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JUDGES AS FRAMERS OF PLEA BARGAINING

Daniel S. McConkie*

The vast majority of federal criminal defendants resolve their cases by plea bargaining, with minimal judicial input or oversight. This presents significant issues concerning transparency, fairness, and effective sentencing. Federal prosecutors strongly influence sentences by the charges they select. The parties bargain informally outside of court and strike a deal, but defendants often plead guilty without a realistic understanding of their likely sentencing exposure. Instead, they plead guilty based on their best guess as to how judges will resolve certain issues and their own fear that they could get an unspecified but severe post-trial sentence. The judge is often reluctant to reject the parties' deal, partly because the judge may have little information about the case and partly because the judge lacks the resources for courtroom-clogging jury trials. What is needed is a public, court-supervised, advocacy procedure early in the case to guide the parties in considering key sentencing issues and fashioning a just and reasonable sentence based on the judge's feedback.

This Article explores a proposed procedure that would do just that. Early in the case, and upon the defendant's request, the parties would litigate a pre-plea motion procedure similar to sentencing proceedings. As part of those proceedings, a pre-plea, presentence report would be prepared with input from the parties. The motion would educate the judge about the case and enable the judge to issue two indicated sentences: one for if the defendant pleaded guilty as charged, and another for if the defendant were convicted at trial. This increased judicial participation through a regularized advocacy procedure would allow judges to help frame the parties' discussion of sentencing issues and sentencing consequences earlier in the case, all without involving the judge in the parties' plea discussions. Several benefits would flow from this: the plea bargaining process would become more transparent, resulting in increased public accountability; the defense attorney would have greater incentives to properly investigate and present key issues; and the defendant could make a more informed decision about whether and on what terms to plead guilty. In short, although plea bargaining is here to stay, criminal justice could be greatly improved

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by bringing more of the plea bargaining process back into the courtroom, where the judge could help frame the key issues for the parties.

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INTRODUCTION

In the federal system, the vast majority—about ninety-seven percent—of federal criminal defendants plead guilty, giving up their constitutional right to a

jury trial in exchange for sentencing concessions.¹ Unfortunately, federal plea bargaining happens with little judicial involvement—between prosecutors and defense attorneys, behind closed doors and with practically no public oversight. This secretive procedure leaves the adjudication of criminal cases to attorneys, not the courts. Recently, the Supreme Court acknowledged that our justice system is “a system of pleas, not a system of trials.”² We must conform federal criminal procedure to this reality, and that will require bringing more of the plea bargaining process back into the courtroom where it belongs.³

The plea bargaining process is initially framed by prosecutors’ charging decisions. By selecting the charges, prosecutors strongly influence the sentence. This is so even where mandatory minimum sentences are not implicated because the advisory Federal Sentencing Guidelines are influential in plea bargaining and sentencing. Soon after indictment, the parties begin their plea discussions. These discussions are informal and out of court. The defense makes its best pitch to the prosecution but has imperfect incentives to fully investigate the case or to make a full presentation of all relevant issues. The parties make their best guess as to the likelihood of a conviction by jury, the court’s likely resolution of key sentencing issues, and the expected difference between a post-plea sentence and a post-trial sentence (“plea/trial differential”). Defendants decide to forego their constitutional rights and plead guilty based on these guesses. Put simply, defendants decide to plead guilty out of fear: they do not want to risk a much more severe post-trial sentence than the more concrete expected sentence that they will get for pleading guilty. On this basis, the parties ultimately strike their deal and present it to the court for approval. Then, for the first time, at what is likely near the end of the case, the court becomes significantly involved in the plea bargaining process.

One reason why judges do not usually reject the deals⁴ is because they often have little information about the case beyond what is stated in the indictment. Frequently, they accept the guilty plea provisionally, pending their examination of the presentence report for sentencing. That report should guide

1. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012); U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS: GUILTY PLEAS AND TRIALS IN EACH CIRCUIT AND DISTRICT, at tbl.10, available at http://www.uscc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table10.pdf.

2. *Frye*, 132 S. Ct. at 1407 (citing *Lafler v. Cooper*, 132 S. Ct. 1376 (2012)).

3. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011) [hereinafter Bibas, *Regulating*]. This Article examines the federal system, but much of what I discuss could also apply to state systems. For example, Rule 11 of the Federal Rules of Criminal Procedure governs plea bargaining. Many states have adopted a very similar rule. See, e.g., HAW. R. PENAL P. 11; TENN. R. CRIM. P. 11; VT. R. CRIM. P. 11; W. VA. R. CRIM. P. 11.

4. See, e.g., Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining*, 76 COLUM. L. REV. 1059, 1064-66 (1976); see also *Medlin v. State*, 280 S.E.2d 648, 640 (S.C. 1981) (Littlejohn & Gregory, JJ., concurring and dissenting) (“It is true that the judge, at least in theory, reserves to himself the right to honor or reject any plea bargain; however, as a practical matter, he accepts the sentence and disposition recommended by the office of the prosecutor in a great majority of the cases in order to expedite their disposition.”).

the court in considering the numerous statutory factors that are meant to make sentencing rational and consistent. But the parties usually contribute to that report's preparation with a more practical aim: to buttress the plea agreement. Paradoxically, the plea agreement tends to shape the presentence report. Even if it does not, by the time of sentencing, the parties already have a reliance interest in their bargain. Thus, the defendant is usually sentenced consistent with the plea agreement, and the whole process of preparing the presentence report after the deal has been struck becomes an empty formality.⁵ Judges have a strong incentive not to reject the parties' deal because doing so would send them back to the bargaining table, thereby prolonging the case and risking a jury trial.

One of plea bargaining's key infirmities is that it largely excludes judges until the tail end of the process. This is unfortunate for many reasons. Judges are institutionally more neutral and less political than prosecutors are. Article III judges can exert an important check on the Executive Branch's law enforcement activities. Plea bargaining discussions are conducted largely on the basis of what the parties believe judges would do at sentencing, but judges have no early opportunity to dispel them of any misconceptions. Finally, on-the-record plea proceedings early in the case would encourage the parties to develop sentencing issues more thoroughly and publicly.

This Article examines these and other infirmities of federal plea bargaining and proposes giving judges a more central role in the process. Of course, there is a limit to how much an enhanced judicial role can accomplish. As long as prosecutors have wide discretion in selecting charges, they will likely dominate plea bargaining. But my proposal—a thought experiment, really—shows how enhanced judicial involvement could change prosecutors' incentives by bringing plea bargaining into the light of the courtroom. That, in turn, could make plea bargaining more fair and transparent to both defendants and the public and more effective in arriving at just and reasonable sentences. This Article makes a novel contribution to the plea bargaining literature by re-conceptualizing the judge's role in plea bargaining and fleshing out and modifying some skeletal proposed reforms from the 1970s⁶ in light of legal developments over the last four decades. The older proposals would abrogate prosecutorial discretion and make the plea/trial differential uniform across all cases. Although conceptually elegant, these proposals are politically infeasible. My proposal is more modest, but letting judges frame the issues early in the case through a public proceeding would work a fundamental reform to plea bargaining.

The Supreme Court recently took an important step toward encouraging more judicial involvement in plea bargaining in a pair of 2012 decisions, *Lafler*

5. See, e.g., Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1116-19.

6. See Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1059; Robert M. Sussman, *Restructuring the Plea Bargain*, 82 *YALE L.J.* 286 (1972). I discuss these proposals at *infra* Part IV.A.

*v. Cooper*⁷ and *Missouri v. Frye*.⁸ These cases strengthened defendants' protections against ineffective assistance of plea bargaining counsel, but they also considered how defendants might prove that their attorneys' ineffective assistance had prejudiced them. This has encouraged judges to make some record of the parties' plea discussions. The parties in turn must conduct their negotiations differently, knowing that the negotiations could become the subject of public litigation. Thus, *Lafler* and *Frye* have effectively invited judges to exert a greater influence in plea bargaining.

This Article proceeds as follows: In Part II, I briefly describe the federal judge's role in plea bargaining. Part III critiques plea bargaining. In Part IV, I put forward my proposal to reform it, and Part V considers the implications of this proposal.

I propose letting defendants request from the court, early in the case, two indicated sentences: one for a guilty plea and another for a post-trial sentence (the difference between these two sentences is called the "plea/trial differential"). The parties would engage in litigation similar to a sentencing proceeding, with the help of a pre-plea presentence report, to systematically explore the key sentencing issues.

My approach is novel because it would permit the court, in determining the two indicated sentences, to consider case-specific factors, such as the size of plea/trial differential necessary for the court to process its caseload, the strength of the prosecutor's case and likelihood of conviction at trial, and the potential undue coerciveness of the plea/trial differential where the prosecutor's case is weak. Using these case-specific factors yields two benefits that are novel to the literature on plea bargaining reform. First, the approach is pragmatic because it would merely ask the sentencing court to make explicit the analysis that it already employs implicitly. Second, it could mitigate any undue coercion in a guilty plea because the court could sufficiently familiarize itself with the prosecution's case to discern whether the government was offering a steep discount off of a potentially draconian post-trial sentence to compensate for the weakness of its case.

This proposal has other significant advantages. It would allow judges to supervise an adversarial procedural that would help frame the parties' subsequent plea negotiations with better information about the factual and legal contours of the case and the potential sentencing consequences. It would take place on the record, improving the transparency and legitimacy of the justice system. In seeking to provide defendants with better information as they make the most important decision in the case, it would comport with *Padilla v. Kentucky*, in which the Supreme Court required that defendants be advised of the risk of deportation before pleading guilty.⁹ Finally, in describing significant

7. 132 S. Ct. 1376 (2012).

8. 132 S. Ct. 1399 (2012).

9. 559 U.S. 356 (2010).

yet achievable changes to criminal procedure, it provides federal criminal practitioners with a detailed roadmap for experimentation and reform.

I. THE FEDERAL JUDGE'S ROLE IN PLEA BARGAINING

In this Part, I describe the federal judge's role in plea bargaining. That role is a minor one; prosecutors are the star of the show. Prosecutors select the defendants and the charges and come to the bargaining table with the most leverage. Defense attorneys make their best pitch for leniency but ultimately encourage their clients to take a deal. Judges ensure that the plea is "knowing" and "voluntary" but essentially rubberstamp most plea agreements¹⁰ and sentence the defendants according to the parties' agreement. Since 1974, federal judges have been prohibited from any participation in the plea discussions, and appeals courts have strictly enforced that prohibition. But *Lafler* and *Frye* are changing that because they require the court and the parties to document more of the plea bargaining process.

Thus, Part II provides a foundation for understanding some of the core weaknesses of federal plea bargaining described in detail in Part III: prosecutors have too much influence; judges have too little; defense counsel lacks a formal procedure to flesh out mitigating factors; the defendant often lacks reliable information about his actual sentencing exposure; and the whole bargaining process lacks rigor, transparency, and accountability.

A. *The Nuts and Bolts of Federal Plea Bargaining*

"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. Nearly all federal convictions (ninety-seven percent) and state convictions (ninety-five percent) result not from trials, but from guilty pleas.¹¹ By 1971, the Supreme Court had acknowledged that plea bargaining was an "essential component of the administration of justice."¹² More recently, that same acknowledgement became more blunt: "[plea bargaining] is the criminal justice system."¹³ "Plea bargaining's triumph" over the jury trial is nearly complete: prosecutors,

10. See, e.g., Bibas, *Regulating*, *supra* note 3; Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 201-02, 206 (2006) (referring to judges as "passive verifiers of plea bargains").

11. *Lafler*, 132 S. Ct. at 1388 (2012); *Frye*, 132 S. Ct. at 1407.

12. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

13. *Frye*, 132 S. Ct. at 1407 (emphasis in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

judges, defense attorneys and defendants all have come to see plea bargaining as in their best interest.¹⁴

In the federal system, plea bargaining is largely conducted outside of the courtroom but culminates on the record with a guilty plea. Typically, after the grand jury issues an indictment and the defendant is arraigned, the defense attorney and the prosecutor negotiate privately. Once they reach an agreement, a hearing is calendared for a change of plea. A plea agreement typically binds the prosecutor to dismiss charges or not to bring particular charges.¹⁵ The agreement often contains a sentencing recommendation that does not bind the court, although the court usually follows the recommendation.¹⁶ Alternatively, the agreement may contain a binding sentencing recommendation.¹⁷ The judge may, but very seldom does, reject a plea agreement that dismisses charges or binds the court.¹⁸ In that case, the defendant may withdraw his guilty plea.¹⁹ Thus, for most defendants, their “day in court” is limited to short, uncontested hearings preceding a guilty plea.

The sentencing differential between those defendants who plead guilty and those who are convicted after a jury trial underlies our whole system of pleas. Put simply, defendants plead guilty primarily because they fear getting a much longer sentence if they lose at trial.²⁰ The main policy rationale for this “plea/trial differential”²¹ is that it incentivizes guilty pleas over time-consuming jury trials, allowing prosecutors, judges, and defense attorneys to process more cases.²² The federal system as currently funded could not handle the strain of trying every case.²³

The United States Sentencing Guidelines are highly influential in determining federal sentences. Even though the Supreme Court made the

14. GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA, 175-80 (2003) [hereinafter FISHER]; see also STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 30-34 (2012).

15. See FED. R. CRIM. P. 11(C)(1)(A).

16. See FED. R. CRIM. P. 11(C)(1)(B).

17. FED. R. CRIM. P. 11(C)(1)(C).

18. FED. R. CRIM. P. 11(C)(5); see also Alschuler *supra* note 4.

19. FED. R. CRIM. P. 11(C)(5).

20. Jeffery T. Ulmer, et al., *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560, 581 (2010) [hereinafter Ulmer] (summarizing interviews with federal court actors).

21. Commentators have referred to this differential alternatively using such terms as a “plea discount” or a “trial penalty.” To facilitate a broader discussion, I use the term “plea/trial differential.”

22. Nancy J. King, et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 964 (2005) [hereinafter King] (discussing widely held “efficiency theory” of plea bargaining).

23. As Justice Scalia put it, the system could “grind to a halt.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (citing Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 38 (1979)). Ulmer finds that the plea/trial differential is greatest in districts with higher caseload pressure. Ulmer, *supra* note 20, at 579.

Guidelines advisory in 2005,²⁴ as of 2012, federal judges only sentenced below the advisory guideline range without government concurrence in about eighteen percent of cases.²⁵ Under these Guidelines, a fixed plea/trial differential has been formalized, in part, as the “acceptance of responsibility” reduction, amounting to two or three offense levels.²⁶ That reduction tends to be about one-third of the post-trial sentence for those who accept responsibility for their crimes by pleading guilty. The reduction—designed to encourage guilty pleas—is virtually assured when the defendant pleads guilty²⁷ and virtually unheard of otherwise.²⁸

In practice, the plea/trial differential can be even greater than the acceptance of responsibility reduction alone would suggest. First, only those defendants who plead guilty can hope for government recommendations of sentences below the otherwise applicable guideline range, such as for providing substantial assistance or participating in an early-disposition (“fast-track”) program.²⁹ In fact, one study has confirmed that, even controlling for Guideline reductions such as acceptance of responsibility, obstruction of justice, and substantial assistance, there is still a plea/trial differential.³⁰ Second, prosecutors often threaten to file more serious charges, sometimes carrying a mandatory minimum, if the defendant does not plead guilty.³¹ Third, prosecutors often make plea offers at the low end of the applicable guideline range,³² but their post-trial recommendations may be at the high end of that

24. *United States v. Booker*, 543 U.S. 220, 227 (2005).

25. U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS: NATIONAL COMPARISON OF SENTENCE IMPOSED AND POSITION RELATIVE TO THE GUIDELINE RANGE, at tbl.N, available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/TableN.pdf [hereinafter SENTENCING COMMISSION Table N].

26. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2004).

27. Sentencing Commission data confirms that this reduction is granted in over ninety-five percent of federal convictions. U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS: OFFENDERS RECEIVING ACCEPTANCE OF RESPONSIBILITY REDUCTIONS IN EACH PRIMARY OFFENSE CATEGORY, at tbl.19, available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table19.pdf. In more serious cases, the prosecutor has discretion to move for the reduction of one additional offense level point if the defendant pleads guilty sufficiently in advance of trial. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2004).

28. The Commentary to the Guidelines states that the acceptance of responsibility reduction will only be granted “in rare situations” if the defendant does not plead guilty. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 at cmt.2. I am not aware of data regarding how often the reduction is actually awarded post-trial, but I believe it is rare.

29. SENTENCING COMMISSION Table N, *supra* note 25.

30. Ulmer, *supra* note 20, at 575. Another common reason for the plea/trial differential is that a jury trial may bring aggravating sentencing factors more fully into the light. *Id.* at 581.

31. *Id.* at 582.

32. Dawn Reddy, *Guilty Pleas and Practice*, 30 AM. CRIM. L. REV. 1117, 1136 (1993); see also U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL § 9-27.400(B) (“The

range, effectively increasing the plea/trial differential by two offense levels. Finally, upward departures may be granted for reasons related to criminal history issues, dismissed and uncharged conduct, pursuant to the plea agreement, or for aggravating circumstances “not adequately taken into consideration by the Sentencing Commission.”³³

Prosecutors are the primary movers in federal plea bargaining. They choose their defendants and the charges, and that choice is virtually unreviewable. Often, they bring very strong cases in which a jury would almost certainly convict. The defendant thus must plead guilty, generally on plea terms favorable to the prosecution. Judges generally go along with these plea agreements because they lack resources to preside over many trials.³⁴ This broad prosecutorial discretion is a hallmark of the American criminal justice system and borders on an inquisitorial, rather than adversarial, role.³⁵

The prosecutor’s plea offer is usually based on the defendant’s criminal conduct and history, without reference to the full analysis of the defendant’s background and characteristics provided in the presentence report.³⁶ Prosecutors’ offers in many districts are still pegged to the advisory Sentencing Guidelines, which promote uniform, if severe, sentences throughout the nation. The Guidelines reduce most cases to a mathematical formula. Prosecutors typically prefer to make offers based on that formula because it promotes uniform, objectively justifiable sentences.

