ARTICLE

BEING HONEST ABOUT CHANCE: MITIGATING *LAFLER V. COOPER'S* COSTS

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[W]hat's the problem about ordering the prosecution to simply repeat the offer he gave before?

– Justice Steven Breyer,
at oral argument in *Lafler v. Cooper*[1]

Some arguments are true but forbidden, cautions Mark Hermann's widely read *Curmudgeon's Guide to Practicing Law*.[2] The correct answer to Justice Breyer's question is just such an argument.

Anthony Cooper shot at Kali Mundy's head and missed. Then, with more success, fired at her again, striking her in the "buttock, hip, and abdomen."[3] Cooper's counsel told him that the prosecutor would be unable to prove his specific intent to kill Mundy because the landed shots had made contact only below Mundy's waist, a proposition that would be true only if Cooper, like Annie Oakley, had perfect aim.[4] Based on this advice, Cooper rejected the prosecutor's favorable plea offer, and the case proceeded to trial.[5]

A Michigan jury found, presumably to Cooper's counsel's chagrin, that Cooper may have intended to hit more vital parts of

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1. Transcript of Oral Argument at 19, Lafler v. Cooper, 132 S. Ct. 1376 (2012) (No. 10–209).
2. MARK HERRMANN, THE CURMUDGEON'S GUIDE TO PRACTICING LAW 33 (2006).
3. *Lafler*, 132 S. Ct. at 1383.
4. *Id.*
5. *Id.*

Mundy's body than he actually did. More specifically, the jury found that Cooper did intend to kill Mundy, and a Michigan judge sentenced him accordingly—a sentence far exceeding the prosecutor's original offer.[6]

What, then, to do about Cooper's counsel's bad advice? Cooper testified that but for that advice, he would have accepted the favorable plea offer, and an early pro se letter to the court lent that testimony credibility.[7]

Justice Breyer's question, then, seems a reasonable one: why not go back and let Cooper accept the offer? Advocates for upholding the sentence responded with fairly weak arguments, including that:

> (1) the Sixth Amendment did not apply to plea negotiations (a proposition that had been rejected "many times," as Justice Kagan rightly pointed out at oral argument);[8]
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> (2) the panoply of trial rights cured any defect in counsel's performance[9] (adopted by Justice Scalia in dissent,[10] but rightly rejected by Justice Kennedy for the Court, who observed that the trial, in a very real sense, *was* the defect[11]); and
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> (3) the prosecutor, courts, jury, and, most significantly, victims, had already expended significant resources in prosecuting Cooper—resources that Cooper could not compensate[12] (a reasonable argument adopted by Justice Alito in dissent,[13] but one which ignores the fact that it is the duty of prosecutors, courts, and juries to try criminal cases).

Given those weak arguments, the Court overturned Cooper's conviction and ordered the State to renew its plea offer (the implications of which for prosecutorial discretion are beyond the scope of this brief Article).[14]

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6. *See id.* (noting how Cooper received a mandatory minimum sentence of 185 to 360 months imprisonment after rejecting the prosecution's initial offer of 51 to 85 months).

7. *Id.* at 1391; Brief of Respondent Anthony Cooper at 2, *Lafler*, 132 S. Ct. 1376 (No. 10–209), 2011 WL 2837936 at *2.

8. Transcript of Oral Argument, *supra* note 1, at 25; Brief for Petitioner at 13–15, *Lafler*, 132 S. Ct. 1376 (2012) (No. 10–209), 2011 WL 1523284, at *13–16.

9. Brief for Petitioner, *supra* note 8, at 15.

10. *Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting).

11. *Id.* at 1385 (majority opinion).

12. *Id.* at 1399 (Alito, J., dissenting); Brief for Petitioner, *supra* note 8, at 20.

13. *Lafler*, 132 S. Ct. at 1399.

14. *Id.* at 1392 (majority opinion).

