

SENTENCING IN AN ERA OF PLEA BARGAINS*

JEFFREY BELLIN** & JENIA I. TURNER***

The literature offers inconsistent answers to a question that is foundational to criminal law: Who imposes sentences? Traditional narratives place sentencing responsibility in the hands of the judge. Yet, in a country where 95% of criminal convictions come from guilty pleas (not trials), modern American scholars center prosecutors—who control plea terms—as the deciders of punishment. This Article highlights and seeks to resolve the tension between these conflicting narratives by charting the pathways by which sentences are determined in a system dominated by plea bargains.

After reviewing the empirical literature on sentence variation, examining state and federal plea-bargaining rules and doctrines, and conducting some empirical analysis of our own, we conclude that neither of the competing narratives is correct. Sentencing in the United States has become a dynamic process with substantial contributions from multiple actors, not a static event controlled by any single actor.

Zooming in on judges' contributions, we find that, contrary to much modern commentary, judges can (and do) influence plea-bargained sentences in even the most restrictive jurisdictions. Yet this judicial imprint is often obscured by formal rules that purport to exclude judges from plea negotiations. In addition, we identify a few scenarios where judges are prevented from influencing plea bargains and thus lose their traditional role as the ultimate arbiter of an individual's sentence. In response to these findings, we propose a reform that would make the already prevalent judicial influence over the substance of plea agreements more transparent. In addition, we suggest a legal change that would eliminate scenarios where judges are legally authorized but practically unable to reject (unusually harsh) plea deals.

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** Mills E. Godwin, Jr., Professor of Law, William & Mary Law School.

*** Amy Abboud Ware Centennial Professor in Criminal Law, SMU Law School. Thanks to Hillel Bavli, Katie Kronick, John Meixner, Anna Offit, Renagh O'Leary, Jason Walker, and participants in the ABA/Academy for Justice/AALS workshop and the University of Georgia Law School faculty workshop series for helpful comments, to David Deutch, Benjamin Gerzik, Kevin Sheneberger, and Lauren Villanueva for their invaluable research assistance, and to the SMU Smart Legal Ed Award—Directed Research, for financial support.

INTRODUCTION.....	180
I. THE LACK OF CONSENSUS REGARDING WHO SENTENCES..	184
A. <i>The Traditional Narrative: Judge as Sentencer</i>	185
B. <i>The Modern Narrative: Prosecutor as Sentencer</i>	192
C. <i>Implications of the Conflicting Narratives</i>	196
II. JUDICIAL INFLUENCE OVER NEGOTIATED SENTENCES	197
A. <i>Direct and Indirect Involvement in Plea Negotiations</i>	197
B. <i>Rejecting Plea Agreements</i>	207
1. Plea Agreement Sample Analysis.....	208
2. Plea Rejection Sample Analysis.....	211
C. <i>Influencing Plea-Bargained Sentences</i>	215
III. LIMITS ON JUDICIAL INFLUENCE OVER NEGOTIATED SENTENCES	219
A. <i>The Default Position: Judicial Influence over Sentences</i>	220
B. <i>Limits on the Judge’s Ability To Reject Plea Deals</i>	221
C. <i>Formal Obstacles to Restricting Judicial Sentencing Discretion</i> ..	222
D. <i>Informal Obstacles to Defying Judicial Preferences</i>	224
IV. ENSURING JUDICIAL INVOLVEMENT IN SENTENCES.....	226
CONCLUSION	229

INTRODUCTION

Who imposes a sentence upon conviction? Traditional narratives place sentencing responsibility with the trial judge.¹ For example, Judge Hardiman explains, “Of the many solemn responsibilities of a judge, imposing sentences is perhaps the most daunting.”² Rules of criminal procedure concur that “[u]ltimate responsibility for sentence determination rests with the trial judge.”³ Yet modern scholars center prosecutors’ selection of charges and plea bargaining as the primary determinant of punishment. Franklin Zimring articulates this point when he writes, “In court systems where the vast majority

1. *Shannon v. United States*, 512 U.S. 573, 579 (1994) (“The judge . . . imposes sentence on the defendant after the jury has arrived at a guilty verdict.”); *Ingoglia v. State*, 651 A.2d 409, 414 (Md. Ct. Spec. App. 1995) (“[I]n this State a sentencing judge is vested with virtually boundless discretion.” (quoting *Logan v. State*, 425 A.2d 632, 642 (Md. 1981))). To the extent the traditional view recognizes conflict, it is between judges and legislators, not judges and prosecutors. See *Oregon v. Ice*, 555 U.S. 160, 171 (2009) (“[S]tate legislative innovations like Oregon’s seek to rein in the discretion judges possessed at common law to impose consecutive sentences at will.”); Eric S. Fish, *Sentencing and Interbranch Dialogue*, 105 J. CRIM. L. & CRIMINOLOGY 549, 549 (2015) (“American legislatures generally delegate primary control over sentencing policy to one of two actors: trial judges or a sentencing commission.”).

2. Thomas M. Hardiman, Foreword, 49 DUQ. L. REV. 637, 637 (2011).

3. FLA. R. CRIM. P. 3.171(a).

of felony case dispositions are the product of negotiated guilty pleas, the defendant's criminal sentence is usually determined long before the judge who issues the formal sentence is involved in the case."⁴

In a system characterized by "mass incarceration,"⁵ answering this question—who selects punishment?—is critical to evaluating the system's failings and promoting change. And the question must have a descriptively accurate answer, even if that answer varies by jurisdiction or circumstances. Yet the literature is replete with arguments built on generalized, conflicting assumptions about who selects sentences (prosecutors or judges), with little recognition, much less resolution, of the tension these conflicting assumptions create.⁶

The traditional model is most familiar. After all, the formal processes of criminal adjudication assume that it is *the judge* who chooses the sentence.⁷ In this model, the parties present relevant facts at a sentencing hearing to an impartial judge who, typically informed by a "presentence report," imposes an individually tailored punishment.⁸ This is the model of sentencing commonly presented to the public by the media, government officials, and judges themselves.⁹ This model also informs important academic and policy debates.

4. FRANKLIN E. ZIMRING, *THE INSIDIOUS MOMENTUM OF AMERICAN MASS INCARCERATION* 40 (2020); see *infra* Section I.B and quotes accompanying note 15.

5. See JEFFREY BELLIN, *MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER* 11–16 (2023) (defining "mass incarceration").

6. See *infra* Part I.

7. See *infra* Section I.A.

8. M. CATHERINE GRUBER, "I'M SORRY FOR WHAT I'VE DONE": THE LANGUAGE OF COURTROOM APOLOGIES 26–32 (2014) (noting importance of presentence report in study of federal sentencing hearings); Mark W. Bennett, *Federal Sentencing: A Judge's Personal Sentencing Journey Told Through the Voices of Offenders He Sentenced*, 26 WASH. & LEE J.C.R. & SOC. JUST. 461, 489 (2020) (complimenting the "amazingly thorough and comprehensive presentence reports" that probation officers draft for district judges); Renagh O'Leary, *Supervising Sentencing*, 57 U.C. DAVIS L. REV. (forthcoming 2024) (manuscript at 7–8) (on file with the North Carolina Law Review) (highlighting influence of sentencing reports in state and federal sentencing).

9. Stephen R. Bough, *Getting To Know a Felon: One Judge's Attempt at Imposing Sentences That Are Sufficient, but Not Greater Than Necessary*, 87 UMKC L. REV. 25, 33 (2018) ("My relatively short time sentencing defendants has been life changing."); Colleen McMahon, Speech, *(Re)Views from the Bench: A Judicial Perspective on Second-Look Sentencing in the Federal System*, 58 AM. CRIM. L. REV. 1617, 1624 (2021) ("Sentencing is something that every judge takes very seriously."); Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT'G REP. 76, 76 (2003) (criticizing fellow judges because, in "exercising sentencing discretion," "we judges ignore" evidence regarding public safety); Daniel E. Wathen, *When the Court Speaks: Effective Communication as a Part of Judging*, 57 ME. L. REV. 449, 452–53 (2005) ("Criminal sentencing presents a real challenge to judicial communication and most judges I know work hard to clearly express the basis for their action."); Alan Ellis, *Presentence and Postconviction Remedies*, CRIM. JUST., Winter 1997, at 34, 35 (1997) ("[W]hen your client enters a guilty plea, absent a binding stipulation as to his or her guidelines, the client has no idea what the range will be and what sentence will be received within,

Substantial empirical literature reports ways in which judicial biases based on race, gender, party affiliation, or prior experience influence sentences.¹⁰ Over the past decades, critics decried, first, early parole release¹¹ and, then, mandatory minimum sentences and strict statutory guidelines¹² as invading the sentencing prerogatives of *judges*.

The traditional view conflicts with a recent scholarly push to center prosecutor power as the engine driving criminal punishment.¹³ Upwards of 95% of convictions result from guilty pleas, not trials, a fact that differs only in degree across American jurisdictions and over time.¹⁴ Since prosecutors, not judges, typically craft plea deals, many legal scholars contend that it is prosecutors, not judges, who select sentences.¹⁵

below, or above it.”); cf. Mark W. Bennett, *A Judge’s Attempt at Sentencing Inconsistency After Booker: Judge (Ret.) Mark W. Bennett’s Guidelines for Sentencing*, 41 CARDOZO L. REV. 243, 262 (2019) (“Sentencing is undoubtedly one of the hardest tasks of a trial judge.’ In my view, it was unquestionably the hardest task!” (quoting Carolin E. Guentert & Ryan H. Gerber, *A Judge’s Attempt at Sentencing Consistency After Booker: Judge Jack B. Weinstein’s Guidelines for Sentencing*, 41 CARDOZO L. REV. 1, 3 (2019))).

10. See *infra* Section II.C.

11. See S. REP. NO. 98-225, at 49 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3232 (reporting on legislation that eliminated indeterminate sentencing on the grounds that “the present system . . . encourages the Parole Commission to release prisoners with its own purposes—not those of the sentencing judge—in mind”); Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1125 (2005) (“In many systems, however, judicial sentencing discretion is a bit of an illusion because the parole board, making its own independent assessment of the case upon the offender’s arrival at prison, sets the presumptive release date.”); Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT’G REP. 69, 74 (1999) [hereinafter Frase, *Sentencing Guidelines in Minnesota*] (“[U]nder indeterminate sentencing, the judge’s sentence has very little effect over how long offenders stay in prison.”).

12. See, e.g., Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 273 (2007) (“Mandatory sentences eliminate judicial discretion”); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 1 (2010) (“A mandatory minimum deprives judges of the flexibility to tailor punishment to the particular facts of the case . . .”).

13. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 172 (2019) (“Compelling assertions about prosecutorial dominance leap off the pages of the criminal justice literature.”); see also *infra* notes 64–66 and accompanying text.

14. *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper*, 46 LOY. L.A. L. REV. 457, 467 (2013) (noting that “by 1879, 70 percent of all pleas were guilty”).

15. See, e.g., Carissa Byrne Hessick, Response, *Separation of Powers Versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps*, 74 VAND. L. REV. EN BANC 159, 176 (2021) (“Plea bargaining empowers prosecutors, allowing them to circumvent juries and, to a great extent, judges in securing convictions and selecting the punishment in their own cases. Put differently, plea bargaining has largely given prosecutors the ‘judicial power’ of conviction and imposing sentence.”); Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 677–78 (2016) (“No serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.”); Marc L. Miller, *Domination*

While widely invoked, the prosecutor-as-sentencer model has profound but rarely confronted implications for the judicial role. If prosecutors control plea-bargained sentences, and convictions overwhelmingly result from guilty pleas, American trial judges are largely ceremonial figures.¹⁶ One can imagine the consternation of those who take on the role. After a distinguished legal career, lawyers celebrate their election or appointment to the bench. These legal giants must be disappointed to then find that they have become mere rubber stamps for outcomes selected by prosecutors, often fresh out of law school.¹⁷ The prosecutor-centered view also suggests the need to reframe familiar sentencing debates. If judges do not impose sentences, judicial bias and backgrounds become largely irrelevant to criminal outcomes. Presentence reports and sentencing hearings are, at best, a waste of time. Parole release, mandatory sentencing laws, and strict guidelines impinge on prosecutorial, not judicial, sentencing prerogatives, and so may not be as problematic or as important as critics suggest.