Prosecutors’ systemic leverage sharply circumscribes the role and utility of defense counsel in plea bargaining. Defense attorneys know that the defendant must plead guilty or face a much longer post-trial sentence. While federal public defenders are savvy repeat players, privately retained counsel often have fewer resources, institutional and otherwise, to gauge the potential sentencing consequences of the case. Informal, unstructured, and off-the-record negotiations do not encourage defense counsel to thoroughly investigate legal issues and mitigating facts, present them persuasively to the prosecution, or aggressively litigate disputed issues. To the extent that defense attorneys are under-resourced or even unskilled, the entire system loses out, particularly the

plea agreement may have wording to the effect that once the range is determined by the court, the United States will recommend a low point in that range.”).

33. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(1) (2004). These four categories account for nearly eighty-three percent of all upward departures. U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS: REASONS GIVEN BY SENTENCING COURTS FOR UPWARD DEPARTURES FROM THE GUIDELINE RANGE, at tbl.24, available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table24.pdf.

34. The prosecutor has no obligation to make a plea offer, *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), nor must the court accept it, *Santobello v. New York*, 404 U.S. 257, 262 (1971).

35. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123-30 (1998) [hereinafter Lynch]; see also Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044-45 (2006).

36. Alschuler, *The Trial Judge’s Role*, *supra* note 4, at 1062-63.

defendant. Without effective defense presentation of exculpatory and mitigating evidence, there can be no counterpunch to the prosecution's heavy blows.³⁷

There is an important exception to the foregoing. The most skilled and best-funded defense attorneys (most commonly found in white-collar cases with wealthy defendants) understand how prosecutorial discretion works. They make detailed presentations to prosecutors concerning their clients' defense during the plea bargaining process and often obtain a favorable plea agreement before an indictment is filed. Those attorneys understand that our criminal justice system can perhaps best be understood as administrative, with the principal decision-making authority vested in the prosecutor. Thus, they put enormous effort and resources into trying to influence prosecutorial decisions.³⁸ This describes a relatively small percentage of federal cases, though.³⁹

Procedurally, once the deal is struck, guilty pleas are governed by Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 does not come into play until the parties reach an agreement on their own, and the Rule neither regulates nor gives the parties guidance in framing those discussions. The Rule provides that the judge "must not participate in these discussions"⁴⁰ and limits the judge's role to taking the guilty plea. Because the parties negotiate off the record, judges cannot easily supervise those discussions, except to ask whether the defendant has been unduly influenced to plead guilty.⁴¹

Under Rule 11, the judge seeks a knowing and intelligent waiver of the defendant's rights,⁴² including the right to plead not guilty,⁴³ the right to a jury trial,⁴⁴ and the right to appeal.⁴⁵ The judge also must advise the defendant of the maximum penalties⁴⁶—though such penalties are rarely imposed—and any mandatory minimum penalties.⁴⁷ The judge "must determine that there is a

37. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004) [hereinafter Bibas, *Plea Bargaining Outside*]; Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975).

38. Lynch, *supra* note 35, at 2123-29.

39. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: "DEFENSE COUNSEL IN CRIMINAL CASES" (Nov. 2000), *available at* <http://www.bjs.gov/content/pub/pdf/dccc.pdf> (finding that only one-third of federal defendants have retained counsel, and that who have representation are typically in white collar cases).

40. FED. R. CRIM. P. 11(c)(1).

41. FED. R. CRIM. P. 11(d) advisory committee notes to 1974 amendment.

42. FED. R. CRIM. P. 11(b)(1)(F) advisory committee notes to 1974 amendment. This essentially codifies the Supreme Court's decision in *Boykin v. Alabama*, 395 U.S. 238 (1969), which required such advisements.

43. FED. R. CRIM. P. 11(b)(1)(B).

44. FED. R. CRIM. P. 11(b)(1)(C).

45. FED. R. CRIM. P. 11(b)(1)(N).

46. FED. R. CRIM. P. 11(b)(1)(H).

47. FED. R. CRIM. P. 11(b)(1)(I).

factual basis for the plea.”⁴⁸ This requirement can be satisfied, regardless of the quantum of evidence, if the defendant admits to conduct that would satisfy the elements of the charged statute.⁴⁹ The judge must decide whether the plea is voluntary and not a result of “force, threats, or promises (other than promises in a plea agreement).”⁵⁰ The voluntariness of a guilty plea can be determined “only by considering all of the relevant circumstances surrounding it.”⁵¹

Generally, following the guilty plea, the presentence report is prepared pursuant to Rule 32 of the Federal Rules of Criminal Procedure to aid the judge in sentencing.⁵² The defendant may consent to the report’s disclosure to the court before he is convicted.⁵³ The purpose of this policy is to prevent the judge, who may have to preside over a jury trial, from being exposed to prejudicial information about the defendant.⁵⁴ Unfortunately, because the report is prepared after the parties strike their deal, they cannot benefit from the probation officer’s investigation and analysis of the case, and the plea deal usually will largely determine the sentence, regardless of what the report ultimately says.⁵⁵

This unfortunate timing of the presentence report leaves the parties and court without helpful information and analysis. The presentence report must calculate the applicable guideline range, identify any other factors relevant to sentencing,⁵⁶ and discuss the defendant’s history⁵⁷ and the crime’s impact on any victims.⁵⁸ The report also may include the defendant’s statement to the probation officer if the defendant consents.⁵⁹ Once a draft report has been prepared, the parties may conduct litigation over it. At sentencing, the parties

48. FED. R. CRIM. P. 11(b)(3). The “factual basis” requirement ensures that the guilty plea is voluntary by making sure that the defendant’s factual admissions constitute the crime to which he is pleading guilty. *McCarthy v. United States*, 394 U.S. 459, 467 (1969) (citation omitted); *see also* *United States v. Newman*, 912 F.2d 1119, 1123 (9th Cir. 1990) (finding that factual basis requirement is prophylactic, not constitutional). “[I]nvestigation into the factual basis of guilty pleas acts to increase the visibility of charge reduction practices, a common form of plea agreement.” AMERICAN BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE, standard 1.6 cmt. (Approved Draft 1968). Thus, the inquiry into whether there is sufficient evidence of the defendant’s guilt is broader than the factual basis inquiry, because the latter does not concern itself with what actually happened but rather with the conduct to which the defendant admits.

49. *Lynch*, *supra* note 35, at 2122 n.5 (citing *United States v. Maher*, 108 F.3d 1513, 1524 (2d Cir. 1997)); *Jenia Iontcheva Turner, Judicial Participation In Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 212-13 (2006).

50. FED. R. CRIM. P. 11(b)(2).

51. *Brady v. United States*, 397 U.S. 742, 749 (1970).

52. I argue in Part III that the presentence report would be more useful if prepared before, not after, the guilty plea.

53. *See* FED. R. CRIM. P. 32(e)(1); *Gregg v. United States*, 394 U.S. 489, 492 (1969).

54. *See* FED. R. CRIM. P. 32(e)(1).

55. *See* FED. R. CRIM. P. 32(e)(1).

56. FED. R. CRIM. P. 32(d)(1).

57. FED. R. CRIM. P. 32(d)(2)(A).

58. FED. R. CRIM. P. 32(d)(2)(B).

59. FED. R. CRIM. P. 32(c)(2).

may object to the presentence report⁶⁰ and introduce evidence.⁶¹ The defendant may speak.⁶² Victims are permitted to be reasonably heard.⁶³ Unfortunately, because this process generally occurs only after the parties have reached a plea agreement, it does not help guide the court and the parties in reaching a just and reasonable disposition of the case.

B. *Rule 11's Prohibition on Judicial Participation in Plea Discussions*

Before 1974, direct judicial participation in plea bargaining was “common practice.”⁶⁴ But that year, Congress amended Rule 11 to forbid such participation.⁶⁵ The concern was that defendants might feel coerced by the judge into pleading guilty and that plea bargaining judges might not be able to objectively assess the voluntariness of the guilty pleas.⁶⁶ The prohibition is prophylactic; it is designed to protect constitutional rights, but it itself is not a constitutional rule.⁶⁷

The circuit courts have interpreted the injunction against judicial participation in plea negotiations very strictly.⁶⁸ In one important case, *United States v. Werker*,⁶⁹ the defendant, Santos-Figueroa, faced a twenty-five year maximum sentence for a violent attempted robbery, and the federal prosecutor refused to plea bargain. Santos-Figueroa asked District Judge Werker for an assurance that he would receive no more than ten years on a guilty plea. The judge, with the defendant’s consent, ordered a pre-plea presentence report to be prepared and announced he would inform the defendant of his intended sentence at a future pre-trial hearing. The judge specified that the indicated sentence would be the same whether the defendant pleaded guilty or was

60. FED. R. CRIM. P. 32(i)(1).

61. FED. R. CRIM. P. 32(i)(2).

62. FED. R. CRIM. P. 32(i)(4)(A).

63. FED. R. CRIM. P. 32(i)(4)(B).

64. *United States v. Davila*, 133 S. Ct. 2139, 2146 (2013) (citing FED. R. CRIM. P. 11 advisory committee notes to 1974 amendment).

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

66. *Davila*, 133 S. Ct. at 2146; *see also* FED. R. CRIM. P. 11 advisory committee notes to 1974 amendment; *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (arguing that judicial plea bargaining is coercive).

67. *McCarthy v. United States*, 394 U.S. 459, 465 (1969).

68. *See, e.g.*, *United States v. Baker*, 489 F.3d 366 (D.C. Cir. 2007) (finding that the judge violated Rule 11 by inviting defendant to plead guilty and telling him that a defendant in a similar case had received a low sentence); *United States v. Cano-Varela*, 497 F.3d 1122, 1128, 1133 (10th Cir. 2007) (finding that Rule 11 was violated where judge told defendant that he faced a potentially “harsh” post-trial sentence and he could “perhaps get a much better, much lesser sentence” on a plea deal); *United States v. Ebel*, 299 F.3d 187 (3rd Cir. 2002) (finding that Rule 11 was violated where judge told defendant the sentence he would receive on a guilty plea); *see also Prohibition of Federal Judge’s Participation in Plea Bargaining Negotiations Under Rule 11(e) of Federal Rules of Criminal Procedure*, 161 A.L.R.FED. 537 (2000) (collecting cases).

69. 535 F.2d 198 (2d Cir. 1976).

convicted at trial.⁷⁰ The government objected to the procedure and sought mandamus. The Second Circuit granted mandamus, interpreting Rule 11's prohibition on plea bargaining very broadly to mean that "the sentencing judge should take no part whatever in any discussion or communication regarding the sentence to be imposed prior to the entry of a plea of guilty or conviction, or submission to him of a plea agreement."⁷¹ The appellate court reasoned that Judge Werker's procedure violated judicial neutrality and could make the defendant feel coerced into taking the court's offer, especially where the government was not a party to the discussions.⁷²

In 1984, there was another significant change to the balance of power between judges and prosecutors in plea bargaining. Before then, federal sentencing was indeterminate: that is, the judge could sentence anywhere within a statutory range. That gave judges relatively greater sway over sentencing than they have now. But with the passage of the Sentencing Reform Act of 1984, sentencing fundamentally changed.⁷³ The Act resulted in binding sentencing guidelines that closely tied prosecutorial charging decisions to sentences.⁷⁴ Prosecutors, through their selection of charges, had much greater power over sentencing under that regime. Of course, as stated above in Part II.A, those guidelines are now advisory, but they are still highly influential. The upshot is, relative to the pre-1974 regime, federal judges until recently have had reduced power in plea bargaining and sentencing.

C. *Lafler and Frye Expand the Judge's Role*

Fast forward several decades, and the pendulum is swinging back in the other direction. In 2012, the Supreme Court handed down two opinions expanding the right to effective counsel in plea negotiations and, perhaps even more importantly, strengthening the legal foundation for greater judicial involvement in the plea bargaining process.

In *Lafler v. Cooper* and *Missouri v. Frye*, pre-trial ineffective assistance of counsel led the defendants to persist in their pleas of not guilty instead of taking advantage of relatively favorable plea offers.⁷⁵ When Anthony Cooper was convicted at trial after rejecting the prosecution's offer based on bad legal

70. *Id.* at 202.

71. *Id.* at 201.

72. In states without Rule 11's prohibition on judicial plea bargaining, the court may follow a *Werker*-style procedure. *See, e.g.,* *People v. Cobbs*, 505 N.W.2d 208, 212 (Mich. 1993) (finding that the judge may indicate a sentence on the record for the case as charged and for any reduction of charges contemplated by the prosecutor, although the judge "must not state or imply alternative sentencing possibilities on the basis of future procedural choices, such as an exercise of the defendant's right to trial.>").

73. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987.

74. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687-89 (1992).

75. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

advice, he received a sentence much longer than he would have recently under a plea deal.⁷⁶ In *Lafler v. Cooper*, the Supreme Court held that he had been prejudiced by his attorney's ineffective assistance.⁷⁷ The *Lafler* court reaffirmed that the right to counsel extends to the plea bargaining process,⁷⁸ and that the defendant was prejudiced if he could show "the outcome of the plea process would have been different with competent advice."⁷⁹ To do that, the defendant would have to show that "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."⁸⁰ In dissent, Justice Scalia complained that the majority opinion elevated plea bargaining from a "necessary evil" to a "constitutional entitlement."⁸¹

In *Missouri v. Frye*,⁸² handed down the same day, the Supreme Court considered similar facts. Galin Frye's attorney never conveyed a favorable offer from the prosecutor to him. The offer lapsed, and he ended up pleading guilty without a plea agreement and receiving a much longer sentence. The Supreme Court found that Frye's attorney had been ineffective in failing to convey the offer.⁸³ That this ineffectiveness was prejudicial could be shown where there was (1) a "reasonable probability [the defendant] would have accepted the [lapsed] plea offer"; (2) a "reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it"; and (3) a "reasonable probability" that the defendant would have received a more favorable sentencing outcome under the plea.⁸⁴

Lafler and *Frye* do much more than strengthen the right to effective assistance of counsel during plea negotiations. In setting forth fact-intensive tests for prejudice, both opinions invite prudent judges to make a better record of the parties' plea negotiations. In fact, such a record would be necessary to properly adjudicate future claims of ineffective assistance of plea bargaining counsel. For example, in *Frye*, the Supreme Court suggested that prosecutors make formal, written offers to the defense and put those offers on the record.⁸⁵ And federal prosecutors have been doing even more to protect themselves against *Lafler*- and *Frye*-type claims. For example, before a case goes to trial,

76. *Lafler*, 132 S. Ct. at 1386.

77. *Id.*

78. *Id.* at 1384.

79. *Id.*

80. *Id.* at 1385.

81. *Id.* at 1397.

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

83. *Id.* at 1408.

84. *Id.* at 1409.

85. *Id.* at 1408-09.

many federal prosecutors put on the record that a plea offer has been made, that the defendant and his attorney have discussed it, and that the defendant has rejected it. That hearing is sometimes referred to as a “no-plea colloquy.”⁸⁶ Federal prosecutors in some districts are requesting that defense attorneys file signed declarations under seal describing their advice to clients about the plea offers and their clients’ reasons for rejecting them.⁸⁷ Some judges may choose to elicit from defense counsel, perhaps in camera, why the offer was rejected.⁸⁸

These sensible procedures are in line with *Lafler* and *Frye*. It could be argued that, in documenting only failed plea discussions, these procedures are not in tension with Rule 11’s injunction that judges not participate in plea discussions. But there is a tension: the parties might conduct those discussions differently knowing that they had to report on not only the outcome but also the substance of the discussions to the judge. Where the court knows nothing of the parties’ plea discussions, those discussions are in some sense private: between the prosecution and the defense and no one else. But where those discussions must be publicly revealed to the judge in future litigation over defense counsel’s effectiveness, the parties may change their approach entirely to plea discussions. Thus, *Lafler* and *Frye*, without mentioning Rule 11’s injunction against judicial plea bargaining, encourage judges to make a record of plea bargaining, and the parties consequently change their behavior to appear more reasonable to the judge and the public. In this way, judges are exerting a positive influence on the parties’ plea discussions without directly participating in them. As we will see below in Part III, my proposal works similarly. But first, we turn in Part II to evaluating the merits of this federal plea bargaining regime.

II. FEDERAL PLEA BARGAINING OPERATES WITH TOO LITTLE JUDICIAL OVERSIGHT, PUTS TOO MUCH POWER IN PROSECUTORS’ HANDS, AND IS CONFUSING AND UNFAIR TO DEFENDANTS

I argue in this Part that federal plea bargaining, which I described in Part I, suffers from several deficiencies. Defendants are asked to knowingly give up their constitutional rights without guidance from the court as to their actual sentencing exposure. The system relies too much on prosecutors and not enough on judges, who are better, by virtue of their institutional role, at judging

86. *The Supreme Court’s decisions in Lafler and Frye*, LAW OFFS. TIMOTHY E. WARRINER, <http://www.warrinerlaw.com/articles/the-consequences-of-the-supreme-courts-decisions-in-lafler-and-frye-ineffective-assistance-of-counsel-in-plea-negotiation> (last visited Jan. 2, 2014).

