In the Shadow of the Bench: Judicial Discretion to Reject Plea Agreements

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In 2021, over 98% of criminal cases at the federal level terminated in guilty pleas, many of which were the result of plea agreements between the prosecution and the defense. The numbers were similar at the state level. Despite this prevalence of plea agreements, many U.S. jurisdictions limit the role that judges may play in providing oversight in the plea negotiation process. At the federal level—and in at least 14 states—judicial participation in the plea-bargaining process is entirely prohibited. In those jurisdictions, judges have one tool for oversight: judicial discretion to reject plea agreements. On the rare occasions in which judges use this tool, the reasons for rejecting plea agreements vary widely. Some cite issues with sentencing leniency, others point to the need for the participation of the public or alleged victims in the legal process, and still others raise concerns around legislative intent, police officers' views, or appellate waivers. However, the exact contours of that discretion remain ill-defined. The reasons for rejection given by different judges sometimes conflict, and the rarity of memorialized rejections means little caselaw has developed on the subject. This, in turn, has created a lack of predictability for parties in the plea-bargaining process.

This Note reviews case law at the federal and state levels to determine what limits appellate courts have placed on that discretion and what factors trial courts have considered relevant to its exercise. It then argues for a unifying two-step framework for judicial rejection of plea agreements. First, trial courts would adopt a rebuttable presumption in favor of rejecting such agreements. Second, the trial court would determine whether the parties

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have rebutted that presumption, considering prosecutorial prerogatives, the defendant's autonomy and rights, the public interest in participating in the criminal legal system, and the views of any alleged victims. By working within this framework, trial courts could enhance the consistency and predictability of judicial rejections of plea agreements for all stakeholders in the criminal legal system.

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INTRODUCTION

Plea bargaining has been a constitutionally recognized part of the American criminal legal system for over 50 years.[1] Upwards of 95% of criminal cases at the federal and state levels terminate in guilty pleas,[2] many of which are secured through negotiations between the prosecution and the defense.[3] Despite widespread recognition among the judiciary that "criminal justice today is for the most part a system of pleas, not a system of trials,"[4] the role of judges in this system is far from clear. At the federal level and in many state jurisdictions, all judicial participation in the actual plea-bargaining process is prohibited, leaving the judge's role tightly circumscribed.[5] Instead, what little judicial oversight exists—to protect defendants' rights, to serve the public interest, and to guarantee alleged victims a voice—comes after the plea agreement has been fully formed and presented to the judge. Only then may a judge exercise the power to reject a plea agreement.[6]

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1. *See* Brady v. United States, 397 U.S. 742, 750–51 (1970) (rejecting the claim that "it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof"); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (finding no constitutional violation where a prosecutor threatened a defendant with a life sentence unless he plead guilty to a minor forgery charge with a five-year sentence).

2. It is difficult to find a scholarly work on the plea-bargaining system that does not mention this fact within its first few paragraphs. *See, e.g.*, Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1063 (2006) ("From 1994 through 2003, the percentage of federal criminal convictions obtained by a guilty plea increased from 91% in 1994 to 96% in 2003."); Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 62–63 (2015) ("In the federal system, the vast majority—about [97%]—of federal criminal defendants plead guilty, giving up their constitutional right to a jury trial in exchange for sentencing concessions.").

3. In 2021, 63,725 criminal cases were terminated in U.S. District Courts; 58,516 resulted in convictions, of which 57,631 (over 98%) came via guilty plea. *See U.S. District Courts—Judicial Business 2021*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2021 [https://perma.cc/S55B-XMSB]; *see also* Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, DEP'T OF JUST. (2011) (estimating that 90 to 95% of federal and state criminal cases are resolved by plea bargain). These numbers may actually underestimate the impact of plea bargaining. Prosecutors Mary Patrice Brown and Stevan E. Bunnell note that "plea bargaining is even more prevalent than the 96% figure suggests since a plea offer and some plea negotiation—albeit ultimately unsuccessful—is also part of just about every federal case that goes to trial." Brown & Bunnell, *supra* note 2, at 1063–64.

4. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

5. *See infra* Part II.A.

6. Along with the ability to reject a plea agreement, the Federal Rules of Criminal Procedure also require a court to consider the plea itself to determine whether, *inter alia*,

Recently, though, a few federal district court judges have sought to exercise this power to greater effect. Whether asserting an expanded conception of the public interest,[7] preserving rights that defendants waived through coercion,[8] or expressing discomfort with the plea-bargaining system writ large,[9] these trial judges have pushed the bounds of judicial discretion to reject plea agreements. In response, some appellate courts have worked to curtail this boundary-pushing,[10] while others seem to have accepted it, if reluctantly.[11] However, absent centralized guidance from the Supreme Court, the Federal Rules of Criminal Procedure, or analogous state rules, the power to reject proposed plea agreements has been left to the independent development of state courts and lower federal courts.

This Note seeks to answer the question of how federal and state courts can better exercise their power to reject plea agreements. Part I examines the role of judicial rejection of plea agreements in the broader plea-bargaining system. It explains that, at least in jurisdictions that bar judges from intervening in plea discussions, judges' most substantial tool for providing input on plea agreements is the discretionary rejection of those plea agreements. Part II analyzes the limits appellate courts have placed on the vast discretion that federal and state rules grant to trial courts to reject plea agreements. It then considers the primary factors that trial courts have relied on in rejecting plea agreements, including both those that have been accepted by appellate courts and those that are untested at the appellate level. This analysis demonstrates the under-theorization of the power of judges to reject plea

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the defendant is pleading guilty voluntarily and knowingly. *See* FED. R. CRIM. P. 11(b); *see also infra* notes 33–38.

7. *See* United States v. Walker, 423 F. Supp. 3d 281, 282 (S.D. W. Va. 2017) (rejecting a plea agreement on heroin and fentanyl distribution charges, citing the public interest in participating in the adjudication of such charges given the ongoing opioid crisis).

8. *See* United States v. Townsend, 2021 WL 777191 at *6 (E.D. Mich. Mar. 1, 2021) (rejecting a plea agreement on the grounds that the appeal and collateral review waivers contained therein were so broad as to be contrary to the sound administration of justice).

9. *See* United States v. Osorto, 445 F. Supp. 3d 103, 109 (N.D. Cal. 2020) (rejecting a plea agreement while arguing that such agreements are contracts of adhesion that pit defendants against "the enormous power of the United States Attorney").

10. *See, e.g.*, *In re* United States, 32 F.4th 584, 595 (6th Cir. 2022) (finding the *Townsend* court, *supra* note 8, erred in basing its decision on a generalized aversion to direct appeal and collateral review waivers).

11. *See* United States v. Walker, 922 F.3d 239, 251 (4th Cir. 2019) (affirming the district court's rejection of the plea agreement because its broader public interest reasoning was not dispositive).

agreements, as no clear guidelines exist for determining when trial courts should exercise that power. Finally, Part III attempts to fill this gap in theory by proposing that courts construct their own frameworks to clarify the role of judicial rejection in the plea-bargaining process. This Note suggests that courts adopt a framework which: (1) establishes a presumption weighted toward rejecting a plea agreement, absent case-specific reasons for its acceptance; and (2) organizes the court's considerations to respect prosecutorial prerogatives, protect defendant autonomy, serve public participation values, and affirm alleged victims' rights.

I. PLEA BARGAINING AND THE JUDICIAL ROLE

This Part explores the operation of the plea-bargaining system at the federal and state level, with an eye toward judicial oversight—or lack thereof—in negotiations between prosecutors and defendants. Section I.A provides an overview of the mechanics of plea bargaining, using the federal system as an example. Section I.B then explains the limited role currently assigned to judges in the federal and many state plea-bargaining systems. Finally, Section I.C briefly surveys the existing scholarship on the role of judges in plea bargaining. The lack of attention paid to judicial rejection of plea agreements raises the question at the heart of this Note: How can judges in jurisdictions that limit their role leverage the one tool in their arsenal—the discretion granted to them to reject plea agreements—to better oversee the plea-bargaining process?

A. PLEA-BARGAINING BASICS

The modern American criminal legal system is driven by plea agreements under which defendants plead guilty in return for prosecutors' recommending lighter sentences, dismissing certain charges, or both.[12] While the procedural rules and case law

12. *See* McConkie, *supra* note 2, at 66–67 ("'Plea bargaining' refers generally to defendants giving up their trial-related constitutional rights and pleading guilty in exchange for prosecutorial concessions, like lighter sentences and dismissals of charges."). Along with waiving the right to a trial, a plea-bargaining defendant may also waive other constitutional rights. *See, e.g.*, Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L. J. 209, 211 (2005) (the right to appeal); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 88 (2015) (the right to effective assistance of counsel at

governing these agreements vary by jurisdiction, the following brief overview generally applies across both federal and state systems.[13]

The plea-bargaining process begins with the defendant's first contact with the criminal legal system. From the outset, the prosecution's power over what charges to bring sets the terms for any plea negotiations.[14] Once charges are brought, plea negotiations may be initiated by either defense counsel or the prosecutor.[15] Prior to negotiations, the defense counsel may have only a limited opportunity to speak with the defendant, while the prosecution often has already consulted with the alleged victims and other interested parties, such as law enforcement.[16] Despite this informational imbalance, the bargaining process in the majority of cases is quick and routine, with minimal negotiation.[17] In select cases, the parties may haggle over the charges, the recommended sentence, the stipulated facts, or other facets of the case.[18] Before finalizing the agreement, defense counsel will confer with the defendant,[19] while the prosecutor may check with a

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sentencing); Donna Lee Elm et al., *Immigration Defense Waivers in Federal Criminal Plea Agreements*, 69 MERCER L. REV. 839, 843 (2018) (the right to immigration relief). Additionally, in exchange for further concessions, a defendant may offer to cooperate with the government in other prosecutions. *See* Brown & Bunnell, *supra* note 2, at 1072.

13. For more thorough discussion of the negotiation process from the prosecutor's perspective, see Brown & Bunnell, *supra* note 2. For the defendant's perspective, with a particular focus on the role of race, see Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93 (2020).

14. *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1313–14 (2018). Crespo has characterized prosecutorial techniques for gaining leverage at the outset of negotiations as "piling on," "overreaching," and "sliding down." *Id.* In piling on, the prosecutor may charge the defendant with additional, overlapping offenses, by, for example, adding aggravated assault and theft to a simple armed robbery charge and, in so doing, holding the chance of a longer sentence over the defendant's head. The prosecutor may also overreach by "inflating the substance of the charges themselves," charging the armed robbery defendant with a much more serious kidnapping offense. *Id.* Finally, by sliding down, the prosecutor may then offer to drop those charges added via piling on and overreaching, making what might have been the original charge of armed robbery look much more enticing from a bargaining perspective.

15. *See* Greenberg, *supra* note 13, at 120.

16. *See id.*; Brown & Bunnell, *supra* note 2, at 1066.

17. *See* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 415 (2008). A variety of factors may influence such "routine case processing," including the workload of public defenders and the economic incentives for private defense attorneys to process cases quickly. *Id.* at 416–17.

18. *See* Brown & Bunnell, *supra* note 2, at 1066–75. Some prosecutorial bargaining positions may be set in advance by office policies. *See, e.g.*, *In re* United States, 32 F.4th 584, 594 (6th Cir. 2022) (describing the U.S. Attorney's Office for the Eastern District of Michigan policy of requiring defendants to waive the right to appeal in all plea agreements).

19. *See* Greenberg, *supra* note 13, at 120.

supervisor.[20] Of course, if the parties cannot reach an agreement, the case will proceed to trial, but that outcome represents less than five percent of criminal cases.[21]

Assuming the parties do reach an agreement, the resulting plea bargain may fall into one of three categories. First, under a "sentence bargain," a prosecutor may offer to recommend a lighter sentence in exchange for the defendant's pleading guilty to the offenses as charged in the indictment or information.[22] Second, in a "charge bargain," a prosecutor may offer to dismiss one or more charges in exchange for the defendant's pleading guilty to the remaining charge or charges.[23] Third, a prosecutor may offer both to recommend a lighter sentence and to reduce the charges in a "hybrid bargain."[24] The differences between these three types of plea agreements may inform not only negotiations between the defense and the prosecution but also the role of the judiciary in overseeing those negotiations.

B. THE JUDICIAL ROLE IN PLEA BARGAINING

Although much of the preceding discussion has framed plea bargaining as a negotiation between the prosecution and the defense, there is, of course, a third actor in the equation: the judge. This Note, however, deals with those jurisdictions in which the judge's role in the plea-bargaining process remains minimal.[25] In

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20. *See* Brown & Bunnell, *supra* note 2, at 1066.

21. *See* Devers, *supra* note 3.

22. Hoskins v. Maricle, 150 S.W.3d 1, 22 (Ky. 2004); *see also* Brown & Bunnell, *supra* note 2, at 1068 ("[T]he second key feature of most federal plea agreements in D.C. has been an agreement with respect to at least some of the factual and legal issues relevant to sentencing."). At the federal level—and in the many states whose rules of procedure with respect to plea bargaining mirror the federal rules—sentence bargains are further subdivided into "binding" agreements, in which the court must impose the parties' agreed-upon sentence if it accepts the agreement, and "nonbinding" agreements, in which the court is under no such obligation even if it accepts the agreement. FED. R. CRIM. P. 11(c)(1); *see also* N.D. R. CRIM. P. 11(c)(1).

23. *Maricle*, 150 S.W.3d at 22; *see also* Brown & Bunnell, *supra* note 2, at 1066–67 ("Like most plea agreements in federal or state courts, the standard D.C. federal plea agreement starts by identifying the charges to which the defendant will plead guilty and the charges or potential charges that the government in exchange agrees not to prosecute.").

24. *Maricle*, 150 S.W.3d at 22.

25. For a list of those jurisdictions, see *infra* notes 85–98 and accompanying text. While this Note does not cover them, several jurisdictions do allow the court to play some role in plea negotiations between the prosecution and the defense. *See* Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 579 (2015). For example, in Oregon state courts, while a trial judge "may not participate in plea discussions," OR. REV. STAT. ANN. § 135.432(1)(a), once the parties have reached a

those jurisdictions, which include the federal system and several state systems,[26] the judge's role is limited to the consideration of an already finalized plea agreement.[27] This section reviews the rules constraining the judicial role in those jurisdictions, focusing on the federal system as an example.[28]

Federal plea bargaining is governed by Federal Rule of Criminal Procedure (Fed. R. Crim. P.) 11. Under Fed. R. Crim. P. 11, the prosecution and the defense may engage in negotiations toward a plea agreement, with three types of agreements: a charge bargain under Fed. R. Crim. P. 11(c)(1)(A); a sentence bargain which does not bind the court to the parties' sentence recommendation under Fed. R. Crim P. 11(c)(1)(B); and a sentence bargain which does bind the court to the parties' sentence recommendation under Fed. R. Crim. P. 11(c)(1)(C).[29] No matter the bargain, however, "[t]he court must not participate in these discussions."[30] For example, under one Federal Circuit precedent,

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tentative plea agreement, the trial judge "may then advise the district attorney and defense counsel whether the trial judge will concur in the proposed disposition." OR. REV. STAT. ANN. § 135.432(2). Moreover, "[a]ny other judge, at the request of both the prosecution and the defense, or at the direction of the presiding judge, may participate in plea discussions." OR. REV. STAT. ANN. § 135.432(1)(b).

26. These jurisdictions include Arkansas, Colorado, the District of Columbia, Kentucky, New Mexico, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. *See infra* notes 80–93 and accompanying text; *see also* Batra, *supra* note 25, at 573–75.

27. *See infra* notes 29–30.

28. Many state rules of criminal procedure largely mirror the federal rules. *Compare* FED. R. CRIM. P. 11 *with* N.D. R. CRIM. P. 11. For the sake of clarity, the foregoing explanation details only the federal system, but for each provision of the Federal Rules of Criminal Procedure discussed below, this Note will also offer a corresponding state rule to demonstrate the synchronicity between the selected states and the federal system in this regard.

29. *See* FED. R. CRIM. P. 11(c)(1)(A), (B), and (C); *see also* COLO. R. CRIM. P. 11(f)(2) (outlining the types of plea agreements the parties may reach in Colorado state courts: (1) a non-binding sentence bargain; (2) a charge bargain in which the district attorney agrees "[t]o seek or not to oppose the dismissal of an offense charged"; and (3) a charge bargain in which the district attorney agrees "[t]o seek or not to oppose the dismissal of other charges or not to prosecute other potential charges.").

