent of criminal convictions result from guilty pleas and only 5 percent result from trials.<sup>102</sup> Plea bargaining is no longer a negligible exception to the norm of trials; it is the norm. Nor, given information deficits and pressures to bargain, can we simply trust in an efficient plea market that reflects full information about expected trial outcomes. Thus, plea bargaining needs tailored regulation in its own right, not simply a series of waivers of trial rights.

Trials no longer set a fixed, normative baseline. The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain. The term plea bargain, then, risks being misleading. Mental anchoring need not focus on post-trial baselines.<sup>103</sup> In a world of bargaining, a much wider range of potential outcomes is on the table. Thus, the Court recognizes that a competent defense lawyer "may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence" that suits both sides' interests.<sup>104</sup>

This vision of "creativ[e] . . . craft[ing]"<sup>105</sup> radically revises the Court's earlier assumption that trial outcomes were normative. Under the former view, any lesser conviction or sentence was an act of grace, largely unregulated except to ensure voluntary waivers of sacred trial procedures. Now, the Court sees that the law is not fixed but variable. It creates a multifarious spectrum of outcomes, both direct and (nominally) collateral, both criminal and civil. A single criminal episode often supports multiple charges. Counsel can thus charge-bargain down to crimes that may not require deportation in exchange for dismissal of charges that do.<sup>106</sup> In exchange, defense counsel can offer

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102. *Id.* at 1485, 1486 n.13.

103. People come up with and evaluate numbers by focusing on a reference point (an anchor) and then adjusting up or down from that anchor. This anchor may come, for example, from the expected sentence after trial, the initial plea-bargaining offer, the statutory maximum sentence, or even a completely random or irrelevant number. Because people usually do not adjust away from their anchors enough, their initial choice of anchors has an inordinate effect on their final result. *See Bibas, supra* note 29, at 2515–18. In this context, focusing on the post-trial sentence as a baseline will make even a mediocre plea bargain look like a good discount off the sticker price. In contrast, focusing on the average plea-bargained result will make a mediocre plea bargain look like a bad deal.

104. *Padilla*, 130 S. Ct. at 1486.

105. *Id.*

106. *Id.*

restitution, forfeiture, or cooperation with the government against other defendants, increasing the size of the pie and splitting the gains from trade. Even begging the prosecution or judge to reduce a jail sentence by one day, from 365 to 364 days, can make all the difference in avoiding automatic deportation.<sup>107</sup> Charges and sentences are not exogenously specified by some neutral rule, but endogenous to the bargaining process.

Since *Padilla*, the Supreme Court has reiterated this understanding of plea bargaining as a complex tradeoff of risks. In *Premo v. Moore*, the Court recently rejected a habeas challenge to a defense lawyer's advice to take a quick plea bargain.<sup>108</sup> Justice Kennedy's opinion for the Court rightly stressed that "[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks."<sup>109</sup> Parties reasonably trade that uncertainty for substantial discounts, to purchase finality, even as they know that their and the other side's evidence may wax or wane.<sup>110</sup> If courts second-guess these bargains in hindsight based on scanty records, prosecutors will have less incentive to offer favorable bargains and everyone will lose.<sup>111</sup> Thus, the early signs are that *Padilla* was not a one-off decision but may have heralded the dawn of a new era.

### *B. A Broader Understanding of Injustice*

Related to the baseline of pleas is a broader evaluation of what makes a plea just. The Court's concern now reaches beyond a defendant's factual guilt of a charge to evaluate whether the punishment is fitting. The Court had previously taken baby steps in this direction, applying some criminal procedures to post-trial capital sentencing.<sup>112</sup> Some capital sentencing law treated defendants who are factually guilty of the crime as being innocent of deserving the death penalty.<sup>113</sup> And, in the last decade, the *Apprendi* line of

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107. See, e.g., *State v. Quintero Morelos*, 137 P.3d 114, 116, 119 (Wash. Ct. App. 2006); NORTON TOOBY & JOSEPH ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 10.1 (4th ed. 2007).

108. 131 S. Ct. 733, 746 (2011).

109. *Id.* at 741.

110. *Id.*

111. *Id.* at 741–42, 745–46.

112. The Court's early regulation of sentencing occurred primarily in capital cases, leaving it unclear how thoroughly the Court would apply these procedural doctrines to noncapital cases. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 686–87 (1984) (applying effective-assistance-of-counsel test to capital sentencing proceedings, while leaving open whether the same test would apply equally at noncapital sentencing); *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (defining, in the context of a capital case, material that prosecutors must disclose to defendants as evidence that would tend either to exculpate the defendant or to reduce the penalty).

113. See, e.g., *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (defining capital defendants as "innocent of the death penalty" for purposes of habeas corpus exception wherever they can show innocence of the capital crime, or that there was no required aggravating factor, or that another requirement for death eligibility had not been met).

cases regulated judicial findings of fact that raised sentences.<sup>114</sup> But *Padilla* squarely recognized that, to make bargaining just, defendants need information to evaluate bargained-for sentences.

Defendants care about much more than just guilty verdicts and convictions. While convictions may be foregone conclusions in many cases, where defendants are caught red-handed with no defense, the punishments need not be. As noted, defendants face a spectrum of possible outcomes even after conviction. Thus, they need to weigh “the advantages and disadvantages of a plea agreement,” compared with other possible pleas as well as compared with trial.<sup>115</sup> The Court has never expressly recognized that a defendant can suffer prejudice if his lawyer’s error causes him to strike a worse plea bargain or go to trial.<sup>116</sup> Some lower courts have rejected the idea, but others have taken that logical next step.<sup>117</sup>

This understanding of prejudice need not degenerate into endorsing gamesmanship and raw partisan advantage. In a market-based plea system, defendants need information and the advice of repeat players to get the going rate. The going rate amounts to equal treatment, not some unfair advantage over others. Once one stops viewing trials as setting the normal and normative baseline, one need not denigrate good defense lawyering as thwarting normal, just outcomes. While the plea bargaining market is grossly flawed in other ways, the fault does not lie with defense lawyers who are simply doing their

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114. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

115. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010) (quoting *Libretti v. United States*, 516 U.S. 29, 50–51 (1995)). *See also id.* at 1486 (suggesting alternative possible plea bargains).

116. In formulating its test for when a lawyer’s ineffectiveness prejudices plea bargaining, the Court described prejudice as “causing [a defendant] to plead guilty rather than go to trial. . . . This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Though the Court did not consider the possibility of two alternative possible plea bargains, its binary framing of plea versus trial appeared to foreclose such prejudice claims. *See Premo v. Moore*, 131 S. Ct. 733, 743, 745 (2011) (applying *Hill*’s standard, that an error must have affected a defendant’s decision to plead guilty instead of going to trial, to bar a claim that a defense lawyer should have obtained a better plea bargain, though *Premo* arose in the context of deferential review of a state-court decision on habeas corpus based on what standard was clearly established). Next Term, in *Lafler v. Cooper* and *Missouri v. Frye*, the Supreme Court will consider whether a defendant can be prejudiced by a defense attorney’s error if the error causes him to go to trial. *Lafler v. Cooper*, 376 F. App’x 563 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 856 (U.S. Jan. 7, 2011) (No. 10-209); *Missouri v. Frye*, 311 S.W.3d 350 (Mo. Ct. App. 2010), *cert. granted*, 131 S. Ct. 856 (U.S. Jan. 7, 2011) (No. 10-444).

117. *Compare* *United States v. Springs*, 988 F.2d 746, 749 (7th Cir. 1993) (Easterbrook, J.) (rejecting the possibility of prejudice), *State v. Greuber*, 165 P.3d 1185, 1190 (Utah 2007) (same), *Bryan v. State*, 134 S.W.3d 795, 802–04 (Mo. Ct. App. 2004) (same), *and State v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000) (same), *with Williams v. Jones*, 571 F.3d 1086, 1091–92 (10th Cir. 2009) (per curiam) (finding prejudice), *reh’g denied*, 583 F.3d 1254 (10th Cir. 2009), *and Commonwealth v. Mahar*, 809 N.E.2d 989, 993 (Mass. 2004) (same).



jobs.<sup>118</sup> As long as plea bargaining exists, the solution must be to improve the market's flaws rather than to drive it underground.