As should already be apparent, the two models set forth above cannot comfortably coexist. The identification of the actor who selects punishment is a basic building block for a wide array of policy analyses. The question must be answered, ideally in a way that drives consensus across the field. As a first step toward achieving that consensus, this Article highlights the overlooked tension and seeks to determine what role American judges play in modern sentencing. Concluding that judges do influence sentencing outcomes, this Article moves onto the tougher questions of how they are able to influence sentences in a world of plea bargains—and the degree of their influence.

This Article proceeds in four parts. Part I highlights the tension in legal scholarship around the foundational question of who sentences, and the problems created by leaving that question unanswered. Part II attempts to resolve the question as a descriptive matter. It reviews: (i) empirical studies of state and federal courts that reveal judicial influence of sentencing outcomes,

& *Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) (“The overwhelming and dominant fact of the federal sentencing system . . . is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing.”); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS, Nov. 20, 2014, at 16 (“In actuality, our criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors and with no judicial oversight. The outcome is very largely determined by the prosecutor alone.”); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 23 (1998) (“[T]he prosecutor often effectively determines the defendant’s sentence at the charging stage of the process . . .”).

16. See, e.g., Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1142 (2011) (describing judges as “passive and reactive” players in plea bargaining). See generally Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976) (describing various systems of plea bargaining wherein a judge’s role is typically limited as compared to a prosecutor’s).

17. Cf. Alschuler, *supra* note 16, at 1063 (describing the typical prosecutor as a “partisan attorney a few years out of law school”).

(ii) state and federal plea-bargaining rules and doctrines, and (iii) three samples of judicial responses to plea deals in federal cases. Part II shows that judges have a variety of tools that they can (and do) use to influence plea-bargained sentences in even the most restrictive jurisdictions.

Identifying the potential for judicial influence in a world of plea bargains only solves part of the puzzle. As this Article reveals, criminal sentencing is best viewed as a dynamic process with multiple inputs, not a static event dictated by a single actor. Given the various contributors to a person's sentence, Part III explores the degree of influence that *judges* wield. We find that the tools available to judges vary by jurisdiction, but even the most restrictive jurisdictions leave judges with significant influence over a typical sentence. And beyond the formal tools, we identify numerous informal mechanisms that judges can use to deter attorneys from frustrating judicial sentencing preferences. Illuminating the many pathways that allow judges to influence plea bargains opens fertile new terrain for academic inquiry and policy reform. A common refrain is that judges only review plea bargains for procedural defects and leave the parties (and primarily the prosecutors, who tend to have greater leverage in the negotiations) to shape the substance of bargains. By contrast, we find that judges can and do influence the content of plea agreements. But this judicial influence is not without limits. We identify scenarios where judicial influence over plea bargaining outcomes is weakest, leading to the impression that prosecutors, not judges, determine sentences.

Finally, in Part IV, we evaluate the normative arguments for offering judges more power over plea-bargained outcomes. We think judges should always have a say in sentencing, a proposition that is, at least formally, reflected in the laws in every American jurisdiction. These laws identify the judge as the actor who chooses the sentence and give judges the power and responsibility to approve or reject all plea deals. Where those statutory promises fall short, policymakers can increase judicial influence over plea-bargained sentences by eliminating the restrictions identified in Part III. But the implications of doing so are complex. Ultimately, we propose a reform that would make direct and indirect judicial participation in shaping plea deals more transparent. In addition, we suggest a legal change for scenarios where mandatory minimum sentences make judges practically unable to reject plea deals. This reform is necessary to effectuate the statutory command that judges serve as the ultimate arbiter of criminal sentences.

I. THE LACK OF CONSENSUS REGARDING WHO SENTENCES

Legal rules and statutes, judicial writing, and scholarly literature offer different answers to the basic question: Who selects the sentence that a person must serve upon conviction? The question is more complex than it first appears because the sentencing power spans two dimensions. To be truly responsible

for a sentence, an actor must control both the initial selection of the sentence and the subsequent finality of that sentence. The initial selection of a sentence can be undercut by mandatory sentencing rules that predetermine the sentence to be imposed for a particular offense. Next, even if an actor has the initial power to select a sentence, that power becomes illusory if it is not final. For example, if parole boards routinely reduce initially imposed sentences, the sentencing power is shared between those two actors, not exercised by the judge (or prosecutor) alone.¹⁸

Against this backdrop, this part summarizes the conflicting answers given in legal discourse to the foundational question of who sentences. It also explores the degree to which equivocation on this point clouds important policy debates, including the diagnosis of a persistent affliction of American criminal law: mass incarceration.

A. *The Traditional Narrative: Judge as Sentencer*

The traditional sentencing narrative places responsibility for sentencing in the hands of the judge. In 1949, the Supreme Court explained:

[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.¹⁹

The Court echoed this sentiment fifty years later, stating: “We have often noted that judges in this country have long exercised discretion . . . in imposing sentence within statutory limits in the individual case.”²⁰ Interestingly, despite these common framings, the narrative of judicial sentencing primacy has never been straightforward.

In the era leading up to the United States’ founding, judges had only a tenuous hold over sentencing authority. Judges lacked the ability to select an initial sentence, and the sentences they imposed upon conviction often lacked finality.²¹ The initial choice was limited because most offenses had

18. Frase, *Sentencing Guidelines in Minnesota*, *supra* note 11, at 74 (describing sentencing as “an exercise in shared authority”).

19. *Williams v. New York*, 337 U.S. 241, 246 (1949).

20. *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (emphasis omitted).

21. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 70–71 (2003); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 51 (2011) (“During colonial times and at the Founding, the process of sentencing was virtually indistinguishable from the process of conviction.”); Elizabeth E. Joh, “*If It Suffices To Accuse*”: *United States v. Watts and the Reassessment of Acquittals*, 74 N.Y.U. L. REV. 887, 901 (1999) (“In the early history of the United States

predetermined sentences, typically mandatory death sentences.²² In this respect, colonial law largely followed the English common law.²³ For example, at the conclusion of Sir Walter Raleigh's infamous 1603 treason trial, the English legal reporters treated sentencing as an afterthought, noting that "[t]he Lord Chief Justice then delivered the judgment of the Court in the usual form in cases of high treason."²⁴ The inattention to the sentence derived not only from the predictability but also from the lack of finality of sentencing in that era. Those facing draconian predetermined punishments had an opportunity for mercy. Ostensibly, that mercy came from the King, not the court. Thus, the perfunctory treatment of the sentence in Raleigh's case proved prescient as Raleigh was subsequently set free by the King.²⁵ Further illustrating the irrelevance of the judge, the King then reinstated the death sentence fifteen years later after Raleigh fell out of royal favor, resulting in Raleigh's beheading.²⁶

Thus, as a formal matter, judges in the colonial era seemed to possess little sentencing discretion. But the reality was different. Outside of prominent cases like Raleigh's, pardons were granted "on the advice of the sentencing judge" who served as the de facto gatekeeper for both the imposition of draconian punishments and their avoidance.²⁷ And, in fact, judicial discretion flourished in creative efforts to avoid capital sentences. By construing the formal law narrowly, "indeed, in many cases, fantastically—English courts were able both to temper the severity of the law and to protect the judiciary's traditional prerogatives in the administration of criminal justice."²⁸

After the founding of the United States, states and the federal systems gradually entrusted judges with broad discretion over sentencing. "In the early

and of England, most punishments were fixed, and judges had little authority to reduce or enhance a sentence."); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 696 (2005).

22. See Klein, *supra* note 21, at 696.

23. 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 1.6(b) (4th ed. 2022), Westlaw (database updated November 2022) (noting that the American colonies generally followed English criminal law with respect to sentencing, but reduced reliance on capital punishment).

24. *Trial of Sir Walter Raleigh, Knight, for High Treason, by a Special Commission of Oyer and Terminer, at Winchester, 17th November, 1603*, in 1 CRIMINAL TRIALS 400, 451 (David Jardine ed., London, Charles Knight 1832). The formulaic sentence for high treason involved a hideous death not worth repeating but available in the original sources, such as *The Trial of Sir Walter Raleigh, Knt. at Winton, for High-Treason, the 17th of November, 1603*, in 1 A COLLECTION OF THE MOST REMARKABLE TRIALS OF PERSONS FOR HIGH-TREASON, MURDER, RAPES, HERESY, BIGAMY, BURGLARY; AND OTHER CRIMES AND MISDEMEANORS 71, 89 (London, T. Read 1734) [hereinafter *Trial of Sir Walter Raleigh, Knt. at Winton*].

25. *Trial of Sir Walter Raleigh, Knt. at Winton*, *supra* note 24, at 89–95.

26. *Id.* (ending with Raleigh's execution by beheading).

27. George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1238 (1995).

28. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 358.

days of the Republic, when imprisonment had only recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square, the period of incarceration was generally prescribed with specificity by the legislature.²⁹ But over time, penal codes grew, and imprisonment replaced corporal and capital punishments.³⁰ American judges found a new role in selecting the precise punishment within broad statutory ranges.³¹ By 1907, the South Carolina Supreme Court commented on sentencing as follows: “Section 120 of the Criminal Code of 1902 prescribes that the punishment for manslaughter shall not exceed 30 nor be less than 2 years’ imprisonment. This provision necessarily implies that the trial judge is to exercise a discretion in imposing sentences.”³²

Again, however, the judge’s initial sentence selection was not the whole story. Parole boards in many jurisdictions could release prisoners well before the expiration of the sentence nominally imposed by the judge.³³

The proliferation of broad sentencing ranges, disparate judging, and freewheeling parole boards led to a backlash in the 1970s.³⁴ At least as a formal matter, this move toward determinate sentencing gave judges both initial choice of the sentence (within a statutory range) and greater sentencing finality.³⁵ By design, this movement toward “truth in sentencing” diminished the role of

29. United States v. Grayson, 438 U.S. 41, 45 (1978). *But see* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1125 (2001) (“At common law, judges enjoyed broad discretion to impose fines, whipping, imprisonment, and other sentences in misdemeanor cases. They also had discretion to downgrade felony sentences of transportation to branding and to trigger the pardon and commutation processes.”).

30. *E.g.*, Klein, *supra* note 21, at 697.

31. *See, e.g.*, MARC L. MILLER, RONALD F. WRIGHT, JENIA I. TURNER & KAY L. LEVINE, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 1206 (6th ed. 2019); KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 9–11 (1998); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 202 (2005) (“[B]y 1791, judges were beginning to exercise broad discretion in imposing indeterminate sentences.”); George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 909 (2000) (reporting that in late eighteenth and early nineteenth century Massachusetts, “the penalty scheme in non-liquor cases left wide discretion in the judge’s hands”).

32. *State v. Reeder*, 60 S.E. 434, 435 (S.C. 1908); *see also* *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (explaining that under the indeterminate system: “Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine.”); John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 643 (2008) (“Before the Guidelines, a judge chose a sentence between probation and the aggregated statutory maximum sentences available for the offenses of conviction.”).

33. *Mistretta*, 488 U.S. at 364 (citing *Brest v. Ciccone*, 371 F.2d 981, 982–83 (8th Cir. 1967); *Rifai v. U.S. Parole Comm’n*, 586 F.2d 695 (9th Cir. 1978)) (“The correctional official possessed almost absolute discretion over the parole decision.”); BELLIN, *supra* note 5, at 48–58.

34. *See* BELLIN, *supra* note 5, at 48–58 (narrating change in American sentencing law).