30. FED. R. CRIM. P. 11(c)(1); *see also* United States v. Davila, 569 U.S. 597, 609 (2013) (reaffirming that, under Rule 11, U.S. district courts may not participate in plea negotiations). For analogous state rules, *see, e.g.*, COLO. R. CRIM. P. 11(f)(4) ("[T]he trial judge shall not participate in plea discussions."); UTAH R. CRIM. P. 11(i)(1) ("The judge will not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney."). Interestingly, in Utah, as in a few other states, the parties may present a tentative plea agreement to the court ahead of the tender of the plea, at which point "[t]he judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved." UTAH R. CRIM. P. 11(i)(2). However, this is quite distinct from judicial involvement in plea negotiations. *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and*

a district court violates Fed. R. Crim. P. 11 when it "rewrite[s] the plea agreement from the bench," "facilitate[s] a plea," or "expresses its preference for or against certain plea-bargaining terms in an unfinalized or hypothetical plea agreement."[31]

Still, courts are not left completely out of the plea-bargaining picture in those jurisdictions that bar participation in negotiations. In the federal system, once the parties have completed negotiations and finalized their agreement, the court has two related duties. Under its first duty, the court must decide whether to accept or reject the guilty plea itself.[32] This duty entails a colloquy with the defendant, under oath and in open court, to determine that: (1) the plea is knowing—that is, the defendant understands the rights being waived and the consequences of their waiver;[33] (2) the plea is voluntary—that is, the plea "did not result from force, threats, or promises (other than promises in a plea agreement)";[34] and (3) that the plea has a factual basis.[35] This

Judicial Participation in Negotiations, 95 TEX. L. REV. 325, 335 n.54 (2016) (noting that Utah Rule 11 may leave room for judicial participation but a strong "statewide norm against judicial negotiation" generally keeps judges from engaging in negotiations).

31. *In re* United States, 32 F.4th 584, 592 (6th Cir. 2022). For a comparable state decision, see State v. Dimmitt, 665 N.W.2d 692, 696 (N.D. 2003) (reviewing North Dakota Rule 11 with respect to judicial involvement in plea bargaining and noting "[o]n this point, the federal rule is substantively identical to our rule and prohibits the court from participating in any plea discussions."); Batra, *supra* note 25, at 573 n.54.

32. *See* FED. R. CRIM. P. 11(b). The Supreme Court has held, "[t]here is, of course, no absolute right to have a guilty plea accepted." Santobello v. New York, 404 U.S. 257, 262 (1971). For a state analogue, see PA. R. CRIM. P. 590(A)(3) ("The judge may refuse to accept a plea of guilty or nolo contendere, and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record.").

33. *See* FED. R. CRIM. P. 11(b)(1); *see also* Boykin v. Alabama, 395 U.S. 238, 243–44 (1969) ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."). For a state example, see TENN. R. CRIM. P. 11(b)(1) (providing that "[b]efore accepting a guilty or nolo contendere plea, the court shall address the defendant personally in open court and inform the defendant of, and determine that he or she understands" the provided list of rights and consequences).

34. FED. R. CRIM. P. 11(b)(2); *see also* TENN. R. CRIM. P. 11(b)(2) (before accepting a plea, the judge must "determine that the plea is voluntary and is not the result of force, threats, or promises" and "inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions" between the parties).

35. *See* FED. R. CRIM. P. 11(b)(3); *see also* TENN. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court shall determine that there is a factual basis for the plea.").

tends to be a standardized process,[36] with procedural rules providing a checklist of factors to move through.[37]

The second duty, consideration of the plea agreement, is much more amorphous. When a defendant enters a guilty plea, the parties must disclose to the court any underlying plea agreement.[38] If the agreement is a charge bargain[39] or a binding sentence bargain,[40] the court may then "accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report."[41] If it chooses to reject the agreement, the court must (1 inform the parties; (2) allow the defendant to withdraw the plea; and (3) advise the defendant that, if the plea is not withdrawn, the sentence imposed may differ from the plea agreement.[42] At that point, the defendant may go through with the plea without the benefit of the bargain, withdraw the plea and negotiate a new plea agreement, or withdraw the plea and go to trial.[43] Consideration of the plea agreement is separate from consideration of the plea itself, meaning that the court may accept a guilty plea but reject

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36. *See* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 212–13 (2006) (arguing that this process may sometimes veer into "perfunctory" territory, meaning "the parties may reach plea bargains that are both inaccurate and unfair"); Julian A. Cook, III, *Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process*, 60 B.C. L. REV. 1073, 1076 (2019) (characterizing this procedure as focused on "[e]xpediency and facial compliance with the governing rules (as opposed to searching inquiries regarding a defendant's knowledge and coercive influences)"). *But see generally* Eric Hawkins, *A Murky Doctrine Gets a Little Pushback: The Fourth Circuit's Rebuff of Guilty Pleas in* United States v. Fisher, 55 B.C. L. REV. E-SUPPLEMENT 103 (2014) (examining the Fourth Circuit's expansion of the voluntariness requirement for guilty pleas).

37. *See* FED. R. CRIM. P. 11(b); *see also* W. VA. R. CRIM. P. 11 (listing the topics to be included in the colloquy, including the nature of the charge, the possible penalties, the right to an attorney, the various trial rights, and the plea's waiver of the right to a trial).

38. *See* FED. R. CRIM. P. 11(c)(2) ("The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera."); *see also* VA. SUP. CT. R. 3(A)(8)(c)(2) ("If a plea agreement has been reached by the parties, it must, in every felony case, be reduced to writing, signed by the attorney for the Commonwealth, the defendant, and, in every case, his attorney, if any, and presented to the court.").

39. *See* FED. R. CRIM. P. 11(c)(1)(A).

40. *See* FED. R. CRIM. P. 11(c)(1)(C).

41. FED. R. CRIM. P. 11(c)(3)(A). Because a nonbinding 11(c)(1)(B) sentence bargain does not restrict the court, Rule 11 does not provide for judicial rejection of such agreements. *See* FED. R. CRIM. P. 11(c)(3)(B). For a corresponding state rule, see N.M. DIST. CT. R. CRIM. P. 5-304 ("Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.").

42. *See* FED. R. CRIM. P. 11(c)(5); *see also* D.C. SUPER. CT. R. CRIM. P. 11(c)(5) (requiring the same three procedural steps).

43. *See infra* note 106.

the plea agreement, so long as it follows Fed. R. Crim. P. 11's procedures.[44]

Despite providing a detailed checklist to guide the court in its first duty—consideration of the plea—Fed. R. Crim. P. 11 fails to provide similarly clear guidelines for the court in its second duty—consideration of the plea agreement.[45] Instead, the Federal Rules have left it to the courts to develop their own criteria for determining whether to accept or reject a proposed plea agreement.[46]

C. SCHOLARSHIP ON THE ROLE OF THE JUDICIARY IN THE PLEA-BARGAINING SYSTEM

Many scholars have examined the judiciary as the key to plea-bargaining reforms. This section does not attempt a comprehensive assessment of that work. Instead, it offers a short synthesis of the scholarship on the role of the judiciary in the plea-bargaining system in order to show a gap in the literature concerning judicial rejection of plea agreements.

First, according to scholars, plea bargaining serves both prosecutorial and defense interests. On the prosecution's side, plea agreements promote efficiency and the preservation of scarce resources.[47] Pleading out weaker cases also protects the reputational and political interests of prosecutors, who may want

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44. Note that Rule 11 deals with these two steps, consideration of the guilty plea and consideration of the plea agreement, in different provisions. Rule 11(b), titled "Considering and Accepting a Guilty or Nolo Contendere Plea," governs the former, while Rule 11(c), "Plea Agreement Procedure," controls the latter. *See* FED. R. CRIM. P. 11(b); FED. R. CRIM. P. 11(c). Indeed, Rule 11(c)(5) demonstrates this distinction, as it allows a defendant to withdraw a guilty plea upon the court's rejection of a plea agreement, indicating that the court may accept a guilty plea, then reject a plea agreement. *See* FED. R. CRIM. P. 11(c)(5).

45. *See* United States v. Robertson, 45 F.3d 1423, 1437 (10th Cir. 1995) ("While Rule 11 vests district courts with the discretion to accept or reject plea agreements, the rule does not define the criteria to be applied in doing so."); *see also* State v. Conger, 2010 WI 56, 325 Wis. 2d 664, 691, 797 N.W.2d 341, 355 (calling consideration of a plea agreement "more of an art than a science" with no applicable "mechanical, multi-element test").

46. *See* FED. R. CRIM. P. 11, Advisory Committee Notes to 1974 Amendments ("The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.").

47. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2142 (1998) ("The existing system of prosecutorial administration has arisen because the traditional adversarial model has become too expensive, contentious, and inefficient to be restored."); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–71 (2004) ("Trials are much more time consuming than plea bargains, so prosecutors have incentives to negotiate deals instead of trying cases.").

to avoid the difficulty and risk of trial.[48] Other case-specific reasons may also include the desire not to put an alleged victim through the trauma of a trial or the need for the defendant's cooperation in related cases.[49] On the defense side, the primary motive to engage in plea bargaining stems from the potential disparity between a plea-based sentence and one imposed after trial.[50] More specifically, numerous studies have shown that sentences imposed after trials are, on average, much longer than those imposed after pleas for similar crimes.[51] This "trial penalty" can cause a defendant to accept a plea agreement in which they plead guilty purely out of fear or aversion to risk.[52] Even where the potential sentence for a trial conviction is low, a defendant may choose to plead guilty in order to move on, keep their job, or tend to a family situation.[53] This motivation is especially strong where pretrial detention may last longer than any sentence imposed after trial.[54]

Scholars and practitioners examining the role of judges in this plea-bargaining system have noted several problems which judges

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48. For a state-level perspective, see Bibas, *supra* note 47, at 2472–73 (noting that most district attorneys are elected, allowing political ambitions to color plea negotiations at the state level). For a federal perspective, see Daniel Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997) (pointing out the role of the Federal Rules of Evidence in shaping how federal prosecutors approach cases).

49. *See* Brown & Bunnell, *supra* note 2, at 1063.

50. The Supreme Court has specifically upheld a prosecutor's power to threaten a defendant with a harsher penalty after trial during plea negotiations. *See* Brady v. United States, 397 U.S. 742, 750–51 (1970) (finding no Fifth Amendment violation where the defendant may have been "influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof"). Indeed, at the federal level, under the U.S. Sentencing Guidelines, a defendant who pleads guilty receives a two- or three-level reduction in recommended sentence. U.S. Sent'g Guidelines Manual § 3E1.1 (U.S. Sent'g Comm'n 2023) [hereinafter "U.S.S.G."].

51. *See, e.g.*, Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1202 (2015) (finding that "federal defendants convicted at trial receive sentences that are [64%] longer than similar defendants who plead guilty"). *But see* David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777, 780–81 (2013) (finding no trial penalty based on a survey of Cook County, Illinois, cases from the early 2000s).

52. McConkie, *supra* note 2, at 66 ("Put simply, defendants plead guilty primarily because they fear getting a much longer sentence if they lose at trial.").

53. *See* O'Hear, *supra* note 17, at 416 ("Many defendants welcome the impersonal, rapid-fire nature of the routine case processing mode, preferring just to 'get it over with' in cases that are unlikely to result in substantial sentences of incarceration."); Greenberg, *supra* note 13, at 123 ("In cases where the prosecution charges the defendant with a misdemeanor, he may plead guilty to just get out of court and resume his life.").

54. *See* Bibas, *supra* note 47, at 2493 ("[P]retrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial.").

may or may not help to alleviate. First, many commentators have pointed out the potential for coercive plea bargaining.[55] Prosecutors have immense power in the realm of plea negotiations,[56] and this power has only been augmented by harsh sentencing laws and the potential for a "trial penalty."[57] Second, tied to the issue of coercion is the informational imbalance between prosecution and defense.[58] Criminal discovery rules may make it particularly difficult for defendants to properly assess the prosecution's case,[59] especially given the lack of a clear federal constitutional right to material evidence during plea negotiations.[60] Third, scholars and practitioners have pointed to

55. *See, e.g.*, Daniel S. McConkie, Jr., *Plea Bargaining for The People*, 104 MARQ. L. REV. 1031, 1061 (2021) ("[P]lea bargaining raises serious deliberation issues concerning the accuracy of plea bargaining (i.e., coercion) and the public's ability to assess plea bargaining (i.e., transparency)."); Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2028 (2006) (detailing "the two most pernicious problems with the present quasi-administrative model in the federal criminal justice system—lack of information for defendants and a biased and coercive process for obtaining pleas"); Turner, *supra* note 36, at 204 ("One of the long-recognized dangers of plea bargaining is that it might coerce an innocent defendant to plead guilty.").

56. *See* Crespo, *supra* note 14, at 1307.

57. Turner, *supra* note 36, at 205 ("Over the last two decades, increasingly harsh sentences, combined with steep sentencing discounts, have imposed great pressure on defendants to plead guilty."). The U.S. Sentencing Guidelines provide, upon motion of the prosecutor, a downward departure if the defendant has provided "substantial assistance in the investigation or prosecution of another person who has committed an offense." U.S.S.G. § 5K1.1.

58. *See* Klein, *supra* note 55, at 2028 (listing "lack of information for defendants," along with the potential for coercion, as "the two most pernicious problems with the present quasi-administrative model in the federal criminal justice system").

59. *See generally* Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After* Brady v. Maryland, 38 N.Y.U. REV. L. & SOC. CHANGE 407 (2014); Bibas, *supra* note 47, at 2494 (noting that, in many jurisdictions, defendants "cannot depose witnesses," "do not learn witnesses' prior statements," and "receive only their own statements and criminal records, documents and tangible objects, reports of examinations and tests, and expert witness reports gathered by the prosecution"); *see also* FED. R. CRIM. P. 16. These rules vary by jurisdiction, *see* Alkon, *supra*, at 419–20 (summarizing recent legislation establishing open-file discovery in Texas), and may be subject to prosecutors' office policies, *see* Greenberg, *supra* note 13, at 122.

60. *See* United States v. Ruiz, 536 U.S. 622, 633 (2002) (holding that there was no constitutional right to have material impeachment evidence disclosed prior to entering a plea agreement). There is currently a circuit split in the federal Courts of Appeal over whether the prosecution must even share exculpatory evidence before a defendant pleads guilty. *Compare* Alvarez v. City of Brownsville, 904 F.3d 382, 394 (5th Cir. 2018) (finding no such right), *with* McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) (upholding the right). Despite this lack of clarity regarding the federal constitutional right, individual federal courts may still institute local rules with stricter disclosure requirements, as many states have in their own rules of criminal procedure. *See, e.g.*, Laural L. Hooper et al., *Treatment of* Brady v. Maryland *Material in United States District and State Courts' Rules, Orders, and Policies*, FED. JUDICIAL CTR. (2004).

the disparate class-[61] and race-based[62] impact on defendants of this system of widespread plea bargaining.[63] The shadow of pretrial detention looms larger over the defendant who cannot afford to post bail, thus requiring them to choose between pleading guilty or remaining in detention, risking the loss of a job, the destabilization of family, and other attendant consequences.[64] Similarly, studies show that racial bias infects the plea negotiation process and its outcomes, rendering it more likely that a Black defendant will receive worse plea recommendations from defense counsel,[65] less favorable charge reductions from the prosecutor, and harsher sentences from the judge relative to a similarly-situated white defendant.[66] The intersection of class and race only exacerbates these inequalities.[67] Finally, many plea-bargaining critics argue that the system leads innocent defendants to plead guilty.[68] After all, the primary reasons that most defendants accept plea

61. For example, the informational imbalance identified above may be exacerbated in the case of an indigent defendant whose public defender does not have the time or resources to conduct an independent investigation of the facts underlying the prosecution's plea offer. *See* Bibas, *supra* note 47, at 2468 ("Rather than basing sentences on the need for deterrence, retribution, incapacitation, or rehabilitation, plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence, and confidence.").