Of course, in the old days and even today in many states, unstructured sentencing kept sentences from being controllable or extremely predictable. But even in these states, going rates and informal expectations develop among the repeat players in the market.<sup>119</sup> And with the growth of mandatory minimums, sentencing guidelines, and collateral consequences, many defendants and their lawyers have even more power to predict and influence outcomes through bargaining. As sentencing laws have grown more complex, defendants must increasingly rely on their lawyers to navigate options and pull levers that greatly affect sentences. Good defense lawyers must know, for example, whether a defendant's small children, ill health, apology, cooperation, or restitution can lower his sentence.<sup>120</sup> Unfortunately, because not all defense lawyers are experienced repeat players, not all are aware of these opportunities. Defense lawyers may even misadvise clients about sentencing guidelines and the likely sentences they face.<sup>121</sup> As a result, some defendants may receive higher sentences than others simply because they could not afford to hire better lawyers.<sup>122</sup> They may be guilty of the crimes, but may not deserve sentences as harsh as the ones they receive. Plea-bargaining doctrine should try to guard against these charge and sentencing inequities, not just convictions of the innocent. *Padilla* is a step in that direction.

### C. The Roles of Lawyers, Not Just Arbiters

Related to the nature of the plea-bargaining market is *Padilla*'s appreciation of the actors who run it. In a world of trials, the crucial guarantor of fairness would be a full presentation of the evidence to a neutral judge and jury. If defendants chose to give up those sacred trial rights, judges' jobs would be to make sure they understood all the procedures that they were forgoing. The pre-*Padilla* plea-bargaining model assumed that judicial oversight of plea agreements and the shadows cast by jury trials would regulate the actions of both defense and government counsel and hence protect defendants. In other

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118. See generally Bibas, *supra* note 29 (cataloguing the structural forces and psychological biases that warp plea bargains, causing them to diverge from expected trial outcomes).

119. See MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 90, 120–21 (1977) (finding, in a qualitative empirical study before the advent of sentencing guidelines, that defense lawyers develop confidence in their ability to predict plea-bargained outcomes and learn to cite prior dispositions to prosecutors, establishing going rates for particular crimes).

120. Bibas, *supra* note 29, at 2483–84.

121. See *United States v. Barnes*, 83 F.3d 934, 939–40 (7th Cir. 1996) (declining to find defense lawyer ineffective for mistakenly calculating sentencing guidelines range as 46 to 57 months, instead of 262 to 327 months, because it was not clear whether the lawyer had failed to investigate and appreciate the implications of a past parole revocation).

122. Bibas, *supra* note 29, at 2477–86.

words, forecasted jury-trial verdicts in theory determined plea-bargained results, and judges still supervise plea colloquies as if those waivers of procedural rights are the heart of plea-bargain decisions. But *Padilla* recognized that these institutional actors—juries, judges, and counsel—play different roles in real plea bargains. The key to plea bargaining is not the plea colloquy, but the bargaining and advice that precede it. Particularly because judges are absent from that bargaining, defense lawyers must actively negotiate and competently advise their clients on whether a bargain is substantively desirable.

### 1. Judges

With the dearth of jury trials, juries are all but absent from defendants' plea decisions. Judges likewise play far smaller roles in plea bargaining than the trial model supposed. Far from actively managing the plea-bargaining process, judges are passive and reactive. They can neither investigate nor advise about the tactics and merits of pleas. Their job is to recite boilerplate plea colloquies to ensure that defendants understand the charges, the direct consequences of conviction, and the procedural rights they are waiving.<sup>123</sup> Those colloquies also seek to expose any coercion, threats, misrepresentations, or improper promises.<sup>124</sup> The federal system and many states forbid judges to take part in the bargaining.<sup>125</sup> One variety of plea bargain, a stipulated-sentence agreement, binds the judge to a particular sentence if the judge accepts the agreement.<sup>126</sup> Other, nonbinding sentence bargains leave judges free to impose different sentences.<sup>127</sup> But even for nonbinding bargains, because there has been no trial at which they could hear the evidence, judges must depend on the parties' selective presentation of the facts.<sup>128</sup> That reactive posture encourages judges to rubber-stamp the parties' recommendations. Judges can, however, inquire about whether defense lawyers are doing their jobs. Thus, judges may ask whether defendants are satisfied with their lawyers' representation and whether their lawyers have had time to explain the bargains to them.

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123. *E.g.*, FED. R. CRIM. P. 11(b).

124. *See id.*

125. *See supra* note 33.

126. *E.g.*, FED. R. CRIM. P. 11(c)(1)(C).

127. *E.g.*, FED. R. CRIM. P. 11(c)(1)(B), (3)(B).

128. Some systems have probation officers prepare presentence investigation reports to provide judges with neutral, more complete information in time for sentencing. The thoroughness and independence of these reports is open to question, however, as probation officers may themselves depend on the parties for their information. *See* Benjamin L. Coleman, *In Defense of Hopper: Raising the Burden of Proof for Dramatic Increases Under the Guidelines*, 12 FED. SENT'G REP. 225, 226–27 (2000) (reporting author's personal observation that "it is rare for a probation officer to conduct an independent investigation of the offense conduct, such as reviewing transcripts, interviewing witnesses, or inspecting a crime scene"); *Probation Officers Advisory Group Survey*, 8 FED. SENT'G REP. 303, 305–06 (1996).

## 2. Defense Counsel

Against this newly acknowledged backdrop of limited judicial involvement, the *Padilla* Court turned to defense counsel's role in looking out for defendants' best interests. Justice Scalia's dissent would have stopped at the status quo, suggesting that defense lawyers need offer no more advice than judges must offer at plea colloquies.<sup>129</sup> But the majority rightly rejected his conflation of two distinct roles. Judges can remain detached precisely because they can rely on defense counsel to do their jobs. "[I]t is the responsibility of defense counsel"—not the court at a plea colloquy—"to inform a defendant of the advantages and disadvantages of a plea agreement."<sup>130</sup> Defense lawyers, not judges, investigate cases and defendants' particular circumstances before pleas. Defense lawyers, not judges, offer their clients opinions and strategic advice. The market system relies on lawyers' professional sense of the going rates. Criminal defendants are often poor and uneducated and may not even speak English. They often have poor or erroneous information and rely on experts to correct them. The old caveat emptor approach is woefully inadequate for defendants navigating the intricacies and inequities of modern plea bargaining. As the Court recognized, defendants must not be "left to the 'mercies of incompetent counsel.'"<sup>131</sup>

The difference between judges' and defense counsel's roles goes hand in hand with different doctrinal bases for regulation. The font of early plea-bargaining regulation was *Boykin v. Alabama*, which interpreted the Due Process Clause to require judges to ensure knowledge, voluntariness, and a factual basis for pleas.<sup>132</sup> Conversely, *Brady v. United States* limited judges' due process obligations to ensuring "ful[l] aware[ness] of the direct consequences" and the absence of threats, misrepresentations, bribes, and the like.<sup>133</sup> But the Sixth Amendment's guarantee of effective assistance of counsel is broader, guaranteeing performance "within the range of competence demanded of attorneys in criminal cases."<sup>134</sup> It is not just a negative right to be

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129. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1496 n.1 (2010) (Scalia, J., dissenting). *See also* Transcript of Oral Argument at 16, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (question by Justice Scalia). While Justice Scalia did not decide the point, he implied that neither defense lawyers nor judges must advise about collateral consequences to ensure that pleas are knowing and voluntary. *Padilla*, 130 S. Ct. at 1496 n.1 (Scalia, J., dissenting) (quoting authorities for the propositions that "awareness of 'direct consequences' suffices for the validity of a guilty plea" and that Rule 11 colloquies, which "[d]o not mention collateral consequences," "approximate[] the due process requirements for a valid plea").

130. *Libretti v. United States*, 516 U.S. 29, 50 (1995).