35. *Id.*

parole boards bringing the sentence pronounced by the court substantially closer to the time the person convicted would serve.³⁶

The new responsibility was sometimes tempered by guidelines and mandatory sentences, but the prevalence of truly mandatory sentences is unclear. There is evidence that their imposition is infrequent even in the jurisdiction that is most notorious for mandatory sentencing laws. The Federal Sentencing Commission reported in 2011 that federal judges retained discretion in over 75% of sentencings and that over the past twenty years, “the proportion of those offenders convicted under an offense carrying a mandatory minimum penalty has remained relatively stable.”³⁷ In state jurisdictions, where mandatory minimums are less common, one modern trend has been to revise mandatory minimum statutes to restore judicial discretion and reduce incarceration levels.³⁸

The role of the modern judge in selecting a sentence is most prominent in the formal laws and rules governing sentencing. For example, the federal sentencing statute states: “The court shall impose a sentence sufficient, but not greater than necessary” to further the enumerated purposes of punishment.³⁹ State law is similar. Florida’s sentencing statute states: “The trial court judge may impose a sentence up to and including the statutory maximum for any offense”⁴⁰ California’s sentencing statute is 4,000 words of guidance, all directed towards the means by which “the court shall sentence the defendant.”⁴¹ Iowa law states that the judge shall impose a sentence “[a]fter receiving and examining all pertinent information, including the presentence investigation report and victim impact statements, if any.”⁴²

And while many jurisdictions rely on sentencing guidelines, guideline regimes typically retain judicial sentencing discretion in two forms: (1) “the Guidelines themselves prescribe a range of time (generally equal to about one-

36. *Id.*

37. U.S. SENT’G COMM’N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 121–22, 131, 140 (2011) (reporting that 27% of sentencings involved a defendant subject to a mandatory minimum and almost half of those avoided the mandatory sentence through substantial-assistance/safety-valve provisions); U.S. SENT’G COMM’N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY21.pdf [<https://perma.cc/9AU5-UNU6>] (reporting that in 2021, 29.9% of federal cases carried a mandatory minimum penalty, but only 15.7% of offenders remained subject to a mandatory penalty at sentencing as offenders received relief under safety-valve and substantial-assistance provisions).

38. RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES (2014), <https://prisonpolicy.org/scans/vera/mandatory-sentences-policy-report-v2b.pdf> [<https://perma.cc/C9JB-SZWY>].

39. 18 U.S.C. § 3553(a).

40. FLA. STAT. § 921.002(g) (2022).

41. CAL. PENAL CODE § 1170 (Westlaw through chapter 1 of 2023–24 1st Extraordinary Sess., and urgency legislation through chapter 888 of 2023 Reg. Sess.).

42. IOWA CODE § 901.5 (2023).

quarter of the minimum sentence), not a fixed sentence” and (2) courts typically are given “latitude to depart from the Guidelines’ range.”⁴³ For example, Michigan’s sentencing laws state: “A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the departure is reasonable and the court states on the record the reasons for departure.”⁴⁴ Additionally, mandatory guideline regimes fell out of favor with the Supreme Court’s decisions in *United States v. Booker*⁴⁵ and *Blakely v. Washington*⁴⁶ in the early 2000s.⁴⁷ These decisions invalidated judicial (as opposed to jury) findings that dictated a certain guideline sentence. The obvious solution to this dilemma was advisory guidelines that guided, but did not mandate, judges’ selection of a sentence. In *Booker*, the Supreme Court noted: “We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”⁴⁸ Scholars frequently highlight the shift from mandatory to advisory guidelines (and vice versa) as a critical factor in preserving (or removing) judicial sentencing discretion.⁴⁹ And this is only one of many areas where such discretion is preserved, with some jurisdictions giving judges

43. David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196, 198 (1995) (“All of the state guidelines systems are presumptive, not mandatory, and they represent a rejection of mandatory sentences”); Frase, *Sentencing Guidelines in Minnesota*, *supra* note 11, at 80 (“State guidelines regulate but do not eliminate discretion; almost all of the existing systems leave plenty of room for the consideration of unique offense and offender characteristics, crime-preventive as well as retributive sentencing purposes, local community values and resources, and emerging sentencing theories”); Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1137 n.6 (2004) (“[W]hile the Guidelines certainly have somewhat tied judges’ hands, the knots are looser than is commonly believed. For one, the Guidelines themselves prescribe a range of time (generally equal to about one-quarter of the minimum sentence), not a fixed sentence. Moreover, the courts have considerably more latitude to depart from the Guidelines’ range than is commonly understood.”).

44. MICH. COMP. LAWS § 769.34(b)(3) (2023); *cf.* *State v. Biles*, 579 P.2d 259, 260 (Or. Ct. App. 1978) (“[W]hile an agreement reached through plea bargaining may and probably usually will be an important consideration in determining what sentence is to be imposed, it is not conclusively dispositive. The trial court must exercise its discretion in determining what sentence to impose. The legislature has mandated that in doing so the trial court must obtain and consider a presentence report and must state on the record the reasons for its decision.”), *aff’d*, 597 P.2d 808 (Or. 1979).

45. 543 U.S. 220 (2005).

46. 542 U.S. 296 (2004).

47. *See Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 313.

48. *Booker*, 543 U.S. at 233 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000); *Williams v. New York*, 337 U.S. 341, 246 (1949)).

49. Norman C. Bay, *Prosecutorial Discretion in the Post-Booker World*, 37 MCGEORGE L. REV. 549, 574 (2006) (“Now that the Guidelines are advisory, prosecutors have less control over a defendant’s sentence.”); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1512 (1993) (“Before the guidelines, the boundaries of bargaining were controlled by the established market parameters of the judicial sentence.”).

discretion to take dramatic steps, such as dismissing charges and sentencing enhancements in “furtherance of justice.”⁵⁰

There is nothing in federal and state sentencing statutes that suggests that judicial sentencing is a mere formality. The statutes provide victims the right to speak at the plea and sentencing proceedings, presumably for purposes of influencing *the judge’s* decision.⁵¹ Defendants must also be allowed to speak prior to the imposition of sentence, and one of the most common allocutions, even after guilty pleas, is a plea to the court for a lenient sentence.⁵² The statutes direct the sentencing judge to consider various factors and command the judge to provide reasons for the sentence imposed.⁵³ Specifically, federal law states: “The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.”⁵⁴

It is also clear that the statutory sentencing guidance is not solely for purposes of sentencing after a trial verdict. The Federal Rules of Criminal Procedure govern guilty pleas and, in this respect, are largely representative of

50. *See, e.g.*, CAL. PENAL CODE § 1385(a) (Westlaw through chapter 1 of 2023–24 1st Extraordinary Sess. and urgency legislation through chapter 888 of 2023 Reg. Sess.) (“The judge or magistrate may, either on motion of the court or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.”); Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 632 (2015) (stating that “[t]welve states permit trial courts to dismiss counts—either misdemeanor or felony—on their own accord” in the interest of justice); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 330 (2017) (noting that “nineteen states have given trial courts the power to dismiss prosecutions for the sake of justice” by “granting a power to dismiss ‘in furtherance of justice’ or a power to dismiss *de minimis* prosecutions”).

51. *See, e.g.*, 18 U.S.C. § 3771(a)(4) (granting victims “[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”); *United States v. Scott*, 494 F. Supp. 3d 61, 64–65 (D. Mass. 2020) (judge rejecting plea agreement in part because of arguments made by victims about the agreement not providing for adequate restitution).

52. *Green v. United States*, 365 U.S. 301, 304 (1961) (“As early as 1689, it was recognized that the court’s failure to ask the defendant if he had anything to say before sentence was imposed required reversal.”); GRUBER, *supra* note 8, at 3, 113–18 (describing defendants’ efforts during allocution at federal sentencing hearings, almost entirely based on guilty pleas, to influence judges’ sentences); FED. R. CRIM. P. 32(i)(4)(A)(ii) (“Before imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence . . .”).

53. *Cf.* Marah Stith McLeod, *Communicating Punishment*, 100 B.U. L. REV. 2263, 2287 (2020) (“State and federal sentencing laws differ in the degree of explanation they require.”).

54. 18 U.S.C. § 3553(a), (c). For a time, there was a sense that prosecutor recommendations regarding sentencing were an imposition on judicial authority. *See* Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 313 (2009) (“For many years, official Department of Justice policy has been that ‘[s]entencing in Federal criminal cases is primarily the function and responsibility of the court.’ Although this policy permits prosecutors to make sentencing recommendations when ‘warranted by the public interest,’ the clear preference is for no recommendation at all.” (quoting U.S. Dep’t of Just., U.S. Att’ys’ Manual § 9-27.710-730 (1997))).

those in the states.⁵⁵ These rules recognize that plea agreements reached between the parties can include sentence recommendations or even a stipulated sentence, i.e., an “agree[ment] that a specific sentence or sentencing range is the appropriate disposition of the case.”⁵⁶ But the rules unequivocally assign ultimate authority to the judge. Courts are not obliged to follow sentence recommendations and “must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.”⁵⁷ Even for plea agreements that include a stipulated sentence, the judge retains the final say: “[T]he court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.”⁵⁸ Consistent with this guidance, the federal sentencing guidelines include a provision recognizing judicial sentencing discretion with respect to guilty pleas and directing judges to only accept plea agreements that result in sentences commensurate with the offense.⁵⁹

And while the most important aspect of sentencing is typically a number signifying the period of years, months, or days of (any) incarceration imposed, there are other important decisions involved in a typical sentencing, including some that can be more important than that number. These include: the nature of custody (halfway house, house arrest, type of prison); credit for time served; deferring sentencing; determining whether sentences on multiple counts will be

55. See *infra* Section II.A (discussing state and federal rules on judicial review of plea agreements); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 849 & n.78 (2018) (noting that every American jurisdiction requires judicial approval of plea bargains); Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RESV. L. REV. 651, 670 (2007) (noting that many states’ rules of criminal procedures are “modeled . . . on the Federal Rules of Criminal Procedure”); Jenia I. Turner, *Virtual Guilty Pleas*, 24 U. PA. J. CONST. L. 211, 218–22 (2022) [hereinafter Turner, *Virtual Guilty Pleas*] (reviewing state and federal rules on judicial review of guilty pleas and plea agreements).

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

57. FED. R. CRIM. P. 11(c)(3)(B).

58. FED. R. CRIM. P. 11(c)(3)(A). One proponent of prosecutor dominance attempts to discount the fact that judges “frequently . . . accept the guilty plea provisionally, pending their examination of the presentence report for sentencing” which “should guide the court in considering the numerous statutory factors that are meant to make sentencing rational and consistent,” by arguing that the process is nonetheless dominated by the plea agreement. Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL’Y REV. 61, 63–64 (2015) (“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.”).

59. U.S. SENT’G GUIDELINES MANUAL § 6B1.2 (U.S. SENT’G COMM’N 2021); cf. Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 405 (2017) (“Today, professional police assemble the evidence, professional prosecutors file and pursue the charges, professional defense counsel test the evidence, and expert judges evaluate the evidence and select the sentence.”); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1430 (2008) (“[I]t is an overstatement to suggest that a federal prosecutor ever has unlimited discretion in selecting charges or determining the sentence.”).

served concurrently or consecutively, suspended in whole or in part; the nature of terms of supervision (if any); fines; restitution; and on and on.⁶⁰ When sentences involve periods of probation, it is the judge who decides whether the terms of that probation have been violated and the consequences.⁶¹ Finally, in many states and the federal system, the judge's sentencing decision has also become more final, as states have reduced or eliminated the possibility of early release on parole.⁶²

B. *The Modern Narrative: Prosecutor as Sentencer*

The judge-as-sentencer narrative works best in a circumstance that is increasingly uncommon: a judicial sentence after trial on a charge without a mandatory sentence. Clearly, in that circumstance, it is the judge who selects the sentence, particularly with diminished reliance on early parole release. But most convictions result from guilty pleas.⁶³ And it is an open question of how the traditional narrative performs when judges sentence defendants after guilty pleas.

Modern scholars acknowledge the trial judge's formal role in sentencing but argue that the system's reliance on plea bargains places decision-making authority with the prosecutor.⁶⁴ As Carissa Hessick explains, "plea bargaining

60. See, e.g., S.C. CODE ANN. § 24-21-410 (Westlaw through 2023 Act No. 102, subject to final approval by the Legis. Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws) ("After conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation."); IOWA CODE § 901.5 (2023) (listing vast array of sentencing options).

61. See BELLIN, *supra* note 5, at 147–48.

62. See, e.g., Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1996 (2005).

63. See *Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); Levenson, *supra* note 14, at 467 (noting that "by 1879, 70 percent of all pleas were guilty").