87. *Id.*; see also *Motion Pursuant to Lafler v. Cooper and Missouri v. Frye*, LAW PROFESSORS BLOG NETWORK, available at <http://lawprofessors.typepad.com/files/motion-pursuant-to-lafler-and-frye-1.pdf> (last visited Jan. 2, 2014) (detailing prosecutor’s motion in Western District of Tennessee).

88. Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper*, 46 LOY. L.A. L. REV. 457, 488 (2013), available at <http://digitalcommons.lmu.edu/llr/vol46/iss2/22> [hereinafter Levenson].

and sentencing the individual defendants before them. The system does not do enough to help defense attorneys bring to light, in an organized fashion, favorable facts to their clients during the plea bargaining stage. Because plea bargaining is largely conducted off the record, the system does not catch errors (such as ineffective assistance of counsel), and the public does not find out why concessions are made. The presentence report, which is prepared only after the guilty plea, is underutilized; if prepared earlier in the case, it could rationally guide the plea negotiations. These problems point to my proposed reform in Part III: a formal, public, pre-trial procedure at the defendant's request that allows the parties to litigate the appropriate sentence in the plea bargain and post-trial scenarios.

A. *An Uncertain Plea/Trial Differential Is Unduly Coercive, and Judges Do Nothing to Dispel This Uncertainty*

Because defendants in the federal system usually do not know the plea/trial differential in advance, they can only guess how long their post-trial sentence will be. However, they do know that their sentence could be very long.⁸⁹ Because judges ultimately impose the sentence, they are well-situated to dispel most of this doubt. But they do not, primarily because they lack sufficient information about the case and do not want to be seen as partial. Unfortunately, by not weighing in, they effectively approve of the coercion inherent in an uncertain plea/trial differential.

When defendants go to trial without understanding the risks involved, they take “a plunge from an unknown height.”⁹⁰ This creates a “general atmosphere of intimidation.”⁹¹ Such a regime requires a large plea/trial differential to exact guilty pleas, as compared to a system in which the differential is made explicit.⁹² For example, a defendant facing a known plea/trial differential of twelve months would be equally incentivized by a plea/trial differential that was just as likely to be six months as eighteen months (leaving the defendant's risk aversion to the side). Defendants cannot accurately gauge the plea/trial differential because that differential could depend on several factors, such as uncertain application of the Sentencing Guidelines and the strength of the prosecution's case.⁹³ Furthermore, now that the Sentencing Guidelines are

89. See 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.1(g) (3d ed. 2011) (citing MILTON M. HEUMANN, PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS, 157-58 (1978)).

90. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1081; see Bibas, *Regulating*, *supra* note 3, at 1140 (arguing that *Padilla v. Kentucky* “squarely recognized that, to make bargaining just, defendants need information to evaluate bargained-for sentences”).

91. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1081, 1087.

92. *Id.* at 1080.

93. See my discussion about the factors that a trial judge should consider in calculating a plea/trial differential. Part IV(E)(2), *infra*.

advisory, federal sentencing has become even less predictable, although it is not clear whether the average plea/trial differential has changed.⁹⁴

Even defendants who have potential defenses or who are innocent may plead guilty when faced with potentially sky-high plea/trial differentials. They accept a relatively certain bargained-for outcome rather than risk a devastating post-trial sentence.⁹⁵

Plea bargaining is even more coercive where, as is often the case in the federal system, the potential prison sentences are lengthy. Prosecutors need higher plea/trial differentials to tempt defendants to plead out to long sentences. For example, a defendant faced with a plea offer of one year and an anticipated post-trial sentence of two years might decide to try his chances at trial because two years of custody might not seem long compared to the chance of an acquittal. In contrast, if the penalties for the same offense were ten years on a plea and twenty years post-trial, defendants are less likely to gamble with longer periods of their lives.⁹⁶

Relatedly, several common federal criminal statutes carry high statutory maximum penalties, which accommodate large plea/trial differentials.⁹⁷ The court advises defendants of these penalties before the guilty plea, typically at the arraignment.⁹⁸ This advisement, which carries the judge's imprimatur, is misleading: the maximum penalty almost is never imposed. For example, even though drug charges often carry maximum penalties of twenty years, forty years, or life,⁹⁹ drug sentences in fact average only seventy months.¹⁰⁰ Notwithstanding, the maximum possible penalty can have an anchoring effect on future plea negotiations.¹⁰¹ And even if defendants know that an average

94. *Id.* Compare Crystal S. Yang, *Have Inter-Judge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker* (University of Chicago Law School Coase-Sandor Institute for Law and Economics Working Paper No. 662, 2d Ser. 2013), available at <http://www.law.uchicago.edu/files/file/662-csy-sentencing.pdf> (arguing that the differential has decreased), with Ulmer, *supra* note 20, at 27 (arguing that trial penalties might increase post-*Booker*).

95. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1239 (2008) [hereinafter Covey] (citing Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-69 (1968), and Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531-36 (2005)).

96. Bibas, *Plea Bargaining Outside*, *supra* note 37, at 2504-07 (discussing variations of future discounting among different types of defendants).

97. *See, e.g.*, 8 U.S.C. § 1326 (2012) (imposing a twenty-year maximum if defendant has a prior "aggravated felony"); 21 U.S.C. § 841 (2012) (imposing a mandatory minimum of ten years to life for specified drug trafficking offenses); 18 U.S.C. § 1343 (2012) (imposing a twenty-year maximum for wire fraud).

98. FED R. CRIM. P. 11(b)(1)(H).

99. 21 U.S.C. § 841(b) (2012).

100. *See* U.S. SENTENCING COMM'N, QUICK DATA FACTS ON FINAL FY2011 NATIONAL DATA, (2011), available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quick_Data_Facts_FY2011.pdf.

101. Bibas, *Plea Bargaining Outside*, *supra* note 37, at 2519, 2533.

sentence is much lower than the maximum, they are understandably risk-averse because they may feel that their life is on the line.

Sometimes, the coercion inherent in the plea/trial differential comes exclusively through the prosecutor. Because several federal statutes carry mandatory minimum sentences, the prosecution can force guilty pleas by threatening to bring (“stack”) these additional charges.¹⁰² Even if the defense correctly guessed that the court would not impose a higher post-trial sentence than the mandatory minimum, the differential between the likely sentence on a plea and the mandatory minimum sentence that the defendant faced post-trial could still be huge.

By pleading guilty, defendants waive constitutional rights, and those waivers must be made with “sufficient awareness of the relevant circumstances and likely consequences.”¹⁰³ Without knowing the likely sentencing outcomes of a guilty plea versus a jury trial, defendants simply cannot be said to have made a knowing waiver.

Because judges ultimately impose the sentence, they are well-situated to dispel most of this doubt. However, judges generally lack sufficient information about the case and do not want to be seen as biased, so they do not intervene, thereby implicitly approving of the coercion inherent in the uncertain plea/trial differential.

B. *Too Much Prosecutorial and Not Enough Judicial Discretion*

Prosecutors have dual roles: to enforce the law as advocates and to see that justice is done. Therein lies some tension: prosecutors must strike “hard blows” without striking “foul ones.”¹⁰⁴ Because prosecutors choose the charges and sentencing is largely guideline-driven, their discretion shapes case outcomes more than judges’ discretion does.

Federal prosecutors generally prefer the Sentencing Guidelines regime because it promotes greater predictability and uniformity of sentences.¹⁰⁵ This allows federal law enforcement to implement nationwide policy objectives. Unfortunately, this simplification can lead to unlike cases being treated as alike. In contrast, judges do not act in concert with each other; they take cases one at a time. Judges, who address defendants directly in court, may feel a greater responsibility than some prosecutors do to consider the effect of a

102. *See, e.g.*, 21 U.S.C. 841(b) (2012) (imposing mandatory minima of five, ten, twenty years, or life for drug trafficking); 18 U.S.C. § 924(c) (2012) (imposing five-year mandatory minimum penalty for possessing a firearm in furtherance of a crime of violence or drug trafficking offense); 18 § U.S.C. 1028A(a)(1) (2004) (imposing two-year mandatory minimum penalty for aggravated identity theft).

103. *Brady v. United States*, 397 U. S. 742, 748, 755 n.6 (1970).

104. *Berger v. United States*, 295 U.S. 78, 88 (1935).

105. *See, e.g.*, U.S. ATTORNEY’S MANUAL § 9-27.745(a) (2009) (“If the court is considering a departure for a reason not allowed by the guidelines, the prosecutor should resist.”).

conviction on defendants and their families. Our sky-high incarceration rates¹⁰⁶ demonstrate that the Department of Justice and Bureau of Prisons value punishment over rehabilitation, but individual judges may choose to disagree with that policy choice.

Federal sentences should consider the defendant as an individual and consider alternatives to incarceration.¹⁰⁷ But this often is not the case because prosecutors drive charging and plea bargaining with little input or oversight by judges. The prosecution's offers are made without reference to a presentence report but rather with an eye toward uniform sentences based on the criminal conduct, not the defendant's background or a full consideration of all of the purposes of the criminal law. The court participates in the back end only of this process when it approves the plea agreement, putting its imprimatur on a final product that bears little judicial imprint. In contrast, a greater role for federal judges in the plea bargaining process might result in sentences more carefully tailored to the unique circumstances of each defendant.

Judges have a small role in adjudicating cases and sentencing. Plea bargaining, driven by prosecutors, collapses adjudication and sentencing into one.¹⁰⁸ Judges maintain their neutrality by not getting into the fray of plea bargaining. Instead, the prosecution and the defense settle the case with little judicial participation.¹⁰⁹ The plea agreement often preempts or severely circumscribes the court's ability to exercise its discretion to sentence the defendant.¹¹⁰ Rule 11's general injunction against judicial participation in plea negotiations is well-intentioned but overly broad. It exalts neutrality at the expense of letting judges examine the cases before them and provide the defendant with helpful information. Although the judge's impartiality is undisputed, this is only because she has almost no meaningful involvement with the case.

106. See Lauren E. Glaze & Erinn J Herbermann, *Correctional Populations in the United States, 2012*, BUREAU OF JUST. STAT. (Dec. 19, 2013), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4843> (stating that one in every 108 adults is incarcerated in prison or jail); see also Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 295 (2013) (“[T]he United States now incarcerates so many people that it has become an outlier; this is not just among developed democracies, but among all nations, including highly punitive states such as Russia and South Africa.”).

107. 18 U.S.C. § 3553(a) (2012).

108. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1062, 1118-19.

109. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

110. Sussman, *supra* note 6, at 288-89. True, American law has long constrained judges' sentencing discretion by statute. See *Apprendi v. New Jersey*, 530 U.S. 466, 479 (2000) (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900*, 13, 36-37 (Prof. Dr. Antonio Padoa Schioppa ed., 1987)).

C. Defense Attorney Disadvantages

Shortcomings in defense counsel also limit the defendant's ability to receive justice due to the economic realities of defense work and the difficulty of determining an appropriate sentence during the plea discussions.

The Supreme Court has sanctioned plea bargaining in part on the assumption that the prosecution and the defendant "arguably possess relatively equal bargaining power" and engage in "give-and-take" negotiations.¹¹¹ In practice, this often is not the case. Most federal criminal defendants are indigent and receive court-appointed counsel.¹¹² Federal Public Defenders Offices have prestige and can attract good lawyers who often are passionate about their work. Still, they carry high caseloads and receive a government salary for their work far below what experienced litigators would receive in the private sector.¹¹³ Their caseload is not likely to be diminished if they take more cases to trial. In the face of these conditions, federal defenders have a huge incentive to encourage their clients to plead guilty.

Private defense attorneys also have large incentives to plead out cases quickly. They are frequently paid as the case progresses through stages, and the trial is the most expensive stage. Many clients cannot afford to pay for their privately retained attorney to try their case. These defendants may start the case with retained counsel and end up with appointed counsel as the litigation slowly drains their bank accounts. Thus, public or privately retained defense attorneys usually lack sufficient incentive to fully investigate and systematically present favorable sentencing information to the court and prosecutor before the guilty plea is entered. Only a lucky few defendants get the kind of well-financed and skilled legal representation that our adversarial system contemplates.

A related problem is the difficulty that defense attorneys, appointed or retained, face in determining their client's actual sentencing exposure. This is a complicated task. True, defense attorneys who know the courthouse, the judges, and the U.S. Attorney's Office can have a good sense of the "going rate" of particular kinds of cases. However, the real work of defending a case lies in distinguishing that case from the rest, in finding unique issues that pose legal or factual problems for the government. Defense attorneys vary widely in their financial and legal ability to do this.¹¹⁴

111. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970)).

112. "Approximately 85 percent of criminal defendants in the federal courts require court-appointed counsel." ADMIN. OFFICE OF THE U.S. COURTS, REPORT TO CONGRESS ON THE OPTIMAL UTILIZATION OF JUDICIAL RESOURCES 74 (1998), available at <http://permanent.access.gpo.gov/lps2770/Report.pdf>.

113. FISHER, *supra* note 14, at 194-200.

114. See Stephen J. Schulhofer, *A Wake-Up Call from the Plea-Bargaining Trenches*, 19 LAW & SOC. INQUIRY 135, 138 (1994) ("[P]lea bargains are often struck on the basis of incomplete, highly imperfect information and little more than the attorney's guess about what a trial might reveal if one were held."); see also *Brady v. United States*, 397 U.S. 742,

Even if a defense attorney discovers unique legal and factual issues that could bear on the disposition of the case, he or she must communicate this effectively to the prosecutor. Whether this communication occurs face-to-face, by telephone, or by email, it is certain to be off the record, and neither the judge nor the defendant is likely to be present. Such informal and unstructured negotiations do not encourage as full an exploration of these issues as one would expect from a public and court-monitored procedure. Likewise, without a public record being made, informal negotiations provide little guard against inadequate or even inaccurate defense presentations.¹¹⁵ This could be especially true where defense counsel has insufficient financial incentives to put the proper preparation and resources into case-dispositive negotiations.¹¹⁶

The complexity of federal criminal litigation also adds to the difficulty for defense attorneys and prosecutors alike of determining the defendant's actual sentencing exposure. Computing a defendant's sentencing exposure under mandatory Sentencing Guidelines was hard enough, but in the wake of Supreme Court opinions making these Guidelines advisory, their application to a given case is even less certain.¹¹⁷ Novel sentencing issues often arise for which there is no "going rate." And the fact patterns for many crimes, such as conspiracy and fraud cases, are highly complex. The plea deals that parties strike represent in part their best guess as to what the judge would do with the case. However, because most deals are struck without real input from the judge and most cases settle, the parties' ideas about going rates may become self-fulfilling prophecies. There are so few trials that their predictive value is lessened.¹¹⁸ Because judges most often simply ratify the parties' deal, the parties never find out what the judge would have done had she had the opportunity to analyze the case independently.

757-58 (1970) (holding that a guilty plea may still be voluntary, knowing, and intelligent even where defense counsel does not accurately predict the plea's sentencing consequences).

115. See, e.g., W. Louis Sands, *Plea Bargaining After Frye and Lafler, A Real Problem in Search of a Reasonable and Practical Solution (Meeting the Challenges of Frye and Lafler)*, 51 DUQ. L. REV. 537, 540-41 (2013) (describing the wide range of informal negotiations that occur in plea bargaining); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 564 (1977) (stating that "in the vast majority of cases, guilt and the applicable range of sentences are determined through information negotiations between the prosecutor and the defense attorney").

116. See, e.g., Bibas, *Plea Bargaining Outside*, *supra* note 37, at 2482 (noting that retained counsel may generally get better results in plea bargaining).

117. JENIA IONTCHEVA TURNER, PLEA BARGAINING ACROSS BORDERS 27 (2009) (citing Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 731 (2005)).

118. Bibas, *Plea Bargaining Outside*, *supra* note 37, at 2481.

D. *Because Plea Bargaining Is Not on the Record, the Results Lack Public Transparency, Consistency, and Thoroughness*

Before Rule 11 was amended in 1974, plea discussions and agreements were “informal and largely invisible.”¹¹⁹ In the courtroom, defendants, their attorneys, prosecutors, and judges alike made ritual denials that any promises had been made to the defendant.¹²⁰ (One commentator referred to this procedure as a “pious fraud.”)¹²¹ This tended to drive plea bargaining “underground,” where it could not be regulated.¹²² While the 1974 amendments required that bargaining be acknowledged in the guilty plea colloquy, the bargaining itself still goes on without court involvement, regulation, or clear rules and off the record.¹²³ It lacks a “regularized advocacy procedure” which would foster transparency, rigor, consistency, and accountability.¹²⁴ Much more can be done to bring plea bargaining out of the shadows and into the light.

Our guilty plea system is essentially run by (well-meaning) professional insiders who process criminal cases with little public scrutiny.¹²⁵ These insiders, including prosecutors, defense attorneys, judges, and probation officers, benefit from the arrangement because they can work out the case without external dissent according to their professional judgment.¹²⁶ This is far removed from the democratic ideal of a public trial by one’s peers.