131. *Padilla*, 130 S. Ct. at 1486 (majority opinion) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

132. 395 U.S. 238, 243 (1969).

133. 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958) (per curiam)).

134. *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970). *See also* *Hill v. Lockhart*, 474 U.S. 52, 56–59 (1985) (quoting this language from *McMann* and applying it to guilty-plea context).

free of threats, lies, and bribes, but a broad positive right to effective assistance whenever the state seeks to imprison a criminal defendant. The Court's touchstone formulation of the content of the right to effective assistance, *Strickland v. Washington*, requires not a fixed set of actions, but "simply reasonableness under prevailing professional norms."<sup>135</sup>

The role of prevailing professional norms for defense counsel is a key difference between *Strickland* and Rule 11 (and analogous state rules). While *Strickland* does not mechanically copy American Bar Association (ABA) standards, it looks to them as guideposts for determining reasonableness.<sup>136</sup> So, unlike the static set of procedures imposed top-down by Rule 11, *Strickland's* standards are dynamic and bottom-up. The law responds and evolves in light of the bar's expectations and accumulated wisdom over time. This is an incremental, common-law, Burkean approach to change, quite unlike formalistic bright-line rules that freeze clear procedures in place. Thus, *Padilla* stressed that whether an attorney's performance was deficient was "necessarily linked to the practice and expectations of the legal community."<sup>137</sup> Those practices and expectations have evolved in response to changes in immigration law that made deportation a far more common and automatic consequence of criminal convictions.<sup>138</sup> The Court looked to bar publications, criminal defense organizations, treatises, and scholars to confirm that its rule reflected prevailing norms.<sup>139</sup> Thus, the Court limited its ruling to the context of deportation, leaving for another day whether other so-called collateral consequences might merit similar treatment.<sup>140</sup> In a later case, the Court can consider the prevailing norms and practical considerations governing loss of child custody, for example.

This dynamic understanding of prevailing professional norms accommodates the important roles of resource allocation and discretion. Defense lawyers often must juggle many cases and lack the resources to litigate every aspect of every case exhaustively. They must perform triage, and prevailing norms guide them in exercising their discretion to allocate resources while still representing their clients zealously. Now that the bar recognizes the importance of deportation to many clients, bar organizations have developed training materials and guides for criminal defense lawyers.<sup>141</sup> In allocating their limited time and resources, lawyers need incentives to exercise their discretion

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135. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

136. *Id.*

137. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010). *See also* Transcript of Oral Argument at 26–28, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (questions by Breyer, J.) (stressing that *Strickland's* reliance on "prevailing professional norms" defies reduction to a simple rule forbidding misadvice or permitting nonadvice).

138. *See Padilla*, 130 S. Ct. at 1480, 1482–83 (noting recent changes in immigration law that have made deportation an automatic consequence and citing an array of recent publications instructing defense lawyers to advise their clients about that risk).

139. *Id.* at 1482–83.

140. *Id.* at 1481–82.

141. *Id.* at 1482–83; *see also* Roberts, *supra* note 68, at 147–48.

properly. The Court declined to limit its rule to misadvice because permitting nonadvice would have “encouraged [lawyers] to say nothing at all.”<sup>142</sup> Since information about deportation is crucial for many defendants and often easily available, defense lawyers ought to provide it.<sup>143</sup>

Though *Padilla* did not cite it, its development of ineffective-assistance standards for pleas mirrors its recent ineffective-assistance standards for capital sentencing. For many years, *Strickland* appeared to be toothless, requiring little of defense counsel.<sup>144</sup> But over the last decade, the Court has looked to ABA standards to require capital defenders to investigate mitigating evidence for sentencing.<sup>145</sup> Defense lawyers have little excuse for not even investigating mitigating evidence, while the defendant’s need for mitigating evidence to ensure a just sentence is enormous. Likewise, they cannot simply avoid mentioning deportation, let alone misadvise about it, because it “may be more important to the client than any potential jail sentence.”<sup>146</sup>

### 3. Prosecutors

While defense lawyers were the central actors in the *Padilla* drama, prosecutors play important roles as well. As the former head of the National District Attorneys Association wrote, prosecutors “must consider [collateral consequences] if we are to see that justice is done.”<sup>147</sup> “How can we ignore a consequence of our prosecution that we know will surely be imposed by the operation of law?”<sup>148</sup> Prosecutors must consider that collateral consequences make victims less likely to press charges, defendants less likely to plead guilty, and judges more likely to lower charges and sentences.<sup>149</sup> As *Padilla* astutely noted, prosecutors can choose to offer creative plea bargains that avoid deportation, giving defendants powerful incentives to plead guilty. More informed bargaining can thus benefit prosecutors as well as defendants.<sup>150</sup> Prosecutors also have incentives to ensure that defendants get accurate

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142. *Padilla*, 130 S. Ct. at 1484.

143. *Id.*

144. See, e.g., 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, 1857–65 (1994); Richard 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, 640–45 (1986).

145. *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000). See generally John H. Blume & Stacey D. Neumann, “It’s Like Déjà Vu All Over Again”: *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127 (2007).

146. *Padilla*, 130 S. Ct. at 1483 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).

147. Robert M.A. Johnson, *Message from the President*, PROSECUTOR, May–June 2001, at 5.

148. *Id.*

149. *Id.*

150. *Padilla*, 130 S. Ct. at 1486.

information about deportation to bulletproof their convictions.<sup>151</sup> The Court's new appreciation of prosecutorial discretion in bargaining is welcome.

The Court also showed an appreciation for how other bodies can help to inform bargaining. One possibility is that rules advisory committees could amend the rules of criminal procedure. At oral argument in *Padilla*, Justice Kennedy repeatedly asked whether Rule 11 ought to be amended to warn defendants about the possibility of deportation.<sup>152</sup> The Court's opinion noted that almost half of states, by statute or rule, already warn defendants about possible immigration consequences.<sup>153</sup> But counsel argued, and the Court appeared to agree, that while a generic warning at a plea colloquy may be salutary, it is no substitute for counsel's particularized advice.<sup>154</sup> Other bodies, such as sentencing commissions, can likewise play a role in tailoring and updating the law, though *Padilla* did not involve nor address these issues.

#### *D. The Erosion of Neat Dichotomies and Bright Lines*

*Padilla* also recognized that modern criminal practice does not fit within neat boxes. Important stages of criminal cases include not just trials, but also investigation, negotiation, and advice. Many key events happen off the record, and at oral argument Chief Justice Roberts and Justice Alito worried that *Padilla* claims would require evidentiary hearings.<sup>155</sup> Off-the-record events likewise matter to other kinds of ineffective assistance claims, such as failure to investigate mitigating evidence. Yet that difficulty has not prevented the Court from applying *Strickland* to review those failures.<sup>156</sup> If anything, judicial scrutiny is all the more necessary precisely because proceedings are hidden and off the record. Otherwise, lawyers may be tempted to cut corners and push

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151. Though the Court did not note it, prosecutors have several other tools that they can use to inform defendants and encourage plea bargains. They can detail the advantages and penalties for defendants in their written plea agreements and at plea colloquies. Even when defendants decide to plead guilty without an agreement, prosecutors can write letters detailing their sentencing guidelines calculations and could just as easily detail collateral consequences. *Cf.* *United States v. Pimentel*, 932 F.2d 1029, 1034 (2d Cir. 1991) (encouraging but not requiring prosecutors to inform defendants of their likely sentencing guidelines calculations). And prosecutors can conduct face-to-face proffer sessions with defendants, detailing the strength of the prosecution's case and the benefits of a guilty plea. *Bibas*, *supra* note 29, at 2525.

152. Transcript of Oral Argument at 8, 13, 31, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (questions of Kennedy, J.).

153. *Padilla*, 130 S. Ct. at 1486 n.15.

154. See Transcript of Oral Argument at 8, 31, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (distinguishing courts' Rule 11 warnings from lawyers' Sixth Amendment duties to advise).

155. *Id.* at 10–11, 18–19 (implying concern over the resource burden that such hearings would place on the criminal justice system, and expressly noting the problems of fading memories and competing accounts of off-the-record proceedings).