62. Implicit biases in the plea-bargaining system have been identified as creating a "presumption of guilt" for Black male defendants. Greenberg, *supra* note 13, at 95.

63. *See* Bibas, *supra* note 47, at 2468 ("Rather than basing sentences on the need for deterrence, retribution, incapacitation, or rehabilitation, plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence, and confidence.").

64. *See id.* at 2492–93.

65. *See* Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 422 (2011) (finding racial bias in defense attorneys' plea recommendations to clients).

66. *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018). According to Berdejó, white defendants are 25% more likely to have their most serious charges dropped or reduced; white felony defendants are 15% more likely to end up with a misdemeanor conviction instead; and white misdemeanor defendants are 75% more likely to receive no incarceration.

67. *See* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 181–82 (2020). Clair argues that disadvantaged defendants—Black, working class—who seek to leverage their knowledge of the criminal legal system and assert their rights are punished for their assertiveness while privileged defendants—white and/or middle class—who possess little prior legal knowledge are rewarded for deferring to legal actors.

68. *See* NAT'L ASS'N CRIM. DEF. LAW., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 17 (2018), https://www.nacdl.org/trialpenaltyreport/ [https://perma.cc/H8R2-4SW9] ("Numerous scholars have examined the innocence problem of plea bargaining and have estimated that anywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent.").

agreements do not relate to any recognition of harm caused.[69] Instead, the coercive effect of the trial penalty[70] and the unique information asymmetry[71] incentivize innocent defendants to plead guilty.

In response to these problems, many scholars have argued for increasing the judicial role in the plea-bargaining system.[72] For example, Rishi Raj Batra has asserted that allowing the judge to participate in plea negotiations helps to offset the informational imbalance, check the power of the prosecutor, and prevent defense counsel misconduct.[73] Susan R. Klein, on the other hand, has posited that federal district court judges could, within the current limits of the Federal Rules, require parties to share information beyond what is required by current constitutional and procedural rules, using the threat of shorter or longer sentences to ensure compliance.[74] Alternatively, Nancy J. King has proposed improvements in judicial oversight of negotiations by increasing funding and providing minimum standards for presentence reports and by requiring pre-plea review of these reports for sentencing bargains.[75] Elsewhere, King, along with Ronald F. Wright, has also argued that routine judicial involvement in plea negotiations can increase efficiency, lead to better outcomes, help prosecutors

69. *See* Clair, *supra* note 67, at 181 ("Guilty pleas are typically taken not because a defendant recognizes the harm they may have caused but because a defendant has been coached by their lawyer to recognize the many costs of taking their case to trial.").

70. *See* McConkie, *supra* note 55, at 1061 (arguing that "the system pressures some innocent defendants into pleading guilty . . . especially through large trial penalties").

71. *See* Bibas, *supra* note 47, at 2494 ("Guilty defendants generally know that they are guilty, and are aware of the likely evidence against them, so they can predict the probable trial outcomes. But defendants who are innocent . . . may have little private information about the state's evidence.").

72. *See, e.g.*, Batra, *supra* note 25, at 588–96 (making five recommendations for how states can involve judges in the plea process to retain the advantages while minimizing the disadvantages of judicial participation); Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 304–08 (2005) (proposing improvements in judicial oversight of negotiated sentences via presentence reports); Turner, *supra* note 36, at 200 (using a comparison between the role of judges in plea bargaining in Germany, Connecticut, and Florida to suggest that involving the judge early in the process can improve the accuracy and procedural justice of the resulting plea agreement).

73. *See* Batra, *supra* note 25, at 584–87; *see also* Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Allowed to Participate in Plea Discussion*, 54 B.C. L. REV. 1667, 1718 (2013).

74. *See* Klein, *supra* note 55, at 2050–52; *see generally* Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. R. 434 (2019) (noting the need for more data and transparency in plea bargaining).

75. *See* King, *supra* note 72, at 304–05.

manage community relations, result in more lenient sentences, and give information to defendants.[76] Finally, by comparing practices in Germany, Florida, and Connecticut, Jenia Iontcheva Turner has recommended allowing judges to inform the defendant of potential sentences, inquire into the factual basis during plea negotiations, and encourage further fact-gathering by the prosecutor.[77]

Of course, there are valid reasons for proscribing judicial involvement in plea negotiations. Most notably, a judge's participation may raise questions of coercion that undermine the voluntariness of any plea rendered by the defendant.[78] Moreover, a judge overseeing negotiations may hear information that could give rise to bias in sentencing or, if an agreement fails to materialize, at trial.[79] Judicial involvement may also infringe on prosecutorial functions, causing a separation of powers problem.[80] Similarly, there is a concern that the court's participation in plea negotiations could undermine its image as an independent arbiter rather than another interested party, especially if it seems the court is more concerned with efficiency than fairness.[81] Finally, the use of judges as overseers of negotiations could simply create too many logistical issues where judicial time and resources are scarce.[82]

Still, no one has undertaken a systematic examination of the judicial discretion to reject plea agreements. Such an analysis occupies a middle ground between those urging greater judicial participation in plea negotiations and those cautioning against it. It operates within the current system of limited judicial involvement at the federal level and among several states. Given

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76. *See* King & Wright, *supra* note 30, at 356–81 (listing reasons for judicial involvement in plea negotiations).

77. *See* Turner, *supra* note 36, at 256–264; *see also* Steven P. Grossman, *Making the Evil Less Necessary and the Necessary Less Evil: Towards a More Honest and Robust System of Plea Bargaining*, 18 NEV. L.J. 769, 772 (2018) (contending that judges should be allowed to advise the defendant as to what sentencing range he or she can expect if convicted at trial).

78. *See* Batra, *supra* note 25, at 580–81.

79. *See id*. at 582; Turner, *supra* note 36, at 203.

80. *See* Turner, *supra* note 36, at 203.

81. *See id*.

82. *See* Brian L. Owsley, *A Reply to Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 51, 56 (2015) ("There are plenty of state courts that do not have multiple judges to handle substantive matters in a prosecution if a judge involved in a plea negotiation feels recusal is appropriate, or if a party objects to the judge's continued involvement in the case.").

that rejection of plea agreements potentially presents a meaningful avenue for judicial oversight of the plea-bargaining process in those jurisdictions, it is worth examining how different federal and state courts have defined this discretion—and whether those definitions serve the parties, the judiciary, and the public interest.

II. JUDICIAL REJECTION OF PLEA AGREEMENTS

This Part analyzes judicial rejections of plea agreements at the federal and state level. It considers both how trial courts have exercised their discretion to reject plea agreements and how appellate courts have reviewed such rejections. It argues that courts have failed to clarify the nature of the discretion granted to them in procedural rules, leaving the judicial role in plea agreements on uncertain ground. Part II.A explains the methodology of this analysis—the jurisdictions considered, as well as the inherent limitations in studying judicial rejection of plea agreements. Part II.B analyzes how appellate courts have cabined trial court discretion to reject plea agreements. Part II.C then surveys the reasons trial courts have given for rejecting plea agreements. Finally, Part II.D explores the conflicts and indeterminacy inherent to the limitations identified by appellate courts and the reasons cited by trial courts, pointing to the need for a new framework.

A. THE CASES CONSIDERED

The following sections analyze the reasoning of trial courts that have rejected plea agreements and of appellate courts that have reviewed such rejections. In order to allow for like-for-like comparisons, this analysis is limited to jurisdictions that, like the federal criminal system,[83] bar or limit judicial participation in plea negotiations, whether by statute, procedural rule, court rule, or case law.[84] As such, the analysis covers the 11 federal circuits that hear criminal cases as well as courts across 14 other jurisdictions:

83. *See* FED. R. CRIM. P. 11(c)(1) ("The court must not participate in these discussions.").

84. For a classification of states by the extent of judicial participation allowed in plea bargaining, see Batra, *supra* note 25, at 573–78; *see also* Turner, *supra* note 36, at 202 n.6 (listing the states that barred judicial participation in plea negotiations entirely as of 2006).

Arkansas,[85] Colorado,[86] the District of Columbia,[87] Kentucky,[88] New Mexico,[89] North Dakota,[90] Ohio,[91] Pennsylvania,[92] South Dakota,[93] Tennessee,[94] Utah,[95] Virginia,[96] West Virginia,[97] and Wisconsin.[98] This list does not encompass all states that prohibit judicial participation;[99] rather, it represents the states that, according to this author's research, have developed some appellate case law on judges' ability to reject plea agreements.

The cases considered in this analysis are further constrained in another, less tangible respect. While there is no strong data on the subject, it would seem that courts rarely exercise their discretion

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85. *See* ARK. R. CRIM. P. 25.3(a) ("The judge shall not participate in plea discussions.").

86. *See* COLO. R. CRIM. P. 11(f)(4) ("The trial judge shall not participate in plea discussions.").

87. *See* D.C. SUPER. CT. R. CRIM. P. 11(c)(1) ("The Court must not participate in these discussions.").

88. While neither procedural rules nor case law in Kentucky comment on the ability of the judge to participate in plea negotiations, *see* Batra, *supra* note 25, at 577 n.84, in practice, judicial involvement is the exception, not the norm. *See Stages of a Criminal Case*, KY. ASS'N OF CRIM. DEF. LAW., https://www.kacdl.net/content.asp?contentid=212#plea%20barg [https://perma.cc/PW3N-XULM] ("Judges are not involved except in very rare circumstances.").

89. *See* N.M. DIST. CT. R. CRIM. P. 5-304 (A)(1) ("A judge who presides over any phase of a criminal proceeding shall not participate in plea discussions.").

90. *See* N.D. R. CRIM. P. 11(c)(1) ("The prosecuting attorney and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.").

91. *See* State v. Byrd, 63 Ohio St. 2d 288, 293–94, 407 N.E.2d 1384, 1388 (1980) ("Although this court strongly discourages judge participation in plea negotiations, we do not hold that such participation per se renders a plea invalid under the Ohio and United States Constitutions."); Batra, *supra* note 25, at 577 n.84.

92. *See* PA. R. CRIM. P. 590(B)(1) cmt. ("Nothing in this rule, however, is intended to permit a judge to suggest to a defendant, defense counsel, or the attorney for the Commonwealth, that a plea agreement should be negotiated or accepted.").

93. *See* S.D. CODIFIED LAWS § 23A-7-8 ("A court shall not participate in such discussions.").

94. *See* TENN. R. CRIM. P. 11(c)(1) ("The district attorney general and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court shall not participate in these discussions.").

95. *See* UTAH R. CRIM. P. 11(i)(1) ("The judge will not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney."). While some scholars categorize Utah R. Crim. P. 11(i)(1) as leaving some room for judicial participation, *see* King & Wright, *supra* note 30, at 335 n.54, others read it as absolutely barring participation, *see* Batra, *supra* note 25, at 577. Moreover, "[j]udges in [Utah] respect a strong, reportedly statewide norm against judicial negotiation." King & Wright, *supra* note 30, at 335 n.54.

96. *See* VA. SUP. CT. R. 3A:8(c)(1) ("In any such discussions under this Rule, the court shall not participate.").

97. *See* W. VA. R. CRIM. P. 11(e)(1) ("The court shall not participate in any such discussions.").

98. *See* State v. Wolfe, 46 Wis. 2d 478, 175 N.W.2d 216 (1970) ("A trial judge should not participate in plea bargaining."); Batra, *supra* note 25, at 575 n.71.

99. For a full list, see Batra, *supra* note 25, at 573–78.

to reject plea agreements.[100] Even where a court does reject a plea agreement, that decision may not result in a written opinion[101] or an appeal.[102] The trial court may orally reject the proposed agreement, and the parties may simply agree to different terms for a plea or go to trial without ever raising an appeal.[103] As such, there may be no record in a large percentage of plea agreement rejections, unless the case otherwise presents newsworthy circumstances.[104] The analysis presented here can necessarily

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100. *See* Jonathan Allen, *In Rare Move, U.S. Judge Rejects Plea Agreement by Ahmaud Arbery's Murderers*, REUTERS (Jan. 31, 2022), https://www.reuters.com/world/us/us-prosecutors-reach-hate-crime-plea-deals-ahmaud-arbery-murder-court-filings-2022-01-31/ [https://perma.cc/J5L3-R826] ("Judges rarely reject plea agreements."); Richard Fausset, *Federal Judge Rejects Hate Crime Plea Deals in Ahmaud Arbery Killing*, N.Y. TIMES (Jan. 31, 2022), https://www.nytimes.com/2022/01/31/us/ahmaud-arbery-hate-crime-plea-deal.html [https://perma.cc/5ZW6-T3MX] ("Paul Butler, a Georgetown law professor and former federal prosecutor, said that it was uncommon for a victim's family to convince a federal judge to reject a plea deal once it had been agreed upon."); Jenia I. Turner, *Virtual Guilty Pleas*, 24 U. PA. J. CONST. L. 211, 230 n.107 (2022) ("Of Michigan judges who stated whether they would accept or reject the plea agreement at the plea hearing, only [one percent] of felony court judges rejected an agreement, and no misdemeanor judges rejected a plea agreement.").

101. *See, e.g.*, Alex Bridges, *Judge Rejects Plea Deal in ATV Fatality Case*, N. VA. DAILY (Nov. 16, 2022), https://www.nvdaily.com/nvdaily/judge-rejects-plea-deal-in-atv-fatality-case/article_bdf03f01-41e8-586c-b35a-b921043f920d.html [https://perma.cc/QM5F-YBKA] (reporting on one judge's rejection of a plea agreement in a Virginia state criminal case, for which this author has not been able to find a written opinion).

102. *In re United States* presents one example of a plea agreement rejection that did not garner an appeal directly. 345 F.3d 450 (7th Cir. 2003). After the district court rejected a proposed plea agreement, the defendant chose to plead guilty anyway. The case was only on appeal because when the government subsequently sought to dismiss a remaining charge, the district court denied the motion and instead appointed an independent attorney to prosecute the remaining charge. *Id.* at 451–52.

103. A written opinion or appeal is still possible in these scenarios. *See, e.g.*, United States v. Vanderwerff, 788 F.3d 1266, 1270 (10th Cir. 2015) (reviewing the district court's rejection of a plea agreement where the parties subsequently negotiated a new plea agreement, reserving to the defendant the right to appeal the rejection of the first agreement). However, if the parties reach a new plea agreement, each side may be satisfied enough to opt not to appeal. Alternatively, if the parties go to trial, the incentives to appeal may also be low. If the defendant is convicted at trial, they would only appeal if the resulting sentence is greater than that contemplated by the rejected plea agreement. If the defendant is found not guilty at trial, they have no incentive to appeal while the government may be barred from appealing by double jeopardy principles.

104. *See, e.g.*, Nathan Lederman, *Judge Rejects Plea Deal in Child Sex Assault Cases as Families Object*, SANTA FE NEW MEXICAN (Dec. 8, 2022), https://finance.yahoo.com/news/judge-rejects-plea-deal-child-160800306.html [https://perma.cc/L8G4-4YLP] (reporting on the "unusual situation" of an attorney for the victims of alleged sexual assaults addressing the court from the gallery to demand the judge take the victims' views into account in considering a proposed plea agreement); Wil Esco, *Gervonta Davis Set for Dec. 12 Trial After Judge Rejects Plea Deal in Alleged Hit-and-Run*, SBNATION: BAD LEFT HOOK (Sept. 21, 2022), https://www.badlefthook.com/2022/9/21/23365254/gervonta-davis-set-for-dec-12-trial-after-judge-rejects-plea-deal-in-hit-and-run-boxing-news-2022 [https://perma.cc/

only deal with those cases that have resulted in a written opinion, an appeal, news coverage, or some combination thereof. Cases that result in appeals or substantial publicity are more likely to involve unusual or extreme reasoning by the trial court. These cases may therefore be unrepresentative of typical plea agreement rejections. However, these cases can still offer important insights into the parameters of judicial discretion to reject plea agreements.

Finally, because there seems to be no considerable difference between federal and state courts' approach to judicial rejection of plea agreements, this Note does not distinguish along jurisdictional lines. Instead, it seeks to provide an overview of how courts across the country—both federal and state—have failed to develop any consistent framework to help individual judges determine whether to accept a plea agreement.