As such, plea bargaining is largely invisible to the public, or even a representative sample of the public, as the Sixth Amendment’s right to a jury trial contemplates. Settlements create little fanfare. Prosecutors have little incentive to justify to the public the reasons for their charging concessions or their willingness to add more severe charges as a consequence of the defendant rejecting the plea offer.¹²⁷ This is a powerful argument in favor of giving judges a greater role in the process because they, unlike prosecutors, are used to having to justify their decisions on the public record.¹²⁸ Although it is true that

119. FED. R. CRIM. P. 11 advisory committee notes to 1974 amendment (citing Arnold Enker, *Perspectives on Plea Bargaining*, in PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 115 (1967) [hereinafter TASK FORCE REPORT]).

120. FED. R. CRIM. P. 11 advisory committee notes to 1974 amendment.

121. *See also* TASK FORCE REPORT, *supra* note 119, at 110-12.

122. *Raines v. United States*, 423 F.2d 526, 530 (4th Cir. 1970); *see also* TASK FORCE REPORT, *supra* note 119, at 110-12.

123. Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013); Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149, 151 (1986).

124. Sussman, *supra* note 6, at 287.

125. STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 29-34 (2012).

126. *Id.*; *see also* King, *supra* note 22.

127. *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (Blackmun, J., dissenting).

128. U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 96-97 (2011) (quoting Testimony of James E. Felman on Behalf of the American Bar Association Before the United States

the public cannot keep informed of most criminal cases, a more public process for disposing of the cases would allow for better oversight, such as by trial and appellate judges, bar organizations, the attorney's supervisors, crime victims and witnesses, concerned members of the affected community, journalists, and scholars.

E. *Presentence Reports Are Not Being Used Sufficiently*

The presentence report systematically analyzes the sentencing factors set forth in 18 U.S.C. § 3553 and therefore could be an important tool in determining a just sentence. Unfortunately, the parties cannot benefit from the report because they strike their deal before the report is ever prepared.¹²⁹

Some judges accept a plea bargain as long as the as-yet-unwritten presentence report later shows that the parties did not misrepresent any material facts to the court.¹³⁰ Other judges take a slightly more expansive view of the presentence report's potential by accepting the plea agreement provisionally, subject to change after the presentence report is written.¹³¹ But by the time of sentencing, they have a strong incentive to not upset the parties' deal and the defendant's expectations, regardless of what the presentence report says.¹³² And if the court rejects the deal, the parties will have to engage in wasteful re-negotiating, or worse, they may go to trial.

It is true that defense lawyers may try to informally provide information to the prosecutor that would ultimately end up in the presentence report. But the presentence report offers a formal process for providing, evaluating, and structuring that information according to the statutory sentencing factors. It encourages and assists the defense to provide as much of that information as possible in a documented form. That information, embodied in a pre-plea presentence report, could be much more beneficial to the administration of justice earlier in the case.

Furthermore, the presentence report may be highly influential to the prosecution because the court's probation officer will have independently evaluated the information provided and possibly have conducted additional investigation. Thus, the pre-plea presentence report could be more likely to

Sentencing Commission for the Hearing on Mandatory Minimums, 12-13 (May 27, 2010); Justice Anthony M. Kennedy, U.S. Supreme Court, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003)); see Alan Dahl, *Eric Holder's Recent Curtailment of Mandatory Minimum Sentencing, Its Implications, and Prospects for Effective Reform* (2013) (unpublished manuscript) (on file with author) [hereinafter Dahl].

129. See also AMERICAN BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-3.3(b) (3d ed. 1999) (mandating that judge should order preparation of presentence report after the parties have already reached a plea agreement).

130. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1117.

131. *Id.* at 1116-18; Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 296-300 (2005).

132. King, *supra* note 131, at 296-300.

give the prosecution flexibility and political cover to recommend a more reasonable sentence.

There are practical limitations to what the pre-plea presentence report can accomplish. For example, the defendant should not be required to incriminate himself in making a statement to the probation officer although the court could perhaps order that any such statements not be used against the defendant should the case eventually proceed to trial. Furthermore, the probation officer is not likely to have the resources to conduct a truly independent investigation regarding information that the parties provide. But the presentence report could still serve as a valuable resource to the parties during plea negotiations.

In the next Part, I describe a proposal to ameliorate the problems described in Part II.

III. A PROPOSAL FOR JUDGES TO FRAME PLEA BARGAINING

My proposal to address the shortcomings of federal plea bargaining described above in Part II is a defendant-initiated, pre-trial adversarial motion procedure that, with the help of a pre-plea presentence report, would frame plea bargaining by allowing the judge to provisionally declare guideline calculations and a maximum sentence on a guilty plea for the charges and a tentative maximum post-trial sentence. Such a proposal would help make all the parties aware of the likely sentencing consequences of the contemplated guilty plea. This proposal also would improve the administration of justice generally by creating a more formalized advocacy process for plea bargaining.

In this Part, I describe my proposal in detail. I argue that this proposal does not run afoul of Rule 11's restriction on judicial participation in plea discussions because the judge is merely informing the defendant of likely sentencing consequences.

The motion for indicated sentences would be most effective if the defendant had maximum discovery to prepare for it. Although the law does not require this, the prosecution typically provides discovery early in the case.

In determining the plea/trial differential in a particular case, the court would be guided by several factors. First, the court would need to consider in general the size of differential necessary to obtain sufficient guilty pleas to keep the court's docket moving. Second, the court would consider the strength of the government's case. Although this calculation is difficult to perform, there is precedent for it in the context of the Bail Reform Act, and the calculation is absolutely necessary for the court to calibrate the plea/trial differential correctly. Third, the court would consider the resources needed to try the case. Fourth, the court would consider, based on all the information available to it, whether a large plea/trial differential would unduly coerce a plea under all the circumstances.

To give the defendant a firm basis for reliance, the court would generally be bound to its indicated sentences unless new information came to light after

the announcement of the plea/trial differential that could not reasonably have been known at the time of the motion.

My proposal allows for the court to consider *ex parte* submissions in determining the indicated sentences. Otherwise, the parties would not bring to the court's attention certain critical information they were unwilling to disclose to each other, in the event the case proceeded to trial.

A. *The Proposed Procedure*

The following procedure could be expressly authorized by amendments to the Federal Rules of Criminal Procedure,¹³³ but even without such

133. Following is a proposed federal rule to implement my proposal:

Federal Rule of Criminal Procedure 12.5 - Motion for Indicated Sentences

(a) Motion

(1) Within 30 days of arraignment, or at a later time for good cause shown, the defendant may move in writing for any of the following indicated rulings:

- (i) an indicated sentence on a guilty or no contest plea,
- (ii) an indicated sentence upon conviction at trial, and/or
- (iii) indicated rulings on any issue related to sentencing (such as fines, restitution, or sentencing guidelines calculations).

(2) If the court does not deny the defendant's motion, the court shall, in open court:

- (i) advise the defendant of his rights under Rule 11(b)(1) and ensure that the defendant understands that his motion for indicated sentences does not constitute a waiver of any of those rights,
- (ii) obtain the defendant's oral consent for the preparation and disclosure of a pre-plea presentence report,
- (iii) explain in general terms the procedures outlined in this rule and determine whether the defendant consents to them, and
- (iv) set a schedule for preparing the presentence report under Rule 32, briefing the motion, and holding a hearing.

(b) Hearing on the Motion

The court may hold a hearing on the motion. The court shall have discretion as to the scope and nature of the evidence presented, including whether the parties may proceed by way of reliable hearsay. If the defendant elects to testify, his statements shall not be introduced against him at a jury trial except on cross-examination for inconsistent statements. The court may consider *ex parte* evidence by a party, but the court shall not rely on that evidence at sentencing unless the opposing party has had an opportunity to rebut that evidence.

(c) Plea/Trial Differential

In determining the plea/trial differential, the court shall consider the defendant's acceptance of responsibility, the caseload in the courthouse where the judge sits, and the strength of the government's case. The court shall not impose a plea/trial differential that is coercive.

(d) Relief

amendments, the Rules should provide federal judges sufficient authority to implement a motion procedure that helps the defendant make what is typically the most important decision in the case: on what terms to plead guilty.¹³⁴

Early in the case,¹³⁵ the defendant could elect to have defense counsel file a “motion for indicated sentences.”¹³⁶ The motion could be brief, stating requests for (1) the preparation of a pre-plea presentence report, (2) indicated guideline calculations and the indicated sentence on a guilty plea, (3) an indicated post-trial sentence, and (4) a hearing. If desired, the defense could concurrently file any other motion, such as a motion to suppress evidence. The motion would need to expressly waive any objections under Rule 32 concerning the disclosure of the presentence report to the court before the adjudication of guilt.¹³⁷

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- (1) The court may deny or defer ruling on a motion for indicated sentences.
 - (2) If the court grants the motion in whole or in part, the court shall put the indicated rulings on the record.
 - (3) The court’s adjudication of the defendant’s motion for indicated sentences shall not by itself constitute participation in the parties’ plea discussions within the meaning of Rule 11(c)(1).

(e) Exceeding the Indicated Sentences at Sentencing

If the court at sentencing decides to exceed its indicated sentences, it shall give the defendant the opportunity to withdraw his plea of guilty or no contest, unless the reason for exceeding the indicated sentences is based on either (1) circumstances which arose after the court decided the motion for indicated sentences or (2) information that was not known to the court and could not reasonably have been known to the prosecution at the time the indicated sentences were pronounced.

(f) Recusal

A judge who adjudicates a motion for indicated sentences shall not, on that basis alone, be required to recuse from the case.

134. *See, e.g.*, FED. R. CRIM. P. 12(b)(2) (“A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.”); FED. R. CRIM. P. 2 (“These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”). Federal Rule of Criminal Procedure 17.1 provides for “pretrial conferences to promote a fair and expeditious trial.” My proposed procedure promotes a fair trial in the sense that it helps defendants to make an informed decision about whether to go to trial. The Advisory Committee Note opines that this rule “is cast in broad language so as to accommodate all types of pretrial conferences.” FED. R. CRIM. P. 17.1 advisory committee’s notes to 1966 amendment.

135. Ideally, the motion for indicated sentences would be made early in the case, when the parties were somewhat less entrenched in their plea bargaining positions and more open to input from a pre-plea presentence report and the court. An alternative to the defense motion is to make this procedure resulting in indicated sentences automatic (as by local rule) and allowing defense counsel to opt out.

136. The motion should generally be made in writing. FED. R. CRIM. P. 47(b).

137. FED. R. CRIM. P. 32(e)(1) (requiring written consent); *accord* AMERICAN BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE, standard 18-5.5 (3d ed. 1994) (allowing for preparation of a pre-plea presentence report); *see also* Alschuler, *The Trial Judge’s Role*, *supra* note 4, at 1117. The local rules in some districts specifically provide for the

As a threshold matter, the court could not consider the motion without sufficient discovery from the prosecution. Likewise, the more information the defendant had about the government's case against him, the better the decision he could make about his guilty plea.¹³⁸ Although federal law limits a defendant's right to pretrial discovery,¹³⁹ defendants in typical federal cases do receive enough discovery early in the case to litigate a motion for indicated sentences, although local rules may provide for early discovery.¹⁴⁰ Likewise, Department of Justice policy calls for most discovery to be produced early in the case.¹⁴¹ Although early discovery generally improves the administration of justice, federal prosecutors are not required by law to turn over discovery early in the proceedings.¹⁴² There are times where the prosecution has good reason not to provide early discovery, such as where such discovery might compromise ongoing investigations or endanger witnesses. In such cases, the prosecutor might inform the court, *ex parte*, of the circumstances, and the court might need to defer ruling on the motion for indicated sentences until sufficient discovery was provided.

Assuming there was sufficient discovery to proceed, the judge would advise the defendant personally as follows:

You are presumed innocent throughout these proceedings. You have a right to plead not guilty and to persist in that plea. You have a right to a jury trial.

Your attorney has indicated that you want a pre-plea, presentence report to be prepared in this case. Is that correct? If I agree and order the preparation of such a report, you will not be giving up any of the rights that I just explained to you. I will consult the pre-plea presentence report and conduct a hearing on the motion. I then will determine indicated sentencing guideline calculations

preparation of pre-plea presentence reports. *See, e.g.*, D.N.M. LOCAL R. 32.G; N.D. OHIO LOCAL CRIM. RULES 32.2. Not all courts, however, have permitted this practice. *See, e.g.*, Memorandum and Order on Motion for Pre-Plea Presentence Report at 1, *United States v. Miguel Carrillo Rodriguez* (D. Mass. Oct. 3, 2007) (No. 06-40007-FDS).

138. Professor Schulhofer advocates full civil-style discovery before a negotiated plea so that the parties fully understand the plea's ramifications. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979, 1998-99 (1992) [hereinafter Schulhofer]. The Supreme Court has held that Due Process does not require this. *See United States v. Ruiz*, 536 U.S. 622, 629 (2002). But I argue elsewhere that Due Process should require ample pre-plea discovery. *See Daniel S. McConkie, Structuring Pre-Plea Criminal Discovery*, 106 *J. CRIM. L. & CRIMINOLOGY* (forthcoming 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532568.

139. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case.").

140. *See, e.g.*, E.D. CAL., LOCAL R. CT. 440(a) (stating that, absent a court order, Rule 16 discovery must be provided within fourteen days of arraignment).

141. David W. Ogden, *Guidance for Prosecutors Regarding Criminal Discovery: Memorandum for Department Prosecutors*, JUSTICE.GOV (Jan. 4, 2010), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm.

142. *See, e.g.*, Jencks Act, 18 U.S.C. § 3500 (2012) (requiring production of written witness statements following their direct examination at trial); FED. R. CRIM. P. 16 (regulating criminal discovery without imposing time limits).

and a maximum sentence should you decide to plead guilty, as well as an indicated maximum sentence should you be convicted by a jury. If your case proceeds to jury trial, the pre-plea presentence report will not be used against you.

This motion procedure that you have requested is intended to give you information about possible sentencing outcomes so that you can make more informed decisions about your case. The pre-trial indicated sentence I give does not in any way obligate you to plead guilty. You have a right to a jury trial, and participating in this motion procedure does not in any way diminish that right. Do you have any questions about this procedure?

Following this colloquy, the court would order the preparation of a pre-plea presentence report and set a date for the hearing. The parties would follow the normal procedure laid out in Rule 32 for the preparation of that report, including submitting evidence in aid of the probation officer's presentence investigation, reviewing the draft report, submitting informal objections to the probation officer, receiving a final pre-plea presentence report, and filing formal objections with the court. The prosecution would need to provide discovery at this early stage of the case sufficient for the defense to litigate the motion for indicated sentences.

At the motion hearing, the parties could put on evidence that would be relevant at trial or sentencing. Because of the abbreviated nature and limited purpose of the proceedings, the court would have discretion to disallow or circumscribe witness testimony in lieu of affidavits. If the defendant elected to testify, his statements could not be introduced against him at trial except in cross-examination for inconsistent statements. The evidence and testimony adduced at the hearing also could be admissible at sentencing. Certain issues might need to be handled *ex parte*. For example, where witness safety concerns weighed against disclosing a witness's identity early in the case, the prosecution might provide to the judge an *ex parte* affidavit summarizing that witness's testimony. The defense might make *ex parte* submissions of its case to avoid revealing its trial strategy. After submitting evidence to the court, the parties could make argument relative to the contested sentencing issues, including the expected plea/trial differential.

Following the hearing, the court would advise the defendant of its indicated (estimated) maximum pre-trial sentence for the charges, assuming the defendant pleaded guilty, and an indicated plea/trial differential. The court also could make findings of fact and conclusions of law relating to sentencing guideline calculations, forfeiture, restitution, or any other sentencing issue that was the subject of the motion.

My proposal echoes a proposal from the 1970s, yet my proposal is detailed, tailored to the federal system, and updated by four decades of legal developments.¹⁴³ In 1972, Robert M. Sussman proposed that the court hold a

143. For another serious proposed procedure to put plea bargaining on the record, see Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 588 (2013). For another thoughtful proposal by a federal judge to have magistrates act as private mediators in the

plea bargaining conference and then order a proposed plea disposition and a proposed post-trial disposition.¹⁴⁴ The plea disposition would differ from the post-trial disposition by a “specific discount rate” that “would embody the median plea concession necessary to induce an administratively acceptable volume of guilty pleas in that jurisdiction.”¹⁴⁵ Sussman’s proposal differs radically from my proposal in its view of prosecutorial discretion to charge. Under his proposal, the judge would exercise “full responsibility for the concessions the defendant receives in exchange for his plea,”¹⁴⁶ effectively abrogating prosecutorial discretion to charge. Because that discretion is a key feature of our system, Sussman’s proposal is not feasible.¹⁴⁷

Unlike Sussman’s, my proposal calls for a case-specific plea/trial differential as opposed to a cookie-cutter “specific discount rate” for an entire jurisdiction.¹⁴⁸ Whatever the merits of this idea, it is unlikely that judges in any courthouse of appreciable size could agree on such a rate. The aim of my proposal is more modest but more realistic: because judges already impose trial penalties on a case-by-case basis, they should make their best effort to calculate that differential on a case-by-case basis so that the defendant can make an informed decision.

Finally, my proposal bears some similarity to a now superseded American Bar Association Standard.¹⁴⁹ Its proposal, unlike mine, permitted the trial judge to participate as a “moderator” in the plea negotiations and make his or her own plea offer, as long as defense counsel and the prosecutor agreed to the judge’s participation.¹⁵⁰ The Standard contemplated the preparation of a pre-plea presentence report and an evidentiary hearing, the scope of which lay solely in the court’s discretion.¹⁵¹

plea bargaining process, see Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS, Nov. 20, 2014, available at <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty>.