156. See *supra* text accompanying note 145 (noting the Court's increased scrutiny over the past decade of capital defense lawyers' failures to investigate mitigating evidence relevant to sentencing).

clients to plead guilty quickly.<sup>157</sup>

The Court did not let floodgate fears dictate a narrow ruling. Instead, it noted that *Strickland*'s bar is high and that no flood of claims had erupted after *Hill v. Lockhart* extended *Strickland* to plea bargaining.<sup>158</sup> To win, convicts must show that rejecting the plea bargain would have been rational.<sup>159</sup> Lower courts are experienced at sifting meritorious from specious claims. And experience confirms that defendants who plead guilty are much less likely to challenge their convictions, as they would lose the benefits of their bargains and risk worse outcomes.<sup>160</sup> The Court's holding reflected this accumulated experience, rather than a bright-line rule closing the courthouse doors.

*Padilla* also poked a large hole in the wall between criminal and civil proceedings, and that hole may lead the wall to crumble or collapse. Criminal defense lawyers are appointed to represent defendants in their criminal cases, not in all of their problems in life. But increasingly, criminal and civil law are intertwined and shade into one another. Clients depend on lawyers to advise them, and their advice within criminal cases must reflect various tradeoffs and consequences. Civil consequences may be predictable or even automatic; plea decisions within criminal cases can trigger large civil consequences. Criminal defense lawyers must look ahead to clear immigration issues, just as mergers and acquisitions lawyers cannot ignore obvious tax, antitrust, or regulatory implications of their deals. The Sixth Amendment test should be not whether a consequence is labeled civil or collateral, but whether it is severe enough and certain enough to be a significant factor in criminal defendants' bargaining calculus.

Taking an apparently incremental approach, *Padilla* did not decide whether to disavow the entire collateral-consequences doctrine that lower courts had developed. It specifically limited its holding to deportation because it is intertwined with the criminal process and hence nearly impossible to classify as direct or collateral.<sup>161</sup> But it relied on the ABA's evolved professional norms, which require advice at least about deportation.<sup>162</sup> Future cases may extend *Padilla*'s reasoning to demolish the collateral-consequences doctrine more generally, focusing on the importance of particular consequences rather than their criminal or civil labels. The bar no longer rigidly separates the two fields, and neither does the Court.

Finally, the Court in *Padilla* did not differentiate between acts and

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157. See Bibas, *supra* note 29, at 2475–76; Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 58–59 (1988) (noting how much worse agency-cost problems are in plea bargaining because of its low visibility and lack of reputational sanctions for poor performance).

158. *Hill v. Lockhart*, 474 U.S. 52 (1985); *Padilla*, 130 S. Ct. at 1484–85.

159. *Padilla*, 130 S. Ct. at 1485.

160. *Id.* at 1485–86.

161. *Id.* at 1481–82.

162. *Id.* at 1482–84.

omissions; it forbade nonadvice as well as misadvice.<sup>163</sup> The Sixth Amendment guarantees not just freedom from state interference, but state-supplied competent counsel.<sup>164</sup> The state cannot imprison defendants without first providing them with effective defense advocates. *Strickland* regulates both acts and omissions.<sup>165</sup> It gives defendants an affirmative right to information and tactical advice so that they can make informed choices whether to plead guilty.<sup>166</sup> But a rule limited to affirmative misadvice would perversely encourage defense lawyers to say nothing at all to avoid allegations of ineffectiveness.<sup>167</sup> Since we now live in a world where almost every right is waivable, courts must police the standards for waiver and ensure good advice.

### *E. The Failure of Formalism and the Rise of Realism*

The notable loser in this exchange was Justice Scalia and his brand of formalist originalism. His dissent, joined by Justice Thomas, reprised his *Blakely* and *Crawford* majority opinions, criticizing judicial construction of the Constitution to solve contemporary problems.<sup>168</sup> The Sixth Amendment, he noted, originally was a negative right to hire counsel, which the Court had extended into a positive right to effective counsel at government expense. He thus implicitly questioned whether even *Gideon* and *Strickland* were right.<sup>169</sup> Assuming *arguendo* that they were, he noted that the Sixth Amendment's text limits it to criminal prosecutions, not broader civil ramifications.<sup>170</sup> And he resisted the majority's use of professional standards to shape constitutional requirements for effective assistance.<sup>171</sup> In other words, he would have confined the Sixth Amendment to the issues implicated in founding-era criminal trials. That approach would have neatly separated criminal from civil, negative from positive, and professional from legal standards. Plea bargaining would have been unregulated, left to caveat emptor and the flawed market (even though plea bargaining did not exist in the eighteenth century).

As I have argued elsewhere, Justice Scalia's originalist arguments often seem at root to be driven by formalism rather than the other way around.<sup>172</sup> At

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163. *Id.* at 1484 (determining “that there is no relevant difference between an act of commission and an act of omission in this context” (internal quotation marks omitted)).

164. *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

165. *Strickland*, 466 U.S. at 690.

166. *See Libretti v. United States*, 516 U.S. 29, 50–51 (1995).

167. *Padilla*, 130 S. Ct. at 1484.

168. *Id.* at 1494 (Scalia, J., dissenting) (ridiculing the majority for turning “[t]he Constitution . . . [into] an all-purpose tool for judicial construction of a perfect world” and noting that we do not live “[i]n the best of all possible worlds”).

169. *Id.* at 1495 (citing *Strickland*, 466 U.S. at 686, and *Gideon*, 372 U.S. at 344–45).

170. *Id.*

171. *Id.*

172. *See Bibas, supra* note 16, at 201–03 (offering this explanation for the *Apprendi-Blakely* line of cases).



the bottom of Justice Scalia's argument was his fear of the slippery slope, of opening Pandora's box. The majority's argument had "no logical stopping-point" and would lead to "years of elaboration" based on nothing but "judicial caprice."<sup>173</sup> But a rule that depends on and follows an evolved consensus of the bar is hardly arbitrary policymaking. Justice Stevens's approach is an incremental one familiar to the common law. It considered the lived experience of bar norms and state legislation and procedures before reaching out to solidify them into a rule.<sup>174</sup> It will indeed require future elaboration. But that temporary uncertainty is a cost worth bearing to protect the 95 percent of defendants who rely on their lawyers' advice when pleading guilty.

The more powerful counterarguments against the *Padilla* majority were not formalist or originalist but pragmatist, exemplified by Justice Alito's concurrence in the judgment, joined by Chief Justice Roberts.<sup>175</sup> At oral argument, Justice Alito surprised this author by expressing some sympathy for *Padilla*'s plight. At the same time, he worried about the difficulties of reconstructing attorneys' advice and disproving misadvice claims at evidentiary hearings years later.<sup>176</sup> And he asked whether the Court could classify the types of consequences that call for advice and those that do not.<sup>177</sup>

Justice Alito rejected Justice Scalia's approach of caveat emptor. His opinion drew Justice Scalia's ire for recognizing that the Sixth Amendment forbids misadvice and requires at least very general warnings about deportation.<sup>178</sup> That approach, like the majority's, is not a bright line and would have required elaboration. His concerns were intensely practical ones about criminal defense attorneys' limited expertise.<sup>179</sup> Immigration law is complex, and bar publications themselves note that "nothing is ever simple with immigration law."<sup>180</sup> In other words, Justice Alito accepted the majority's pragmatic frame of reference and the importance of the bar's accumulated wisdom, but disputed its conclusion on its own terms.

Justice Alito further contended that the majority's rule headed off statutes, plea forms, and procedural rules that had been developing more flexible solutions in many states. The majority's new rule risks upsetting many criminal convictions, he objected, whereas nonconstitutional solutions would not be as

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173. *Padilla*, 130 S. Ct. at 1496 (Scalia, J., dissenting).

174. *Padilla*, 130 S. Ct. at 1482-83.

175. Because Chief Justice Roberts did not write separately and did not say much at oral argument, one cannot know why he joined Justice Alito's pragmatic concurrence. It is possible that his joining exemplifies how Justice Alito's prosecutorial perspective is influencing his colleagues, but that is sheer speculation—it is impossible to tell.