B. THE LIMITING PRINCIPLES PROVIDED BY APPELLATE COURTS

While all of the jurisdictions considered in this section allow a trial court presented with a plea agreement to reject that agreement,[105] appellate courts commonly recognize that the trial court's discretion in this regard is not "unbounded."[106] Instead, in reviewing the rejection of plea agreements by trial courts, appellate courts often apply a standard of review derived from the Supreme Court's rule in *Santobello v. New York* that "[a] court may reject a plea in exercise of sound judicial discretion."[107] Thus, appellate courts have found the rejection of a plea agreement proper where the trial court acted in "the sound administration of

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B7UT-XW5K] (detailing the rejection of a plea agreement in the prosecution of a professional boxer).

105. *See, e.g.*, N.M. DIST. CT. R. CRIM. P. 5-304(C) ("[T]he court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report."); FED. R. CRIM. P. 11, advisory committee's note to 1974 amendment ("The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.").

106. *In re* Morgan, 506 F.3d 705, 710 (9th Cir. 2007); *see also* Hockaday v. United States, 359 A.2d 146, 148 (D.C. 1976) ("[T]he exercise of that discretion is circumscribed by the nature of the trial judge's role in the plea bargaining process."); State v. Williams, 851 S.W.2d 828, 832 (Tenn. Crim. App. 1992) ("That there is discretion at all implies that there are limits to its exercise. It must not be arbitrary.").

107. 404 U.S. 257, 262 (1971). *Santobello* dealt only with a guilty plea itself, but courts have still used it for reviewing rejections of underlying plea agreements. *See infra* notes 108–109.

justice,"[108] or "sound judicial discretion."[109] In practice, three limiting principles have emerged. First, the rejection of a plea agreement must be on the record, reasoned, and not arbitrary.[110] Second, trial courts must be wary of separation of powers concerns when considering a plea agreement negotiated and approved by a prosecutor.[111] Third, trial courts must grant individualized consideration to each plea agreement.[112]

1. *On the Record, Reasoned, and Not Arbitrary*

The most basic limiting principle in this realm is that a trial court's rejection of a plea agreement must be on the record,[113] reasoned,[114] and not arbitrary.[115] The first two of these subpoints seem intended to enable appellate review.[116] The third prevents a trial court from basing its rejection of a plea agreement on an error of law.[117] For example, in *Goosby v. State*, a Tennessee trial court

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108. United States v. Severino, 800 F.2d 42, 46 (2d Cir. 1986); *In re* United States, 32 F.4th 584, 594–95 (6th Cir. 2022).

109. People v. Darlington, 105 P.3d 230, 232 (Colo. 2005); *see also* United States v. Robertson, 45 F.3d 1423, 1437 (10th Cir. 1995) ("[S]o long as district courts exercise sound judicial discretion in rejecting a tendered plea, Rule 11 is not violated.") (citing *Santobello*, 404 U.S. at 262).

110. *See infra* Part II.B.1.

111. *See infra* Part II.B.2.

112. *See infra* Part II.B.3.

113. *Darlington*, 105 P.3d at 232 ("The trial court must consider all relevant factors and articulate the reasons for rejecting an agreement on the record."); Hoskins v. Maricle, 150 S.W.3d 1, 24 (Ky. 2004), *as modified on denial of reh'g* (Dec. 16, 2004) (requiring that the trial court "set forth in the record both the prosecutor's reasons for forming the bargain and the court's justification for rejecting it").

114. United States v. Cota-Luna, 891 F.3d 639, 647 (6th Cir. 2018) ("Very few cases address the type of inquiry that a district court should engage in when considering whether to accept a plea agreement. But one thing is clear: a district court must rationally construct a decision based on all relevant factors.") (internal quotation marks omitted).

115. United States v. Walker, 922 F.3d 239, 248–49 (4th Cir. 2019) ("[A] district court is not entitled to base its decision on arbitrary or irrational factors."); State v. Williams, 851 S.W.2d 828, 832 (Tenn. Crim. App. 1992) ("That there is discretion at all implies that there are limits to its exercise. It must not be arbitrary."); State v. Montiel, 2005 UT 48, ¶ 16, 122 P.3d 571 ("[C]ourts must state their reasoning for rejecting a proposed plea agreement on the record.").

116. *See Walker*, 922 F.3d at 248–49 ("To ensure the existence of sound reasons for rejection of a plea agreement, and to facilitate appellate review, the rejection and its justification should be on the record.").

117. *See* United States v. Doggart, 906 F.3d 506, 509–10 (6th Cir. 2018) (reversing the district court's rejection of a plea agreement due to the district court erring in ruling that the defendant's admitted conduct did not amount to an objective threat under 18 U.S.C. § 875); United States v. Vanderwerff, 788 F.3d 1266, 1272–1275 (10th Cir. 2015) (reversing based on the district court's misinterpretation of Lafler v. Cooper, 566 U.S. 156 (2012) and United States v. Booker, 543 U.S. 220 (2005)).

rejected the plea agreement of one defendant in a consolidated trial on the grounds that the agreement would require severing the defendant's case from his co-defendant's and the court did not have authority to order such a severance.[118] Finding that the trial court did have the authority to sever, the Tennessee Court of Criminal Appeals reversed the rejection of the plea agreement for lack of a "legal basis."[119] The requirement that the trial court not act arbitrarily is thus a rather narrow one. This limit is not unique to the consideration of plea bargains either; it applies generally to exercises of judicial discretion.[120]

2. *Separation of Powers*

A trial court's discretion to reject a proposed plea agreement is structurally constrained by separation of powers concerns as well. This is particularly relevant when a plea derives from a so-called "charge bargain."[121] Because a charge bargain involves an agreement by a prosecutor to drop one or more charges, such agreements implicate the "tradition of prosecutorial independence."[122] Thus, in *United States v. Miller*, the Ninth Circuit held that a district court could not categorically reject plea agreements that cut a multiple-count indictment down to a single charge because, *inter alia*, such a rejection infringed upon the prosecutor's "exclusive domain" over charging decisions.[123] The court stressed that prosecutors are "representatives of the executive branch of the government" who are better positioned to determine when to bring charges, which charges to bring, and how strong a case may be.[124] Ultimately, the court cautioned against rejecting a plea agreement where it "may force prosecutors to bring

118. 917 S.W.2d 700, 707 (Tenn. Crim. App. 1995).

119. *Id.*

120. *See* Koon v. United States, 518 U.S. 81, 100 (1996) (holding that "[a] district court by definition abuses its discretion when it makes an error of law" in considering a district court's sentencing decision).

121. *See supra* note 23 and accompanying text.

122. United States v. Miller, 722 F.2d 562, 565 (9th Cir. 1983).

123. *Id.* In *Miller*, the defendant Robert Miller was charged with three counts of armed bank robbery but agreed to plead to one count. The agreement featured no binding or recommended sentence. The district court judge rejected this agreement because "single count pleas did not provide him with the broad sentencing power he thought necessary in some cases," despite that not being the case there. *Id.* at 563. The result was an incredibly clean example of a charge bargain with no ramifications for the judge's sentencing power, making the Ninth Circuit's focus on prosecutorial charging discretion clear.

124. *Id.*

charges they ordinarily would not, or to maintain charges they would ordinarily dismiss as on-going investigations uncover more information."[125] The Ninth Circuit, like other courts,[126] seemed to focus on the proper roles of the executive and judicial branches as well as the need for respect for prosecutorial decisions.

However, the need to be sensitive to the separation of powers does not generally prevent the trial court from rejecting a charge or a sentence bargain. As to charge bargains, in *State v. Montiel*, Utah defendant Alex Montiel, charged with aggravated robbery subject to an enhanced penalty for use of a dangerous weapon, agreed to plead guilty as part of a deal that would drop the firearms enhancement.[127] The result would have been to cabin the judge's sentencing range to a maximum of five years, as compared to five years to life under the charged offenses.[128] The trial court rejected the agreement because, in the words of the presiding judge, "I don't waive firearms enhancements, folks. You plead them, they're stuck unless I'm convinced that there was some mistake in pleading."[129] The Utah Supreme Court found no separation of powers violation, noting that with plea bargains "both executive and judicial functions are involved" because the "effect [is] to limit the sentence available."[130] Courts considering this problem recognize that, in the context of charge bargains, the line between judiciary and executive becomes hazy.[131] That is because, while the executive has sole discretion over charging decisions and the judiciary bears primary responsibility over

125. *Id.*

126. *See, e.g.*, United States v. Vanderwerff, 788 F.3d 1266, 1278 (10th Cir. 2015) (reversing the rejection of a plea agreement that "conflict[ed] with the settled law of plea bargaining, under which courts accord considerable discretion to the government in crafting charge bargains").

127. 2005 UT 48, ¶ 3, 122 P.3d 571.

128. State v. Montiel, 2004 UT App 242, ¶ 6 n.2, 95 P.3d 1216, *aff'd*, 2005 UT 48, 122 P.3d 571 (citing UTAH CODE ANN. § 76-3-203(3) (West 2001)).

129. *Montiel*, 2005 UT 48 at ¶ 4.

130. *Id.* at ¶ 26 (alteration in original) (citation omitted).

131. *See* United States v. Bean, 564 F.2d 700, 704 (5th Cir. 1977) ("[S]ince the counts dismissed pursuant to plea bargains often carry heavier penalties than the counts for which a guilty plea is entered, a plea bargain to dismiss charges is an indirect effort to limit the sentencing power of the judge."). Federal courts, in particular, note the interplay between charge bargains and FED. R. CRIM. P. 48(a), which requires that the government obtain leave of the court in order to dismiss an indictment. *See, e.g.*, United States v. Carrigan, 778 F.2d 1454, 1462–64 (10th Cir. 1985) (finding Rule 48's more limited discretion inapplicable to consideration of a charge bargain); *see also* State v. Louser, 959 N.W.2d 883, 887–89 (N.D. 2021) (holding that the analogous N.D. R. CRIM. P. 48(a) supported a trial court's discretion to reject charge bargain).

sentencing,[132] charging decisions may limit or enhance the range of applicable sentences by the use of sentencing minimums, maximums, and enhancements.[133]

Moreover, appellate courts seem less concerned with separation of powers principles in pure sentence bargains.[134] In *In re Morgan*, the defendant Chad Harley Morgan had planned to plead guilty to the entirety of a one-count indictment in exchange for a sentence of 37 months of imprisonment pursuant to a binding sentence bargain under Fed. R. Crim. P. 11(c)(1)(C).[135] However, the trial judge rejected the agreement because such a stipulated sentence "leaves no judging to the judge."[136] The district court essentially cited its own separation of powers concern that the prosecutor was infringing upon the judicial domain of sentencing, implying a policy rejection of sentence bargains generally.[137] While the court of appeals reversed the district court's rejection due to its lack of individualized consideration,[138] it noted the different concerns inherent in the rejection of a sentence bargain because "a prosecutor plays a strictly advisory role in sentencing decisions."[139] Thus, the rejection of sentence bargains is not limited by separation of powers concerns in the way that the rejection of charge bargains is.

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132. *See* Hoskins v. Maricle, 150 S.W.3d 1, 12 (Ky. 2004), *as modified on denial of reh'g* (Dec. 16, 2004) ("The power to charge persons with crimes and to prosecute those charges belongs to the executive department. . . . The power to conduct criminal trials, to adjudicate guilt, and to impose sentences within the penalty range prescribed by the legislature belongs to the judicial department.").

133. For example, in *Montiel*, the dropping of charges pursuant to the proposed plea agreement would have limited the trial judge's sentencing discretion. *Montiel*, 2005 UT at ¶ 4. In contrast, in United States v. Stevens, 239 F. Supp. 3d 417, 421 (D. Conn. 2017), discussed *infra* in Part II.C.3, the proposed charge bargain would have dropped a mandatory minimum 20-year prison sentence, thereby granting the judge more discretion to impose a sentence below 20 years.

134. *See supra* note 22 and accompanying text.

135. 506 F.3d 705, 708 (9th Cir. 2007).

136. *Id.*

137. *See id.; see also Maricle*, 150 S.W.3d at 12 ("The power to conduct criminal trials, to adjudicate guilt, and to impose sentences within the penalty range prescribed by the legislature belongs to the judicial department.").

138. The court of appeals reversed because the district court failed to accord individual consideration to the proposed plea agreement. *In re Morgan*, 506 F.3d at 712. Indeed, the district court's reasoning would seem to apply to all binding sentence bargains, categorically barring them in contravention of the third limiting principle. *See infra* Part II.B.3.

139. *In re Morgan*, 506 F.3d at 711.

3. *Individualized Consideration*

Related to separation of powers concerns is the requirement that a trial court give individualized consideration to a proposed plea agreement.[140] For example, the Sixth Circuit issued a mandamus requiring a district court to reconsider a proposed plea agreement where it "did not base its decision on the circumstances of the case."[141] The defendant, Ashley Townsend, had agreed to a plea bargain on drug and firearms violations that would cut the mandatory minimum sentence from 20 years of incarceration to ten.[142] The district court rejected that agreement, finding the broad waivers of Townsend's rights to appeal and collateral review contained therein to be contrary to the public interest.[143] However, the Sixth Circuit found error on review because, though the district court's concerns about appeal waivers generally were valid, "the court never articulated what would support that finding *in this case*."[144] It was not enough that the district court "inserted the phrase 'the circumstances of this case' at various points in its opinion."[145] The Sixth Circuit thus made it clear that consideration of a plea agreement requires more than gesturing toward an assessment of the actual agreement before the court.[146]

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140. *See, e.g.*, United States v. Walker, 922 F.3d 239, 251 (4th Cir. 2019), *vacated*, 140 S. Ct. 474 (2019) (commenting that a plea agreement rejection based solely on the cultural context of the opioid crisis or the trial court's concerns with the plea bargain system could potentially give rise to an abuse of discretion claim); *In re* United States, 32 F.4th 584, 595 (6th Cir. 2022) (holding that trial court's categorical policy against appeal waivers was not sufficient to reject plea agreement); United States v. Miller, 722 F.2d 562, 566 (9th Cir. 1983) (reversing the rejection of a plea agreement pursuant to a categorical policy against bargains that leave only one count out of a multi-count indictment); *In re* Morgan, 506 F.3d 705, 711–12 (9th Cir. 2007) (holding that a trial court must provide "individualized reasons" for rejecting a sentence bargain); State v. Caldwell, 2013-Ohio-5017, ¶¶ 13–15, 1 N.E.3d 858 (trial court's "all-or-nothing" approach was abuse of discretion); State v. Williams, 851 S.W.2d 828, 832 (Tenn. Crim. App. 1992) (noting that a blanket policy against allowing plea agreements where defendant refuses to admit guilt "may cross the line of discretionary propriety"); State v. Montiel, 2005 UT 48, ¶ 17, 122 P.3d 571, 576 (adopting the rule that "courts are not permitted to categorically reject all plea bargains").

141. *In re United States*, 32 F.4th at 594.

142. United States v. Townsend, 2021 WL 777191, at *1 (E.D. Mich. Mar. 1, 2021).

143. *Id.* at *3. The appeal waivers in question had been included pursuant to a recently adopted policy of the U.S. Attorney's Office for the Eastern District of Michigan. The district court began its rejection of the plea agreement by noting how that new policy "radically altered customary local practice." *Id.* at *1.

144. *In re United States*, 32 F.4th at 595 (emphasis in original).

145. *Id.* at 596.

146. *See also In re* Morgan, 506 F.3d 705, 712 (9th Cir. 2007) ("We accordingly hold that district courts must consider individually every sentence bargain presented to them and

This individualized consideration requirement seems to rest on three grounds. First, state and federal appellate courts have suggested it is inherent in the principles of judicial discretion.[147] As the Ninth Circuit has recognized, "the existence of discretion requires its exercise."[148] Second, it is also a corollary to the separation of powers concerns identified above.[149] That is, prosecutors may act pursuant to categorical policies, but judges are limited to the case before them.[150] Third, this requirement seems geared toward respecting the rights and autonomy of the defendant.[151] The Sixth Circuit raised this issue in *In re United States* in noting that categorical rejections of plea agreements "may leave criminal defendants such as Townsend worse off."[152] Similarly, the *Miller* court argued that "[w]hen dealing with issues as fundamental as a person's freedom or imprisonment, our judicial system can—and must—give every case independent consideration."[153]

Much like separation of powers concerns, though, the bar against categorical considerations is not absolute. So long as a trial court genuinely engages with the facts of the case, it can also be influenced by broader policies, showing the malleability of this analysis.[154] In *State v. Montiel*, the trial judge stated his policy

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must set forth, on the record, the court's reasons in light of the specific circumstances of the case for rejecting the bargain.").