What was the forbidden but best rationale for upholding Cooper's conviction? At oral argument, Justice Alito correctly stated that the Court's remedy could not "unscramble the eggs,"[15] but was wrong about which eggs were scrambled. The problem was not the substantial resources expended in prosecuting Cooper, but that, *in proceeding to trial*, *Cooper stood a chance of being acquitted altogether*.

The advocates for upholding Cooper's sentence for both Michigan and the United States as amicus made that argument only as a closing shot (in the case of the former) and sheepishly (in that of the latter, who listed several reasons before ending with "and frankly to avoid the risk of an acquittal"), and it likewise took a back seat at oral argument.[16] Most importantly, it did not figure at all in the majority opinion.[17]

Why such reticence? Counsel recognized that the argument was true but unacceptable.[18] We are rightly uncomfortable with the idea of courthouse as casino, in which such fundamental concepts as guilt and innocence are left to the vagaries of chance.

But such a perspective sets up a false dichotomy: trials are not slot machines, nor are they laboratories.[19] Factually innocent defendants will *very likely* be acquitted, and, to a lesser extent, factually guilty ones will *very likely* be convicted. But a system dependent upon such nebulous, uncertain concepts as credibility and persuasion, the fiction of a lay jury exercising its reason, and, worst of all, endless attempts at parsing the protean "beyond a reasonable doubt" standard, will of necessity produce occasionally unpredictable results (to say nothing of the so-called "CSI Effect," in which jurors equate "reasonable doubt" with "an absence of forensic evidence"[20]). This unpredictability, given our constitutional prohibition against double jeopardy, might permanently redound to a guilty defendant's benefit, particularly so given the difficulty in establishing specific intent in cases like

15. Transcript of Oral Argument, *supra* note 1, at 16.

16. Brief of Wayne Cnty., Michigan as Amici Curiae Supporting Respondents at 24–25, *Lafler*, 132 S. Ct. 1376 (No. 10–209); Transcript of Oral Argument, *supra* note 1, at 24. Chief Justice Roberts mentioned the argument when questioning Cooper's counsel, but noted its unsavory character: "Juries—I don't want to say often, but it is not—it's certainly not inconceivable that a jury may decide *for whatever reason* we are not going to convict this guy." *Transcript of Oral Argument*, *supra* note 1, at 55 (emphasis added).

17. *See Lafler*, 132 S. Ct. at 1383–92.

18. Transcript of Oral Argument, *supra* note 1, at 39–40.

19. Unfortunately, Justice Scalia used a similar "casino" metaphor in dissent, but he was discussing not the trial but the unpredictable world of plea bargaining itself. *See Lafler*, 132 S. Ct. at 1398 (Scalia, J., dissenting).

20. *See* Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 NEW ENG. L. REV. 435, 441–42 (2007).

Cooper's. Indeed, it would be (rightly) unthinkable for the prosecutor, learning that Cooper would have accepted his offer but for the bad advice, to file a motion compelling specific performance of the agreement had Cooper been acquitted. In short, suggesting that our trials might not ensnare the guilty gives us pause, but it is manifestly true (as is, the Innocence Project has demonstrated, its converse[21]).

What so vexes prosecutors about *Lafler*, then, is that Cooper will get to have his cake and eat it too—he got a shot at acquittal, then, that having failed, he will get the original plea offer the prosecutor designed, at least in part, to avoid that contingency.

The problem, then, is not one of resources (as Justice Alito contended[22]), but of information. Cooper received a look behind the veil of uncertainty provided by the trial and did not like what he saw. Rather than an egg that cannot be unscrambled, this is a bell that cannot be unrung.

After *Lafler,* a prosecutor rightly worries, a defendant will be able to proceed to trial with the plea offer in his pocket, forcing specific performance when counsel's advice to proceed turns out to be incorrect, as it must have been—he was, after all, convicted! Chief Justice Roberts himself noted this concern at oral argument: "[I]f you're the defense counsel, the best thing for you to do is not communicate any plea offer you get, and then if your client is found guilty, then you can go back and say, oh by the way, I didn't tell you about this, and he gets a whole new trial."[23] As in other contexts, the defendant benefits from both his counsel's successes (by getting a favorable result) and failures (by obtaining relief). The rational prosecutor might respond to *Lafler,* then, by eliminating plea offers altogether, or at least reducing them.