176. Transcript of Oral Argument at 10, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (questions of Alito, J.).

177. *Id.* at 54 (questions of Alito, J.).

178. *Padilla*, 130 S. Ct. at 1496 (Scalia, J., dissenting).

179. *Id.* at 1487-91 (Alito, J., concurring in the judgment).

180. *Id.* at 1490.

disruptive.<sup>181</sup> No federal court of appeals had gone as far as the majority, so the Court should hesitate to venture that far, whereas lower courts are quite used to reviewing claims of misadvice.<sup>182</sup>

Finally, Justice Alito did not limit his frame of reference to jury trials. In recognizing that the Sixth Amendment forbids misadvice, he rightly worried that “incompetent advice distorts the defendant’s decision-making process.”<sup>183</sup> If misadvice skews the contracting process, “the defendant can[not] fairly be said to assume the risk . . . [of] indirect consequences of which he or she is not aware.”<sup>184</sup> Even absent misadvice, Justice Alito would have required general deportation warnings and express disclaimers, so defendants would know to consult with immigration lawyers.<sup>185</sup> In other words, Justice Alito evinced concern for informing and regulating the contracting process well before trial. His reasoning contained the seeds of important consumer protections, including disclaimers and warnings.

In short, Justice Alito’s approach was intensely pragmatic. It did not seek refuge in bright lines, textual exegesis, or eighteenth-century visions of jury procedures. It grappled seriously with the bar’s expertise and norms. It reflected upon the practical problems of delving into immigration law and disrupting convictions. It also heeded the unfairness of making defendants decide in the dark. Though he is often lumped together politically with Justice Scalia and was even derided as “Scalito,” Justice Alito’s concurrence differs greatly from Justice Scalia’s dissent in tone, focus, and outcome.<sup>186</sup> His realism befits his experience as a federal prosecutor, just as Justice Scalia’s bright-line formalism reflects his scholarly bent as a former academic.

Though the evidence is hazier, the other former prosecutor on the Court may likewise be showing her realistic streak. The first three questions to respondent’s counsel were posed by Justice Sotomayor.<sup>187</sup> She emphasized that a guilty plea is not just a factual statement of guilt, but a conscious, strategic decision to sacrifice rights.<sup>188</sup> That choice among risky alternatives must be informed, particularly when a defendant signals that he cares about deportation and asks for advice. Though she did not write separately, the majority opinion

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181. *Id.* at 1491. Justice Scalia’s opinion also nodded towards these concerns about experimentation and alternatives. But he tacked them on briefly at the end, almost as an afterthought, rather than making them the heart of his dissent. *Id.* at 1496–97 (Scalia, J., dissenting).

182. *Id.* at 1491–94 (Alito, J., concurring in the judgment).

183. *Id.* at 1493.

184. *Id.*

185. *Id.* at 1494.

186. See Ann Althouse, Op-Ed., *Separated at the Bench*, N.Y. TIMES, Nov. 1, 2005, at A27 (questioning the common, condescending conflation of the two jurists by the use of this epithet).

187. Transcript of Oral Argument at 35–37, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (questions of Sotomayor, J.).

188. *Id.*

accords with her realism about how and why defendants plead guilty and may reflect her influence.

In the end, the two ex-prosecutors on the Court reached different conclusions, but their shared vocabulary and competing concerns framed the debate.<sup>189</sup> The needs and norms of the twenty-first century, not the neat boxes of the eighteenth, define *Padilla*. That is quite a turnaround from seven years ago, when Justice Scalia's formalist originalism seemed to triumph in *Crawford* and *Blakely*.

Now, it remains to be seen whether the Court will persist in this nascent trend; one swallow does not a spring make, nor one fine day.<sup>190</sup> *Padilla* could turn into a jurisprudential dead end, an outlier limited to its egregious facts. Particularly with the departure of Justice Stevens, the author of the majority opinion in *Padilla*, one cannot know whether the Court will persist in this direction.<sup>191</sup> Justice Kagan, for example, has yet to show her hand or her methodology in deciding criminal cases. But one may dare to hope that the bright-line rule of caveat emptor is in retreat, and that the project of consumer regulation and tactical guidance has begun.

#### IV.

##### CONSUMER REGULATION OF PLEA BARGAINING

A solid majority of the Court has thus begun to soften caveat emptor. Instead, it recognizes that defendants need protections to ensure that their pleas reflect accurate information and competent tactical advice. The Court's past constitutional rulings on plea bargaining have prompted nonconstitutional reforms building on their base. For example, after the Court expressly approved of plea bargaining, Rule 11 required judges to elicit plea bargains and put them on the record.<sup>192</sup> And while *Boykin* required mentioning only three constitutional rights at plea colloquies, Rule 11 has codified and expanded

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189. That tentative assessment may become clearer in future cases if, for example, the Court confronts the buying of cooperator testimony in exchange for leniency. One could imagine Justices Alito and Sotomayor debating the need to crack the mob's code of silence versus the proven risk of false testimony. A recent petition for certiorari was a missed opportunity for just such a debate: it asked the Supreme Court to consider the constitutionality of cooperation agreements that require cooperating witnesses to testify consistently with their prior statements in order to earn leniency. Petition for Writ of Certiorari at i, *Bannister v. Illinois*, No. 09-1576, *cert. denied*, 131 S. Ct. 638 (2010).

190. ARISTOTLE, *NICOMACHEAN ETHICS* 17 (F.H. Peters trans., C. Kegan Paul & Co. 1881) ("If one swallow or one fine day does not make a spring, neither does one day or any small space of time make a blessed or happy man."). English translations often substitute "summer" for the original "spring" in this proverb.

191. *But see supra* note 117 and text accompanying notes 108–09 (discussing *Premo v. Moore* as a partial continuation of *Padilla*'s plea-bargaining realism).

192. FED. R. CRIM. P. 11 & Advisory Committee Note (1974) (citing *Brady* and *Santobello*'s approval of plea bargaining as justification for bringing plea bargains out into the open and regulating them in new subsection (e), which has since been renumbered as (c)); *Brady v. United States*, 397 U.S. 742, 752–53 (1970); *Santobello v. New York*, 404 U.S. 257, 260 (1971).

*Boykin*'s advisories. Today, it prescribes many more advisories.<sup>193</sup> Rule 11 now requires warnings and waivers of procedural rights, as well as a minimal factual basis for pleas.<sup>194</sup>

Rule 11 is a form of consumer regulation, but it is limited and ineffective. It emphasizes the waived procedures of theoretical trials, not the pros and cons of various substantive plea outcomes. What defendants need is more robust consumer protection, much like the laws that regulate consumer contracts. The Constitution requires only one layer of protection, but *Padilla* pours a foundation that should prompt legislatures and rules committees to build more layers.

Indeed, developing flexible nonconstitutional responses might obviate further constitutional reforms. That would invert Justice Alito's fears about constitutionalizing this area and stifling development. Better information and tactical advice could head off the need to ban certain deals substantively, for instance. Perhaps, then, Justice Alito should be especially supportive of reforming the rules to address the problem he acknowledges. The Justices have the power to do so. The Supreme Court, in its rulemaking capacity, promulgates the Federal Rules of Criminal Procedure, which many states copy in large part.<sup>195</sup> It bases the rules on the draft proposed by an advisory committee, which seeks to reflect the wisdom of leading judges, lawyers, and professors.<sup>196</sup> Even now, the Criminal Rules Advisory Committee is considering whether to propose amending Rule 11 in light of *Padilla*.<sup>197</sup> By pursuing nonconstitutional consumer protections, the Court can complete the work of its *Padilla* decision, experimenting without freezing one approach in place.

The remainder of this Part maps the contours of possible reforms. First, Part IV.A considers the kinds of plea-bargaining protections that might counteract chronic misunderstandings and irrationality. Then, Part IV.B touches briefly on what roles various institutional actors ought to play in implementing these reforms.