144. Sussman, *supra* note 6.

145. *Id.* at 301.

146. *Id.* at 287; see also *id.* at 301-02.

147. In 1974, Professor Albert W. Alschuler, a prominent plea bargaining critic, made a brief but similar proposal similar to Sussman’s. He proposed that the defendant initiate a “pretrial conference” for plea bargaining, that a simplified pre-plea presentence report be prepared for the conference, that the trial judge’s role in the proceeding be non-coercive, that the defendant be present, and that the proceeding be conducted on the record. But his proposal suffers from the same deficiencies as Sussman’s. Alschuler, *The Trial Judge’s Role*, *supra* note 4, at 1124, 1146-49. For an excellent recent discussion of Alschuler’s and Sussman’s proposals, see RICHARD L. LIPPKE, THE ETHICS OF PLEA BARGAINING 16-28 (2011) and Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199 (2006).

148. Sussman, *supra* note 6, at 301.

149. AMERICAN BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-3.3 (2d ed. 1979).

150. *Id.* at standard 14-3.3(c).

151. *Id.* at standard 14-3.3(c)-(e).

B. *How to Determine an Appropriate Plea/Trial Differential*

The court's first indicated sentence would be the sentence to be given on a plea, based on standard sentencing considerations.¹⁵² In this Part, I discuss the court's second indicated sentence, which would equal the first plus a "plea/trial differential." Rightly or wrongly, this differential is a key and durable feature of our system of pleas.

Federal courts already impose longer sentences for defendants who exercise their right to trial.¹⁵³ Indeed, the acceptance of responsibility reduction institutionalizes this practice.¹⁵⁴ However, under our advisory Sentencing Guidelines regime, judges and prosecutors can and do tailor the plea/trial differential to the facts and circumstances of each case. Although many commentators have called for a uniform differential for all cases,¹⁵⁵ those recommendations go against a strong ideal in criminal justice to treat cases individually. Even where Sentencing Guidelines promote uniformity and there are mountains of cases that need to be processed, the system eschews binding formulas. Plea bargaining prosecutors tailor the differential by threatening stiffer charges and greater post-trial sentences according to the facts of the case before them. Likewise, judges who sentence after trial tailor their sentences according to the facts and circumstances of the case.¹⁵⁶ My proposal is unique in seeking to make the plea/trial differential more rational, consistent, and transparent, while still tailoring it to the facts of each case.¹⁵⁷

In calculating a plea/trial differential, the court could consider at least the following factors: the optimal number of guilty pleas for that courthouse, based on its caseload; the strength of the prosecution's case; and whether the differential is unduly coercive in a given case.

152. See 18 U.S.C. § 3553(a) (2012); FED. R. CRIM. P. 32 (articulating procedure for sentencing hearings).

153. See Part II.A, *supra*.

154. *Id.*; see also *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (holding that the prosecutor may impose stiffer charges on a defendant for refusing a plea offer and insisting upon a jury trial). Some state courts have sought to limit *Bordenkircher's* reach. See 5 LAFAYETTE ET AL., *supra* note 89, § 21.1(g) (3d ed. 2012) (Westlaw); see also *People v. Collins*, 27 P.3d 726, 732 (Cal. 2001) ("[T]he state may not punish a defendant for the exercise of a constitutional right, or promise leniency to a defendant for refraining from the exercise of that right" (citing *United States v. Jackson*, 390 U.S. 570 (1968))); *People v. Ellis*, 658 N.W.2d 142, 143 (Mich. 2003) ("[T]hat the practice that appears to have been utilized by the trial court in this case, commonly referred to as a 'waiver break,' is unethical and a ground for referral to the Judicial Tenure Commission in the future."). Other courts have been more willing to recognize that guilty pleas lead to sentencing breaks. See, e.g., *State v. Morrow*, 75 S.W.3d 919 (Tenn. 2002); *People v. Dixon*, 63 Cal. Rptr. 3d 637 (Ct. App. 2007).

155. See, e.g., Sussman, *supra* note 6, at 292-93, 301, 303; Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1125-29; Schulhofer, *supra* note 138, at 2003-08 (endorsing the solution proposed in Sussman, *supra* note 6); Covey, *supra* note 95, at 1268-86.

156. 18 U.S.C. § 3553(a) (2012) (mandating individualized consideration of the defendant, the offense conduct, and the need to deter).

157. Individual tailoring would not, however, preclude some absolute limit (e.g., 50%, 100%, 200%) on the size of the plea/trial differential.

1. *Optimal Number of Guilty Pleas*

First, given the local caseload, a judge could determine the average length of the plea/trial differential sufficiently large to incentivize an “administratively acceptable” number of guilty pleas.¹⁵⁸ Judges should consider the caseload in their courthouse and available resources to try cases. In jurisdictions with heavier dockets, fewer jury trials are possible and a higher plea/trial differential is generally needed to exact sufficient guilty pleas to process the caseload.¹⁵⁹ I propose that judges make this baseline explicit on the record.¹⁶⁰ Although in an ideal world a defendant would not be disadvantaged for going to trial in a district with crowded dockets, my proposal would at least promote uniformity within the same courthouse or district. Of course, judges who do not intend to penalize defendants for the misfortune of being prosecuted in less-busy jurisdictions can simply put that fact on the record. To tailor the differential, judges would want to consider not only their caseload generally but also the resources that would be required to try the case at hand. Factors bearing on this decision would include the expected length of the trial, complexities in selecting a jury, the number of witnesses, enhanced security measures, and the need for court interpreters.

2. *Strength of the Prosecution’s Case*

Second, judges should consider the strength of the prosecution’s case in indicating a plea/trial differential. Prosecutors already do this because such individualized calibration is necessary to encourage enough defendants to plead guilty. To illustrate, consider two similarly situated federal defendants charged with the same crime.¹⁶¹ The first defendant faces a near-certain chance of conviction at trial and the other faces only a seventy percent chance. If they both get the same offer from the prosecution of a thirty-five percent sentencing “discount” (from the post-trial perspective), the first defendant will jump at the offer, but the second will reject it, knowing that the prosecutor will be reluctant to dedicate substantial resources to trying such a close case.¹⁶² Accordingly, the

158. Sussman, *supra* note 6.

159. Sussman, *supra* note 6, at 301-02 (proposing a discount rate that “would be uniform for all defendants within a given jurisdiction and would embody the median plea concession necessary to induce an administratively acceptable volume of guilty pleas in that jurisdiction”).

160. This comports with the common usage of the acceptance of responsibility reduction to incentivize guilty pleas. Judges have “wide discretion” in whether to apply the reduction. *See, e.g.*, *United States v. Melot*, 732 F.3d 1234 (10th Cir. 2013) (reviewing for clear error).

161. The following hypothetical is greatly simplified and does not take into account the myriad complicating factors of plea bargaining in the shadow of a jury trial, ably described by Professor Bibas. *See* Bibas, *Plea Bargaining Outside*, *supra* note 37.

162. I am grateful to Professor George Fisher for helping me to develop this example. Email from George Fisher (Dec. 11, 2012, 12:25 a.m. PST) (on file with author).

prosecutor will have to give a larger discount to incentivize the second guilty plea, and the court should assist in the determination of the size of that discount.

Federal judges already have precedent that could guide their determination of the strength of the prosecutor's case. The Bail Reform Act, which governs bail decisions in federal court, requires judges to consider this factor in making bail decisions.¹⁶³ The procedure for bail review hearings is similar to sentencing procedure and therefore instructive in how to determine the strength of the prosecution's case in a motion for indicated sentences. The bail review hearing is a "full-blown adversary hearing"¹⁶⁴ at which the defendant has the right to an attorney, "to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise."¹⁶⁵ The rules of trial evidence do not apply at the hearing.¹⁶⁶ The district court has discretion to take evidence by live testimony or proffer.¹⁶⁷ The district court may limit any live testimony on grounds of relevance or to prevent a pre-trial detention hearing from becoming a full-blown trial.¹⁶⁸ In short, the Bail Reform Act provides good precedent for how to provide adequate due process to litigate the strength of the prosecution's case.¹⁶⁹

Several objections could be made to this portion of my proposal. For example, it could be argued that calibrating the plea/trial differential to the strength of the prosecution's case would tempt the defendants who are most likely factually innocent with the best offers.¹⁷⁰ While this may be true, this complaint overlooks the real issue: innocent defendants getting charged in the first place. Assuming that the prosecution's case against an innocent defendant appears strong enough to convince twelve jurors beyond a reasonable doubt, that defendant would probably prefer to at least have the option of cutting his losses. Furthermore, my proposal would familiarize the judge with the facts of

163. 18 U.S.C. § 3142(g)(2) (2012). Under the Act, the defendant is presumptively entitled to bail unless the court finds by clear and convincing evidence that no bail conditions will reasonably assure the defendant's appearance in court and protect the public. 18 U.S.C. § 3142(e)-(g) (2012). In making that determination, the judge must consider "the available information concerning": (1) "the nature and circumstances of the offense charged," (2) "the weight of the evidence against the person," (3) the defendant's history and characteristics, and (4) the danger to the public if the defendant were released. 18 U.S.C. § 3142(g) (2012). Some courts have declared the weight of the evidence to be "the least important of the various factors," *United States v. Hir*, 517 F.3d 1081, 1090 (9th Cir. 2008), perhaps because of the litigation difficulties it presents.

164. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

165. 18 U.S.C. § 3142(f) (2012); *see also* *United States v. Stone*, 608 F.3d 939, 948-49 (6th Cir. 2010).

166. 18 U.S.C. § 3142(f) (2012).

167. *United States v. Delker*, 757 F.2d 1390, 1396 (3d Cir. 1985) (citation omitted).

168. *Id.* at 1398.

169. Due process "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

170. Sussman, *supra* note 6, at 292; Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1126-27; Covey, *supra* note 95, at 1250.

the case far beyond what could be learned from the spare factual basis underlying most plea agreements. That factual basis is a factor in determining the voluntariness of the plea by making sure that the defendant's factual admissions constitute the crime to which he is pleading guilty.¹⁷¹ Armed with that knowledge, a judge would be in a much better position to decide if the prosecutor's case was so weak that accepting a guilty plea would be unconscionable. In that case, the judge could refuse to accept the guilty plea.¹⁷²

Additionally, it could be objected that litigating the strength of the prosecutor's case would not be easy. Prosecutors would have an incentive to exaggerate the strength of their case to force the plea. They might possess information not discoverable to the defendant that bears on the likelihood of acquittal. For example, the prosecutor may be aware that a particular law enforcement witness writes excellent reports but is nervous and impatient on the witness stand. Likewise, defense attorneys would have every incentive to downplay the prosecution's case. Although the court cannot perfectly gauge the strength of the prosecution's case, the court's supervision of this procedure is likely to yield a better estimate of the strength of the case than informal discussions between the parties.

Finally, it could be objected that considering the strength of the prosecution's case in plea bargaining would tend to defeat sentencing uniformity.¹⁷³ Suppose that persons A and B, having similar backgrounds and individual characteristics, conspire together to commit a crime. Suppose that the government has a strong case against A and a weak case against B.¹⁷⁴ Ideally, A and B would receive similar sentences to avoid "unwarranted sentence disparities."¹⁷⁵ But under my proposal, B will likely get a shorter sentence through sheer luck. This result is troubling but no worse than the status quo: nobody gets sentenced unless convicted, and convictions are easier to get when the evidence is strong.

Thus, my proposal recognizes that plea bargaining is informed by the strength of the prosecution's case. There are principled objections to this state of affairs, but the hard reality is that defendants plead guilty as a function of the strength of the case against them.¹⁷⁶ By allowing a neutral arbiter to determine the strength of the prosecution's case, my proposal would provide more

171. *McCarthy v. United States*, 394 U.S. 459, 467 (1969).

172. Rule 11 grants this discretion. FED. R. CRIM. P. 11(c); *see, e.g.*, *United States v. Kraus*, 137 F.3d 447, 453 (7th Cir. 1998); *see also* Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 *CARDOZO L. REV.* 2295, 2335 (2006) ("The partial ban system relies on courts to review the bargained-for sentences, requiring them to reject exceedingly lenient bargains.").

173. Sussman, *supra* note 6, at 292-93.

174. As where evidence is suppressed due to an unlawful warrantless search in a place where B, but not A, has a reasonable expectation of privacy.

175. 18 U.S.C. § 3553(a)(6) (2012).

176. Bibas, *Plea Bargaining Outside*, *supra* note 37, at 2464.

accurate incentives for guilty pleas and encourage consistency and transparency in the plea/trial differential.

3. *Potentially Undue Coercion*

The third and last consideration in determining the plea/trial differential is whether the differential is unduly coercive to a particular defendant. Coercion is inherent to any criminal justice system, but we must ask how much and what kind of coercion is acceptable. The plea/trial differential should not unduly pressure a defendant having a defense that is reasonably likely to succeed into pleading guilty.¹⁷⁷ But the coercion inherent in the plea/trial differential may be mitigated by the advice of competent counsel and a “full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty.”¹⁷⁸ In other words, by reducing the unnecessary coercion of uncertainty, we can reduce the coercion of the plea/trial differential itself.

The motion for indicated sentences provides just that by giving the defense reliable guidance as to the likely sentencing consequences that the defendant faces. The court, having familiarized itself with the strength of the prosecution’s case, should not accept a guilty plea if there is a “hazard of an impulsive and improvident response to a seeming but unreal advantage.”¹⁷⁹ The judge should be careful to consider any exculpatory evidence and weaknesses in the prosecution’s case. If the judge sees a high chance of acquittal, she can refuse to take the plea and inform the defendant that she will not increase the sentence based solely on the fact that he elected a jury trial. Alternatively, the prosecution, in an attempt to justify an apparently weak case, may present ex parte evidence to the court that might be inadmissible at a jury trial.

Of course, there are limits on how well this procedure can monitor coercion. In a brief hearing, judges will not necessarily be able to determine if a defendant is innocent. And even if they do, they may not want to refuse a plea agreement where prosecutors are willing to supersede the indictment to add charges carrying heavy mandatory minimum sentences. Still, my proposal would somewhat improve the ability of judges to determine whether a plea is unfairly coerced.

Some judges might be uncomfortable putting on the record their analysis of the above-listed factors, particularly factors such as caseload pressure, for which the accused is seemingly not responsible. Such judges seek to avoid violating the doctrine of unconstitutional conditions, which prohibits them from

177. See *Brady v. United States*, 397 U.S. 742 (1969) (holding that plea bargaining is constitutional as long as it’s not coercive); see also Lucian E. Dervan, *Bargained Justice: Plea-Bargaining’s Innocence Problem and the Brady Safety-Valve*, 51 UTAH L. REV. (2012).

178. *Brady*, 397 U.S. at 754-55.

179. *Id.* at 754.

unduly burdening the constitutional right to a jury trial.¹⁸⁰ As an alternative, such judges could explicitly rely on the acceptance of responsibility reduction by saying something along these lines: “Based on the information before me at this time, it appears that if the defendant goes to jury trial, he will not merit a two-point reduction in his offense level for acceptance of responsibility, nor would the government likely make a motion for an additional point off under those circumstances. I have no intention of imposing a post-trial sentence in this case any greater than would be occasioned by the loss of acceptance of responsibility.” That advisement would give defendants the important assurance that they did not likely face the statutory maximum sentence post-trial. This approach has the obvious benefit of simplicity and would be consistent with the uniform national acceptance of responsibility reduction. Although this alternative is a one-size-fits-all approach and is not ideal, it is an option for judges uncomfortable with putting too much of their analysis on the record.

My proposal gives judges the flexibility to set case-specific plea/trial differentials that take into account their caseload, the strength of the prosecution’s case, the resources needed to try the case, and whether the differential is unduly coercive. Judges already consider caseload pressure in formulating post-trial sentences. By litigating the strength of the prosecution’s case, the defense will be less susceptible to prosecutorial bluffing, the defendant will get a second opinion—this one from the judge—as to his likelihood of conviction at trial, and the judge will be in a much better position to judge whether a plea offer is unduly coercive. A final advantage to this explicit and systematic consideration of the plea/trial differential is that it would foster better appellate review of the reasonableness of post-trial sentences.¹⁸¹ Of course, judges who do not intend to increase defendants’ sentences simply because those defendants chose to take their case to trial can simply advise their defendants of this fact at arraignment.

C. *When a Court May Exceed Its Own Indicated Sentences*

We next consider whether and under what circumstances a court may sentence the defendant in excess of the previously announced indicated sentences. Ideally, defendants would have an accurate pre-trial signal from the court that they could rely on, enforceable as a contract.¹⁸² But experience teaches that, after the court issues its indicated sentences but before sentencing, new information that should bear on the sentence often comes to light. For this

180. *United States v. Jackson*, 390 U.S. 570 (1968).

181. *See* Alschuler, *The Trial Judge’s Role*, *supra* note 4, at 1132.