147. *See, e.g.*, State v. Williams, 851 S.W.2d 828, 832 (Tenn. Crim. App. 1992) ("That there is discretion at all implies that there are limits to its exercise. . . . For example, a strict policy against the acceptance of any plea in which the defendant refuses to acknowledge his guilt, absent any other sound basis for rejection, may cross the line of discretionary propriety.").

148. United States v. Miller, 722 F.2d 562, 565 (9th Cir. 1983).

149. *See* State v. Caldwell, 2013-Ohio-5017, 1 N.E.3d 858, 865 at ¶ 23 ("While trial judges retain the inherent right to reject a plea, where a prosecutor, as here, lays out a viable rationale for offering and recommending a plea, the trial court's decision to reject that plea should at least objectively address why the court has rejected the prosecutor's analysis.").

150. *See Miller*, 722 F.2d at 565 ("Although courts are free to accept or reject individual charge bargains, they should avoid creating broad rules that limit traditional prosecutorial independence."). *But see* Kimbrough v. United States, 552 U.S. 85, 112 (2007) (finding no error in the district court's below-Guidelines sentence based on a broader policy consideration of the 100-to-1 sentencing disparity between crack cocaine and powder cocaine under the Guidelines).

151. *See In re* United States, 32 F.4th 584, 596 (6th Cir. 2022); *Miller*, 722 F.2d at 565.

152. *In re United States*, 32 F.4th at 596. Under the facts of the case, the trial court's rejection indeed left Townsend worse off since the proposed plea agreement would have cut the mandatory minimum from 20 years down to ten years. *Id.*

153. *Miller*, 722 F.2d at 565.

154. *See, e.g.*, United States v. Walker, 922 F.3d 239, 251 (4th Cir. 2019), *vacated*, 140 S. Ct. 474 (2019) (upholding the rejection of a plea agreement based, in part, on "discussion

against allowing the waiver of firearm enhancements as part of his reasoning in rejecting the plea agreement.[155] The Utah Supreme Court held that "[i]dentifying a predilection against a certain type of plea agreement is a far cry from refusing to even consider a plea."[156] No error occurred because the "predilection" against waiving firearm enhancements was only one of "at least three different factors" considered by the trial court, along with "the effective reduction in felony level that the plea would produce and the corresponding reduction in the possible term of imprisonment" and "the fact that the victim had not been informed of the specific plea agreement reached between the prosecution and defendant."[157] These other factors evinced an individualized consideration of the plea agreement, even if a categorical policy played some role in the ultimate rejection.[158]

C. THE REASONS TRIAL COURTS REJECT PLEA AGREEMENTS

This section analyzes the reasons trial courts cite for rejecting plea agreements and how appellate courts have reacted to some of them. These rationales vary widely without any unifying theory. While some recur throughout time and across jurisdictions, others have only been the province of a lone court or two pushing the bounds of their ill-defined power. This section assigns plea agreement rejections into eight categories based on the reasoning used. These categories are not mutually exclusive or clearly distinguished in the case law. Instead, they merely serve as an analytical framework that may be useful in thinking about how courts have exercised their discretion at this pivotal stage of plea bargaining.

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of the opioid crisis" and "criticism of the plea bargaining system"); State v. Williams, 851 S.W.2d 828, 832 (Tenn. Crim. App. 1992) (finding no abuse of discretion where the trial judge suggested a policy against accepting plea agreements without an admission of guilt because the trial judge also considered the defendant's specific explanation for pleading guilty).

155. *See* State v. Montiel, 2005 UT 48, ¶ 4, 122 P.3d 571; *see supra* notes 127, 128, 129, 130.

156. *Montiel*, 2005 UT at ¶ 30.

157. *Id.*

158. *See id.*

1. *Sentencing Factors and Overly Lenient Agreements*

The most common consideration trial courts cite when rejecting a plea agreement is the sentence contemplated by the agreement. Trial courts frequently reject plea agreements as too lenient.[159] This applies equally in cases of charge bargains as in cases of sentence bargains.[160] The determination of leniency may be driven by the sentences received by co-defendants or otherwise similarly situated defendants,[161] the defendant's past conduct,[162] the punishment authorized for the original charged offenses,[163] or comparisons to people serving similar sentences.[164] Decisions that a sentence proposed by a plea agreement is too short need not be limited to the principle of retribution against the specific defendant though.[165] For example, in *Commonwealth v. Hartley*, a Virginia court rejected a plea agreement that would have reduced a two-count felony indictment for possession with intent to sell, give, or distribute marijuana and hashish oil to a suspended $100

159. *See, e.g.*, United States v. Wright, 291 F.R.D. 85, 90 (E.D. Pa. 2013) (rejecting plea agreements as unreasonable because "they are too lenient in light of the seriousness of the charged crimes"); United States v. Dickerson, 636 F. App'x 506, 510 (11th Cir. 2016) (affirming rejection of plea agreement where 64-month sentence cap contained in agreement was 20 months below low-end of U.S.S.G. sentence range); State v. Southworth, 2002-NMCA-091, 132 N.M. 615, 52 P.3d 987, at ¶43 (upholding rejection based on "disparity between the potential sentences for the crimes charged and those contained in the plea").

160. *See* United States v. Smith, 417 F.3d 483, 488–89 (5th Cir. 2005) (no abuse of discretion where district court rejected a charge bargain reducing a two-count indictment to a one-count plea agreement because the resulting statutory maximum would be too low).

161. *See* United States v. Rivera, 2006 WL 3771940, at *2 (8th Cir. Dec. 26, 2006) (finding no error in trial court's consideration of a co-defendant's much longer sentence handed down as part of jury trial).

162. *See Smith*, 417 F.3d at 485 (affirming rejection based on information in pre-sentence report that defendant had allegedly been defrauding women for 11 years and had a 20-year-long criminal record).

163. *See* Hoskins v. Maricle, 150 S.W.3d 1, 25 (Ky. 2004), *as modified on denial of reh'g* (Dec. 16, 2004) (rejection of plea agreement for being "too lenient" was not abuse of discretion where death penalty was authorized punishment for charged offenses, compared to ten years maximum under plea agreement).

164. *See* State v. Holtry, 1981-NMCA-149, 97 N.M. 221, 638 P.2d 433, at ¶ 12 (upholding rejection where defendant accused of assault resulting in death would receive 18-month sentence because "there are too many people doing 18 months' probated sentences for little or nothing and in this case a human life was taken").

165. Federal courts, in particular, often incorporate their consideration of the sentencing factors laid out in 18 U.S.C. § 3553(a) into their decision to accept or reject a proposed plea agreement. *See, e.g.*, United States v. Wright, 291 F.R.D. 85, 89 (E.D. Pa. 2013). These factors include: (1) the nature of the offense and history of the defendant; (2) the need to reflect the seriousness of the offense, to deter future offenses, to protect the public, and to rehabilitate the defendant; (3) the sentences available; (4) the U.S. Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) "the need to avoid unwarranted sentence disparities"; and (7) restitution. 18 U.S.C. § 3553(a).

fine.[166] In doing so, the court relied heavily on its conclusion that the proposed fine would fail to deter others from engaging in similar offenses.[167] On the other side of the equation, trial courts are also empowered to find that a plea agreement is too harsh.[168] This type of rejection is far less frequent, however.[169]

There may also be limits to the court's ability to find a plea agreement too lenient. The determination must be supported by the facts—or at least by the appellate court's interpretation of the facts. In *United States v. Cota-Luna*, defendants Alejandro Cota-Luna and Antonio Navarro-Gaytan were charged with two counts: (1) conspiracy to possess with intent to distribute 92 kilograms of cocaine; and (2) possession with intent to distribute 92 kilograms of cocaine.[170] Because Cota-Luna and Navarro-Gaytan appeared to be small players in a larger drug conspiracy, the parties quickly agreed to a one-count plea to conspiracy with recommended sentences of 36 months' imprisonment for Cota-Luna and 33 months' imprisonment for Navarro-Gaytan, down from a mandatory minimum of ten years per count on the original

166. Commonwealth v. Hartley, 2020 WL 10459719 at *6 (Va. Cir. Ct. Sept. 11, 2020).

167. *See id*.

168. *See* United States v. Walker, 922 F.3d 239, 250 (4th Cir. 2019), *vacated*, 140 S. Ct. 474 (2019) ("[A] court can reject a plea agreement that it sees as too harsh."). On the other hand, for a court *refusing* to reject a plea agreement because the result at trial might be too harsh for the defendant, see United States v. Streett, 2022 WL 1091459, at *26 (D.N.M. Apr. 12, 2022) ("Streett's Plea Agreement is a good one, and it reduces his exposure. It would be a train wreck for him if this case went to trial.").

169. The greater frequency of "too lenient" rejections over "too harsh" rejections can be connected back to separation of powers principles. This is because "judges' power over plea bargains is generally structured more as a check against prosecutors departing from their initial charging decision in the direction of leniency than as a check against unduly severe charging and plea bargain decisions by prosecutors." Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 81 (2017). Alternatively, this tendency could also be attributed to personnel. According to a 2021 study by the Cato Institute, out of 384 federal non-senior Article III judges who had experience working in the criminal legal system before joining the bench, 263 had experience only on the prosecutorial side, compared to 66 who had experience only on the defense side and 55 who had experience on both sides. Clark Nelly, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates [https://perma.cc/7WCE-ZHPR] (also summarizing previous studies on the professional backgrounds of federal judges). Judges are certainly capable of putting their professional backgrounds aside—and such backgrounds are unlikely to be the determinative factor in the consideration of a plea agreement. Still, it seems natural to wonder whether the large portion of judges with prosecutorial backgrounds might be less willing to second-guess the charging decisions and sentencing suggestions of prosecutors, and, as a result, less willing to reject plea agreements as too harsh.

170. *See* United States v. Cota-Luna, 891 F.3d 639, 643 (6th Cir. 2018).

indictment.[171] Judge John Adams of the U.S. District Court for the Northern District of Ohio rejected the plea agreement as too lenient in light of the drug weight involved.[172] However, on appeal, the Sixth Circuit found that "the amount of drugs overrepresented—not underrepresented—the seriousness of the offense."[173] The court of appeals instead focused on: (1) the defendants' lack of knowledge of the amount of drugs involved; (2) the defendants' lack of access to the drugs; (3) the fact that the drugs were never sold; (4) the defendants' lack of involvement in the planning of the crime; and (5) the fact that the defendants "did not stand to benefit from it."[174] Ultimately, the court of appeals found that the district court's rejection of the plea agreement was not supported by the facts and so reversed.[175] That level of scrutiny is, however, rare in cases where a trial court rejects a plea agreement as too lenient.

2. *Public Interest and Participatory Values*

More abstractly, courts also often cite the public interest when rejecting a plea agreement. While "the public interest" is commonly listed as part of the general standard when considering a plea agreement,[176] the term is used here to refer more specifically to concerns about the public's participation in a criminal case. Trial courts have used their discretionary power to reject plea agreements in order to flag cases where that concern bears special consideration.[177]

The most outspoken advocate of this position has been Judge Joseph R. Goodwin of the U.S. District Court for the Southern

171. *See id.* at 644.

172. *See id.* at 648 ("[T]he district court stated that the sentences specified in the agreements might be too lenient given that Defendants were responsible for '90 plus kilograms of cocaine.'").

173. *Id.* at 647.

174. *Id.* at 648.

175. *See id.*

176. *See, e.g.*, United States v. Wright, 291 F.R.D. 85, 89 (E.D. Pa. 2013) ("[C]ourts have tended to rely on the adequacy of the sentence's length, the factors under 18 U.S.C. § 3553(a), and the public interest as factors in determining the plea agreement's reasonableness."); Hoskins v. Maricle, 150 S.W.3d 1, 21 (Ky. 2004), *as modified on denial of reh'g* (Dec. 16, 2004) (a trial court should not disturb a plea agreement unless "contrary to the manifest public interest").

177. For example, in *Wright*, the district court rejected a plea agreement in a public corruption trial, stressing the public's "right to expect transparency in the charges to which Defendants agree to plead guilty." 291 F.R.D. at 92.

District of West Virginia.[178] In a line of opioid-related cases, Judge Goodwin has centered the public interest in his analysis.[179] In particular, these cases hinge on four factors, two of which—"the interest of the public in participating in adjudication of the conduct charged" and "the public's ability to achieve community catharsis"—relate to the public interest.[180] In *United States v. Stevenson*, Judge Goodwin expanded on his reasoning for this focus:

> [T]he criminal jury trial (1) plays an important role in maintaining the appropriate separation of powers between the three branches of government, (2) creates an educated populace that respects the law and has faith in the criminal justice system, and (3) provides an appropriate forum for the community to peacefully express its outrage at arbitrary government action as well as vicious criminal acts.[181]

Thus, Judge Goodwin's analysis positions the court as the representative of the people, providing a voice for public concerns in certain plea agreements.

Judge Goodwin's approach has not received explicit approval or disapproval on appeal. The Fourth Circuit upheld his rejection of a plea agreement in *United States v. Walker*.[182] There, the defendant, Charles Walker, Jr., was charged with three counts of distribution of heroin, two counts of distribution of fentanyl, and a

178. *See* United States v. Walker, 423 F. Supp. 3d 281, 298 (S.D. W. Va. 2017) (rejecting a plea agreement in heroin and fentanyl distribution case due to the public interest in participating in a trial that could aid in education about overdose deaths and deterrence of opioid dealing); United States v. Wilmore, 282 F. Supp. 3d 937, 948 (S.D. W. Va. 2017) (same); United States v. Stevenson, 425 F. Supp. 3d 647, 648 (S.D. W. Va. 2018) (rejecting a plea agreement because a generalized interest in expediency is not sufficient to overcome "the people's interest in participating in the criminal justice system"); United States v. Kimble, 2020 WL 7407902, at *8 (S.D. W. Va. Dec. 17, 2020) (rejecting plea agreement in fentanyl distribution case because the recommended sentence range of 120 months to 180 months essentially asked the court to hold defendant criminally liable for uncharged conduct).

179. *See, e.g.*, *Wilmore*, 282 F. Supp. 3d at 941 ("If I determine that the proffered plea agreement is not in the public interest, I will reject it.").

180. *Id.* (The other two factors are "the defendant's conduct in light of the cultural context in which it occurred" and "the apparent motivation behind the plea agreement.").

181. *Stevenson*, 425 F. Supp. 3d at 649.

182. *See* United States v. Walker, 922 F.3d 239, 254 (4th Cir. 2019), *vacated*, 140 S. Ct. 474 (2019).

firearms offense.[183] Under the proposed plea agreement, Walker would have pled guilty to a single count of possession with intent to distribute heroin and the government would have dropped the other charges.[184] Judge Goodwin rejected the agreement, citing the cultural context of the opioid crisis,[185] the public's interest in overdose education and opioid deterrence,[186] the nature of the alleged offenses requiring community catharsis via jury trial,[187] and the lack of a motivation on the part of the prosecutor aside from efficiency.[188] Without approving Judge Goodwin's "broad considerations" regarding the opioid crisis and the plea-bargaining system, the Fourth Circuit affirmed due to Judge Goodwin's focus on "whether the particular plea agreement . . . was too lenient" and "whether it served the public interest."[189]

Thus, the role of public participatory values in the consideration of a plea agreement remains somewhat unclear. Even Judge Goodwin's analysis may be limited to the context of drug-related charges in West Virginia's opioid crisis.[190] Still, Judge Goodwin is not alone in stressing public participatory values in determining whether to reject a plea agreement.[191]

3. *Alleged Victims' Rights*

Another factor related to public participatory values is the consideration of alleged victims' rights. Scholars have pointed out

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183. *See* United States v. Walker, 423 F. Supp. 3d 281, 282 (S.D. W. Va. 2017). For further discussion of the district court case, see *Recent Case: United States v. Walker*, 131 HARV. L. REV. 2073 (2018).

184. *See Walker*, 423 F. Supp. 3d at 282.

185. *See id.* at 284, 296.

186. *See id.* at 297–98.