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193. Compare *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (requiring affirmative waiver on the record of the privilege against self-incrimination and the rights to jury trial and to confront one's accusers), with FED. R. CRIM. P. 11(b)(1) (requiring warnings not only about the three rights required by *Boykin* but also about the rights to plead not guilty, testify, counsel, and compulsory process, as well as the danger of prosecution for perjury, the existence of any appeal waiver, the various penalties, and the existence of sentencing guidelines). See generally *supra* text accompanying note 30 (discussing *Boykin* and Rule 11's requirements).

194. FED. R. CRIM. P. 11(b). Likewise, the discovery obligations of Rule 16 and the Jencks Act go well beyond *Brady v. Maryland*'s constitutional minimum. Compare 18 U.S.C. § 3500 (2006) (requiring disclosure of witnesses' prior statements at trial), and FED. R. CRIM. P. 16 (requiring a series of disclosures of inculpatory evidence upon request of the defendant), with *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (recognizing defendant's due process right to disclosure of exculpatory evidence that is material to guilt or punishment).

195. Rules Enabling Act, 28 U.S.C. § 2072(a) (2006).

196. See *id.* § 2073(a)(2), (b).

197. Conversation with Nancy J. King, Reporter, Advisory Committee on the Federal Rules of Criminal Procedure (Sept. 23, 2010).

*A. The Content and Format of Plea Protections*

In much of Europe, consumer regulation specifies or forbids a wide variety of substantive terms.<sup>198</sup> In the United States, substantive consumer regulation is limited. Far more prominent is a series of procedural regulations designed to ensure that consumers understand and consider carefully the most important terms of their bargains. So, for example, the Truth in Lending Act requires clear, standardized disclosures of annual percentage rates (APRs), finance charges, fees, grace periods, and treatment of credit balances.<sup>199</sup> The Magnuson-Moss Warranty Act requires clear, simple disclosures of warranties to shoppers before purchases.<sup>200</sup> The Uniform Commercial Code requires disclaimers of certain implied warranties to be conspicuous. It also specifies phrases such as “as is” or “with all faults” that suffice to disclaim implied warranties.<sup>201</sup> Federal Trade Commission (FTC) regulations guarantee consumers a three-day cooling-off period to rescind purchases made from door-to-door salesmen.<sup>202</sup> And various deceptive trade practices acts regulate misleading or high-pressure sales tactics.<sup>203</sup> These disclosure rules have not abolished deception and misunderstanding, but surely they are better than nothing.

It is astonishing that a \$100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment. It would not take much to extend the consumer protection analogy to plea bargains. Legislatures and rules commissions could forbid some terms outright. Mostly, however, they would regulate the contracting process procedurally to ensure a modicum of understanding and advice.

Many cognitive deficits plague plea bargaining and merit fixing. Probably the most basic is sheer incomprehension because defendants often are unsophisticated laymen facing repeat-player prosecutors. Many defendants also feel pressured to make hurried decisions based on advice by lawyers whom they may not yet have come to trust. Defense lawyers are often overburdened, of varying ability and experience, and may have incentives to plead cases out quickly. Framing, anchoring, and loss aversion are also factors. Overconfidence and impulsivity probably play lesser roles because impulsive, overconfident

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198. *See, e.g.*, Unfair Contract Terms Act, 1977, c. 50 (U.K.); Council Directive 93/13, On Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 (EC).

199. Truth in Lending Act, 15 U.S.C. §§ 1601–1614 (2006). Regulation Z, implementing the statute, is codified at 12 C.F.R. § 226 (2011).

200. Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312 (2006). The Federal Trade Commission’s regulations implementing the act are codified at 16 C.F.R. § 700 (2011).

201. U.C.C. § 2-316(2), (3) (2007) (specifying rules for disclaimers of implied warranties in general and for implied warranties of merchantability or fitness for a particular purpose in particular).

202. 16 C.F.R. § 429.1 (2011).

203. *E.g.*, REVISED UNIF. DECEPTIVE TRADE PRACTICES ACT (1966); Federal Trade Commission Act of 1914, 15 U.S.C. § 57a (2006) (authorizing the FTC to make rules forbidding unfair or deceptive acts or practices).

defendants are more likely to go to trial or hold out for better deals.<sup>204</sup> Solutions should attack each of these problems, especially poor defense lawyering and incomprehension, followed by excessive pressure to plead quickly. The following list is not meant to be a comprehensive blueprint for legislation, but rather an effort to brainstorm about possible solutions.

*Improving Comprehension.* The most basic and important reforms focus on ensuring that defendants know what they are doing. Most critically, they need better defense lawyers, as I will discuss, and simpler, clearer plea bargains.<sup>205</sup> But for starters, all plea agreements should be in writing. While many plea bargains are written down, not all are.<sup>206</sup> Their terms may be set forth at the plea hearing in full, in part, or not at all. Simply memorializing all agreements in writing, ahead of time, would go a long way toward reducing confusion and later evidentiary disputes about what was promised or understood. A simple check-the-box form with blanks for the defendant's name, the charge(s), and the sentence might suffice for simple misdemeanors and the like.

Another comprehension problem is that innumeracy hinders defendants' grasp of the risks of various outcomes, such as the chance of various convictions or sentences after trial. Following standard best practices for translating numbers into common-sense terms can help. Psychological research shows that displaying numerical information visually, and phrasing risks in absolute rather than relative terms, help people to understand risks better. It is also important to use standard numerical formats and to reduce the number of calculations and inferences that readers must make.<sup>207</sup> For example, lawyers and plea agreements could phrase sentencing ranges not as 126 to 144 months but as 10 ½ to 12 years. A bar graph could then show how that range stacks up alongside the likely sentencing range after trial, based on recent post-trial sentences in similar cases in that jurisdiction. Worksheets could also disclose

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204. For discussions of how these cognitive biases and heuristics warp plea bargaining, see generally Bibas, *supra* note 29, at 2496–2527.

205. Of course, simplicity competes at least somewhat with thoroughness. Pleas should ideally cover all the important consequences a defendant will likely face, without injecting a distracting mound of trivial considerations. That balancing requires judgment calls trading off simplicity against thoroughness. The touchstone should be the accumulated experience of the bench, bar, and academy about which terms matter most to defendants in practice and how best to express them simply and clearly.

206. *E.g.*, *Ex parte Yarber*, 437 So. 2d 1330, 1336 (Ala. 1983) (“We are unaware of any requirement that the [plea] agreement be reduced to writing.”); *State v. Thrift*, 440 S.E.2d 341, 348 (S.C. 1994) (holding that “oral [plea] agreements are perfectly enforceable”).

207. *See, e.g.*, Hannah Faye Chua et al., *Risk Avoidance: Graphs Versus Numbers*, 34 MEMORY & COGNITION 399, 407 (2006); Ellen Peters et al., *Numeracy Skill and the Communication, Comprehension, and Use of Risk-Benefit Information*, 26 HEALTH AFF. 741, 744–46 (2007); Isaac M. Lipkus & J. G. Hollands, *The Visual Communication of Risk*, 25 J. NAT'L CANCER INST. MONOGRAPHS 149, 159–160 (1999); Paul Slovic et al., *Affect, Risk, and Decision Making*, 24 HEALTH PSYCHOL. S35, S37–S38 (2006).

parole eligibility and similar standard terms. Computerized fill-in forms could ensure correct calculations tied to the crimes of conviction.

Clear numbers should be accompanied by clear language. To improve defendants' comprehension, drafting commissions could require summaries of agreements in plain English. Studies consistently show that laymen understand very little of the boilerplate legalese in jury instructions and the like. Rewriting legalese in simpler, shorter terms using the active voice increases readers' understanding markedly.<sup>208</sup> The American Law Institute or the Uniform Law Commission could draft legible disclosure forms in plain English, similar to the standard boxes and tables disclosing credit-card rates, grace periods, billing cycles, and fees. They could include reasonable standard terms as defaults.

Prosecutors would remain free to bargain for nonstandard terms, but those could face closer scrutiny and regulation. For example, prosecutors sometimes ask one defendant to plead guilty in exchange for lenient treatment of a close relative, but these terms are often criticized as coercive.<sup>209</sup> For such package deals, prosecutors might have to display the provisions in large, boldfaced type, specifically discuss them at plea colloquies, and have defendants initial those paragraphs individually.<sup>210</sup> That would both improve defendants' understanding and perhaps offset one of the most coercive pressures to plead.