182. *See* *Santobello v. New York*, 404 U.S. 257 (1971). *Santobello* is discussed in Alschuler, *The Trial Judge’s Role*, *supra* note 4, at 1068 n.33.

reason, the court cannot be contractually bound to its indicated sentences in the same way the prosecutor would be bound to the terms of a plea agreement.¹⁸³

My proposal depends on the parties sharing the relevant sentencing information with the court when the motion for indicated sentences is litigated. This is because if a court must consider making post-trial adjustments to its indicated plea/trial differential, the same set of factors that was useful *ex ante* is not sensible to consider *ex post*. For example, it makes little sense to try to readjust the defendant's likelihood of acquittal (e.g., based on the actual performance of trial witnesses) following a conviction. Certain factors that are difficult to predict *ex ante* probably should not affect the sentence post trial, even if the judge's prediction is incorrect. These include that the trial takes longer than the parties expected, or that the parties' cases turn out to be stronger or weaker than predicted (such as where witnesses testify very poorly). Getting a reasonable *ex ante* assessment of the appropriate sentence is paramount because doing so will benefit nearly all defendants. In contrast, waiting until post-trial to consider the sentence is logically appealing but ill-suited to our system of guilty pleas.

However, new information may come to light during the litigation, especially if the parties conduct additional investigation as they prepare for trial. The court may need to consider this information at sentencing. Furthermore, it makes sense to accommodate post-trial adjustments to the estimated plea/trial differential based on the defendant's conduct after the motion for indicated sentences. For example, the defendant might perjure himself on the witness stand or otherwise obstruct justice, as by threatening witnesses or destroying evidence.¹⁸⁴ The trial may consume inordinate resources due to the defendant's disruptive or dilatory conduct or because of his attorney's excessive zeal.¹⁸⁵ Alternatively, a crime victim might suffer unusual trauma by testifying.¹⁸⁶ And vivid, in-person trial testimony may unexpectedly shed new light on the seriousness of the crime.

The court's indicated sentences are fact-specific determinations that should be reviewed on appeal for abuse of discretion. That deferential standard would provide defendants sufficient protection from detrimental reliance; judges already have a strong incentive not to exceed their indicated sentences without good justification because in so doing, they might deter guilty pleas in other cases before them.¹⁸⁷ In contrast, overly strict appellate review might increase

183. *See, e.g.*, *United States v. Gonzalez-Melchor*, 648 F.3d 959, 963 (9th Cir. 2011).

184. Under the advisory Sentencing Guidelines, such conduct can dramatically increase the sentence, because a defendant who qualifies for obstruction of justice is usually ineligible for acceptance of responsibility. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.2 (2012) (setting out two-point enhancement for obstruction of justice); *id.* § 3E1.1 cmt. n.4 (2012) (mandating that there be no acceptance of responsibility reduction if defendant obstructs justice).

185. FISHER, *supra* note 14, at 179.

186. *Id.*

187. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1094-95 n.111.

an already existing incentive to preserve greater flexibility at sentencing by offering too large plea/trial differentials. Ultimately, judges will have to determine the differential carefully and thoroughly, keeping in mind their ethical duty to give defendants accurate guidance in sentencing.

Where the defendant pleads guilty, there may still be circumstances in which exceeding the indicated sentence on a plea could be justified. For example, the defendant's own misconduct following the motion for indicated sentences might justify such an increase, but ordinarily the defendant should be afforded the opportunity to withdraw his plea without penalty.¹⁸⁸

In summary, a court could justifiably exceed its indicated plea/trial differential where new information came to light after the announcement of the plea/trial differential that could not reasonably have been known at the time of the motion (except in those circumstances detailed above), or when the defendant's conduct following the motion warranted it. Were it not so, the parties might have an incentive to hold back information from the court during the motion for indicated sentences.

D. *Considering Ex Parte Information*

The proposed procedure provides for the court to consider *ex parte* submissions in determining the indicated sentences. The court would not be able to rely upon such information at sentencing unless the opposing party had an opportunity to rebut the submissions.

The court must be able to consider information that the parties, for good reason, would be unwilling to disclose to each other prior to an adjudication of guilt. The defense might not otherwise reveal the full circumstances of the crime. Such information could tend to simultaneously establish and mitigate the defendant's guilt but could also give the prosecution ideas for further pre-trial investigation to shore up its case. Likewise, the prosecution would not want to make disclosures to the defense that might risk compromising ongoing investigations or endangering witnesses. But an *ex parte* procedure puts the relevant information before the court, either in the form of affidavits or even *ex parte* testimony.

Any information that the parties submit *ex parte* should be considered by the court at sentencing only if the other party has had a chance to respond to it. If the other party does not get that chance, the court may have to allow the defendant to withdraw his guilty plea or even void the plea due to fraud by the prosecution.

188. *See, e.g.*, CAL. PENAL CODE § 1192.5 (1994).

E. *No Need for the Judge to Recuse If the Defendant Goes to Trial*

In the rare case where the defendant rejects the plea deal and elects a jury trial,¹⁸⁹ some commentators have argued that the trial judge should recuse.¹⁹⁰ That judge, having gone to the trouble of issuing indicated sentences, would have arguably become personally invested in the case and impatient with the defendant's protestations of innocence and rejection of the court's offer. Such a judge may find it difficult to preside dispassionately over the trial.¹⁹¹ This concern is overblown because the information that a judge learns during a motion for indicated sentences is no different from other prejudicial information that the court inevitably learns without the need for recusal. Furthermore, judges routinely make other kinds of rulings that the parties dislike. Neither those rulings nor the parties' reactions to them are generally considered to cause the judge to become so emotionally invested that recusal is required.

Defendants have a due process right to a neutral and detached judge.¹⁹² Thus, a judge must recuse herself for actual bias or prejudice.¹⁹³ A judge must also disqualify herself where she has "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."¹⁹⁴ The right to a neutral and detached judge is so important that the law and judicial ethics provide for recusal where the judge's "impartiality might reasonably be questioned,"¹⁹⁵ even if no actual bias exists. This perception of fairness is central to judicial ethics because the accused and the public must perceive judges to be impartial if the justice system is to have democratic legitimacy.¹⁹⁶

Whether the judge's impartiality might *reasonably* be questioned is the heart of the matter. A "reasonable person" is an objective, thoughtful,

189. See, e.g., Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1109.

190. See *id.* at 1111; Sussman, *supra* note 6, at 305-06.

191. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1111; Sussman, *supra* note 6, at 305-06.

192. *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972).

193. 28 U.S.C. § 144 (2012); see also CODE OF CONDUCT FOR U.S. JUDGES, Canon 3C(1)(a) (effective July 1, 2009).

194. 28 U.S.C. § 455(b)(1) (2012).

195. 28 U.S.C. § 455(a) (2012); MODEL CODE OF JUD. CONDUCT r. 2.11 (2010) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."); see also CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C(1) (2009).

196. CHARLES GARDNER GEYH, FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 1 (Kris Markarian ed., 2d ed. 2010) [hereinafter GEYH]. Judges must therefore act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and to avoid impropriety and the appearance of impropriety in all activities" (citing CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 2A); see also Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191 (2012); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L. J. 127, 156-58 (2011).

disinterested observer who knows all the surrounding circumstances.¹⁹⁷ Such an observer would expect a judge to be able to hear information unfavorable to a defendant without losing impartiality. A well-informed observer to the criminal justice system would realize that judges often learn of information that reflects unfavorably on the defendant.¹⁹⁸

Furthermore, judges cannot ordinarily be considered biased, such that they must recuse themselves, based on what they learn about a case during the course of the proceedings.¹⁹⁹ For example, experienced judges know that most defendants are guilty but are still able to presume that each defendant is innocent. Likewise, judges assume that a defendant who goes to trial has rejected the prosecution's plea offer.²⁰⁰ Indeed, *Frye* suggests that this rejection be put on the record.²⁰¹ Other prejudicial information that judges learn during the case comes from the indictment, bail motions and hearings, motions in limine under Federal Rules of Evidence 403 and 404(b), evidence that is probative of the defendant's guilt that is suppressed for Fourth or Fifth Amendment violations, a pre-plea presentence report,²⁰² and proffered trial evidence that the judge excludes as irrelevant or unduly prejudicial.²⁰³ Indeed, in the civil context, judges routinely provide informal guidance in mid-trial settlement negotiations without being thought incapable of handling subsequent phases.

For practical reasons, automatic recusal is undesirable, though recusal would still be appropriate in some cases.²⁰⁴ Reassignment to a new judge causes duplication of work as that judge gets up to speed on the case. Reassignment also encourages forum-shopping: defendants might refuse the court's offer in hopes of having reassignment to a more favorable judge.²⁰⁵ Recusal is even less appropriate where, as with my proposal, the defendant has

197. GEYH, *supra* note 196, at 18.

198. *Id.* at 19.

199. This is called the "extrajudicial source doctrine." *See id.* at 30-31. They would not need to recuse unless they "display[ed] a clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

200. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1108-11.

201. *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012).

202. A judge who sees a pre-plea presentence report and then presides over the trial would not normally be required to recuse. FED. R. CRIM. P. 32 advisory committee notes to 1974 amendment; *see Webster v. United States*, 330 F. Supp. 1080 (E.D. Va. 1971).

203. The civil context is also analogous where judges mediate settlement negotiations.

204. Although the Model Code of Judicial Conduct generally permits judges to encourage the lawyers to settle a matter, the comments warn that such participation can affect the judge's objectivity and appearance of objectivity and may warrant disqualification. MODEL CODE OF JUDICIAL CONDUCT r. 2.6(b) & cmt. 3.

205. Alschuler acknowledges these problems, but still recommends that the judge recuse if the defendant goes to trial. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1111-12.

moved for indicated sentences and therefore supplied the judge with allegedly biasing information.²⁰⁶

In summary, in the rare case that goes to trial, there is no need for judges to recuse simply because the defendants “rejected” the court’s indicated sentence on a plea. Judges frequently learn of prejudicial information during the litigation without holding it against defendants, and judges routinely make tough decisions in cases without become overly emotionally invested. They can be trusted to do the same in this context.

IV. IMPLICATIONS OF MY PROPOSAL

The most important implication of my proposal is that it would let judges judge. It would empower them to preside over litigation of meaningful sentencing issues when that litigation was most helpful. This would improve the adversary system in the context of plea bargaining. Furthermore, it would enhance the dignity of the court by letting judges influence the parameters of the parties’ plea discussions. In doing so, judges would not encourage guilty pleas or participate in the actual plea discussions.

Several other advantages flow from involving the court in the plea bargaining process. Defendants would benefit because the procedure would help guide their attorneys in investigating the case and presenting it to the court and the prosecution. The parties could more accurately determine likely sentencing outcomes, leading to better negotiated resolutions, and defendants would be less likely to plead guilty based on their guess of how harsh their post-trial sentence might be. Guilty pleas would be more knowing and voluntary as a result.

The proposal also would encourage prosecutors to act not merely as advocates for a case but as ministers of justice. Litigating a motion for indicated sentences, including the pre-plea presentence report, will assist prosecutors in formulating just plea offers and will hold prosecutors more publicly accountable for those offers. Finally, the public hearing on the motion for indicated sentences would give crime victims an opportunity to confer with prosecutors about the appropriate disposition of the case before the plea bargain was finalized.

A. *Let Judges Judge*

My proposal gives judges a significant role in framing the parties’ plea discussions. Judges are institutionally more neutral and less politically responsive than prosecutors. They take sentencing one case at a time instead of thinking in terms of law enforcement priorities and policies. Their enhanced role in the plea process could help guard against coercive plea bargains. Their

206. See GEYH, *supra* note 196, at § 4.05A (“To require recusal, bias or prejudice normally must be rooted in an extrajudicial source.”).

enhanced role also would enhance truth-seeking and consistency in plea bargaining.

In the federal system, United States Attorneys are presidential appointees. The work that they and their Assistants do is inherently political, although they have a strong ethic for merit-based promotions and doing justice the best they can. But the public often wants harsh, retributive justice from its agents. Prosecutors thus perform a difficult balancing act. They are ministers of justice, but they work in a system that is both political and adversarial; they cannot help but have their temperament shaped by their adversarial duties.²⁰⁷ Prosecutors, to secure convictions and avoid losing trials, are tempted to take the strongest cases to trial and plead out the weakest ones. The problem with this is that the weakest cases may be the most deserving of a trial, and to secure a plea in those cases, prosecutors might increase the plea/trial differential to coercive levels.

In contrast, federal judges with life tenure are not accountable to voters for securing convictions and long sentences. Article III judges thus are better able to consider other purposes of the criminal justice system, such as rehabilitation. These judges tend to be well-seasoned lawyers and jurists with more experience than prosecutors,²⁰⁸ and their ethics center on impartiality. By weighing in on appropriate sentencing outcomes early in the case, judges could relieve prosecutors of some political pressure.

By presiding over a full workup of cases on the record before the guilty plea, judges can help frame plea discussions according to public ends and help ensure that plea bargaining is more than a private agreement between prosecutors and defense attorneys. A formal adversarial proceeding conducted on the record “is more likely to foster formality and regularity, the use of adversary techniques for marshaling relevant information, and the introduction of procedural safeguards” than informal bargaining between prosecutors and defense attorneys.²⁰⁹ This proceeding is more likely to consistently take into account all of the critical statutory sentencing factors, including the criminal conduct;²¹⁰ the defendant’s history and characteristics;²¹¹ alternatives to incarceration²¹² and how they might achieve the purposes of the criminal law; the United States Sentencing Guidelines;²¹³ and “the need to avoid

207. Alschuler, *The Trial Judge’s Role*, *supra* note 4, at 1065.

208. Dahl, *supra* note 128, at 29 (citing Stanley Sporkin & Asa Hutchinson, Debate, *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279, 1288 (1999)); *see also* Alschuler, *The Trial Judge’s Role*, *supra* note 4, at 1129-31.

209. Alschuler, *The Trial Judge’s Role*, *supra* note 4, at 1129-32; *see also* Sussman, *supra* note 6, at 303.

210. 18 U.S.C. § 3553(a)(1) (2012).

211. *Id.*

212. 18 U.S.C. § 3553(a)(3) (2012).

213. 18 U.S.C. § 3553(a)(4)-(5) (2012); *see also* United States v. Pimentel, 932 F.2d 1029 (2d Cir. 1991) (encouraging prosecutors to inform defendants of likely sentencing guideline ranges, and judges to do the same, before the guilty plea).

unwarranted sentence disparities”²¹⁴ and restitution²¹⁵—formal litigation, rather than informal discussions. This is a complicated determination. The parties will arrive at better and more uniform plea bargains when a judge conducts a formal and public adversarial proceeding to frame the parties’ subsequent plea discussions with concrete information about likely sentencing outcomes. By giving judges a meaningful, neutral role in a process to which they have largely been excluded, my proposal enhances the dignity of the court.

My proposal encourages judges to independently evaluate the parties’ plea bargain. The first canon of judicial ethics requires judges to “uphold and promote the independence, integrity, and impartiality of the judiciary.”²¹⁶ This canon applies with special force in the plea bargaining context.²¹⁷ Likewise, the Supreme Court, by making the Sentencing Guidelines advisory, has re-enthroned judicial independence in sentencing. Finally, Rule 11 itself evinces a policy of judicial independence in evaluating the waivers, voluntariness, and factual basis of the plea.²¹⁸ Under the current plea bargaining regime, the court often pegs its thinking to the deal that the parties have already struck. In contrast, under my proposal, the court will consider the pre-plea presentence report, conduct an adversary hearing, and perform its own sentencing analysis of the case.

This expanded role of the judge in helping to set the stage for future plea bargaining would push back somewhat against the American tradition of “adversarial legalism.”²¹⁹ In our system, the parties, not the judge, direct the proceedings.²²⁰ This expresses an American ideal of populist, grassroots, locally democratic criminal justice.²²¹ In contrast, judges figure more prominently in continental criminal justice systems. For example, in Germany, professional judges dominate the investigation, pre-trial procedures, and the trial itself.²²² This serves the ideals of professionalism and consistency because an experienced and well-trained cadre of judges directs and decides the cases.²²³

American-style plea bargaining fits squarely into the tradition of adversarial legalism, but there are reasons to question this regime. First, our system of pleas is essentially an administrative (not trial-based) criminal justice

214. 18 U.S.C. § 3553(a)(6) (2012).

215. 18 U.S.C. § 3553(a)(7) (2012).

216. MODEL CODE OF JUD. CONDUCT r. 1.2 (2010).

217. See AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, standard 14-3.3(b)(ii) (3d ed. 1999) (mandating that the judge give proposed plea agreement “due consideration” but reach an “independent decision” regarding charging and sentencing decisions).

218. FED. R. CRIM. P. 11.

219. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

220. *Id.* at 11.

221. *Id.* at 71.

222. *Id.* at 11.

223. *Id.* at 71.

system. The Department of Justice and its United States Attorneys direct this system; the courts do not.²²⁴ The cases are decided not by judges and juries but by prosecutors who bargain with the defense, subject to the court's approval. This administrative system is characterized by informal, private negotiations between the parties—not structured, public proceedings that foster thoroughness, consistent application of law, and accountability.

The parties to those informal negotiations cannot easily administer justice through this private administrative regime. As set forth above, prosecutors must respond to political pressures to which judges are immune. Defense attorneys do not always have the resources to effectively contend with prosecutors. Moreover, the prosecution's head start in the investigation and control over the discovery put the defense at a disadvantage.²²⁵ The public is largely excluded from the plea bargaining process. In contrast, judges are suited by training and temperament to preside over a public, adversarial process that should characterize our criminal justice system.