64. See, e.g., Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1128 (2021) ("[S]ince 94% of criminal convictions are resolved by plea bargain, prosecutors—not judges—determine a defendant's fate the vast majority of the time."); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 878 (2009) ("In most cases, then, the prosecutor becomes the adjudicator—making the relevant factual findings, applying the law to the facts, and selecting the sentence or at least the sentencing range."); Dennis E. Curtis, *Mistretta and Metaphor*, 66 S. CAL. L. REV. 607, 618 (1992) ("The primary job of prosecutors is to charge, convict, and (now) select a sentence."); Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1353 (2016) ("In a great many cases, charge selection is not the beginning of an adversarial process, but the *outcome* of the case, practically speaking."); Richard S. Frase, *A Consumers' Guide to Sentencing Reform: Reflections on Zimring's Cautionary Tale*, 23 BERKELEY J. CRIM. L. 1, 4 (2018) (asserting that the prosecution is "the most important institutional determinant of a criminal sentence"); Bennett L. Gershman, *The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction*, CRIM.

has largely given prosecutors the ‘judicial power’ of conviction and imposing sentence.”⁶⁵ The prosecutor, it is contended, effectively determines the initial sentence by strategically selecting from a broad array of charges and enhancements to effectively coerce the defendant to accept a guilty plea on the prosecutor’s terms. While the judge technically imposes the sentence, that sentence is actually selected prior to the sentencing hearing by the prosecutor, “long before the judge . . . is involved.”⁶⁶ And then, with determinate sentencing regimes, infrequent early parole release and few pardons, the sentence is effectively final in most cases. Thus, “[t]he outcome is very largely determined by the prosecutor alone.”⁶⁷

To support the provocative claim that prosecutors, not judges, sentence, the modern narrative must account for two other actors who appear to have some say in the process: defendants and judges. Defendants possess an absolute veto over any plea deal.⁶⁸ And while defendants often face great pressure to plead guilty, every defendant must be offered some incentive to do so. Without

JUST., Fall 1990, at 2, 4 (1990) (arguing that prosecutors “make a very precise selection of the ultimate sentence[.]” and “the judge’s role is simply to ratify the choice of sentence determined by the prosecutor”); Richard Lorren Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. REV. 1047, 1095–96 (2021) (“Most plea-bargaining scholarship—beyond overly stressing guilty-plea agreements to the point of ignoring many other potential criminal settlements—has been quick to dismiss the judge’s role, emphasizing the centrality of the prosecutor instead.”); William Ortman, Essay, *The Yates Memo Versus Administrative Law*, 165 U. PA. L. REV. ONLINE 191, 213 (2017) (“Because the vast majority of criminal convictions result from guilty pleas, not trials, a prosecutor’s selection of charges and punishment is the main event in a criminal case.”); Simons, *supra* note 54, at 330 (“[S]entencing enhancements create a largely charge-based system in which prosecutorial decisions determine the sentence.”); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 6 (2013) (“The modern criminal justice process is prosecutor-dominated. Prosecutors have broad charging and plea-bargaining discretion, and their choices have a huge impact on sentences.”); cf. Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 547–48 (2016) (“The important point for present purposes is that, as a practical matter, the outcome of government litigation often will be determined, not by a court, but by government litigators themselves.”).

65. Hessick, *supra* note 15, at 176 (“Plea bargaining empowers prosecutors, allowing them to circumvent juries and, to a great extent, judges in securing convictions and selecting the punishment in their own cases. Put differently, plea bargaining has largely given prosecutors the ‘judicial power’ of conviction and imposing sentence.”).

66. ZIMRING, *supra* note 4, at 40.

67. Rakoff, *supra* note 15 (“In actuality, our criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors and with no judicial oversight. The outcome is very largely determined by the prosecutor alone.”). As indicated above, typical assertions of prosecutor dominance are hedged: prosecutors “largely” or “very largely” determine sentence, *id.*; the charges are “the main event”; they have “virtually absolute power” over sentencing, Miller, *supra* note 15, at 1252 (“The overwhelming and dominant fact of the federal sentencing system . . . is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing.”). Although rarely spelled out, these hedges may simply reflect recognition that judges play a clearer role at sentencing after rare trials, the defendant’s agency in declining plea deals, or a recognition of judges’ influence even in plea-bargained cases.

68. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (“[I]f a defendant’s guilty plea is not . . . voluntary and knowing, it has been obtained in violation of due process and is therefore void.”).

an incentive to plead guilty, defendants will go to trial, overwhelming prosecutors (and courts) with more cases than can be tried.

The prosecutor-centered narrative posits that the prosecutor can create an illusory incentive to plead guilty by artificially inflating the potential post-trial sentence through overcharging.⁶⁹ This allows the prosecutor to threaten the defendant with a sentence above what even the prosecutor desires. When the defendant pleads guilty to avoid the draconian sentence, the resulting sentence matches the prosecutor's ex ante preference without the inconvenience of trial.⁷⁰ Not only does the prosecutor save the resources and avoid the risk of trial, but the prosecutor also becomes the actor who selects the defendant's sentence.

The modern narrative must also account for judges who, by law, must sign off on guilty pleas and, for many plea agreements, retain the formal authority to select the ultimate sentence.⁷¹ The modern account denies that judges exercise the agency they are formally offered, however, contending "that judges almost automatically ratify prosecutorial charge reductions and sentence recommendations."⁷² This observation fits neatly with studies showing that judges rarely reject plea deals,⁷³ and case law explaining that, by citing a plea agreement, the judge satisfies the statutory requirement of offering reasons for the sentence.⁷⁴ These accounts do not typically explain why judges are so passive, but the possibilities range from judges being lazy, disinterested, uninformed, or practically powerless to intervene.⁷⁵

Just as the traditional judge-centered narrative shows signs of strain when confronted with the reality of mandatory sentencing laws and plea bargains, the modern prosecutor-centered narrative shows cracks upon closer examination. A prosecutor's ability to coerce defendants to plead guilty through overcharging is limited by a number of factors. First, the fact pattern must offer itself to such

69. See, e.g., Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254 (2008) ("In most cases, prosecutors overcharge not because they seek to impose unduly harsh sentences on defendants, but simply because of the bargaining leverage it provides.").

70. See Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. 539, 550 (2023) [hereinafter Bellin, *Plea Bargaining's Uncertainty Problem*] ("Defendants, the modern consensus suggests, have little choice but to plead guilty and accept the severe punishment prosecutors desire.").

71. See *infra* Section II.A.

72. Alschuler, *supra* note 16, at 1065.

73. See *infra* Section II.B.1.

74. See *State v. Thacker*, 862 N.W.2d 402, 409 (Iowa 2015) ("[A] sentencing court does not abuse its discretion for failing to state sufficient reasons for imposing a sentence if it 'was merely giving effect to the parties' agreement.'" (quoting *State v. Cason*, 532 N.W.2d 755, 757 (Iowa 1995))); *People v. Quijada*, 202 Cal. Rptr. 846, 847 (Cal. Ct. App. 1984) ("It is the general rule that the court is required to state its reasons for imposition of a consecutive sentence. . . . However, there is sufficient compliance with this requirement where, as here, the court recites the plea bargain as its reason.").

75. McConkie, *supra* note 58, at 64 ("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.").

overcharging. In many cases, there may be an obvious offense that fits the facts, and the prosecution will struggle to alter the basic trial calculus by conjuring up other charges or enhancements around the periphery of that offense.⁷⁶

Second, the prosecutor-centered narrative only works if the initial (over)charging includes a harsh, statutorily mandated sentence. If the initial charge does not trigger a mandatory sentence, the judge's role reemerges—since it is the prospect of the judge's *selection* of the harsh sentence that coerces the defendant to accept the guilty plea, not the prosecutor's selection of the charge.

Take, for example, a defendant who is caught carrying a loaded firearm in a jurisdiction where the defendant is prohibited from carrying weapons or ammunition.⁷⁷ The prosecutor could, theoretically, charge the defendant with one count of possessing a firearm, and six additional counts of carrying ammunition (one for each bullet). Then, the prosecutor could propose that the defendant plead guilty to carrying a handgun in exchange for dismissal of the six ammunition counts. If each charge carries a penalty of up to five years, the plea deal reduces the defendant's nominal sentencing exposure from thirty-five years in prison to five. But the pressure created by the prosecutor's tactics subsides if these sentences are not mandatory and a judge retains sentencing discretion, or if the law requires or permits concurrent (as opposed to consecutive) sentences.⁷⁸ A reasonable judge will sentence the defendant based on the underlying facts of the offense—possessing a loaded gun—regardless of whether there is a charge accompanying each bullet.⁷⁹

In addition, the modern narrative does a poor job of explaining why judges would reflexively acquiesce to the sentences preferred by line prosecutors. This is particularly true in the many cases where the plea deal includes only a sentence recommendation, not a binding stipulation—since the resulting disposition allows judges to impose their sentencing preferences without

76. Gleeson, *supra* note 32, at 641 (noting that charge bargains may not always be feasible as “[i]n many contexts, especially narcotics and violent crime, there are not that many lesser counts to work with”); cf. Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1236–37 (2020) (presenting data on state prison populations to show that “charge selections at the state level are typically straightforward for the crimes that matter most”).

77. See, e.g., MASS. GEN. LAWS ANN. ch. 140, § 129C (Westlaw through chapter 6 of the 2023 1st Ann. Sess.) (“No person, other than a licensed dealer or one who has been issued a license to carry a pistol or revolver or an exempt person as hereinafter described, shall own or possess any firearm, rifle, shotgun or ammunition . . .”).

78. See, e.g., N.Y. PENAL LAW § 70.25 (McKinney 2023) (setting out rules to govern judges' discretion in selecting whether sentences on distinct charges are to be served concurrently and consecutively); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1334–38 (2018) (discussing variation in state laws on cumulative sentencing and their effects on prosecutorial power in plea bargaining).

79. The judge may, of course, be unreasonable and sentence the overcharged defendant more severely, but even if that occurs, the judge's irrational sentencing practice, not the prosecutor's superfluous charging, coerces the defendant to plead guilty.

disrupting the plea deal.⁸⁰ Judges are influential legal figures, often elevated to the bench after an accomplished career, sometimes in the local prosecutor's (or public defender's) office. Why would they seek a judicial post, or be satisfied in that job, if all it entailed was rubber stamping decisions of other legal actors?

C. *Implications of the Conflicting Narratives*

Conflicting narratives are awkward in any field. The conflicting narratives described above are especially problematic for criminal law scholars, however, because they concern a foundational question: Who sentences? The answer to that question is central to a host of important academic and policy debates.

One of the most obvious implications concerns diagnosis of American mass incarceration.⁸¹ Severe sentences are a substantial contributor to the staggering increase in the number of Americans in jail and prison.⁸² The sentencing decision includes the critical in-out question: whether someone will be incarcerated at all and, if so, how lengthy the incarceration will be. Diagnosing the increase in this country since the 1970s in both areas requires an ability to identify the actor responsible. Is it the prosecutor? The judge? Neither or both? Accurate diagnosis is, of course, critical to sustainable reform.

Another important implication concerns judicial selection. Americans are paying increasing attention to the background of appointed and elected judges. For example, commentators cheered President Biden for breaking from tradition to appoint more defense attorneys than prosecutors to the federal bench.⁸³ In a system dominated by guilty pleas, however, the significance of such appointments diminishes if judges play little role in sentencing. In fact, if prosecutors (not judges) drive sentences, politicians could best decrease sentence severity by identifying the most aggressive prosecutors and decreasing their influence by appointing them to judicial positions. Similarly, scholars' and commentators' attempts to identify and eliminate judicial bias become less pressing if judges play only a ceremonial role.⁸⁴

80. See *infra* Part III.

81. See BELLIN, *supra* note 5, at 120–21.

82. *Id.*; COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 70 (Jeremy Travis et al., eds., 2014) ("The increase in U.S. incarceration rates over the past 40 years is preponderantly the result of increases both in the likelihood of imprisonment and in lengths of prison sentences—with the latter having been the primary cause since 1990."); ALLEN J. BECK & ALFRED BLUMSTEIN, TRENDS IN U.S. INCARCERATION RATES: 1980–2010 28, 33–34 (2012).

83. Chris Geidner, *Biden Outshines Trump—and Obama—by Appointing Public Defenders as Judges*, MSNBC (Aug. 15, 2021, 3:03 PM), <https://www.msnbc.com/opinion/biden-outshines-trump-obama-appointing-public-defenders-judges-n1276856> [<https://perma.cc/76W5-3GBT>].

84. See *infra* Section II.C (discussing empirical studies of the effects of judicial characteristics on sentencing outcomes).

Finally, a raft of policy questions, including the desirability of mandatory minimum sentencing, parole release, and “truth in sentencing” proceed from assumptions about who imposes a sentence.⁸⁵ The merits of these policies depend at least in part on an assumption of whose prerogatives they interfere with: judges, prosecutors, or someone else entirely.