*Moderating Pressures.* Defendants often face great pressure to plead out quickly, which may lead them to make life-altering decisions before they come to appreciate the consequences. One way to reduce this pressure would be a cooling-off period for plea bargains authorizing five years' imprisonment or more.<sup>211</sup> The law could forbid guilty pleas at the initial appearance for serious felonies, to avoid pressure to plead immediately after first meeting with one's defense lawyer. It could also require prosecutors to disclose the deal's terms and defense lawyers to offer advice at least three days before the plea hearing, unless the court finds compelling reasons to allow an immediate plea. (The

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208. See Amiram Elwork et al., *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 434–39 (1982); Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601, 606, 614–18; Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 79–93 (1988) (summarizing empirical studies); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480–83 (1976).

209. See, e.g., *People v. Fiumefreddo*, 626 N.E.2d 646, 650–53 (N.Y. 1993) (scrutinizing carefully but approving deal in which adult daughter pleaded guilty to murder in exchange for a light sentence for her father). See generally Bruce A. Green, “Package” Plea Bargaining and the Prosecutor’s Duty of Good Faith, 25 CRIM. L. BULL. 507 (1989) (scrutinizing the ethical problems posed by package plea bargains).

210. Cf., e.g., *State v. Danh*, 516 N.W.2d 539, 542–43 (Minn. 1994) (requiring disclosure by prosecutors and careful colloquy by trial courts on package-deal terms of plea agreements).

211. One could require cooling-off periods for all pleas, but because they could be cumbersome, it makes sense to reserve them for the highest-stakes cases where defendants may feel the most pressure to jump at a deal. Moreover, cooling-off periods in minor cases could force petty offenders who did not make bail to remain in jail longer instead of pleading guilty in exchange for time served.

final plea deal might need to be put on the table a week before trial, to allow time for advice and avoid pressure for last-minute deals.) Cooling-off periods help to make decisions more dispassionate and to reduce second-guessing of rash snap judgments. They are most valuable when (1) people make a decision infrequently and are therefore inexperienced, and (2) the decision is an emotional one.<sup>212</sup> Felony guilty pleas satisfy both criteria.

*Construction of Terms.* To counterbalance prosecutors' repeat-player advantages, the law could also construe nonstandard terms more strictly. Contract law often employs the canon of construing ambiguous terms *contra proferentem*, that is, against the party who drafted them.<sup>213</sup> Plea bargaining law could apply this canon more vigorously.<sup>214</sup> Prosecutors are repeat players and can draft plea agreements to minimize ambiguity. If they want to draft contracts containing nonstandard terms, then prosecutors ought to be crystal clear or risk having any ambiguities construed against them. If, for example, prosecutors want defendants to forfeit crime-related property, they ought to spell out specifically what property is to be forfeited. Issues will arise on which *ex ante* precision is impossible, such as the definition of good-faith cooperation in an undercover investigation and subsequent testimony. There, agreements ought at least to set benchmarks for performance as clearly as possible.

*Prosecutorial Disclosure.* In addition to rules of construction, prosecutors might be subject to certain disclosure obligations, even when defendants decide to plead guilty without plea agreements. The Second Circuit, for example, encourages prosecutors to send defendants letters setting forth their understandings of how the U.S. Sentencing Guidelines should apply to each defendant's case.<sup>215</sup> These *Pimentel* letters, as they are called, give defendants fair warnings of the sentences they are likely to receive in exchange for their pleas and any enhancements that arguably apply.<sup>216</sup> Other mandatory disclosures could cover concurrent versus consecutive sentencing for all pending charges, as well as possible or mandatory parole, supervised release,

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212. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 250–51 (2008) (giving as examples cooling-off periods for high-pressure door-to-door sales and also mandatory waiting periods for divorces).

213. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981) (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom the writing otherwise proceeds.”).

214. Some courts already apply the *contra proferentem* canon to plea agreements. *United States v. Gebbie*, 294 F.3d 540, 552 (3d Cir. 2002) (summarizing cases). More recently, however, courts have been treating that canon in private litigation, and the analogous rule of lenity in criminal litigation, as last-resort tiebreakers and not as weighty independent considerations. Edward J. Imwinkelried, *Forensic Science: Scientific Evidence—and Statutes*, 43 CRIM. L. BULL. 739, 753 (2007).

215. *United States v. Pimentel*, 932 F.2d 1029, 1034 (2d Cir. 1991). Though the absence of a *Pimentel* letter would not necessitate reversal, the presence of one would create a safe harbor against claims of misunderstanding or misadvice about Guidelines calculations.

216. *See id.*



civil commitment, and asset forfeiture. These disclosures would help to inform defendants' decisions about whether (and how) to plead guilty.

Prosecutors and courts could likewise have to clarify the consequences defendants face in other ways. For example, they ought to notify defendants of possible departures from presumptive sentences. They might also have to consolidate all outstanding cases for sentencing, so defendants have a comprehensive picture of the exposure they face. Indeed, the ABA's *Standards for Criminal Justice: Sentencing* already require both of these steps.<sup>217</sup>

More generally, plea bargains could take a page from the law of default terms. There is an extensive literature on the possibility of using information-forcing and penalty defaults in ordinary contracts.<sup>218</sup> These doctrines can induce parties to disclose information and discuss possibilities to which they might not otherwise have adverted. In this context, one might make default terms standard and somewhat prodefendant. This way, repeat-player prosecutors would explicitly set forth the more prosecution terms they were proposing, prompting defendants and defense counsel to focus on and think about them. That approach would encourage careful written records of agreements instead of oral understandings that risk disputes and forgetfulness later on.

For instance, because the parties might not consider the possibility of breach, defaults would prod the parties to specify what constitutes a breach and what remedies could serve as liquidated damages. Today, some plea agreements simply ask defendants to waive their rights to appeal without further explanation.<sup>219</sup> Others, however, specify that defendants are waiving their rights to appeal any sentence below a set number except on specified grounds.<sup>220</sup> Courts ought to be more willing to uphold specific waiver terms, which ensure that waivers are knowing, but could construe vague waivers narrowly.

*Framing.* Difficult issues surround the decision of which frame or baseline to use. Possibilities include the defendant's current status (either freedom on bail or imprisonment pending trial) or the expected post-trial sentence. The choice of a baseline on which to anchor greatly influences whether defendants view bargains as gains (to be locked in) or losses (worth gambling to avoid). The same is true of probabilities: it matters greatly whether

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217. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 18-5.15, 18-5.16 (3d ed. 1994).

218. The literature on the topic is far too vast to catalogue here, and there is significant debate about whether penalty default rules exist or differ from those based on the parties' hypothetical intents. The seminal article on the topic is Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

219. *E.g.*, *United States v. Guevara*, 941 F.2d 1299, 1299 (4th Cir. 1991) (upholding an explicit waiver of a defendant's "right to appeal her sentence [under 18 U.S.C. § 3742(a)] or on any" other grounds).

220. *E.g.*, COMM. ON SECOND CIRCUIT COURTS, FED. BAR COUNCIL, PROFFER, PLEA AND COOPERATION AGREEMENTS IN THE SECOND CIRCUIT at C-4, C-14, C-15, C-31, C-36, C-62 (2003) (reprinting standard-form plea agreements used by the U.S. Attorney's Offices for the District of Connecticut and the Northern, Southern, Eastern, and Western Districts of New York).

defense counsel describes a 15 percent chance of acquittal at trial or an 85 percent chance of conviction. The choice of baselines is never neutral, so plea bargainers can manipulate bargains to make them seem like gains or reduced losses depending on whether they want them to seem attractive or not.<sup>221</sup> It is not clear that there is a single baseline that best tracks defendants' wishes in a world of perfect information. So perhaps the default ought to be a socially optimal one, framing plea bargains consistently as gains relative to trial outcomes, nudging defendants towards pleas. Whether to require that framing or merely make it a default starting point depends on how much one fears that lawyers manipulate frames for self-serving ends.