My proposal calls for federal judges to direct a procedure that, without participating in or even encouraging plea discussions, would frame and intelligently inform them. The judge would order the preparation of a pre-plea presentence report, order briefing on the motion, conduct a hearing, make preliminary findings as to contested issues (such as guideline calculations), satisfy herself that the defendant is in fact guilty, and indicate the plea/trial differential. This proposal imports some elements of the continental system of bureaucratic criminal justice to enhance truth-seeking and consistency in our own system of pleas. However, the proposed procedure is still firmly planted in adversarial legalism. The parties would still engage in private plea discussions without judicial participation and control the direction of the litigation.

An added benefit to my proposed procedure is that by actively involving judges in the proceedings, the dignity of the court would be enhanced. Currently, most defendants have little interaction with the judge before sentencing. After arraignment, but before the guilty plea, they typically appear in court but a few times, as at status conferences and perhaps a suppression motion. They understand that the prosecutor is largely in charge of their case.²²⁶ In contrast, the defendant (and the public) might have a more positive view of judges if those judges played an active role in developing a record of the case before the guilty plea. Judges then could dispassionately give the accused concrete information about his sentencing options without coercion and without losing their own objectivity. The alternative is for judges to sit idly by while defendants waive their constitutional rights under a plea bargaining procedure that often lacks true adversarial combat and results in guilty pleas that are not fully informed. While the status quo does indeed preserve the

224. Lynch, *supra* note 35, at 2123-25.

225. See *supra* Part III.C.

226. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1066.

impartiality of the court, the tradeoff is too little judicial participation in a system of pleas that is largely unregulated.

B. *Consistent with Rule 11's Prohibition on Judicial Participation in Plea Discussions*

Currently, Rule 11 does not allow the court to participate in plea discussions,²²⁷ and courts have interpreted this prohibition broadly.²²⁸ Ideally, the Federal Rules of Criminal Procedure would be amended to clarify that judges may participate in my indicated motion procedure, without directly participating in the parties' plea discussions. But even without that amendment, this proposal does not contravene Rule 11 or the principles of judicial ethics. Although several appellate cases interpret the prohibition strictly, newer Supreme Court precedents require a reexamination of these precedents. Thus, my proposal gives force to a key purpose of Rule 11: to ensure that those who waive their constitutional rights in exchange for perceived sentencing benefits do so knowingly and voluntarily.

By its own terms, Rule 11 does not prohibit pre-plea presentence reports or hearings to provide indicated sentences. Instead, it requires that plea discussions be conducted without the court's participation.²²⁹ Several courts have interpreted this prohibition strictly.²³⁰ But those decisions are wrong to the extent that they prevent judges from telling defendants the likely consequences of their guilty plea. In fact, the Supreme Court has recently strengthened this principle. In *Padilla v. Kentucky*, the Supreme Court held that defense counsel was ineffective in failing to advise the defendant that a guilty plea carried the risk of deportation.²³¹ Just as defendants should not plead guilty without correct legal advice about the risk of deportation, they should not plead guilty without correct legal advice concerning their likely sentence.

A good example of a decision that takes the Rule 11 prohibition too far is *United States v. Werker*,²³² discussed *supra* in Part II.B. There, the Second Circuit stated that "the indication of sentence inevitably invites alterations and clarifications of the proposed sentence through direct negotiations with the judge." But this need not be so—the court can issue indicated sentences based on the charges before it without rendering an advisory opinion.²³³ The *Werker*

227. FED. R. CRIM. P. 11(c)(1).

228. *See supra* note 68.

229. FED. R. CRIM. P. 11(c)(1); *see also* MODEL CODE OF JUD. CONDUCT r. 2.6(B) (2010) ("A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute, but shall not act in a manner that coerces any party into settlement.").

230. *United States v. Davila*, 133 S. Ct. 2139, 2146 (2013) (citing Fed. R. Crim. P. 11 advisory committee notes to 1974 amendment).

231. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

232. 535 F.2d 198, 203 (2d Cir. 1976).

233. Indicated sentences are not advisory opinions. First, they are preliminary orders to be revisited by the same judge at sentencing. Second, they do not meet either of the

court argued that where the parties only come to the court because they reached an impasse in the negotiations, “the judge’s response to the inquiry becomes the essential element in the ensuing discussions.”²³⁴ But providing valuable information to the parties in the context of their impending plea negotiations is not the same as participating in their plea negotiations. Providing timely and relevant information just helps ensure that whatever deal the parties ultimately strike is well-founded on the defendant’s likely sentencing exposure.

Rule 11 already requires judges to be involved in the plea bargaining process in ways similar to those rejected by the *Werker* court. For example, judges may use their discretion to reject a plea bargain.²³⁵ In the rare case in which they do so, they must put their reasons on the record.²³⁶ That explanation, of course, will likely influence future negotiations between the parties.²³⁷ Nevertheless, the Seventh Circuit has sensibly held that such explanations do not constitute judicial participation in plea discussions.²³⁸

Likewise, whereas the *Werker* court rejected advisory sentences, Rule 11 already requires the court to advise defendants of “any maximum possible penalty, including imprisonment, fine, and term of supervised release”²³⁹ and any mandatory minimum penalty.²⁴⁰ Advising the defendant of the likely, as opposed to maximum, sentencing consequences of a guilty plea is conceptually similar to advisements that Rule 11 already requires. Such an announcement would not involve the court at all in any actual plea discussions. Furthermore, advising the defendant of maximum penalties is itself somewhat coercive, a powerful reminder of the risk of not pleading guilty. In contrast, advising the defendant of a likely sentence below the statutory maximum is actually less coercive than advising of the statutory maximum without clarifying that such a

traditional criteria for advisory opinions: there is an actual dispute between the litigants; and there is a substantial likelihood that the indicated sentences will affect the defendant’s decision of whether to plead guilty. *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 53-60 (3d ed. 2006).

234. *Werker*, 535 F.2d at 203.

235. FED. R. CRIM. P. 11(c).

236. *See, e.g.*, *United States v. Kraus*, 137 F.3d 447, 453 (7th Cir. 1998).

237. *Id.*

238. *Id.*

239. FED. R. CRIM. P. 11(b)(1)(H).

240. FED. R. CRIM. P. 11(b)(1)(I). Interestingly, before 1974, the Rule was broader and required an advisement of the “consequences of the plea.” FED. R. CRIM. P. 11 advisory committee notes to 1974 amendment. That former advisement presumably included not only statutory maxima and mandatory minima, but also collateral consequences (such as how the conviction might affect parole eligibility). It appears that the intent of the amendment narrowing the advisement was to make it more feasible for the court to give reliable advisements that could be determined from the face of the statutes. However, the pendulum is swinging back the other way—courts often advise defendants of other consequences to their felony guilty pleas, like deportation, *see Padilla v. Kentucky*, 559 U.S. 356 (2010), the denial of federal welfare benefits, 21 U.S.C. § 862 (2012), and ineligibility for parole (which was abolished in the federal system in 1984).

sentence is highly unlikely. Thus, Rule 11's flat prohibition should not be interpreted too strictly, and *Werker* should be overruled.

Even if Rule 11 were to prohibit the issuing of indicated sentences, under my proposal, the defendant invokes the procedure and therefore forfeits any protection from the prohibition to the extent that the procedure runs afoul of the prohibition at all. And even if that right were not forfeited, any violation of it would be harmless error.²⁴¹

It should be remembered that Rule 11 is a prophylactic, not a constitutional, rule.²⁴² Its purposes are, first, to "assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary" and, second, "to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination."²⁴³ An overly strict reading of Rule 11's prohibition on judicial participation in plea discussions has taken the focus away from encouraging and documenting voluntary pleas. A plea is only voluntary where the defendant is "fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel."²⁴⁴ Such a plea cannot stand if induced by threats or misrepresentations.²⁴⁵ The prohibition as interpreted has unnecessarily deterred judges from any involvement in the plea bargaining process. This not only has allowed plea bargaining without the benefits of an adversarial procedure to inform it, but also has resulted in pleas that are *less* voluntary because the misleading threat of a maximum possible sentence is the only sentencing guidance they get from the judge before they reluctantly plea bargain with the prosecutor.

Rule 11's prohibition and the interpreting case law, like *Werker*, have discouraged judges from openly participating in the plea bargaining process. But, the prohibition has not eliminated judges' influence in plea bargaining. Many judges award very high sentences to defendants who lose at trial; the parties know this, and the prosecution uses this to its advantage in plea negotiations.²⁴⁶ A reputation for draconian sentencing—in which the judge maintains a menacing silence regarding plea negotiations—is more coercive than the light but constructive judicial involvement proposed in *Werker*.

241. The denial of a Rule 11 right is reviewed for plain or harmless error. FED. R. CRIM. P. 11(h); *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013).

242. *Davila*, 133 S. Ct. at 2142; *McCarthy v. United States*, 394 U.S. 459, 463-64 (1969).

243. *McCarthy*, 394 U.S. at 465.

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

245. *Id.*

246. *Ulmer*, *supra* note 20, at 2; *see also* *People v. Earegood*, 162 N.W.2d 802, 809 (Mich. Ct. App. 1968).

Likewise, if the judge has a reputation for lenient sentencing after trial, the parties take that fact into account as well.²⁴⁷

Furthermore, there are more flexible ways to regulate judicial plea bargaining besides Rule 11's prophylactic rule against any judicial participation in plea discussions. For example, the American Bar Association's Model Code of Judicial Conduct states, "A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement."²⁴⁸ This standard strikes the right balance between letting judges participate in the plea bargaining process and guarding against judicial coercion. Recent Supreme Court cases are consistent with this approach. As discussed in Part II.B above, *Lafler* and *Frye* already require judges to become involved in the plea bargaining process by making a pre-trial record of defense counsel's effective plea bargaining assistance. And *Davila* makes clear that Rule 11 violations will be reviewed only for plain or harmless error. My proposal is a small step indeed toward putting more of the plea bargaining process on the record.

C. *Provides Defendants Greater Certainty and Better Assistance of Counsel*

My proposal will eliminate some sentencing uncertainty. In *Santobello v. New York*, the Supreme Court held that the plea bargain was enforceable against the prosecution like any ordinary contract.²⁴⁹ My proposal is consistent with a consumer protection view of plea bargaining contracts because it seeks to make the consequences of the plea more clear to the defendant, just as consumer protection laws help people to understand common but complicated transactions like buying a used car.²⁵⁰

More certainty would be especially helpful to defendants who face long maximum sentences. Those defendants may feel pressure to plead out, even though most of them would be sentenced to far below the statutory maximums, even following a jury trial. Since the judge advises the defendant of the maximum possible sentence, it is only fitting that the judge also advises the defendant of the likely sentencing outcomes.

This procedure also would help defendants when the facts of the case are relatively sympathetic, but the defendant still wishes before pleading guilty to assess how the court views those facts. If the court sees the case as the prosecutor does, then the defendant is out of luck. But if the court takes a more

247. *Earegood*, 162 N.W.2d at 809.

248. MODEL CODE OF JUD. CONDUCT r. 2.6(B) (2010). Before judges participate in settlement discussions, comments to that Rule ask judges to consider several factors, such as whether the parties have requested such participation, the sophistication of the parties, whether the case will be tried to a judge or jury, and whether the matter is civil or criminal. *Id.* at cmt. 2.

249. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

250. *Bibas, Regulating*, *supra* note 3.

favorable view of the facts, and the indicated sentences so reflect, the defendant would gain leverage in subsequent plea negotiations. Without the motion for indicated sentences, that same defendant might have pleaded guilty on less favorable terms and the court might have rubber-stamped the plea agreement.

Likewise, in cases with unusual facts or charges, the parties have a harder time predicting how the court will sentence. Certain statutes, like marriage fraud,²⁵¹ are seldom used. Certain defendants, like those who are mentally ill, may seem more sympathetic and simultaneously more likely to recidivate. In those cases, courts may be even less inclined than usual to follow the advisory Sentencing Guidelines, and the parties, especially the defendant, would benefit from indicated sentences.

Second, although there is no substitute for adequately skilled and resourced defense counsel, my proposal aids in the effective assistance of counsel at the plea bargaining stage by helping defense counsel develop a record of sentencing issues and informing defense counsel and the defendant directly of the likely sentencing outcomes. In *Missouri v. Frye*, the Supreme Court addressed how to ensure against late, frivolous, or fabricated claims that defense counsel failed to convey plea offers to the defendant. The *Frye* court suggested that prosecutors make written plea offers and that those offers go on the record.²⁵² My proposal strengthens and works in harmony with the *Frye* regime because it causes the likely sentencing outcomes to be put on the record. The more plea bargaining is put on the record, the less reviewing courts will encounter situations in which defendants allege that an offer was not conveyed or that they did not understand the potential sentencing consequences they faced. Additionally, the *Lafler* court's observation that "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance" implies that counsel could potentially be ineffective for failing to correctly predict the likelihood of conviction.²⁵³

Another reason why defense counsel might favor my proposal is that the motion procedure and indicated rulings would help to formally structure the plea negotiations. This would focus the parties' attention on key issues, holding their feet to the fire with judicially imposed deadlines and demanding from both parties a more systematic consideration and presentation of the § 3553(a) sentencing factors. Finally, indicated sentences may also help ameliorate the low trust that defendants have toward appointed counsel because if the judge weighs in on likely sentencing consequences, defendants will not have to place so much trust in their attorneys.²⁵⁴ In short, my proposal defines a formal process to help all defense attorneys provide good representation in plea

251. 8 U.S.C. § 1325 (2012).

252. *Missouri v. Frye*, 132 S. Ct. 1399, 1408-09 (2012); see also *supra* Part II.B.

253. *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012); Josh Bowers, *Lafler, Frye, and the Subtle Art of Winning by Losing*, 25 FED. SENT'G REP. 126, 127 (2012).

254. *Bibas, Plea Bargaining Outside*, *supra* note 37, at 2478.

bargaining and to give defendants more certainty about the potential sentence they face.

D. *Benefits to Prosecutors and Crime Victims*

My proposal benefits other players in the system. It encourages prosecutors to act as ministers of justice instead of simply an advocate for convictions and long terms of imprisonment.²⁵⁵ Prosecutors who have to engage in the litigation required for a presentence report will be better able to make plea offers based on the whole context of the case. Also, prosecutors inclined to lenience may find some political cover in my proposed procedure because the court and the probation officer generally would have already made their views known before plea discussions began in earnest.²⁵⁶

My proposal also would incentivize prosecutors not to strong-arm defendants into pleading guilty by threatening to add more serious charges to the indictment.²⁵⁷ After the court goes to the trouble of deciding a motion for indicated sentences, the prosecutor would risk the court's ire by adding new charges and effectively starting the case over. Following arraignment, many federal cases lie virtually dormant from a litigation standpoint until the guilty plea. Thus, judges are indifferent to prosecutors' superseding the indictment. In contrast, my proposal creates some inertia around the original charges by moving a portion of the sentencing litigation to the beginning of the case.

If prosecutors are involved in crafting the presentence reports before plea discussions begin, they will be better able to determine a just sentence.²⁵⁸ Whereas a typical plea offer might currently be based primarily on the seriousness of the defendant's crime and criminal history, the prosecutor's plea offer should take into account all the purposes of sentencing: punishment, incapacitation, deterrence, and rehabilitation, including how the incarceration will affect the defendant's family and community and the future collateral effects of incarceration upon the defendant after his sentence is served. Prosecutors will more systematically consider all these purposes if, early in the case, they have to think through formal and informal objections to the pre-plea presentence report early in the proceedings and have the opportunity to discuss the matter in open court with the judge and the defense attorney.²⁵⁹

255. See MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

256. Of course, prosecutors who want to play hardball will still be able to supersede the indictment with stiffer charges. I deal with this objection below.

257. This practice is permitted under *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

258. *Id.*; Gabriel J. Chin, *Taking Plea Bargaining Seriously: Reforming Pre-Sentence Reports After Padilla v. Kentucky*, 31 ST. LOUIS U. PUB. L. REV. 61 (2011) (arguing that pre-plea presentence reports would make waivers of rights in guilty pleas more knowing and voluntary).

259. See Sussman, *supra* note 6, at 290.

On a systemic level, there are good reasons for the Department of Justice to favor my proposal. By loosening prosecutors' grip on the system, it would help prosecutors to better exercise their discretion and thereby enhance the Department's reputation for seeking justice, not just swift convictions.

Furthermore, my proposal also could benefit crime victims by giving them a more significant role in the plea bargaining process. Crime victims already have "[t]he reasonable right to confer with" federal prosecutors about plea bargaining and sentencing in their case.²⁶⁰ However, this right to confer does not at all limit prosecutors' discretion to dispose of cases as they see fit.²⁶¹ Victims also have a right to be "reasonably heard" in court regarding the defendant's guilty plea and sentencing.²⁶² A public hearing about potential sentencing consequences in the case would facilitate victims conferring with prosecutors before plea deals were struck and make it harder for prosecutors to plead out cases too cheaply. However, if the defense anticipates damaging victim testimony at a motion for indicated sentences, it may elect not to move for indicated sentences at all.

E. *Possible Objections*

Several objections could be made to my proposal. I address them below.

1. *Litigation Costs*

First, adding a pre-trial motion procedure in every felony case would impose additional litigation costs on the system. This criticism is partly blunted by the fact that much of the work of the motion for indicated sentences, such as the preparation of the presentence report and holding a quasi-sentencing hearing, would have to be done anyway during the sentencing phase of the case. To the extent that the work would need to be done later in the case anyway, doing it earlier in the case would not put a drag on the system; indeed, doing that same work early in the case could greatly improve the administration of criminal justice.