I. POTENTIAL REMEDIES AND THE INSURANCE ANALOGY

Perhaps we should welcome such a reduction: plea bargaining is, in Justice Scalia's words, an "embarrassing adjunct to our criminal justice system,"[24] one that has long faced an avalanche of justified criticism.[25] While plea bargaining's

21. *See* THE INNOCENCE PROJECT, http://www.innocenceproject.org/about/ (last visited, Feb. 11. 2013).

22. *Lafler*, 132 S. Ct. at 1398–99 (Alito, J., dissenting).

23. Transcript of Oral Argument, *supra* note 1, at 39.

24. *Lafler*, 132 S. Ct. at 1397 (Scalia, J., dissenting).

25. *See, e.g.*, Douglas G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 70–71 (1983); Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32

necessity might be overstated, its ubiquity indicates that shifts in its frequency would significantly upset the established order. So long as prosecutors charge more cases than they can try, plea bargaining is here to stay. How then to reduce the number of cases like Cooper's, to prove the Court correct in its confidence that a "flood[ ]" of similar litigation will not be forthcoming?[26]

There is an analogy here to ex ante insurance coverage disputes. Cooper's position reminds us of an insured who, after a substantial loss, claims he would have paid a small additional premium if only he knew that his loss was uncovered. The problem is again one of information—the insured has been able to "look" into the future and see his loss, and his contention that he *would have* paid a tiny premium to offset it is beyond doubt. Likewise, the insurer, seeing an actualized massive loss, has every incentive to contend that the parties contracted knowing such loss was excluded.

Such insurance principles might guide criminal courts crafting *Lafler* remedies. Insurance decisions, unlike *Lafler*, recognize the problems of moral hazard, prohibiting the insured from benefitting from their reckless behavior.[27] In the same way, a defendant who "recklessly" exercises his right to trial might not be heard to complain about the result. Subjective expectations of coverage are rightly viewed skeptically, as should a criminal defendant's claimed desire to accept the agreement—importantly, other defendants might not have Cooper's beneficial ex ante acceptance of guilt in his letter to the trial judge.

Similar processes seemed to attract the Court. At oral argument, Chief Justice Roberts suggested that the judge might perform a similar monitoring function: "[W]hy is it so terribly difficult to tell the defendant he has a right to accept that offer if he wants, but then go through the normal process, which is it has to be approved by a judge and all that stuff?"[28]

A more active judicial role in plea bargaining, however, is problematic for a variety of reasons. Federal Rule of Evidence 408 specifically prohibits a party from introducing settlement offers for the common-sense reason that they undermine a party's position at trial:[29] just as a prosecutor should not tell a

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STAN. L. REV. 887, 904 (1980).

26. Transcript of Oral Argument, *supra* note 1, at 42.

27. *See* W. Cas. & Sur. Co. v. W. World Ins. Co., 769 F.2d 381, 385 (7th Cir. 1985) ("Once a person has insurance, he will take more risks than before because he bears less of the cost of his conduct.").

28. Transcript of Oral Argument, *supra* note 1, at 17.

29. FED. R. EVID. 408.

jury that the defendant offered to plead guilty, a defense attorney should not be able to remind a sentencing judge of the prosecutor's lesser plea offer.

Judicial monitoring harms the defendant as well. A defendant might reasonably worry that a judge will "punish" his rejection of a favorable offer, particularly when the trial imposes costs on others (especially child victim testimony). The problem might be avoided by having another judge review the plea offer *in camera*, but this would result in a massive expenditure in the resources of prosecutor and defense counsel (in preparing such submissions) and the court (in reviewing them).

Indeed, even the simple suggestion of reducing all plea *offers* to writing (distinct from all *agreements*, a common requirement), is impracticable. Those who have practiced in high-volume state criminal courts are aware of the quick give-and-take immediately before the plea colloquy—an undesirable yet necessary part of funneling an avalanche of cases to resolution.