It is, then, critically important to understand who sentences, even if that answer shifts in different circumstances. Given the potential flaws in both narratives, it is likely that the answer lies somewhere in between. Indeed, the discussion so far suggests that neither one is right about sentencing. As a descriptive matter, any particular sentence depends on contributions from many different actors. Legislators set sentencing ranges and establish guidelines, prosecutors select applicable charges and enhancements (based on evidence gathered by police), judges choose a precise sentence within the legal boundaries, and correctional authorities can release prisoners prior to the end of the judicially selected term. And if this weren’t complicated enough, all these variables are filtered through the cloudy lens of plea bargaining. That means an official’s contribution to a sentence can manifest indirectly by influencing the choices made by another actor. For example, the plea deal offered by a prosecutor and accepted by a defendant will be influenced by the legislative framework, as well as the anticipated actions of the assigned judge and a parole board—even if the negotiations themselves never involve those actors. Thus, the first insight into the complexity of the “who sentences?” question is that sentencing is a cooperative enterprise. Every sentence is an amalgamation of direct and indirect contributions from a variety of actors. Keeping in mind this important complexity, the next part zooms in on the *judge’s* role in the complicated milieu of American sentencing.

II. JUDICIAL INFLUENCE OVER NEGOTIATED SENTENCES

A. *Direct and Indirect Involvement in Plea Negotiations*

The primary argument that judges have little influence over sentences highlights that: (1) most convictions result from plea deals and (2) judges are not part of the plea-bargaining process. This argument encounters an initial complexity. It is true that some jurisdictions prohibit judicial involvement in plea bargaining—but many permit it or at least tolerate it. And even in the strictest prohibitory systems, judges maintain the power, and obligation, to review and ultimately approve or reject plea agreements. This authority allows judges to shape the negotiations and sentences indirectly, even where direct participation is prohibited.

85. See BELLIN, *supra* note 5, at 48–60 (chronicling changes in American sentencing laws).

Over a dozen states permit judicial involvement in plea bargaining, and many others abide by it, even if their rules remain silent on the issue.⁸⁶ In these states, judges may participate in the discussions directly, or they may at least comment on tentative plea agreements and thus steer the parties toward a resolution favored by the court. As Professors King and Wright found in their interviews with practitioners and judges in participation-permissive states, “the judge’s advance views on sentencing provide[] welcome assurance that, if [the parties] proposed a sentence, the judge would probably accept their proposal.”⁸⁷ Judicial involvement is also valued for moderating differences between the prosecution and defense during the negotiations and limiting outlier plea deals.⁸⁸ Because judicial involvement can help iron out differences between the parties, it is also seen as more efficient, primarily by encouraging earlier settlement.⁸⁹ For all these reasons, judicial participation is widely used in states that permit it and even in some states where the rules are silent on the practice.⁹⁰

On the other hand, just over a third of jurisdictions prohibit judicial intervention in plea bargains to avoid jeopardizing judicial impartiality and prevent judges from coercing defendants to plead guilty.⁹¹ Bans on judicial

86. See, e.g., ARIZ. R. CRIM. P. 17.4(2); *State v. D’Antonio*, 877 A.2d 696, 696 (Conn. 2005); *State v. Warner*, 762 So. 2d 507, 507 (Fla. 2000); HAW. R. PENAL P. 11(f); IDAHO CRIM. R. 11(f); ILL. R. SUP. CT. 402; MAINE R. UNIF. CRIM. P. 11A; MASS. R. CRIM. P. 12(b); *People v. Cobbs*, 505 N.W.2d 208, 212 (Mich. 1993) (per curiam); N.Y. Advisory Comm. on Jud. Ethics, Op. 17-110 (2017); N.C. GEN. STAT. § 15A-1021 (LEXIS through Sess. Laws 2023-122 of the 2023 Reg. Sess. of the Gen. Assemb.); OR. REV. STAT. § 135.432 (2021); *Harden v. State*, 277 S.E.2d 692, 695 (S.C. 1981) (per curiam); VT. R. CRIM. P. 11(e)(1) (permitting judicial participation in plea discussions if discussions are on the record). For states that tolerate the practice in some form, see, for example, *State v. Byrd*, 407 N.E.2d 1384, 1388 (Ohio 1980) (“Although this court strongly discourages judge participation in plea negotiations, we do not hold that such participation *per se* renders a plea invalid under the Ohio and United States Constitutions.”); Brief for Appellant, Petitioner Honorable Robert K. Pirraglia at 52–53, *In re Comm’n on Jud. Tenure & Discipline*, 916 A.2d 746 (R.I. 2007) (No. 2003-512-MP), 2005 WL 6231681, at *26–27 [hereinafter Brief for Judge Pirraglia].

87. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 374 (2016).

88. *Id.* at 365–72.

89. See *id.* at 363–64.

90. See, e.g., *Byrd*, 407 N.E.2d at 1388 (acknowledging the practice in Ohio despite silence in the rules); Brief for Judge Pirraglia, *supra* note 86, at 52–53 (same with respect to Rhode Island).

91. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 202–03 (2006) [hereinafter Turner, *Judicial Participation*]. In just over a third of the states and the federal system, judges are prohibited from being directly involved in negotiations. See, e.g., *State v. Buckalew*, 561 P.2d 289, 292 (Alaska 1977); ARK. R. CRIM. P. 25.3(a); COLO. REV. STAT. § 16-7-302(1) (LEXIS through all legislation from the 2023 Reg. Sess. effective as of June 30, 2023); GA. UNIF. SUPER. CT. R. 33.5(A); MISS. R. CRIM. P. 15.4(b); MO. SUP. CT. R. 24.02(d); *Cripps v. State*, 137 P.3d 1187, 1191 (Nev. 2006); N.J. R. CT. 3:9-3(a); N.D. R. CRIM. P. 11(c)(1); *Commonwealth v. Johnson*, 875 A.2d 328, 331–32 (Pa. Super. Ct. 2005); S.D. CODIFIED LAWS § 23A-7-8 (Westlaw through the 2023 Reg. Sess. and Supreme Court Rule 23-17); TENN. R. CRIM. P. 11(c)(1); *Moore v. State*, 295 S.W.3d 329, 332 (Tex. Crim. App. 2009); UTAH R. CRIM. P. 11(i)(1); VA. SUP. CT. R. 3A:8(c)(1); WASH. REV. CODE § 9.94A.421 (2022); W. VA. R. CRIM. P. 11(e)(1);

participation vary in their rigidity. Several states that formally prohibit direct judicial involvement in the negotiations nonetheless permit the court, upon the parties' request, to state on the record whether it would accept a proposed agreement (or if not, why not) before the defendant enters a guilty plea.⁹² An example is Colorado Revised Statutes section 16-7-302(1), which provides that a "trial judge shall not participate in plea discussions."⁹³ After setting out the formal prohibition, the section goes on to state that the parties may present a proposed plea deal to the judge, along with "the reasons therefor."⁹⁴ The judge can then indicate "whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him."⁹⁵

Judges in jurisdictions such as Colorado can thus influence the plea discussions by telling the parties—before the defendant enters a guilty plea—whether a proposed plea agreement would be acceptable.⁹⁶ If not, the parties

State v. Williams, 2003 WI App 116, ¶ 12–13, 265 Wis. 2d 229, 666 N.W.2d 58; FED. R. CRIM. P. 11(c)(1). In some states, such as Alabama, no formal prohibition on judicial participation exists, but the practice does not seem to have developed broadly, perhaps because of the above-mentioned concerns over such participation. See ALA. R. CRIM. P. 14.3. Compare Tinsley Morgan Griffin Hill, *The Veil of Prosecutorial Discretion: A Study of Alabama Prosecutors and Felony Plea Bargains* 5 (2021) (Ph.D. dissertation, University of Alabama) (on file with the North Carolina Law Review), with Mack v. State, 288 So. 2d 150, 151 (Ala. Crim. App. 1974) (noting that trial judge had "wisely" engaged in the negotiations).

92. ARK. R. CRIM. P. 25.3(b); COLO. REV. STAT. § 16-7-302(2) (LEXIS through all legislation from the 2023 Reg. Sess. effective as of June 30, 2023); GA. UNIF. SUPER. CT. R. 33.5(B); UTAH R. CRIM. P. 11(i)(2). Likewise, the Kansas Court of Appeals affirmed that "judges should not participate in the negotiation of the proposed terms of a plea agreement, nor should they encourage the defendant to accept or reject any of the proposed terms"; yet the court found that it was not improper when the parties inquired, before the plea hearing, whether the judge would accept the proposed plea agreement, and the court responded affirmatively. *State v. Oliver*, 186 P.3d 1220, 1226 (Kan. Ct. App. 2008). In Washington, despite statutory language prohibiting direct participation in the negotiations, judges are permitted to act as "moderators." *State v. Wakefield*, 925 P.2d 183, 187 (Wash. 1996) (en banc) ("[W]here the prosecutor and defense are unable to reach a plea agreement, they may ask the trial judge to moderate their discussions. Moreover, the trial judge may inquire as to the possibility of a plea arrangement if he or she has not been advised of one." (citation omitted)).

93. § 16-7-302(1); COLO. R. CRIM. P. 11(f)(4).

94. § 16-7-302(2).

95. *Id.*; see also ARK. R. CRIM. P. 25.3(b) (providing that, once a plea agreement has been reached, upon request of the parties, the judge may review the agreement and indicate whether the judge will concur with it); MO. SUP. CT. R. 24.02(d) ("The court shall not participate in any such discussions, but after a plea agreement has been reached, the court may discuss the agreement with the attorneys including any alternative that would be acceptable."); *State v. Bolger*, 332 N.W.2d 718, 719, 721 (S.D. 1983) (holding that the judge did not impermissibly participate in plea negotiations when judge was approached by counsel to indicate whether he would accept charge and sentencing recommendation negotiated by the parties).

96. *Cf. People v. Venzor*, 121 P.3d 260, 263–64 (Colo. App. 2005) (noting that the court impermissibly participates in the negotiations when it "commit[s] itself to a sentencing position before the agreement was entered into or acted upon by the parties" or "attempt[s] to influence defendant to

can return to the negotiating table and craft a new agreement in response to the judge's concerns, or they can proceed to trial. In the end, these states' nominally "prohibitory" rules are therefore similar in effect to the "permissive" rules in states like Michigan and Florida, which limit judicial participation to telling the parties on the record whether an agreement is acceptable, and, if not, why not.⁹⁷

Some prohibitory jurisdictions have stricter bans on judicial involvement.⁹⁸ In federal court, even if the parties wish to obtain a judge's views on a tentative plea agreement, they may not do so. A federal judge may not comment on hypothetical plea agreements⁹⁹ or make any "remarks directed to future or ongoing plea negotiations which suggest what [disposition] will satisfy the court."¹⁰⁰ Federal judges are also prohibited from suggesting that there may be a difference in the sentence to be imposed in the event of a plea bargain as

give up his right to go to trial" but holding that court complied with the rules when it "simply pointed out that (1) in light of defendant's comments, his plea would not satisfy all the elements of the crime, and thus, did not qualify as a straight guilty plea; and (2) defendant's willingness and intention to plead guilty, despite his refusal to admit he acted knowingly, 'in essence . . . convert[s] these proceedings to an *Alford* plea'" (citation omitted in original)). The Utah rules are even clearer on this point. UTAH R. CRIM. P. 11(i) ("When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved. . . . If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge must advise the parties as to the nature of the divergence from the plea agreement and then call upon the parties to either affirm or withdraw from the plea agreement.").

97. FLA. R. CRIM. P. 3.171(d) ("After an agreement on a plea has been reached, the trial judge may have made known to him or her the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, the judge shall advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible."); *People v. Cobbs*, 505 N.W.2d 208, 212 (Mich. 1993) (per curiam) ("At the request of a party, . . . a judge may state on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense. . . . [A] defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation.").

98. See, e.g., W. VA. R. CRIM. P. 11(e); *State v. Welch*, 734 S.E.2d 194, 197–99 (W. Va. 2012).

99. See, e.g., *In re United States*, 32 F.4th 584, 593 (6th Cir. 2022) ("[W]hile plea negotiations are ongoing a district court is prohibited from commenting on a hypothetical plea agreement that it would or would not accept."); *United States v. Diaz*, 138 F.3d 1359, 1363 (11th Cir. 1998) (holding that "a court should not offer comments touching upon proposed or possible plea agreements because '[s]tatements and suggestions by the judge are not just one more source of information to plea negotiators; they are indications of what the judge will accept, and one can only assume that they will quickly become "the focal point of further discussions.'" (quoting *United States v. Adams*, 634 F.2d 830, 835 (5th Cir. 1981))), *abrogated on other grounds by* *United States v. Davila*, 569 U.S. 597 (2013); *United States v. Pena*, 720 F.3d 561, 570 (5th Cir. 2013) ("[W]hile the rule 'requires that a district court explore a plea agreement once disclosed in open court[,] . . . it does not license discussion of a hypothetical agreement that it may prefer.'" (alterations in original) (quoting *United States v. Miles*, 10 F.3d 1135, 1140 (5th Cir. 1993))).