187. *See id.* at 297.

188. *See id.*

189. United States v. Walker, 922 F.3d 239, 251 (4th Cir. 2019), *vacated*, 140 S. Ct. 474 (2019).

190. All four of the cases in which Judge Goodwin has used some form of this framework have featured charges related to distributing heroin, fentanyl, or other opioids, and the opioid crisis has featured heavily in the analysis. *See, e.g.*, Walker, 423 F. Supp. 3d 281, 284 (S.D. W. Va. 2017) ("The plea agreement proffered by the parties in this case was made in the context of a clear, present, and deadly heroin and opioid crisis in this community. West Virginia is ground zero.").

191. *See, e.g.*, State v. Hines, 919 S.W.2d 573, 584 (Tenn. 1995) (upholding rejection of plea agreement on murder charge where trial court relied on ground that "this case should be decided by a jury"); State v. Conger, 2010 WI App 56, ¶ 32, 325 Wis. 2d 664, 797 N.W.2d 341 (validating "the general public's perception that crimes should be prosecuted" and "the public's right to have the crimes actually committed fairly prosecuted" as legitimate considerations).

the tension between the plea-bargaining system and the interests of alleged victims.[192] Some statutes, court rules, and rules of procedure expressly provide for consideration of alleged victims' views in judicial evaluations of plea agreements.[193] At the federal level, for example, the Crime Victims' Rights Act (CVRA) has been interpreted as requiring district courts to consider the views of alleged victims in determining whether to accept or reject a plea agreement.[194] Even absent such requirements, though, courts have found it necessary to review alleged victims' opinions on a proposed plea agreement.[195]

Of course, consideration of the views of alleged victims does not require that plea agreements be drawn to meet those alleged victims' desires. Instead, courts seem more focused on ensuring that prosecutors simply consult with any alleged victims before finalizing plea agreements. The most famous recent rejection of a

192. Matthew Clair points out that the vast majority of guilty pleas are taken "not because a defendant recognizes the harm they may have caused but because a defendant has been coached by their lawyer to recognize the many costs of taking their case to trial." Clair, *supra* note 67, at 181. In turn, this undermines the interest of alleged victims in having their rights reaffirmed. *Id.* While victim involvement risks turning the criminal legal system into a private system for vengeance, it also "encompass[es] both utilitarian considerations (such as crime control) and the reaffirmation of victim dignity." Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 326 (2007) (arguing for increased consideration of alleged victims' views earlier in the plea-bargaining process).

193. *See, e.g.*, OHIO R. CRIM. P. 11 ("To the extent required by Article I, Section 10a of the Ohio Constitution or by the Revised Code, before accepting the plea, the trial court shall allow an alleged victim of the crime to raise any objection to the terms of the plea agreement."); *see also* AM. BAR ASS'N, *ABA Standards for Criminal Justice: Pleas of Guilty* § 14-1.1(b) (3d ed. 1999) ("As part of the plea process, appropriate consideration should be given to . . . the interests of the victims . . . .").

194. 18 U.S.C. § 3771. Subsection (a) of the CVRA guarantees victims "[t]he reasonable right to confer with the attorney for the Government in the case." 18 U.S.C. § 3771(a)(5). Subsection (b) provides: "In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights" provided by the CVRA. 18 U.S.C. § 3771(b). *See also In re* Dean, 527 F.3d 391 (5th Cir. 2008). *In re Dean* arose out of an explosion at a refinery operated by the defendant, BP Products North America Inc. Victims of the explosion had asked the district court to reject a proposed plea agreement, a request that the district court denied. On appeal, the Fifth Circuit Court of Appeals found that the district court had "failed to accord the victims the rights conferred by the CVRA." *Id.* at 394.

195. *See, e.g.*, Hoskins v. Maricle, 150 S.W.3d 1, 25 (Ky. 2004), *as modified on denial of reh'g* (Dec. 16, 2004) ("When evaluating a plea agreement . . . the trial court may consider the opinions of the crime victims."); State v. Montiel, 2005 UT 48, ¶ 29, 122 P.3d 571 (approving the trial court's consideration of "the fact that the victim had not been informed of the specific plea agreement reached between the prosecution and defendant"); State v. Conger, 2010 WI App 56, ¶ 17, 325 Wis. 2d 664, 797 N.W.2d 341 (listing "the interests of the victim" among factors to be considered when determining whether to reject a plea agreement).

plea agreement illustrates this principle. In the federal hate crime case against Travis and Gregory McMichael for the murder of Ahmaud Arbery, Judge Lisa Godbey Wood of the Southern District of Georgia rejected a proposed plea agreement after Mr. Arbery's mother urged the court not to accept it.[196] There, the McMichaels had already been convicted of Mr. Arbery's murder in state court, but the plea agreement would have included a public admission that the killing was racially motivated.[197] In return, the agreement—a binding sentence bargain pursuant to Fed. R. Crim. P. 11(c)(1)(C)—would have guaranteed that the McMichaels would be sent to federal prison, which they perceived as safer than state prison.[198] Although the federal prosecutor claimed to have consulted Mr. Arbery's family in advance,[199] Mr. Arbery's mother spoke against the deal at the plea hearing, objecting to the proposed prison transfer.[200] Ultimately, Judge Wood rejected the agreement due to its binding nature, citing the need "to hear at sentencing from all concerned, including the victim's family."[201] Judge Wood's decision demonstrates that courts may be willing to reject plea agreements where the alleged victims have not been given a voice in the negotiations.

Other courts have similarly focused on incorporating alleged victims' views into the process of plea bargaining. In *United States v. Stevens*, the defendant Christopher Stevens was alleged to have sold fentanyl-laced heroin that resulted in a young man's overdose death.[202] Stevens agreed to plead guilty to a single count of distribution of heroin, but Judge Jeffrey Alker Mayer of the U.S.

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196. *See* Fausset, *supra* note 100.

197. *See id.*

198. *See id.* ("But Judge Wood noted that the deal was a special kind that would force her to agree to its exact terms.").

199. A prepared statement from the Department of Justice noted the prosecutors' obligations under the CVRA. *Id.*

200. *See* Richard Fausset & Shaila Dewan, *How a Plea Deal in the Arbery Hate Crime Case Unraveled*, N.Y. TIMES (Feb. 2, 2022), https://www.nytimes.com/2022/02/02/us/ahmaud-arbery-murder-plea-deal.html [https://perma.cc/P3RV-5UCR]; Steve Inskeep & Debbie Elliott, *Judge Rejects a Plea Deal on Federal Hate Crime Charges in Arbery's Murder*, NPR (Feb. 1, 2022), https://www.npr.org/2022/02/01/1077198393/judge-rejects-a-plea-deal-on-federal-hate-crime-charges-in-arbery-s-murder [https://perma.cc/8KUY-JU3W].

201. David K. Li & Janelle Griffith, *Judge Rejects Federal Hate Crimes Plea Deal for at Least One of Ahmaud Arbery's Killers*, NBC NEWS (Jan. 31, 2022), https://www.nbcnews.com/news/us-news/judge-rejects-federal-hate-crimes-plea-deal-ahmaud-arberys-killers-rcna14268 [https://perma.cc/YH7G-NSL3]. No written opinion accompanied this decision, but several news sources covered Judge Wood's reasoning.

202. *See* United States v. Stevens, 239 F. Supp. 3d 417, 418 (D. Conn. 2017).

District Court for the District of Connecticut rejected the plea agreement after discovering that the U.S. Attorney had not consulted with the alleged victim's mother, who preferred a charge of distribution resulting in death.[203] While Judge Mayer highlighted the potential violation of the CVRA, he did not rest his rejection of the plea agreement on that ground alone.[204] Instead, Judge Mayer argued that the "sound administration of justice requires not only respect for the rights and interests of criminal defendants but also respect for the rights and interests of crime victims."[205] The problem was not the substance of the plea agreement but the process used to arrive at that agreement. Regardless of whether an alleged victim urges severity or leniency, offering the victim a voice serves restitution and respect interests.[206]

4. *Legislative Intent*

Less common are considerations related to legislative intent.[207] In *United States v. Osorto*, the defendant Allan Josue Funez Osorto's plea agreement contained a waiver of the right to seek compassionate release without first exhausting all administrative procedures or waiting 180 days after filing a request with the Bureau of Prisons.[208] Judge Charles Breyer of the U.S. District Court for the Northern District of California rejected this plea agreement.[209] In doing so, Judge Breyer pointed to the recent enactment of the First Step Act, which allowed incarcerated

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203. *See id.* at 418, 421, 425.

204. *See id.* at 425 n.8 ("[E]ven if I am mistaken about the broad scope of the CVRA's reasonable-right-to-confer provision, I would still exercise my discretion to decline to accept the guilty plea in this case for the multiple additional reasons described in this ruling.").

205. *Id.* at 420.

206. *See id.* at 421. Judge Mayer also tied these interests into the broader public interest, noting that, without alleged victim input, "the public will understandably have less confidence that a plea bargain is a just and fair resolution." *Id.* at 423. Thus, the consideration of alleged victims' rights is not entirely distinct from sentencing factors of public participation values.

207. *See* United States v. Osorto, 445 F. Supp. 3d 103, 104 (N.D. Cal. 2020) (rejecting plea agreement containing compassionate release waiver in light of the First Step Act's amendment of 18 U.S.C. § 3582(c)(1)(A) to allow defendants to move for compassionate release on own behalf); State v. Louser, 2021 ND 89, ¶ 25–27, 959 N.W.2d 883, 891 (affirming trial court's rejection of plea agreement that would have treated defendant's fourth DUI offense as a third offense despite N.D.C.C. § 39-08-01(3)'s directive to treat subsequent offenses differently).

208. *See Osorto*, 445 F. Supp. 3d at 104–05.

209. *See id.* at 105.

individuals to file a motion for compassionate release on their own behalf.[210] While, according to Judge Breyer, "a federal prosecutor is not required to draft plea agreements that reflect Congress's wishes," the judicial duty to effectuate congressional intent makes "Congress's wishes an appropriate consideration in evaluating the [p]lea [a]greement."[211] This reliance on legislative intent may, however, be limited to situations in which Congress or the state legislature has spoken directly on the point at issue.[212] As a result, its applicability may be limited.

5. *Views of Law Enforcement and Probation Officials*

Consideration of the views of law enforcement and probation officials may also weigh in a court's decision to reject a proposed plea agreement. Federal courts often consider the views of probation officers in the form of presentence reports (PSRs), which probation officers compile to assist courts in sentencing.[213] Such consideration is, however, often folded into sentencing determinations, and does not typically constitute an independent evaluation of the plea agreement.[214] State courts may also consult their own "pre-plea reports."[215] Apart from any probation-prepared report, the Wisconsin Supreme Court has upheld the contemplation of law enforcement opinion in rejecting a plea agreement. In *State v. Conger*, the defendant Joshua D. Conger agreed to a plea bargain that would reduce a felony charge of possession with intent to deliver over 200 grams of marijuana to

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210. *See* 18 U.S.C. § 3582(c)(1)(A). Per Judge Breyer, "Congress's aim was to increase the number of defendants who received compassionate release." *Osorto*, 445 F. Supp. 3d at 108.

211. *Osorto*, 445 F. Supp. 3d at 108.

212. *See Louser*, 959 N.W.2d at 885, 891 (rejecting a plea agreement that would have negated a state "legislative directive" that a fourth offense DUI be treated as a Class C felony rather than a Class A misdemeanor).

213. *See* James L. Johnson & Carrie E. Kent, *Federal Presentence Investigation Report: A National Survey*, 83 FED. PROB. 28, 28 (2019).

214. *See, e.g.*, United States v. Rivera, 2006 WL 3771940, at *2 (8th Cir. Dec. 26, 2006) (rejecting plea agreement that would result in sentence 67 months below the low-end recommendation contained in the PSR).

215. *See* People v. McGhee, 677 P.2d 419, 421 (Colo. App. 1983) (affirming trial court's rejection of plea agreement that would have granted defendant two years' probation where pre-plea report recommended that probation be denied); *see also* People v. Copenhaver, 21 P.3d 413, 417 (Colo. App. 2000) ("Among the factors which a trial court may properly consider are the defendant's previous criminal history and any pre-plea report or recommendation.").

three counts of misdemeanor possession with intent to deliver.[216] The trial court rejected this agreement based on the quantity and street value of the drugs involved and law enforcement's general opposition to "reductions from felonies to misdemeanors."[217] While cautioning against giving too much weight to law enforcement's views, the Wisconsin Supreme Court found "the viewpoint of law enforcement" to be "[o]ne appropriate factor among many."[218] This amorphous factor would seem to have an acknowledged but limited role in judges' decisions regarding plea agreements.

6. *Timing of the Plea Agreement*

Trial courts also often reject plea agreements on the basis of timing. That is, a court may reject a proposed agreement because a court-imposed deadline has passed or because the parties presented it too close to trial.[219] Unlike many of the other factors listed so far, this one eschews any consideration of the substantive terms of a plea agreement. The ability to reject a plea agreement on timing grounds thus derives less from the specific grant of discretion and more from the court's power to control its docket.[220]

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216. *See* State v. Conger, 2010 WI App 56, ¶ 7–8, 325 Wis. 2d 664, 797 N.W.2d 341.

217. *See id.* at ¶ 10.

218. *See id.* at ¶¶ 4, 42, 49 ("[I]t would be inappropriate for a court to deny a . . . plea agreement on the grounds that it gives law enforcement veto power over plea agreements or on the grounds that it followed a policy that amendments from felonies to misdemeanors were never approved. . . ."); *see also* George v. State, 1982 WL 944, at *1 (Ark. Ct. App. Aug. 25, 1982) (upholding rejection of plea agreement against challenge that court had impermissibly relied on sheriff's comments against agreement because "the comments made by the sheriff had little to do with the court's refusal to accept the plea").

219. *See* United States v. Gamboa, 166 F.3d 1327, 1331 (11th Cir. 1999) (holding that the trial court did not abuse its discretion in rejecting an accepted plea agreement because the defendant did not accept before the court-imposed deadline); Cochran v. State, 1992 WL 315946, at *3 (Ark. Ct. App. Oct. 28, 1992) (upholding trial court's rejection of plea agreement because it was presented as the jury was finishing deliberations); People v. Grove, 566 N.W.2d 547, 558 (Mich. 1997) (finding no abuse of discretion where "the trial judge refused to accept the defendant's plea because it was presented over a month after the plea cutoff date and one day before trial was to begin"); People v. Jasper, 17 P.3d 807, 814 (Colo. 2001) ("We hold that it is not an abuse of discretion for the trial court to reject a plea bargain solely for failure to tender it before a court-imposed plea deadline."). *But see* State v. Sears, 542 S.E.2d 863, 866, 868 (W. Va. 2000) (finding abuse of discretion where trial court refused to consider plea agreement because it was presented the day before trial).

220. *See Gamboa*, 166 F.3d at 1331 ("[T]he prerogative of prosecutors and defendants to negotiate guilty pleas is outweighed by judicial discretion to control the scheduling of trial procedures in ongoing prosecutions, plus the broad interests of docket control and effective utilization of jurors and witnesses."); *Jasper*, 17 P.3d at 812 (linking this power to other rules of procedure vesting trial courts with authority to impose pretrial deadlines for expert disclosures, discovery, and omnibus hearings).

The actual details of the deadline imposed by the trial court and the timing of the agreement seem not to matter on review.[221] With that said, considerations of timing may be overcome on review by extenuating circumstances.[222]

7. *Appeal and Collateral Review Waivers*

At least two federal cases in the last decade have raised the question of a trial court's ability to reject a plea agreement due to the waiver of a defendant's rights to direct and collateral review.[223] In *United States v. Townsend*, for example, the U.S. District Court for the Eastern District of Michigan rejected a plea agreement because it contained appeal and collateral review waivers.[224] The district court argued that: (1) the defendant could not enter into the agreement knowingly since the waivers barred relief based on yet-to-be-recognized rights; and (2) the waivers "insulate from judicial oversight the government's plea-bargaining practices."[225] On the government's petition for a writ of mandamus, the Sixth Circuit found the appeal waivers to be a "legitimate consideration" for the district court, but still ruled that the rejection was improper as it was not sufficiently individualized.[226] This decision leaves the role of appeal waivers in the rejection of plea agreements on somewhat shaky ground.[227]

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221. *See Gamboa*, 166 F.3d at 1330–31 (plea agreement presented 40 minutes after deadline); *Grove*, 566 N.W.2d at 547 (plea agreement presented one month after deadline but one day before trial); *Cochran*, 1992 WL 315946, at *3–4 (plea agreement presented during jury deliberations).