II. CHANCE AND THE LAFLER ADVISEMENT

We can find an efficient solution by digging more deeply into *why* the advice upon which Cooper relied was deficient. The State of Michigan apparently stipulated that Cooper received deficient performance,[30] a fact that puzzled any prosecutor who has tried a specific intent crime, along with Chief Justice Roberts himself: "Even if it's not legally true that if you shoot . . . the person below the waist, that's not a defense, but I can see a reasonable juror saying he probably didn't intend to kill her. . . . Maybe that is not such a bad strategy."[31]

Michigan's stipulation makes it difficult to determine the exact deficiency, but it seems to have occurred because Cooper's counsel, like everyone else involved in the case, had a blind spot when it came to chance. The advice likely would have been sufficient—indeed, as Justice Roberts suggested,[32] somewhat valuable—had Cooper been told it would be *difficult* for the prosecutor to establish specific intent, but not *impossible*. In other words, Cooper's counsel erred not in telling him he *likely* would be acquitted, but that he *would*.

Cooper likely could not complain had his counsel told him he stood a small chance of being convicted, but he rightly

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

31. Transcript of Oral Argument, *supra* note 1, at 58.

32. *See id.* (explaining that even a small chance of conviction may deter some defendants from going to trial).

complained when he was assured. If advised even of a small chance of conviction, he could have assessed his own risk aversion and made a decision, however rational, of proceeding to trial. Even had his counsel *misstated* the odds of conviction, such a decision likely would not have led to *Strickland* prejudice.[33] The problem was that Cooper's counsel ignored it altogether.

Therefore, the solution to ensure that a flood of incarcerated defendants do not suddenly recall their eagerness to plead is a simple, on-the-record recognition of chance. Defendants already receive many judicial advisements, both at their initial hearing and their plea: at a minimum, judges must advise them of their so-called *Boykin* rights.[34] Plea bargaining, befitting its covert character, is conspicuously absent from that advisement. It would be fairly simple, and more realistic, to add what we might call a *Lafler* advisement, where the judge states:

> The State sometimes offers a "plea bargain," which may dispose of some or all of the charges, or may recommend a specific sentence. To accept a plea bargain, you must waive your right to proceed to trial. That trial is our best way to determine the truth of the facts the State has alleged. Nevertheless, no one can predict the future with certainty, and for that reason, no one, including your attorney, can promise or guarantee either that you will be convicted, or that you will be acquitted. You should carefully consider your attorney's advice on whether to plead guilty or not guilty, which is based on training and experience you likely do not have. However, the decision to plead guilty, with or without a plea bargain, is yours and yours alone.

At both oral argument and in the decision itself, the *Lafler* majority chided Justice Scalia's naïveté in ignoring the plea bargaining revolution, pragmatically recognizing its overwhelming frequency.[35] Yet we require another such

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33. *See* Strickland v. Washington, 466 U.S. 668, 687–88, 691 (1984) (creating a two-part test to establish a claim of ineffective assistance of counsel). Under *Strickland* a criminal defendant must show that his or her counsel's performance fell below an objective standard of reasonableness, and that, if counsel had provided adequate legal services, the result of the proceeding would have been different. *Id.* Absent such a showing, a criminal defendant may not obtain relief for ineffective assistance of counsel.

34. *See* Boykin v. Alabama, 395 U.S. 238, 242–43 (1969) (stating that judges must affirmatively show that the defendant's guilty plea was intelligent and voluntary by advising them of three constitutional rights involved in a waiver: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers).

35. *See Lafler* 132 S. Ct. at 1388 (noting that the current criminal justice system is "for the most part a system of pleas, not a system of trials"); Transcript of Oral Argument, *supra* note 1, at 25–26 (pointing out that approximately 98% of criminal cases involve plea bargaining).

pragmatism to avoid a *Lafler* revolution: one requiring our courts to be honest about chance.