100. *United States v. Kraus*, 137 F.3d 447, 455 (7th Cir. 1998).

opposed to after trial.¹⁰¹ Again, the purpose of these prohibitions is to preserve the judge's impartiality and to minimize the risk that a defendant would feel pressured to plead guilty.¹⁰²

But even in systems following this stricter approach, judges retain powerful tools with which to influence the negotiations and the ultimate sentence. Most importantly, many plea agreements include terms for sentencing *recommendations* as opposed to stipulated sentences.¹⁰³ These agreements are sometimes labeled “Type B” agreements in the federal system, as they are governed by Federal Rule of Criminal Procedure 11(c)(1)(B). The sentence recommendations negotiated in Type B agreements are not binding on the court, and the judge may depart from them even while accepting the underlying plea agreement and associated guilty plea.¹⁰⁴ Type B agreements therefore leave judges with significant direct influence over the ultimate sentence, and they are very common.¹⁰⁵

These agreements also have effects beyond the case in which they are negotiated. A judge's reaction to the parties' recommendation in one case signals to prosecutors and defense attorneys, who are often repeat players in the courthouse, what plea agreements and sentences the court is likely to accept in the future.¹⁰⁶

To try to reduce judicial influence, the parties can negotiate a plea deal with a stipulated sentence (also known as “Type C” agreements in the federal system), which is “binding” on the court.¹⁰⁷ Despite the “binding” appellation of Type C agreements, judges may reject these agreements as well.¹⁰⁸ Type C agreements become binding only if the court accepts them.¹⁰⁹

101. *United States v. Casallas*, 59 F.3d 1173, 1177–78 (11th Cir. 1995) (holding that Rule 11 was violated where trial court judge suggested that the defendant would face a ten-year minimum mandatory term if he pleaded guilty and a fifteen-year minimum mandatory term if he did not). Some states that prohibit judicial participation in bargaining have similar bans on comments about the likely sentence. *E.g.*, *McDaniel v. State*, 522 S.E.2d 648, 650 (Ga. 1999).

102. FED. R. CRIM. P. 11 advisory committee's note to 1974 amendment (citing *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966)).

103. *See infra* Section II.B.1 (providing an analysis of plea agreements in federal court showing that agreements containing a sentencing recommendation as one element are the most common types of plea agreement).

104. FED. R. CRIM. P. 11(c)(1)(B).

105. *Id.*

106. *See infra* notes 133–140 and accompanying text.

107. FED. R. CRIM. P. 11(c)(1)(C).

108. FED. R. CRIM. P. 11(c)(3)(A).

109. FED. R. CRIM. P. 11(c)(1)(C). The main difference between “binding” and “nonbinding” sentence agreements is that in the former, the defendant may withdraw his guilty plea if the court rejects the agreement. FED. R. CRIM. P. 11(c)(3).

Some judges dislike these stipulated sentence agreements precisely because they attempt to restrict the judge's sentencing discretion.¹¹⁰ As one judge sarcastically complained at a hearing, "Why should we accept [a Type C plea agreement]? Maybe we don't even need the court. We can just agree to it, put it in the computer, and the sentence would take place."¹¹¹ Other judges similarly complain that Type C agreements "tie [their] hands"¹¹² and produce sentences that result from "closed door negotiations with the executive branch" rather than from a public hearing before an independent judge.¹¹³

Yet despite frequent judicial grumblings about the rigidity of stipulated sentence agreements, judges do in fact have broad discretion to reject such agreements.¹¹⁴ They can do so for a range of reasons, including that "the agreement does not adequately reflect the seriousness of the offense, unduly cabins the judge's sentencing discretion, or is 'contrary to the sound administration of justice.'"¹¹⁵ If a judge rejects a "binding" stipulated sentence agreement, the judge must simply provide reasons for the rejection and give the defendant the opportunity to withdraw his plea.¹¹⁶

110. *See, e.g.*, *United States v. Robertson*, 45 F.3d 1423, 1439 (10th Cir. 1995); Transcript of Sentencing Hearing at 3–4, *United States v. Cruz*, 567 F. Supp. 3d 573 (E.D. Pa. 2021) (No. 11-716-1) [hereinafter Transcript of Sentencing Hearing] (scrutinizing Type C agreement and asking why the case contains a Type C plea agreement: "What is the reason why this case should be treated differently [by allowing a Type C agreement] than the thousands of cases that go to the courts every day?"); *Espinoza v. Martin*, 894 P.2d 688, 689, 691 (Ariz. 1995) (striking down policy adopted by a group of Arizona state judges to reject all stipulated sentence agreements; policy adopted because "sentencing 'is a judicial function which should not be subjected to limitations which are imposed by the parties'" (citation omitted in original)).

111. Transcript of Sentencing Hearing, *supra* note 110, at 5.

112. *United States v. Wilson*, No. 19-10404, 2021 WL 6116631, at *1 (9th Cir. 2021).

113. *United States v. Aegerion Pharms., Inc.*, 280 F. Supp. 3d 217, 225 (D. Mass. 2017).

114. *E.g., Wilson*, 2021 WL 6116631, at *1 ("[The court] must consider individually every sentence bargain presented to [it] and must set forth, on the record, the court's reasons in light of the specific circumstances of the case for rejecting the bargain." (quoting *In re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007))); *United States v. Kraus*, 137 F.3d 447, 453 (7th Cir. 1998). Some appellate courts have even affirmed a plea rejection where the judge has failed to state a specific reason for the decision. *United States v. Severino*, 800 F.2d 42, 45 (2d Cir. 1986); *United States v. Foy*, 28 F.3d 464, 472 (5th Cir. 1994).

115. *In re United States*, 32 F.4th 584, 594–95 (6th Cir. 2022) (citations omitted) (quoting *United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990)). State law provides similar standards. *See, e.g.*, *Hoskins v. Maricle*, 150 S.W.3d 1, 24 (Ky. 2004) ("[A plea agreement] can be approved or rejected in the discretion of the trial court, but the trial court must articulate the prosecutor's reasons for forming the bargain and the court's reasons for rejecting it." (citation omitted)); *State v. Sears*, 542 S.E.2d 863, 867 (W. Va. 2000) (holding that the "court's ultimate discretion in accepting or rejecting a plea agreement is whether it is consistent with the public interest in the fair administration of justice").

116. *See, e.g., In re Morgan*, 506 F.3d at 712 (holding that "district courts must consider individually every sentence bargain presented to them and must set forth, on the record, the court's reasons in light of the specific circumstances of the case for rejecting the bargain"); *Frankson v. State*, 518 P.3d 743, 757 (Alaska Ct. App. 2022) ("[W]hen a trial court rejects a sentencing agreement, it should put its reasons for doing so on the record. The majority of jurisdictions have adopted such a requirement, and

When judges provide reasons for their rejection of a stipulated sentence deal, the reasons not only explain the judge's decision but also signal to the parties what alternative bargain might be acceptable. The requirement to provide reasons for rejections therefore stands in uneasy tension with the ban on judicial involvement in the negotiations.¹¹⁷ Not surprisingly, rejections occasionally engender disputes about whether the court improperly influenced the negotiations when clarifying its reasons for rejecting the agreement.¹¹⁸

A judge's rejection of a plea agreement also results in frustrated expectations and delays, as the parties must renegotiate or proceed to trial. It appears that the parties have adapted to the common judicial aversion to stipulated sentence agreements, however. While more studies would be helpful, current evidence suggests that only a minority of plea agreements in federal courts feature stipulated sentence agreements.¹¹⁹

we likewise adopt it here."); *State v. Montiel*, 122 P.3d 571, 578 (Utah 2005) (same). If a court rejects a stipulated sentence agreement, it must allow a defendant to withdraw the associated guilty plea. *See, e.g.*, FED. R. CRIM. P. 11(c)(5); ALASKA R. CRIM. P. 11(e)(3); GA. UNIF. SUPER. CT. R. 33.10; KY. R. CRIM. P. 8.10; MASS. R. CRIM. P. 12(c)(4)(B), (d)(4)(B); MONT. CODE ANN. § 46-12-211(4) (Westlaw through chapters effective Jan. 1, 2024, of the 2023 Sess.); N.D. R. CRIM. P. 11(c)(5); NMRA RULE 5-304(d); N.J. CT. R. 3:9-3(e); TEX. CODE CRIM. PROC. ANN. art. 26.13(2) (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.); *Frederick v. State*, 151 P.3d 1136, 1143 (Wyo. 2007).

117. *E.g.*, *Kraus*, 137 F.3d at 453–55; *United States v. Garrott*, No. 217-CR-487, 2019 WL 758604, at *1–2 (M.D. Ala. Feb. 20, 2019), *aff'd*, 812 Fed. Appx. 905 (11th Cir. 2020) (noting that the defendant “sought a status conference so the ‘parties can discuss with the Court its concerns regarding the first plea agreement in order to try to fashion a new plea agreement or decide to go to trial’” and that “this motion borders on an invitation for the court to engage in plea negotiations, which of course it cannot do,” declining “to say what an appropriate sentence is in this case,” and saying only “that 36 months’ imprisonment is inappropriate, for the reasons described”). Courts have tried to resolve that tension by opining that judges may not express an opinion on proposed agreements *before* the defendant pleads guilty; but as part of their duty to review plea agreements, judges can do so *after* a plea has been entered and the agreement has been presented to the court. *See, e.g.*, *In re United States*, 32 F.4th at 593; *United States v. Pena*, 720 F.3d 561, 570 (5th Cir. 2013); *United States v. Crowell*, 60 F.3d 199, 204 (5th Cir. 1995).

118. *E.g.*, *United States v. Schneider*, 40 F.4th 849, 853–54 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 814 (2023) (mem.); *Kraus*, 137 F.3d at 453; *Crowell*, 60 F.3d at 204; *Williams v. United States*, No. 413CR169, 2020 WL 5821971, at *5 (N.D. Miss. Sept. 30, 2020); *United States v. Sandoval-Enrique*, 870 F.3d 1207, 1218 (10th Cir. 2017).

119. *See infra* Section II.B.1 (review of federal plea agreements finding that Type C agreements were the least common and occurred in only about 20% of negotiated cases); Transcript of Sentencing Hearing, *supra* note 110, at 8 (noting the rarity of Type C plea agreements); John B. Meixner, Jr., *Modern Sentencing Mitigation*, 116 NW. U. L. REV. 1395, 1436–37, 1437 n.221 (2022) (reviewing over 300 federal criminal convictions and finding that only 8 (less than 3%) featured plea agreements with stipulated sentences); Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post-Booker*, 37 WM. MITCHELL L. REV. 469, 496–99 (2011) (discussing reasons why binding plea agreements were rarely used after the adoption of the federal sentencing guidelines). On the other hand, at least in some districts, corporate defendants are more likely to get Type C agreements. *United States v. Aegerion Pharms., Inc.*, 280 F. Supp. 3d 217, 225 (D. Mass. 2017) (lamenting that “corporations routinely get ‘C’ pleas after closed door

Parties can also reduce judicial influence to some degree by negotiating charge bargains (“Type A” agreements).¹²⁰ In these agreements, the defendant pleads guilty in exchange for the prosecutor reducing, dismissing, or agreeing not to bring certain charges.¹²¹ If the judge accepts a Type A agreement, the parties can be certain that the disposition they negotiated will be included in the judgment.¹²² The negotiated modification or dismissal of charges typically reduces the defendant’s sentencing exposure in two ways. First, the statutory maximum sentencing range typically shrinks with the dismissal of charges and accompanying enhancements. Second, the defendant’s culpability may appear lower as the judge is presented with evidence only with respect to the remaining charges. Type A bargains leave judges with the discretion to choose the resulting sentence on the remaining charges, however.