222. *See* United States v. Shepherd, 102 F.3d 558, 562 (D.C. Cir. 1996), as amended (Jan. 31, 1997), as amended (Mar. 4, 1997) (commenting that although lateness of plea request was a proper consideration, "it is also significant that Shepherd's request came at the beginning of trial with a plausible explanation for the delay"). For an argument against the court's power to set plea deadlines, see Michael D. Cicchini, *Under the Gun: Plea Bargains and the Arbitrary Deadline*, 93 TEMPLE L. REV. 89 (2020) (pointing out that arbitrary deadlines do not comport with the requirement of individualized analysis and may raise separation of powers concerns).

223. *See In re* United States, 32 F.4th 584, 593 (6th Cir. 2022); United States v. Vanderwerff, 788 F.3d 1266, 1279 (10th Cir. 2015). Although *Osorto* dealt with a waiver of the right to seek compassionate release, rather than appellate or collateral review, its analysis can be added to this line of cases as well. *See* 445 F. Supp. 3d 103, 105 (N.D. Cal. 2020).

224. *See* 2021 WL 777191, at *3 (E.D. Mich. 2021).

225. *Id.* at *3–4.

226. *See In re United States*, 32 F.4th at 595.

227. The other major case on the topic, *Vanderwerff*, 788 F.3d at 1277, does not provide any more clarity. While the Tenth Circuit ruled that "[t]he district court was not empowered to tilt the balance against Mr. Vanderwerff's first plea agreement containing an appellate

8. *Attempts to Set Up an Appeal*

At least two state appellate courts have also reviewed the rejection of plea agreements where the trial court believed that the defendant was attempting to lay the groundwork for a later appeal.[228] In the recent *Commonwealth v. DeSabetino*, defendant Richard DeSabetino II rejected a plea agreement for seven-and-a-half to 15 years before trial and accused defense counsel of being ineffective throughout trial.[229] Then, during trial, DeSabetino sought to agree to a plea bargain offered by the Commonwealth for eight-and-a-half to 20 years.[230] In a sidebar discussion with DeSabetino, the trial court rejected the plea agreement, citing its belief that DeSabetino was trying to set up an appeal on the basis that counsel's ineffectiveness made the plea involuntary.[231] Importantly, the trial court did not find that the plea itself was involuntary; it simply believed that DeSabetino would appeal on that ground.[232] Without much discussion of its reasoning, the Pennsylvania Superior Court upheld the trial court's decision on appeal.[233]

D. PROBLEMS WITH THE CURRENT FRAMEWORK FOR REJECTING PLEA AGREEMENTS

The limits and factors just surveyed add up to a conflicting and indeterminate framework for the evaluation of plea agreements. The limits that appellate courts have established are malleable to the point of inconsistency. The reasons trial courts cite for rejecting plea agreements offer no unifying theory. While much of this lack of standardization may be attributable to the nature of judicial discretion, current doctrine does little to provide

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waiver because of its negative views toward plea bargaining," its reasoning was tied up with the district court's other errors of law in rejecting the plea agreement. *See id.* at 277.

228. *See* Commonwealth v. DeSabetino, 2022 WL 17098636, at *1–2 (Pa. Super. Ct. Nov. 22, 2022); State v. Williams, 851 S.W.2d 828, 831 (Tenn. Crim. App. 1992) (affirming trial court's rejection of plea agreement on ground that "had it approved the plea, it would be an invitation for a post-conviction relief petition on the issue of voluntariness").

229. *See DeSabetino*, 2022 WL 17098636, at *1–2.

230. *See id.* at *1.

231. *See id.* at *2–5.

232. *See id.*

233. *See id.* at *4 ("[T]he trial court's concern, as reflected in its opinion, was that Appellant was attempting to set up a challenge to the voluntary aspect of his plea. . . . As such, the plea would not serve the interests of justice. We find no abuse of discretion in this regard.").

predictability for bargaining parties, trial judges, or appellate courts.

As for the limits established by appellate courts, their application generally fails to give meaningful guidance to trial judges. Both the separation of powers principle and the individualized consideration requirement carry an inherent tension in their applications.[234] For example, separation of powers concerns have led appellate courts to note both that the trial court may not infringe upon the prosecutor's charging decisions[235] and that once the defendant is charged, the judge's sentencing powers override the prosecutor's charging power.[236] Similarly, while the individualized consideration requirement precludes the rejection of a plea agreement based on a categorical policy, trial judges may allow such a policy to play a role alongside individualized factors.[237] On either front, it is unclear where the line is between a permissible rejection and an impermissible one. Both ultimately require a case-by-case decision by an appeals court without a clear standard to guide trial judges.[238]

The reasons given by trial judges when rejecting plea agreements similarly provide no unifying theory on which bargaining parties or other courts may rely. Certainly, some of those reasons are based on more easily identifiable principles than others. For example, *United States v. Booker*[239] and the U.S. Sentencing Guidelines specifically recommend incorporating sentencing factors into the plea agreement decision, granting federal judges the discretion to consider a plea's resulting sentence

234. *See supra* Parts II.B.2 and II.B.3.

235. *See* United States v. Vanderwerff, 788 F.3d 1266, 1272, 1278 (10th Cir. 2015) (reversing a plea agreement rejection due, in part, to "the settled law of plea bargaining, under which courts accord considerable discretion to the government in crafting charge bargains").

236. *See* State v. Conger, 2010 WI 56, 325 Wis. 2d 664, 683, 797 N.W.2d 341, 351 ("[B]oth the fact that the court's jurisdiction is invoked by the commencement of a case and that the legislature has granted prosecutors sole discretion to amend a charge only prior to arraignment mean that the prosecutor's unchecked discretion stops at the point of arraignment.").

237. *See supra* notes 154–158 and accompanying text.

238. *See In re* United States, 32 F.4th 584, 596–97 (6th Cir. 2022) ("While it is true that the Judiciary wields significant power over criminal sentencing and has no authority over the Executive branch's charging decisions, those separation of powers concerns are best addressed on a case-by-case basis, not with a bright-line rule.").

239. *See* United States v. Booker, 543 U.S. 220, 227 (2005) (finding that a provision of the Federal Sentencing Act making the U.S. Sentencing Guidelines mandatory violated the Sixth Amendment, thereby making the Sentencing Guidelines only advisory and giving federal district court judges substantially more discretion in sentencing).

when deciding whether to accept the plea agreement.[240] Moreover, a common criticism of the plea-bargaining system is that it cuts the public out of the criminal process altogether.[241] It therefore makes sense that judges should respond to that criticism by considering public participatory values when deciding whether to reject a plea agreement.[242]

In other instances, however, the reasons judges give for their plea rejections seem to conflict with the limits laid out by appellate courts. Consider legislative intent. The use of legislative intent to reject a plea agreement has some analytical force. For one, a legislative directive may alleviate the separation of powers concerns inherent in the rejection of the decision of one branch—the prosecutor, an executive branch official—by the decision of another branch—the judge, a judicial branch official.[243] However, the issue with this reasoning is that it comes with no obvious limits. It might, for example, require courts to reject all plea agreements that waive mandatory firearm enhancements[244]—raising concerns about a lack of individualized consideration. Likewise, though widely accepted, timing-based rejections based on judicially imposed deadlines seem difficult to square with

240. *See* United States v. Torres-Echavarria, 129 F.3d 692, 696 (2d Cir. 1997) ("[T]he text of section 6B1.2 requires a district judge . . . to determine on the record that (1) the remaining charges reflect the seriousness of the underlying offense and (2) the agreement will not undermine the statutory purposes of sentencing or the Guidelines."). Though *Torres-Echavarria* was decided before *Booker*, the sentencing guidelines remain advisory and still recommend consideration of the purposes of sentencing. *See* U.S.S.G. § 6B1.2.

241. *See* McConkie, *supra* note 55, at 1053. McConkie argues that the jury trial right, often seen as held by the defendant, should be reconceptualized as a public right as well. *See id.* Some plea agreement rejections read as agreeing with this contention, albeit on a more limited, case-by-case basis. *See, e.g.*, United States v. Wright, 291 F.R.D. 85, 92 (E.D. Pa. 2013) ("Defendants are innocent until proved guilty and have a right to put the Government to its proofs. Conversely, the public has a right to expect transparency in the charges to which Defendants agree to plead guilty.").

242. *See* United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 323 (D. Mass. 2013) (rejecting plea agreements between corporate defendants and the government and conceiving judges as "the elephant in the room" of plea bargaining, "whose role it is to zealously protect the public interest").

243. Per Judge Posner in *In re United States*, 345 F.3d 450, 454 (7th Cir. 2003), this balancing between branches is key to the federal criminal system since, "[p]aradoxically, the plenary prosecutorial power of the executive branch safeguards liberty, for, in conjunction with the plenary legislative power of Congress, it assures that no one can be convicted of a crime without the concurrence of all three branches."

244. *See* State v. Montiel, 2005 UT 48, ¶¶ 29–30, 122 P.3d 571 (affirming the rejection of a plea agreement while implying that a blanket rejection of plea agreements waiving firearm enhancements would be an abuse of discretion).

separation of powers principles and the individualized consideration requirement.[245]

The reasons cited by trial judges may also conflict with each other. There appears an obvious conflict between a trial judge's rejecting a plea agreement to preserve a defendant's ability to bring an appeal[246] and a trial judge's rejecting a plea agreement for fear of an appeal.[247] And it is possible that the public interest could clash with other factors, such as alleged victims' rights.[248] The current framework, however, provides no guidance on which factor to weigh more heavily. Of course, these reasons have been culled from the cases of dozens of different courts, so complete consistency should not be expected. Still, could there be a better way to frame judicial discretion to reject plea agreements in order to increase predictability and respect the various interests at play?

III. A NEW FRAMEWORK FOR REJECTING PLEA AGREEMENTS

This Part proposes two reforms to the judicial approaches to plea agreement rejections seen in Part II. First, Part III.A argues that a court considering a proposed plea agreement should adopt a presumption in favor of rejection unless the parties demonstrate case-specific reasons for the court to accept the agreement. Second, Part III.B proposes that the court consider a four-part framework of interests representing the prosecution, the defendant, the public, and any alleged victims before accepting a plea agreement. Both proposals help to address the lack of guidance demonstrated in Part II, while also responding to some of the critiques of plea bargaining seen in Part I. Of course, these proposals do not purport to solve all of the problems of plea bargaining. Instead, they offer a narrow way to improve the procedure for judicial consideration of plea agreements in only

245. *See* Cicchini, *supra* note 222, at 113–14 (arguing that timing-based rejections fail to comply with the requirement of individualized consideration and violate separation of powers doctrine). After all, it is difficult to see how a court that rejects all agreements that are not filed by a set number of days before trial does not run afoul of the requirement that each agreement receive an individualized assessment.

246. *See* United States v. Townsend, 2021 WL 777191, at *4 (E.D. Mich. Mar. 1, 2021).

247. *See* Commonwealth v. DeSabetino, 2022 WL 17098636, at *4 (Pa. Super. Ct. Nov. 22, 2022).

248. Consider the Ahmaud Arbery case. There, prosecutors argued the plea agreement served public catharsis values by requiring the defendants to admit the attack was racially motivated, but the judge rejected the plea agreement upon the request of Mr. Arbery's family. *See* Fausset, *supra* note 100.

those jurisdictions where judges are otherwise barred from involvement in plea bargaining. They do so by simply encouraging trial courts to exercise a more structured form of oversight over the plea-bargaining process within the limits already placed on their power.

A. PRESUMPTION IN FAVOR OF REJECTION

Trial courts should adopt a presumption in favor of rejecting proposed plea agreements, with that presumption rebutted where the parties present case-specific reasons for a given agreement's acceptance. This approach would largely invert the practice seen in courts that treat acceptance of the plea agreement as the baseline[249] and require individualized reasons to reject the agreement.[250] Such an inversion would not be without precedent, as a pair of federal district court judges have gestured to a preference for rejecting rather than accepting plea agreements already.[251] This Note goes beyond those isolated opinions, though, and advocates for an express presumption in favor of rejection across the board.[252]

Such an approach would ask the prosecution and the defense to explain their reasoning for reaching the plea bargain.[253] Many

249. *See* Hockaday v. United States, 359 A.2d 146, 148 (D.C. 1976) ("Thus, where, as here, a disposition has been agreed upon by both the defendant and the government, the trial court must identify good reasons for a departure from following that course. If no proper cause exists to vitiate the plea, the trial court is obliged to accept it.").

250. *See* United States v. Severino, 800 F.2d 42, 46 (2d Cir. 1986) ("[I]f the court has reasonable grounds for believing that acceptance of the plea would be contrary to the sound administration of justice, it may reject the plea.").

251. *See* United States v. Stevenson, 425 F. Supp. 3d 647, 648 (S.D. W. Va. 2018) ("[T]he scales of justice tip in favor of rejecting plea bargains unless I am presented with a counterbalance of case-specific factors sufficiently compelling to overcome the people's interest in participating in the criminal justice system."); United States v. Wright, 291 F.R.D. 85, 88 (E.D. Pa. 2013) ("An agreement should be accepted 'only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons.'") (quoting U.S.S.G. § 6B1.2 cmt. (2012)).

252. In contrast, the approach of Judge Goodwin in *Stevenson*, 425 F. Supp. 3d at 648, seems to be limited to fentanyl and heroin cases in the context of the West Virginia opioid crisis. *See supra* note 190.

253. Of course, there may be situations in which the parties may prefer not to explain the basis of the plea agreement in open court—for example, in the case of a cooperation agreement—but the Federal Rules of Criminal Procedure already address such situations. *See* FED. R. CRIM. P. 11(c)(2) ("The parties must disclose the plea agreement in open court when the plea is offered, *unless the court for good cause allows the parties to disclose the plea agreement in camera*.") (emphasis added); FED. R. CRIM. P. 11(c)(5) ("If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the

courts considering rejecting a plea agreement already ask the prosecutor to elaborate,[254] question the defendant on the matter,[255] or both.[256] Indeed, the Federal Rules of Criminal Procedure[257] and analogous state rules[258] require trial courts to conduct a colloquy with the defendant to ensure the guilty plea itself is knowing, voluntary, and based in fact.[259] Of course, it could be argued that these determinations are more objective and, thus, more susceptible to judicial decision-making. Still, the four-part framework suggested in Part III.B can similarly guide the court's inquiry.[260]

Once the court hears the parties' reasons for reaching the plea agreement, it should then, if accepting that agreement, state its reasons for doing so. Most jurisdictions require this when a court rejects a plea agreement,[261] and many already extend that requirement to the acceptance of plea agreements as well.[262] This Note only argues that trial courts shift the emphasis from explaining why they should not accept a plea agreement to

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court must do the following on the record and in open court (*or, for good cause, in camera*) . . .") (emphasis added).

254. *See* United States v. Stevens, 239 F. Supp. 3d 417, 418 (D. Conn. 2017) (questioning prosecutor on his communications with the alleged victim prior to reaching plea agreement).

255. *See* Commonwealth v. Desabetino, 2022 WL 17098636, at *2–4 (Pa. Super. Ct. Nov. 22, 2022) (recounting sidebar discussion between court and defendant regarding basis for plea agreement).

256. *See* State v. Conger, 2010 WI 56, 325 Wis. 2d 664, 688, 797 N.W.2d 341, 353 (finding "the reasons stated by the prosecutor and defense counsel for recommending the plea agreement" to be valid inquiry for trial courts).

257. *See* FED. R. CRIM. P. 11(b) (requiring that, before accepting a plea of guilty, "the court must address the defendant personally in open court," "determine that the defendant understands" the ramifications of the plea, "determine that the plea is voluntary," and "determine that there is a factual basis for the plea").

258. *See, e.g.*, KY. R. CRIM. P. 8.08 ("The court . . . shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.").

259. *See supra* Part I.B. As discussed, scholars disagree on the effectiveness of this colloquy in actually safeguarding defendants' rights. *See supra* note 36.