260. 18 U.S.C. § 3771(a)(5) (2012) (codifying the right to confer). "Prosecutors should make reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations." OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ235121, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 41 (2012). *But see In re W.R. Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005) ("Nothing in [Crime Victims' Rights Act] requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.") (cited in CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE REPORT, PUB. NO. RL33679, CRIME VICTIMS' RIGHTS ACT: A SUMMARY AND LEGAL ANALYSIS OF 18 U.S.C. 3771 (2012)).

261. 18 U.S.C. § 3771(d)(6) (2012).

262. FED. R. CRIM. P. 60(a)(3); *cf.* Crime Victims' Rights Act, 18 USC § 3771(a)(4) (2012).

Still, it is likely that a motion for indicated sentences would result in higher litigation costs. For example, the parties often enter into a plea agreement on issues that otherwise would need to be litigated at sentencing, such as disputed guideline variables or the defendant's ability to pay a fine. In a motion for indicated sentences, the defense might prefer to litigate some of those issues. This would require the district court to adjudicate some issues that the parties might otherwise have privately resolved. However, such litigation would help ensure that key issues in the case were explored, developed, and decided in a public forum, resulting in a more fair procedure and a more just outcome.²⁶³ Furthermore, my procedure could be fruitless in those cases—fewer than ten percent—that do not result in convictions.²⁶⁴ The silver lining is that this procedure might hasten the dismissal of weak, unfounded, and unwise prosecutions.

The motion for indicated sentences may be filed before the defense files a suppression motion, but for the purposes of the motion for indicated sentences, the court should assume that such a motion would be denied. The prosecution often relies on potentially suppressible evidence in plea bargaining.²⁶⁵ The parties each make their own assessments of how likely the judge is to suppress the evidence. Motions to suppress are seldom granted.²⁶⁶ Therefore, the risk is small that the court will be exposed to evidence in the indicated sentence proceedings that would ultimately be suppressed. Also, considering suppression motions at every motion for indicated sentences could raise the litigation cost of the procedure so high as to render it impractical in most cases.²⁶⁷

There may be other complicated issues that the parties do not wish to litigate. In those instances, the court could issue indicated sentences in the alternative based on the parties differing positions. For example, calculating the “loss” in a fraud case can be intricate.²⁶⁸ If the defense estimates the fraud loss to be much lower than the prosecution's estimate, they may ask the court to issue two sets of indicated sentences: one that assumes the defense estimate to be correct and another that assumes the same about the prosecutor's.

An additional cost would arise in litigating the plea/trial differential (including the strength of the government's case) because that factor obviously is not litigated at sentencing. However, the advantages of this plea/trial differential are twofold: first, it gives the parties, especially defendants, valuable information about actual sentencing consequences; second, it allows

263. Cf. Owen Fisk, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (discussing that in civil context, settlement aims to maximize the ends of private parties, while adjudication uses public resources to give force to constitutional and legal values).

264. UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT (2012), available at http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf.

265. See *United States v. Schipani*, 435 F.2d 26 (2d Cir. 1970).

266. Prudent prosecutors often spot suppression issues in advance and never charge the cases at all.

267. See Sussman, *supra* note 6, at 311.

268. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b) n.3.

the court to examine the potentially coercive effect of that plea/trial differential.²⁶⁹ And most of the litigation needed to determine the plea/trial differential would have to be done anyway in preparing the presentence report.

Thus, even though the motion for indicated sentences would probably entail somewhat higher litigation costs, these costs would be modest, especially in comparison with the gains to the system in fairness and efficiency. Furthermore, because the defendant would have to elect to file the motion, it is not anticipated that the motion would be filed in every case.

Related to this first objection is the concern that prosecutors will try to “game the system” by offering special plea deals to defendants who plead guilty without causing the prosecution and the court to go through the trouble of litigating a motion for indicated sentences. The root of that concern is that the motion for indicated sentences would be so onerous that not filing it would become another bargaining chip for the defense. And defendants who use this chip but do not like the prosecutor’s concession might go ahead and file the motion anyway to see if the judge takes a more favorable view of the case.²⁷⁰ However, because the motion would usually involve work that would need to be done at the sentencing phase, I do not believe that prosecutors would grant a substantial sentencing concession in such cases. Furthermore, although it is common practice for prosecutors to offer significant sentencing concessions for jury trial waivers, they do not always penalize defendants for filing non-frivolous pre-trial motions. Many, if not most, federal prosecutors see themselves as ministers of justice. Ideally, they would come to view the motion for indicated sentences as a sensible approach to curtailing the excesses of plea bargaining by involving the court at an earlier stage in the proceedings.

2. *Presumption of Innocence*

A second objection to my proposal is that preparing a presentence report and holding what amounts to a sentencing hearing before an adjudication of guilt contravenes the presumption of innocence.²⁷¹ This criticism is largely blunted by the fact that the defendant alone could authorize this procedure and would still be presumed innocent until he pleaded guilty or the matter were submitted to the finder of fact. A much greater countervailing concern,

269. My proposal bears some similarity to another that would tie the plea offer to the maximum post-trial sentence by a fixed percentage (e.g., if the maximum plea/trial differential is twenty percent and the plea offer is for five years, then the maximum post-trial sentence would be six years). See Covey, *supra* note 95. Both proposals are concerned with the coerciveness of the plea/trial differential, but mine allows the judge to tailor the plea/trial differential to the case at hand and does not allow the prosecutor to tie the judge’s hands at sentencing.

270. Alschuler, *The Trial Judge’s Role*, *supra* note 4, at 1102. Under Alschuler’s proposal, plea bargaining before the motion for indicated sentences would be unethical because the parties could reach an agreement before the motion procedure, rendering that procedure an empty formality. *Id.* at 1147 n.291.

271. Sussman, *supra* note 6, at 291.

addressed by my proposal, is that the plea/trial differential itself burdens the presumption of innocence because it pressures all defendants, innocent or not, to forego constitutional rights and plead guilty.²⁷²

Even though the motion for pre-plea presentence report and indicated sentences does not actually defeat the presumption of innocence, a defendant presented with the option might think that it did. Although most defendants plead guilty, many do not plan to do so at the beginning of the case. If they are not presented with the option of filing a motion for indicated sentences in the right way, they might lose confidence in the system's fairness. Thus, defense attorneys must take care in presenting this option to their clients, and the courts must give the advisements²⁷³ and conduct the motion proceeding so as to make clear that the accused truly is presumed innocent.

3. *Leaves Prosecutorial Discretion Intact*

A third objection is that by leaving prosecutorial discretion intact, this proposal would allow prosecutors to file new charges if they were not satisfied with the judge's indicated sentences. This is true. My proposal seeks to be practical, and limiting prosecutorial discretion seems politically infeasible. However, I do not believe that federal prosecutors would often file new charges following the motion for indicated sentences, unless they wanted to leverage a plea using a mandatory minimum charge.

Primarily, new charges would not affect the sentence in most cases. Federal prosecutors are already supposed to charge "the most serious, readily provable charge" at the outset of the case.²⁷⁴ Federal courts consider all "relevant conduct" at sentencing.²⁷⁵ Relevant conduct essentially includes all conduct related to the offense of conviction, even if the defendant was neither charged with nor convicted of certain aspects of that offense.²⁷⁶ The sentencing guidelines likewise typically focus on the facts of the case, not the charged violation, in enhancing sentences.²⁷⁷ Thus, the prosecutor's legal characterization of the offense will often have little impact on the sentence, and adding or dismissing particular charges will not make much of a difference.²⁷⁸

272. *Id.* at 288.

273. *See supra* Part IV.A.

274. U.S. ATTORNEY'S MANUAL § 9-27.430 (2009).

275. U.S. SENTENCING GUIDELINES MANUAL Ch. 1, Part B, § 1.3 (2013).

276. U.S. SENTENCING GUIDELINES MANUAL Ch. 1, Part A, § 1.4(a).

277. To facilitate plea bargaining, prosecutors sometimes try to skew the court's perception of the case by not revealing relevant conduct to the court and probation. Ulmer, *supra* note 20, at 24 (surveys of federal prosecutors confirms existence of "fact-bargaining"). But this would defeat the purposes of sentencing and contravene Department of Justice policy. U.S. ATTORNEY'S MANUAL § 9-27.400 ("Plea bargaining . . . must honestly reflect the totality and seriousness of the defendant's conduct.").

278. When a case is soon to be tried, prosecutors sometimes add charges to the indictment that are easier to prove or that give the jury an opportunity for a "compromise verdict," that is, to convict on some charges but not on others. Often the compromise verdict

Prosecutors might be reluctant to add more serious charges following a motion for indicated sentences because the case would have already gotten some exposure in the courtroom and even in public, and prosecutors do not like to publicly admit that they are bringing new charges solely to leverage a guilty plea.

Even if the prosecution does supersede the indictment, the judge would have a strong incentive to anchor future sentences to those original indicated sentences. First, the judge would have already considered the case on the first go-round and capped the penalties. Psychologically, the judge might tend to anchor future consideration of the case based on that first impression. Second, judges would want to incentivize prosecutors not to seek a superseding indictment because that could result in a renewed motion for indicated sentences. As repeat players in the system, judges would likely communicate to prosecutors, both directly and indirectly, their displeasure at being put through that same exercise twice.

One important exception where new charges could indeed sharply increase the sentence is statutes with a mandatory minimum. A prosecutor not satisfied with the court's indicated sentences could in many federal cases effectively override them by bringing new charges with mandatory minimum penalties.²⁷⁹ However, the Department of Justice has recently begun to curtail its use of mandatory minima for certain nonviolent, low-level drug offenders.²⁸⁰

Additionally, all things being equal, prosecutors prefer not to bring new charges in a pending case, and that would be especially true following a motion for indicated sentences. New charges must be justified to the grand jury, judges, defense counsel, and the public. To some extent, new charges can "reset" the case, putting a drag on the system by resetting the speedy trial clock and changing the elements of proof, thereby requiring additional defense

is an illusion, because the sentence is usually based on the relevant criminal conduct, regardless of how it is legally characterized. See Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 2: Prosecutorial Discretion)*, VOLOKH CONSPIRACY (Jan. 16, 2013), <http://www.volokh.com/2013/01/16/the-criminal-charges-against-aaron-swartz-part-2-prosecutorial-discretion> (describing this charging strategy in the context of cyber-crime prosecutions under Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2), (a)(4); § 1343).

279. These charges are most prominent in drug prosecutions, which comprised about thirty percent of all federal prosecutions in 2012. Most of those cases involve the use or threat of mandatory minimums. The frequency of other common types of federal prosecutions is as follows: immigration cases (32.2%), fraud (10.5%), and firearms (9.8%). U.S. SENTENCING COMM'N, OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY (FISCAL YEAR 2012), available at http://www.uscc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/FigureA.pdf. The sentences in drug cases are usually driven by mandatory minimums.

280. ERIC HOLDER, MEMORANDUM TO THE UNITED STATES ATTORNEYS AND ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION, *Department Policy on Charting Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (August 12, 2013). The "Smarter Sentencing Act of 2013" (S.B. 1410), a bi-partisan bill cutting most mandatory minimums in drug cases in half, was approved by the Senate Judiciary Committee on January 30, 2013 but ultimately died.

investigation. In cases whose motion for indicated sentences has garnered media attention, the public may not agree with the prosecutorial decision to hold back on the strongest charges in an attempt to leverage a plea. Others may not agree with adding stiffer charges solely because the defendant—who is supposedly presumed innocent and has a right not to incriminate himself—refused to plead guilty.²⁸¹ Courts may consider stiffer charges to be vindictive.²⁸² As argued above in Part VI.E, my proposal encourages the prosecutor to act as a minister of justice and not to engage in gamesmanship with the court. In summary, federal prosecutors generally already prefer to initiate the case with the most serious, readily provable charges since doing so may call less attention to itself than adding charges after a defendant refuses to plead guilty. The motion for indicated sentences should only strengthen that norm.

4. *Length of Proceedings*

A fourth objection to my proposal is that this proposed motion procedure would delay the proceedings, impair the defendants' speedy trial rights, and in some cases lengthen pre-trial custody. Although there is some merit to these objections, the benefits of the motion for indicated sentences will likely outweigh any delays to individual cases, given the already long lifespan of most federal cases.

In the context of the average federal criminal case, the delay in the proceedings occasioned by this motion is not significant. In 2004, a federal felony case took an average of more than ten months to wend its way to completion in the district court.²⁸³ Probation officers may need one to two months to complete a draft pre-plea presentence report. The parties would then need one to two months to fully brief the motion and litigate the contents of that report. Thus, most federal cases could accommodate the three months or so of litigation that the motion for indicated sentences would ordinarily entail.

One important exception to this is immigration cases, which constitute about a third of federal prosecutions.²⁸⁴ They typically last no more than a few months. About two-fifths of those cases are illegal reentry cases under 8 U.S.C.

281. *See* *Bordenkircher v. Hayes*, 434 U.S. 357, 368 (1978) (Blackmun, J., dissenting) (arguing that prosecutors should bring the most serious charge at the beginning of the case because superseding indictments to increase the penalties would appear vindictive to the public).

282. *United States v. LaDeau*, 734 F.3d 561 (6th Cir. 2013) (affirming dismissal where prosecutor had originally charged a child pornography case with no mandatory minimum penalty and brought a new charge carrying a five-year mandatory minimum only after losing a suppression motion).

283. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF JUSTICE STATISTICS 59-60 (2004).

284. U.S. SENTENCING COMM'N (2012), *supra* note 279.

§ 1326.²⁸⁵ Several districts are authorized to operate “fast track programs,” under which defendants, in exchange for pleading guilty early in the case, are offered a substantial (up to four levels) sentencing discount in addition to the acceptance of responsibility reduction. Those defendants are typically in pre-trial detention and are under enormous pressure to plead guilty. Some districts, like the Eastern District of California, have pre-plea presentence reports prepared to give those defendants more sentencing certainty. Perhaps an abbreviated version of my procedure would be appropriate in such cases: some districts are already using pre-plea presentence reports to provide greater certainty to all parties; because those cases are generally so simple, the court could still have time to issue indicated sentences, especially where it had no intention of imposing the ten-year or twenty-year max based on the facts in the presentence report.

Other categories of cases may likewise not be good candidates, such as where the defendant is in custody and a few months of pre-trial detention could dwarf the expected post-trial sentence.

The motion for indicated sentences should pose no difficulties under the Speedy Trial Act. Federal defendants have a constitutional right to a speedy trial²⁸⁶ and a statutory right to a trial generally within seventy days of being indicted.²⁸⁷ However, those time periods are routinely tolled in most districts for a multitude of statutorily defined reasons.²⁸⁸ Most defendants are willing to waive their right to a speedy trial because they believe that the additional time benefits their defense. A motion for indicated sentences initiated by the defendant would fall into that category, too. In fact, many cases could move more quickly as a result of this motion. The parties often spend significant time in plea negotiations, and this motion, by triggering court-imposed deadlines, could help the parties work more expeditiously to identify the key issues early in the case.

A more fundamental response to this objection that the proposed procedure would unduly delay the proceedings is that in a regime where virtually all defendants plead guilty, many defendants might value the protections that my proposed procedure would afford them over their right to a speedy trial.

285. BUREAU OF JUSTICE STATISTICS, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM 17 (2010), available at <http://www.bjs.gov/content/pub/pdf/iofjs10.pdf>.

286. U.S. CONST. amend. VI.

287. Speedy Trial Act, 18 U.S.C. § 3161(c)(1) (2012).

288. 18 U.S.C. § 3161(h) (2012). Time spent litigating and adjudicating a motion for indicated sentences would be excluded from the seventy days as a pending pre-trial motion. 18 U.S.C. § 3161(h)(1)(D) (2012). Additionally, if the court ordered the preparation of a pre-plea presentence report, the time necessary to prepare that report could also be excluded as “reasonable time necessary for effective preparation.” 18 U.S.C. § 3161(h)(7)(B)(iv) (2012).

CONCLUSION

Although federal law has made some strides in acknowledging the dominance of guilty pleas, plea bargaining has been kept in the shadows because of Rule 11's overly strict injunction against judicial participation in those discussions. As a result, most of the plea bargaining process is informal and off the record. But judges could participate usefully in the process without actually sitting at the bargaining table.

My proposal brings an important stage of plea bargaining into the light: allowing the court to help frame the issues for the parties' plea negotiations. By allowing the parties, with the defendant's consent, to litigate the appropriate sentence early in the case with the benefit of a pre-plea presentence report, the judge has an opportunity to become familiar with the case and provide indicated sentences that the parties can rely on in their subsequent plea negotiations. The judge also can guard against plea offers that are unduly coercive, as where the government's case is very weak. The defense attorney can systematically flesh out in open court the mitigating factors for the prosecution and the court to consider at sentencing. The prosecutor can get greater feedback from the court, the probation officer, and the defense about appropriate sentence in the case. And the public nature of this pre-plea sentencing litigation keeps all the system's professional players more accountable to the public for how criminal cases are resolved.

Federal criminal procedure has generally rested on at least two assumptions: first, that trials determine guilt or innocence and second, that judges preside over the proceedings. Plea bargaining's triumph over criminal procedure has conclusively thrown out the first assumption.²⁸⁹ But the second need not be thrown out as well. In fact, as I have demonstrated, our system of pleas could work much better if we let judges frame the parties' plea negotiations. My proposal is a step in that direction, with real benefits to defendants and the public alike.

289. See FISHER, *supra* note 14.