Although charge bargains implicate prosecutorial discretion to select the charges for the case, federal and state courts generally allow judges to reject such bargains as well (but again require that judges provide reasons for the rejection and allow defendants to withdraw their guilty pleas).¹²³ Relevant rules of procedure often specifically grant such discretion, and even when they do not, many appellate courts allow trial judges to reject charge bargains on the grounds that the decision to do so is inextricably linked with the judge’s sentencing authority.¹²⁴ In the federal system, the sentencing guidelines expressly recognize that a court may reject a charge bargain if the negotiated charges do not reflect the seriousness of the conduct in the case.¹²⁵

negotiations with the executive branch while individual offenders but rarely are afforded the advantages of a ‘C’ plea”).

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

121. Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 411–19 (2010) (studying federal prosecutors’ charging decisions in 2001 (pre-*Booker*) and finding that about 12% of federal prosecutions involved charge reductions that lowered the statutory maximum penalty, that a charge reduction is associated with recommended sentences “that are about 23% shorter for otherwise equivalent offenders,” and that charge reductions reduce actual sentences “by 19% relative to sentences without charge reductions” by placing the defendant in a different presumptive guideline range).

122. FED. R. CRIM. P. 11(c)(4).

123. See *In re United States*, 32 F.4th 584, 596–97 (6th Cir. 2022); FED. R. CRIM. P. 11(c)(5); Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 80–82 (2017) [hereinafter Brown, *Judicial Role*]; MILLER ET AL., *supra* note 31, at 1029 (noting that “rules and statutes in more than 30 states require prosecutors to obtain the consent of the court to dismiss a charge”).

124. See, e.g., *United States v. Gamboa*, 166 F.3d 1327, 1330 (11th Cir. 1999).

125. Section 6B1.2 of the guidelines provides that the court “may accept [a charge bargain] if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.” U.S. SENT’G GUIDELINES MANUAL § 6B1.2(a) (U.S. SENT’G COMM’N 2018). In other words, the guidelines emphasize that judges should not accept charge bargains that understate the seriousness of the offense committed or undermine the statutory purposes of punishment. See, e.g., *Gamboa*, 166 F.3d at 1330.

Because charging is traditionally a prosecutorial function, however, some jurisdictions constrain the authority of trial courts to reject charge bargains more narrowly than the authority to reject sentence bargains.¹²⁶ For example, some federal appeals courts have required rejections of charge bargains to be based on reasons specific to the circumstances of the case and not to “frustrate prosecutorial independence.”¹²⁷ Still, these are relatively loose constraints that judges can overcome simply by noting briefly how the charge bargain they oppose understates the seriousness of the actual offense conduct.¹²⁸ Judges in many jurisdictions are less free to reject charge bargains in favor of leniency, however, unless there are evidentiary deficiencies in the case.¹²⁹

The broad variation in plea agreements complicates the picture, but one constant remains. Judges review all plea agreements—even those that feature charge bargains and stipulated sentences—and determine whether to accept them. Even if the parties enter into “binding” Type A or Type C agreements, state and federal judges have broad discretion to accept or reject such agreements and, with Type A and Type B agreements, to select the ultimate sentence.¹³⁰

Existing studies, while limited, suggest that judges rarely reject guilty pleas and plea agreements in practice.¹³¹ But even if judicial rejection of plea

126. *In re Vasquez-Ramirez*, 443 F.3d 692, 697–98 (9th Cir. 2006); *United States v. Robertson*, 45 F.3d 1423, 1439 (10th Cir. 1995) (“While the district court has considerable leeway in rejecting the bargain based on its sentencing aspect, its discretion is more limited when its decision is based on the bargain’s charging aspect.”).

127. *See, e.g., In re United States*, 32 F.4th at 596–97 (“So long as the district court’s assessment is soundly based on the circumstances of the case and does not frustrate prosecutorial independence, we generally do not otherwise limit what the district court may consider.”); *United States v. Kraus*, 137 F.3d 447, 453 (7th Cir. 1998). Some appellate courts have even affirmed a plea rejection where the judge has failed to state a specific reason for the decision. *United States v. Severino*, 800 F.2d 42, 45 (2d Cir. 1986); *United States v. Foy*, 28 F.3d 464, 472 (5th Cir. 1994).

128. *See, e.g., United States v. Musselwhite*, 709 F. App’x 958, 971 (11th Cir. 2017) (per curiam) (finding no abuse of discretion where district court rejected charge bargain because it did not “adequately reflect the seriousness of the actual offense behavior”).

129. Brown, *Judicial Role*, *supra* note 123, at 67–68, 80–82.

130. Appellate courts review a judge’s rejection for abuse of discretion. *See In re United States*, 32 F.4th 584, 592 (6th Cir. 2022); *State v. Sears*, 542 S.E.2d 863, 868 (W. Va. 2000).

131. *See infra* Section II.B.1 (finding that judges rejected none of the seventy-seven plea agreements in a random sample of federal cases); ROY B. FLEMMING, PETER F. NARDULLI & JAMES EISENSTEIN, *THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES* 115 (1992) (discussing a study of nine medium-sized felony courts in Illinois, Michigan, and Pennsylvania finding that judges rejected plea agreements in a minority of cases, when they objected to a sentencing recommendation or charge reduction); MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 150–51 (1978) (interviewing judges in Connecticut and finding that they go along with plea bargain recommendations “generally” and “in the vast, vast majority of cases”); WILLIAM F. McDONALD, U.S. DEP’T OF JUSTICE, *PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES* 135 (1985); Alschuler, *supra* note 16, at 1063–64 (finding from interviews with local practitioners in the 1970s that “five of the[] six [Houston

agreements is infrequent, judges nonetheless retain significant leverage over sentencing in negotiated cases for two additional, related reasons. First, the parties become aware of judicial preferences and structure plea deals to avoid judicial rejection.¹³² Thus, judges can influence a broad swath of plea deals even without a large number of formal rejections.¹³³ Second, judicial influence that manifests as the rejection of sentencing recommendations in Type B agreements will not appear as rejections at all.¹³⁴ Refusal to follow a sentence recommendation is not a “rejection” of the agreement, but nevertheless permits the court to impose a different sentence than the one the parties contemplated. And as with rejections, departures from sentencing recommendations have ripple effects on future negotiations as the parties accommodate judicial sentencing preferences in their agreements.¹³⁵

Because judges have broad discretion to reject plea agreements or deviate from a proposed post-plea sentence, the defense and the prosecution have long contended with a level of uncertainty in plea bargaining.¹³⁶ Regardless of the type of plea agreement contemplated, both the defense attorney and the prosecutor must calculate in the course of their negotiations whether the final agreement will be acceptable to the judge, and if not, to what extent the judge might depart from the agreed-upon sentence.¹³⁷

felony court] judges followed the prosecutor’s sentence recommendation in almost every guilty-plea case that came before them,” while the sixth, “considered a maverick by prosecutors and defense attorneys alike,” accepted the plea agreement in around 90% of cases); *see also id.* (reporting that a study by James N. Johnson found that “three of the ten judges who then sat in felony cases followed the prosecutor’s recommendation in 100% of the cases that came before them; one other judge followed the prosecutor’s recommendation in 99% of his cases, two in 98%, one in 96%, one in 92%, and one—[the ‘maverick’]—in 88%”); Turner, *Virtual Guilty Pleas*, *supra* note 55, at 232 (finding, based on observations of virtual plea hearings in Texas during the COVID pandemic, that judges rejected plea agreements on the record in only about 1% of cases).

132. *E.g.*, Kraus, 137 F.3d at 453 (“Pragmatically speaking, by signaling what has motivated the court to reject an agreement, the court’s remarks no doubt will have an effect on any future negotiations.”); FLEMMING ET AL., *supra* note 131, at 115 (explaining how plea agreement rejections in some cases were spread in the court community and shaped norms about future plea agreements); HEUMANN, *supra* note 131, at 151 (noting that a rejection, even if rare, “serves notice on all participants that the judge can—and will—exercise his prerogatives” and “set[s] rough guidelines for prosecutor and defense attorney alike to the range of dispositional outcomes that the judge considers appropriate”).

133. HEUMANN, *supra* note 131, at 152 (“Thus, the fact that judges rarely overturn negotiated settlements reflects success on the part of the court ‘adversaries’ in anticipating the judge’s own sentencing proclivities.”).

134. *See* Shayna M. Sigman, Comment, *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317, 1319 (1999) (explaining why judges prefer Type B bargains).

135. FLEMMING ET AL., *supra* note 131, at 115.

136. *See* HEUMANN, *supra* note 131, at 151–52; Bellin, *Plea Bargaining’s Uncertainty Problem*, *supra* note 70, at 550.

137. Jolly & Prescott, *supra* note 64, at 1111 (“The main takeaway is that judges have broad sentencing discretion and appear to use their discretion in ways that are individually distinctive—systematically so. When this happens, or when a judge signals that it will happen going forward, we should expect parties to negotiate settlement agreements in light of that information.”).

Qualitative studies have repeatedly affirmed this insight. An interview-based study of plea negotiations in Alabama found that prosecutors there “fear[] the judge’s refusal of the plea deal. . . . [E]ven in plea deals, prosecutors did not feel as though they could act without consideration of judicial discretion.”¹³⁸ Likewise, a large qualitative study of plea bargaining in Connecticut concluded that “[t]he judge’s significance for the plea-bargaining process . . . rests in his potential power to upset negotiated dispositions. Prosecutors and defense attorneys must plea bargain within the bounds of what the judge will ‘go along with.’”¹³⁹ An anthropological study of medium-sized felony courts in Illinois, Michigan, and Pennsylvania likewise found that judges’ rejections of pleas and plea agreements had important effects on future negotiations beyond the case at hand:

When a judge turned down a plea, the grapevine quickly spread the news. If the judge refused another plea in a similar case and then a third, the attorneys’ “book” on judges soon included a new entry on that judge’s plea preferences. Declarations from the bench that sentencing recommendations would not be heeded had the same effects. . . . [A]s these actions accumulated over time, they became part of the courthouse culture and shaped the court’s guilty plea process.¹⁴⁰

Thus, it is clear that judges can influence plea deals even as it is unclear how often they do so. But mapping the pathways by which judges can approve, reject, and reshape plea agreements is important regardless of how frequently those powers are exercised. It reveals that judicial approval of plea agreements and resulting sentences are, at a minimum, a cooperative exercise of the powers of the parties and the court, not a *de facto* unilateral choice by the prosecutor. Apart from the select scenarios discussed later in Section III.B., a court’s acceptance of a plea agreement reflects the court’s approval of the resulting sentence, not the court’s inability to intervene.

B. *Rejecting Plea Agreements*

Comprehensive data on judicial responses to plea deals is sparse. We examine a sample of federal plea-bargained cases to measure two variables: (1) the extent to which parties attempt to narrow judicial sentencing discretion in their plea agreements via stipulated sentences; and (2) the frequency with which judges exercise their discretion to reject plea agreements or depart from sentencing recommendations. We then conduct a separate analysis focusing exclusively on judicial rejections of plea agreements in order to understand the

138. Hill, *supra* note 91, at 108.

139. HEUMANN, *supra* note 131, at 152.

140. FLEMMING ET AL., *supra* note 131, at 115.

circumstances under which federal judges choose to wield their authority to discard a plea agreement.¹⁴¹

1. Plea Agreement Sample Analysis

In our first analysis, we examined seventy-seven plea-bargained cases selected partially randomly from the roughly 7,700 federal criminal cases filed between January 1, 2019, and June 1, 2019.¹⁴² We tracked the frequency with which parties entered into different types of plea agreements: (1) charge bargains; (2) sentence recommendations; (3) stipulated sentences; (4) hybrid agreements featuring charge bargains and sentence recommendations; and (5) hybrid agreements featuring charge bargains and stipulated sentences. We then analyzed the frequency of different judicial reactions to the agreements: Did the judge approve the agreement or reject it? If there was a sentence recommendation by the prosecution consistent with the plea agreement, did the court follow the recommendation, or did it depart up or down from the recommendation?

Because of data availability constraints, we focused only on federal cases filed within a six-month period. Therefore, our sample does not capture variation over time, nor does it reflect the full variety of agreements and judicial responses in state jurisdictions across the country. As we discuss below, however, our findings are broadly consistent with the existing research on judicial responses to plea agreements at the state level.

By necessity, our sample also excludes cases where the plea agreement was sealed or otherwise unavailable on Lexis CourtLink or PACER, the two databases we used to conduct the research. It is also a relatively small sample. We did, however, take steps to ensure that it was geographically representative of different federal districts.¹⁴³ While further research would be helpful to ensure more representative results, this preliminary analysis provides novel and

141. *See infra* Section II.B.2.