260. *See infra* Part III.B.

261. *See* United States v. Walker, 922 F.3d 239, 249 (4th Cir. 2019) ("To ensure the existence of sound reasons for rejection of a plea agreement, and to facilitate appellate review, the rejection and its justification should be on the record."). For a jurisdiction that permits, but apparently does not require, its trial courts to state such reasons on the record, see State v. Doherty, 261 N.W.2d 677, 682 n.9 (S.D. 1978) ("If the court rejects a plea agreement, it may, in its discretion, advise the prosecuting attorney and defendant and his attorney of the reasons for the rejection. . . .").

262. *See* United States v. Wright, 291 F.R.D. 85, 89 (E.D. Pa. 2013) ("A district court must ordinarily set forth its reasons for accepting or rejecting the plea agreement on the record and that those reasons must be individualized and based on the specific facts and circumstances of each case.").

explaining why they should. Such a shift comports with the Federal Rules of Criminal Procedure,[263] the U.S. Sentencing Guidelines,[264] and some state rules[265] as well.

This suggested approach would fit within the limits on plea agreement rejection already identified by appellate courts.[266] First, because this approach comports with rules of procedure,[267] no error of law inherently applies to the presumption. Second, shifting to a presumption in favor of rejection does not raise any new separation of powers concerns.[268] It still respects prosecutors' power over charging decisions by listening to their reasoning and avoiding overbroad rules that would generally limit prosecutorial discretion.[269] Third, this approach satisfies the requirement that the court give each plea agreement individual consideration.[270] Case-specific considerations would still drive each decision. Rejections would occur where the court determines that the reasons given for this specific agreement do not suffice.[271] Thus, presuming a plea agreement should be rejected absent case-specific reasons for its acceptance would not violate the limits placed on trial court discretion.

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263. "As is the situation under the current Rule, the court retains absolute discretion whether to *accept* a plea agreement." FED. R. CRIM. P. 11, advisory committee notes to 1999 amendments (emphasis added). Note that the committee notes focus on the acceptance of plea agreements, not their rejection.

264. The Guidelines sets forth determinations a court should make for each type of plea agreement, phrasing each one as "the court may accept the agreement if the court determines . . . ," U.S.S.G. 6B1.2(a), "the court may accept the recommendation if the court is satisfied either that . . . ," U.S.S.G. 6B1.2(b), and "the court may accept the agreement if the court is satisfied either that . . . ," U.S.S.G. 6B1.2(c). Again, the baseline, absent these determinations, is that the court rejects the proffered agreement.

265. *See, e.g.*, COLO. R. CRIM. P. 11(f)(5) ("Notwithstanding the reaching of a plea agreement between the district attorney and defense counsel or defendant, the judge in every case should exercise an independent judgment in deciding whether to grant charge and sentence concessions.").

266. *See supra* Part II.A.

267. *See supra* notes 257, 258, 263–263.

268. *See supra* Part II.A.1.

269. *See* United States v. Miller, 722 F.2d 562 (9th Cir. 1983). The *Miller* court suggested that separation of powers concerns only arise where "[*c*]*ategorical* limitations on charge bargains . . . force prosecutors to bring charges they ordinarily would not, or to maintain charges they would ordinarily dismiss as on-going investigations uncover more information." *Id.* at 565 (emphasis added).

270. *See supra* Part II.A.2.

271. One Tennessee court has expressly upheld the use of a presumption in favor of rejecting plea agreements in certain situations. *See* State v. Williams, 851 S.W.2d 828, 832 (Tenn. Crim. App. 1992) (finding no abuse of discretion where the trial judge suggested a policy against accepting plea agreements without an admission of guilt because the trial judge also considered the defendant's specific explanation for pleading guilty).

This rebuttable presumption would channel the supervision of plea agreements in which courts are already engaging toward a more predictable framework. Trial judges seem to accept the overwhelming majority of plea agreements presented to them.[272] Requiring judges to explain all those acceptances would encourage the development of a more robust record of what factors they take into account when evaluating a plea agreement. Given concerns for respecting prosecutorial prerogatives and defendant autonomy, judges could be expected to still provide a record of their reasoning when rejecting a plea agreement, as well. In this way, the presumption would foster more case law on when and why judges reject plea agreements. Parties entering into plea negotiations could then refer to that case law to determine whether a given agreement would be accepted or rejected. Similarly, appeals courts could operate with more understanding of how trial judges evaluate plea agreements. The outcome would be enhanced consistency for courts and parties, addressing some of the issues of predictability identified by this Note.

This approach has its limitations. First, if the presumption has a meaningful impact in terms of the rejection rate for plea agreements, it might slow down the plea-bargaining process and thereby decrease its efficiency.[273] Surely, the defendant who just wants to get through their court case and put a minor allegation behind them would be unhappy to find their routine plea put through a long, deliberative process of rebutting this presumption.[274] That process might also further overburden prosecutors, private defense attorneys, and, especially, public defenders.[275] Indeed, this presumption may defeat many of the efficiency gains that motivate plea bargaining in the first place. It

272. *See supra* note 100.

273. *Cf.* McConkie, *supra* note 55, at 1036 (arguing for reforms to the criminal legal system, such as plea juries and community prosecutions, that would discourage plea bargaining).

274. *See* O'Hear, *supra* note 17, at 416 ("Many defendants welcome the impersonal, rapid-fire nature of the routine case processing mode, preferring just to 'get it over with' in cases that are unlikely to result in substantial sentences of incarceration.").

275. *See* Bibas, *supra* note 47, at 2479 (noting that the workload of public defenders already makes it difficult for them to develop possible defenses and thus results in "fewer plea-bargaining chips").

is an open question, though, whether efficiency alone should be sufficient to justify a resort to plea bargaining.[276]

Second, and conversely, if this approach were to be designed so as not to slow down the plea-bargaining process and infringe upon the separation of powers, the presumption in favor of rejection would likely have to be easily rebuttable. In that case, it would seem the presumption would be doing no substantive work at all. The presumption might even be open to the same criticisms that are sometimes levied at the Fed. R. Crim. P. 11(b) determination of whether the plea itself is voluntary, is knowing, and has a factual basis.[277]

Ultimately, these counterarguments miss the point of the presumption. The presumption would serve procedural justice—by providing more predictability, by "giv[ing] defendants opportunities to tell their sides of the story," and by requiring prosecutors to "explain their bargaining positions"[278]—even if substantive outcomes remain the same.

B. FOUR-PART FRAMEWORK

In addition to adopting a presumption in favor of rejecting proposed plea agreements, this Note proposes a four-part framework through which courts could determine whether to accept or reject a given plea agreement. Each part corresponds to a party, person, or group for whose interests the court should account: the prosecutor, the defendant, the public, and any alleged victims. This framework narrows and clarifies the considerations discussed in Part II.C, providing more consistent guidelines while still allowing for individualized assessment of each plea agreement.

First, the court should give weight to the respect due to prosecutors as representatives of a coequal branch of government. Because plea agreements represent a mixture of executive and

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276. *See* United States v. Walker, 423 F. Supp. 3d 281, 291 (S.D.W. Va. 2017) (questioning the use of plea agreements motivated solely by efficiency and an overworked court system).

277. *See* Turner, *supra* note 36, at 206, 212–13 (arguing that judicial review of whether the plea is voluntary, is knowing, and has a solid factual basis is often "perfunctory," meaning "the parties may reach plea bargains that are both inaccurate and unfair").

278. O'Hear, *supra* note 17, at 411 (identifying the criteria for a "procedurally just" plea-bargaining system).

judicial functions,[279] it is imperative that a court considering a plea agreement take executive prerogatives into account.[280] Under the frameworks described in Part II, courts often weigh prosecutorial independence via the separation of powers limitation and individual consideration requirement. The approach described in Part III.A supplements that balance by asking prosecutors to give their reasons for each plea agreement on the record or in camera.

Second, the court should expressly address the defendant's autonomy and rights—even those that the plea agreement seeks to waive—in its decision regarding whether to accept or reject the proposed agreement. The requirement for individualized consideration partially serves the defendant's autonomy interest already,[281] and the colloquy conducted as part of consideration of the plea itself raises the rights waived as well.[282] This framework goes beyond both of those current iterations, urging the court to directly consider the defendant's rights with respect to the plea agreement rather than the plea.

The difficulty here lies in the potential tension between respecting the defendant's autonomy (as expressed in the plea bargain that the defendant has struck) and protecting the defendant's rights (by considering whether that plea bargain may have been coerced).[283] Allowing defendants to state their reasons for entering plea agreements may help address this tension. Requiring that plea negotiations take place on the record and be submitted to the presiding judge, as some scholars have suggested,

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279. *See* Hoskins v. Maricle, 150 S.W.3d 1, 12 (Ky. 2004) ("The power to charge persons with crimes and to prosecute those charges belongs to the executive department. . . . The power to conduct criminal trials, to adjudicate guilt, and to impose sentences within the penalty range prescribed by the legislature belongs to the judicial department.").

280. A prosecutor may have several valid reasons for preferring a plea agreement in a given case. *See* Brown & Bunnell, *supra* note 2, at 1064–65 (noting that prosecutors pursue plea agreements for a variety of reasons aside from efficiency, "including the promotion of individual justice, resolution for victims, defendant rehabilitation, horizontal consistency, and general deterrence"); United States v. Stevens, 239 F. Supp. 3d 417, 421 (D. Conn. 2017) (speculating that, where the indictment as charged carried a high mandatory minimum, "[a] reasonable prosecutor could well conclude that such a severe sentence is not warranted in the absence of evidence that the defendant intended or wanted to kill the victim, or for any other mitigating reason").

281. *See supra* notes 151, 152, and 153.

282. *See supra* Part I.B.

283. "One of the long-recognized dangers of plea bargaining is that it might coerce an innocent defendant to plead guilty." Turner, *supra* note 36, at 204. Again, Fed. R. Crim. P. 11(b) already aims to prevent non-knowing, involuntary, or non-factual pleas.

may prove useful as well.[284] These procedures would allow the court to consider not only what terms to which the defendant is agreeing but also why the defendant is agreeing to those terms. This means that a court could reject a plea agreement that a defendant genuinely wanted to enter. For example, where a plea agreement includes a waiver of all appellate rights without any consideration of the individual defendant's case[285] despite the presence of a genuine issue for an appeals court to adjudicate, the court may find the need to protect the defendant's rights outweighs the desire to respect the defendant's autonomy. In such a situation, the court may choose to reject the plea agreement. There is no guarantee this framework would alleviate concerns over the harshness of the plea-bargaining system on individual defendants,[286] but it would hopefully present a step in the right direction of protecting defendants' rights.

Third, courts should—and most courts already do—consider the public's interest in participating in the criminal legal system. Aside from Judge Goodwin's opioid cases,[287] courts raising concerns over sentencing,[288] legislative intent,[289] and appeal waivers[290] also fall into this category. In sum, courts should weigh whether the public has a right to have these charges adjudicated in a public forum rather than in private plea discussions, whether other politically accountable branches have expressed opinions on the matter, and whether the plea agreement allows for proper public oversight. The answers to these questions will vary with the nature of the charges, the alleged underlying conduct, and the terms of the plea agreement. For example, these considerations might lean slightly toward rejection of a plea agreement in a government corruption case where the public may deserve to see

284. Rishi Batra, while discussing jurisdictions in which judges can participate in plea negotiations, has argued that those negotiations should occur on the record to allow for future review. *See* Batra, *supra* note 25, at 589–92; *see also* Turner, *supra* note 36, at 206 ("The lack of transparency in plea bargaining makes it very difficult to detect undue coercion in a particular case. Plea negotiations occur privately between the prosecutor and the defense attorney.").

285. *See generally In re* United States, 32 F.4th 584 (6th Cir. 2022) (reviewing a district court's rejection of a plea agreement under which the prosecution required the defendant to waive most appellate rights pursuant to an office policy).

286. *See supra* Part I.C.

287. *See supra* Part II.B.2.

288. *See supra* Part II.B.1.

289. *See supra* Part II.B.5.

290. *See supra* Part II.C.1.

the case go to trial for deterrence and catharsis purposes,[291] while a simple DUI might not raise these concerns.[292]

Fourth, the court ought to take into account the interests of any alleged victims of the alleged offenses. Here, again, there may be a fine line to walk between respecting alleged victims' wishes and allowing private vengeance to override the public prosecution's prerogatives.[293] However, many courts already consider any alleged victims in their plea bargain determinations, whether required by law or not.[294] By incorporating alleged victims' interests, this framework suggests a clearer balancing between those interests and those of the other three parties or groups identified. Thus, the court should lean toward rejection where the alleged victims have not been informed about the agreement at all,[295] though a simple disagreement between the alleged victims and the prosecution over the terms of the plea agreement might not warrant such a consideration.[296] The focus is on ensuring the views of alleged victims are taken into account rather than requiring that the plea agreement comport with alleged victims' preferences.

Adopting this four-part framework—and the presumption identified in Part III.A—would not serve as a universal salve for the plea-bargaining system, but it would hopefully marginally improve both process and results. It would also be relatively easy to implement. No legislation, appellate court rulings, or rule amendments would be required.[297] The federal and state rules and

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291. *See* United States v. Wright, 291 F.R.D. 85, 92 (E.D. Pa. 2013) (citing importance of public trust in government officials as one reason for rejecting a plea agreement in a public corruption case).

292. *But cf.* State v. Louser, 2021 ND 89, 959 N.W.2d 883 (N.D. 2021) (rejecting a plea agreement for a fourth DUI offense).

293. *See* O'Hear, *supra* note 192, at 326 (noting one common critique of alleged victim involvement in plea bargaining is that it could turn prosecution into a system of private vengeance).

294. *See supra* Part II.B.3.

295. *See* State v. Montiel, 2005 UT 48, ¶ 29, 122 P.3d 571 (rejecting a plea agreement because, *inter alia*, "the victim had not been informed of the specific plea agreement reached between the prosecution and defendant").

296. For example, if the prosecutors did confer with the family in the Ahmaud Arbery case, their opposition to the substance of the proposed plea agreement alone would not counsel rejection under this factor. *See* Fausset, *supra* note 100.

297. Andrew Manuel Crespo notes that any legislation making plea bargaining more difficult is unrealistic: "[Prosecutors] therefore seek from legislators legal tools—such as expansive criminal codes—that will maximize their power and thereby make their jobs easier. And legislators, for their part, always oblige, because they know that they can be blamed only for withholding such tools—not for the prosecutors' potential abuse of them down the road." Crespo, *supra* note 14, at 1380.

case law in question provide for ample discretion at the trial court level. And the implementation of a rebuttable presumption in favor of rejection, with a focus more on procedural justice than on outcomes, would put less stress on limited judicial resources than many of the other proposals put forth by scholars.[298] The most significant roadblock to change may simply be trial courts' own reluctance to exercise the substantial discretion at their disposal.[299] That reluctance may explain why the under-theorization of judicial discretion to reject plea agreements has persisted. However, the fact remains that trial courts have the power to provide clearer guidance to parties, to appellate courts, and to each other. Perhaps they could harness that power to lead the way to a better plea-bargaining system.

CONCLUSION

The current plea-bargaining system at the federal level and in many states prevents meaningful judicial oversight in the negotiating process. Instead, the most significant opportunity for court intervention comes when the parties present their already-formed agreement for approval. Because disparate courts at the federal and state levels weigh various considerations without clear guidelines, rethinking the status quo may help to address key critiques of the plea-bargaining system. Trial courts should use the discretion granted them to reframe the inquiry as whether reasons exist to justify a given plea agreement, considering prosecutorial prerogatives, defendant rights, public participation, and alleged victim interests. It may be a small improvement, but further investigation into this understudied aspect of plea bargaining may present realistic roads to reform.

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298. *See, e.g.*, Owsley, *supra* note 82 (pointing out the logistical issues with increasing judicial participation in plea negotiations, including the need for additional judges to ensure the judge at a potential trial is not the judge who oversaw plea negotiations).

299. Brown, *supra* note 169, at 66 (arguing that the common myth that judges are "passive" in the plea bargaining process is "due predominantly to judges' own reluctance about—or aversion to—exercising greater authority over charging . . . rather than to any limitations from constitutional law or from the common law and adversarial process traditions").