*Improving Defense Lawyering.* Most important of all would be the advice of counsel. Defendants must trust their lawyers because they cannot begin to learn enough and their lawyers are experts. Defense lawyers may need training, guidance, and reminders to ensure that they advise their clients competently. Bar associations could help to address this concern by developing best practices for advising defendants on guilty pleas.<sup>222</sup> Checklists or computer programs could flag typical collateral consequences of which defense lawyers must warn, based on each defendant's charges, jurisdiction, immigration status, address, and job. They could do the same for defense lawyers' duties to investigate, prepare, meet with clients, and advise. Checklists sound too obvious to be much of a change, but they would offer much more concrete guidance than current law. *Strickland* shied away from rules or even rules of thumb to guide defense lawyers and lower courts, making review difficult and prey to the inevitability bias.<sup>223</sup> As Dr. Atul Gawande has argued, checklists remain an underused solution to the modern problem of extreme complexity. They remind professionals to avoid common errors by going by the book.<sup>224</sup> These measures are incremental, practical starting points. One can at least hope for more radical reforms, such as alleviating the chronic underfunding, overwork, and agency costs that plague appointed defense counsel.<sup>225</sup>

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221. See Bibas, *supra* note 29, at 2507–19.

222. See AM. BAR ASS'N, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 19-2.1 (3d ed. 2004) (calling for jurisdictions to compile all collateral consequences); UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT § 4 (2009) (same).

223. *Strickland v. Washington*, 466 U.S. 668, 688–89, 696 (1984); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 5–6. *But see* Blume & Neumann, *supra* note 145 (noting that, in regulating defense counsel's investigation of mitigating evidence at capital sentencing, the Court has increasingly looked to bar guidelines).

224. ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009).

225. I have previously discussed these problems. A partial solution, I have suggested, is to concentrate criminal-defense appointments among public defenders (as opposed to appointed private lawyers) to maximize the benefits of repeat-player knowledge and experience. See Bibas, *supra* note 29, at 2476–86, 2534, 2539–40.

Perhaps counterintuitively, the relatively small-bore proposals I have just outlined may help lead to broader-based reforms. In objecting to *Padilla*'s disclosure requirement, Justice Scalia feared that the Court's opinion would foreclose better legislative regulation of plea bargaining.<sup>226</sup> But increased transparency and disclosure may have a different effect on legislatures. If full disclosure of overly harsh collateral consequences causes many defendants to balk at pleading guilty, prosecutors may press for reforms. They may urge legislatures either to curtail collateral consequences, or at least to make them waivable as part of plea bargains, to avoid gumming up the plea-bargaining assembly line. Alternatively, they may press legislatures to give them even bigger sticks with which to threaten higher post-trial penalties and so coerce pleas.

Now, there is a danger in analogizing plea bargains too closely to the law of contracts. Plea bargains are not simple bilateral deals; they should also respect victims' and the public's sense of justice. The more that prosecutors must do before imposing a penalty, the more they can behave strategically and omit terms to dictate lower outcomes. Perhaps some terms ought not be within prosecutors' control to remove the possibility of their being used as plea-bargaining chips. But if certain terms are out of prosecutors' control, judges must carefully advise defendants about any mandatory terms that trump purported bargains to prevent surprise.

The point here is not so much to come up with specific solutions as to prod more creative thinking. Plea bargains are hugely important yet complex legal products that are beyond the power of many defendants to navigate unaided. Though that market is deeply flawed by agency costs and structural and psychological distortions, neither complaining nor wishing will make it disappear.<sup>227</sup> It is here to stay and cries out for practical reforms. Clear disclosures, reasonable standard terms, careful drafting and construction, and competent advice would improve this market. Boilerplate disclosures and consumer protections may not work wonders in practice, but they would be better than nothing. Even if these changes do not dictate substantive terms, they can help somewhat to make the bargaining process fairer, clearer, and better informed.

### *B. The Contributions of Various Institutional Actors*

I have already alluded to the roles that lawyers and judges could play in this scheme. As noted just above, line prosecutors and judges might have various disclosure obligations. Rules of construction might prod prosecutors to spell out unclear terms. Judges would read unclear or nonstandard agreements

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226. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1496–97 (2010) (Scalia, J., dissenting).

227. See generally *Bibas*, *supra* note 29 (advocating practical reforms within the real world of guilty pleas).

vigorously against the drafter. Line defense counsel could use checklists and training in plea bargaining.

As Part III.C suggested, the institutional picture should be more complex than just the two courtroom attorneys and one judge. Legislatures and rules advisory committees could restructure the processes of discovery and the substance of plea colloquies. Supervisory prosecutors could play important roles in promulgating office policies and standard-form plea agreements. They could review these materials with care. They could also ride herd on line prosecutors to prevent high-pressure tactics such as exploding offers and unconscionable threats or bluffs. Supervisory defense lawyers could regularly inquire about the problems faced by their subordinates and aggregate their feedback. As repeat players, they can tell supervisory prosecutors about problems with individual prosecutors or office policies that have the effect of leaving defendants bewildered or pressured. Supervisory defense lawyers and bar associations can also train new defense lawyers by giving them the checklists and guidance they need.

The most important yet neglected role may lie with sentencing commissions. What defendants need is not another Rule 11 boilerplate litany, but accurate, intelligible information about the likely sentences they face after plea versus after trial. Commissions could be pivotal in creating the sort of standardized information about typical sentencing outcomes that ought to dominate the substance of warnings. They could consult with graphic designers and marketers to devise simple, intelligible ways to represent the ranges of average sentences for various crimes. They could also test-market various formats on ex-cons to see which formats most effectively counteract various biases and heuristics. For example, maybe graphical frequency distributions could offset defendants' overoptimism, or maybe it would be better to offer vignettes with photos of past defendants who assumed they would do better than average.

The broader point is that higher-level institutions would bring a new perspective to consumer protection in plea bargaining. Supervisory prosecutors, supervisory defense counsel, bar authorities, rules advisory committees, legislatures, and sentencing commissions can collect data broadly, see problems synoptically, and address them proactively. The aim is not to blame bad apples but to put systems in place to detect patterns of problems and prevent future ones. The Supreme Court cannot do this on its own, but one hopes that *Padilla* will spur other institutions to build on *Padilla's* recognition of the problem.

#### CONCLUSION

The Supreme Court is finally beginning to grapple with the difficulty of historical change. We have superimposed a modern criminal procedure market upon a colonial Bill of Rights meant for jury trials. For decades, the Court

barely regulated plea waivers. The managerial mindset emphasized the need to process large caseloads efficiently, and originalists cared little about proceedings beyond jury trials and sentences. Though Justice Scalia's formalist originalism crested early in the last decade, it showed little influence on other Justices in *Padilla*. That may be because the newer Justices see the world not as theoretical ex-professors but as pragmatic ex-prosecutors. In *Padilla*, both Justices Alito and Sotomayor cared less about historical juries and slippery slopes than about practical guidance and reasonable, workable rules. That is now the Court's center of gravity and the focus of debate in the middle of the Court. It remains to be seen, of course, how Justice Kagan will change that balance; she replaces Justice Stevens, whose common-law incrementalism prevailed in *Padilla*, yet lacks his private-practice experience.

Assuming that it continues, the Court's pragmatic incrementalism reflects lawyers' and defendants' need for practical guidance. The Court need not devise constitutional rules from whole cloth in a handful of unrepresentative cases that reach it. Instead, it can piggyback on the accumulated wisdom of the bench, the bar, and the academy. Academics can offer novel suggestions, and the bar can experiment with them. Over time, a consensus can evolve, much as the common law did. Rules advisory committees, and the Court in its rulemaking capacity, can then codify that consensus. Flexible, nonconstitutional consumer-protection measures can evolve upon the Court's constitutional foundation. If egregious errors nevertheless persist, the Court can eventually develop constitutional common law to rein in outliers. That pragmatic, incremental approach to constitutional change is far more promising than a novel judicial fiat or a completely laissez-faire approach to proven injustices.