142. Following John Meixner's example, we relied primarily on the Lexis CourtLink database to search court dockets for plea agreements and related documents to examine the terms of agreements and judicial reactions to the agreements. *See Meixner, supra* note 119, at 1436. We selected the initial set of sixty-seven cases randomly from the 7,700 cases on PACER. When relevant documents were missing on CourtLink, we consulted PACER to obtain the information. If the information was not available on PACER, we excluded the case from our analysis. This led to the exclusion of fifty-four cases. The exclusion of cases lacking data on plea agreements or sentencing considerations may introduce a selection bias, but we had to work within the constraints of the data available to us. To ensure that our sample was more broadly geographically representative, we selected the last ten cases from federal districts that had been underrepresented in the original random sample.

143. Because some districts were more likely to have documents sealed or unavailable, after our initial random sampling of cases, we deliberately selected ten cases from underrepresented districts in order to get a sample that reflected roughly proportionately the number of cases filed within different districts. Despite these efforts, some districts are still under- or over-represented.

useful information on judicial sentencing in negotiated cases. We present our findings in Table 1 below.

Table 1: Plea-Bargained Cases and Judicial Responses¹⁴⁴

Plea Agreement Type	Type A (Charge Bargain)	Type B (Sentence Recommendation)	Type A & B (Hybrid Charge Bargain and Sentence Recommendation)	Type C (Stipulated Sentence)	Type A & C (Hybrid Charge Bargain and Stipulated Sentence)
Dist. Ct. Cases with Plea Agreements	7	18	37	6	9
Plea Agreements Approved	7	N/A	37	6	9
Judicial Departure in Favor of More Lenient Disposition ¹⁴⁵	0	8	18	0	0
Judicial Rejection in Favor of More Lenient Disposition	0	N/A	0	0	0
Judicial Departure in Favor of Harsher Disposition ¹⁴⁶	0	1	0	0	0
Judicial Rejection in Favor of Harsher Disposition	0	N/A	0	0	0
Judicial Agreement with Sent Rec by P	N/A	9	19	N/A	N/A

144. The table represents a sample selected partially randomly from federal criminal cases filed between January 1, 2019, and June 1, 2019. *See supra* notes 142–143 and accompanying text.

145. We coded a disposition as “more lenient” when it was more lenient than the sentence recommended by the prosecution. We determined the recommendation by reading the parties’ sentencing memoranda, the transcript, and/or other notes from the sentencing hearing.

146. We coded a disposition as “harsher” when it was harsher than the sentence recommended by the prosecution. We typically determined the recommendation by reading the parties’ sentencing memoranda, the transcript, and/or notes from the sentencing hearing.

First, we found that the large majority of plea agreements—roughly 80%—featured charge bargains or sentence recommendations, or both.¹⁴⁷ Hybrid agreements featuring both a charge bargain and a sentence recommendation were the most common type of agreement negotiated by the parties, representing almost half of those we reviewed.¹⁴⁸ Consistent with prior research, we found that agreements featuring stipulated sentence agreements (on their own or as part of a hybrid agreement) were relatively rare and represented about 20% of all agreements.¹⁴⁹ These results confirm our hypothesis that the parties strive to accommodate judicial preferences and refrain from constraining judicial discretion through stipulated sentences.¹⁵⁰

Our findings on judicial reactions to plea agreements also align with existing evidence from qualitative studies of state courts—namely, that judges very rarely reject plea agreements, but that they depart from sentencing recommendations more frequently.¹⁵¹ Federal district court judges approved plea agreements in all seventy-seven cases we reviewed.¹⁵² However, judges departed from sentencing recommendations fairly often, in twenty-seven of seventy-seven, or about one-third of cases.¹⁵³ Notably, all but one of the judicial departures were in favor of leniency. In a few cases, a mandatory statutory minimum constrained judicial discretion to depart (further) downward.

In brief, in the large majority of negotiated cases, judges retained significant sentencing discretion, whether under a charge bargain, a bargain involving a sentence recommendation, or a hybrid of the two. In about 20% of negotiated cases, judges' sentencing discretion was limited by the parties' stipulations,¹⁵⁴ but even in those cases, judges retained the authority to reject the agreement and force the parties to renegotiate or go to trial.¹⁵⁵ Although none of the judges in our sample used this authority, it was at their disposal. Our next analysis, focusing on judicial rejections of plea agreements, shows how federal judges choose to wield this authority to achieve a desired sentencing outcome.

147. *See supra* tbl.1.

148. *See supra* tbl.1.

149. *See supra* tbl.1.

150. *See supra* notes 119, 137–140 and accompanying text.

151. *See supra* note 131 and accompanying text; *see also* Brandon L. Garrett, William E. Crozier, Kevin Dahaghi, Elizabeth J. Gifford, Catherine Grodensky, Adele Quigley-McBride & Jennifer Teitcher, *Open Prosecution*, 75 STAN. L. REV. 1365, 1413 (2023) (finding that judges in Massachusetts state court influenced sentencing in one-fifth to one-fourth of negotiated cases).

152. *See supra* tbl.1.

153. Our interpretation that judges departed downward from the prosecutor's recommendation was based on the parties' sentencing memoranda and/or transcripts or notes from the sentencing hearings.

154. Most, but not all, Type C agreements were for a specific sentence. A minority of Type C agreements stipulated to a range or a cap, thus still leaving some discretion to the judge.

155. *See supra* Section II.A.

2. Plea Rejection Sample Analysis

To understand when and why judges might choose to reject a plea agreement, we reviewed thirty-one randomly selected federal district court decisions from 2012–22 in which the judge rejected a plea agreement and gave a reason for the rejection.¹⁵⁶ We also reviewed all thirty-two federal appeals court decisions from 2017–22 that concerned rejections of a binding plea agreement by the district court.¹⁵⁷

Before analyzing our two samples of plea rejection decisions, it is important to foreground some caveats. We do not suggest that these two samples, featuring rejections of *federal* plea agreements in *written* decisions, are representative of the practice in America's courts, or even federal courts. Looking at *written* decisions in *federal* cases and focusing on *rejections* of plea agreements necessarily skews the results. To begin, it does not reveal what the rate of rejections is in the entire universe of federal criminal cases, or of cases across the United States. As explained earlier and confirmed by our analysis in the previous section, such rejections remain rare.¹⁵⁸

In addition, these two samples likely overrepresent decisions in which judges rejected a plea agreement for being *overly lenient*.¹⁵⁹ Defendants are

156. These decisions were randomly selected from the larger pool of 2,459 district court decisions that our search on judicial rejection of plea agreements returned. We used the following terms to conduct our search of federal district court decisions in the 2012–22 period: (judge court) /s (reject! refuse!) /s plea /s agreement. We reviewed 465 randomly selected decisions that matched the search criteria, and of these, only thirty-two concerned actual rejections of a plea agreement by a federal judge. By rejection of a plea agreement, we mean a rejection of a charge bargain or of a stipulated sentence or sentence range (Type A or Type C agreements). We excluded decisions in which the judge rejected sentence *recommendations* negotiated by the parties (Type B agreements).

157. We excluded from review the few that concerned Type B agreements and the four that were already included in the district court sample.

158. See *supra* Section II.B.1 (finding that federal judges rejected none of the seventy-seven agreements in the random sample, though they did depart from sentencing recommendations in about one-third of negotiated cases).

159. Prior studies of judicial involvement in plea negotiations found that judges were more likely to influence plea deals in the direction of leniency rather than harshness. King & Wright, *supra* note 87, at 371 (“[M]ost interviewees told us that judicial input usually leads to sentences that are more lenient than the sentences defense attorneys would obtain for their clients if they had to deal with the prosecutor alone.”); Garrett et al., *supra* note 151, at 1413 (quantitative plea tracking study finding that judges in Massachusetts “imposed [plea] outcomes [that] were usually more lenient than what the prosecutor recommended”). In addition, because we focused on *rejections* of plea agreements, we effectively excluded the many cases in which the judge was presented with a sentencing recommendation in a Type B agreement and departed from it. As we discussed in Section II.B.2, judges departed from such recommendations much more often (twenty-five times more often) in the direction of leniency than in the direction of harshness. Cf. Kimberly Kaiser & Cassia Spohn, *Why Do Judges Depart? A Review of Reasons for Judicial Departures in Federal Sentencing*, CRIMINOLOGY, CRIM. JUST., L. & SOC’Y, Aug. 2018, at 44, 48 (finding that judges departed downward about nine times more frequently than upward from the sentencing guidelines in 2013).

significantly more likely than prosecutors to appeal sentencing decisions,¹⁶⁰ and judges are more likely to issue a written opinion in anticipation of an appeal. Therefore, the written decisions we examined would tend to feature cases in which the court believes it needs to explain a decision unfavorable to defendants, i.e., a rejection in favor of harshness. Likewise, appeals court decisions on plea rejections tend to overwhelmingly feature cases in which the defendant chose to appeal¹⁶¹—that is, cases in which the court rejected a plea agreement for being overly lenient. Finally, a Type C agreement generally represents a concession to defendants because it eliminates the risk of a harsher penalty being imposed by the judge.¹⁶² Therefore, any rejection of a Type C agreement is likely to occur because the court believes the agreement excessively benefits the defendant, not because it benefits the prosecution too much.

While recognizing that our plea rejection samples are not representative, we present these findings simply to show that courts do, in fact, use the tools described throughout this Article. The findings presented in this section illustrate *some* judges' reasons for rejecting plea agreements and underscore judicial discretion to shape sentencing outcomes through the ultimate authority over plea agreements.

Our findings on judicial rejections of plea agreements are as follows. Among the agreements that the district courts rejected, six were pure Type A charge bargains, two were charge bargains combined with a sentence recommendation (hybrid Type A and B agreements), nine were charge bargains with a stipulated sentence, sentence range, or sentencing factors (hybrid Type A and C agreements), and fourteen were Type C sentence agreements.¹⁶³ In the appeals court rejection group, seventeen decisions involved Type C agreements, nine involved hybrid Type A and C agreements, and six involved Type A agreements.¹⁶⁴

We do not include analysis of Type B agreement cases because there were few challenges in the case law to judges' "rejection" of those agreements. This finding reflects the fact that there is little for a judge to "reject" or the defendant to contest when a plea deal consists of a *nonbinding* sentence recommendation. Indeed, as part of the plea colloquy for these agreements, "the court must advise

160. See U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 180, 183 (2021) (reporting that in 2021, federal defendants filed 2,525 sentencing appeals while the government filed thirty-two sentencing appeals, meaning that defendants were seventy-nine times more likely to file an appeal).

161. See *id.*

162. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212, 241–42 (2005).

163. See *infra* tbl.2.

164. See *infra* tbl.2.

the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation.”¹⁶⁵

Table 2: Plea Agreement Rejection Decisions Reviewed

Agreement Type	District Court Decisions (Random Sample 2012–22)	Appeals Court Decisions (All Decisions Involving Agreement Rejection, 2017–22)
Type A (Charge Bargain)	6	6
Type C (Stipulated Sentence)	14	17
Type A & Type C (Hybrid-Charge Bargain and Stipulated Sentence)	9	9
Type A & Type B (Hybrid-Charge Bargain and Sentence Recommendation)	2	0
Total	31	32

In twenty-three out of the thirty-one district court rejections (74%), judges rejected the agreement because they thought the negotiated sentence (or the sentence that would result from the negotiated charge dismissals) was too lenient; in three out of the thirty-one rejections (10%), they did so because they thought the sentence was too harsh; and in the remaining five (16%), they rejected the agreement for other reasons. Twenty-five of the thirty-two appeals court cases (78%) featured district court rejections on the grounds that the disposition was too lenient; two cases (6%) featured a rejection on the grounds that the disposition was too harsh; and six (19%) featured rejections on other grounds.¹⁶⁶

When judges rejected a plea agreement for being unduly lenient, they typically explained that the agreement understated the defendant’s criminal history or otherwise failed to properly take into account sentencing-related

165. FED. R. CRIM. P. 11(c)(3)(B).

166. The total adds to more than 100% because in two of the thirty-two appeals court cases, the court had multiple reasons for rejecting the agreement—both that the agreement was too lenient and that it unduly constrained the court’s discretion to consider sentencing-related factors.

facts.¹⁶⁷ Other reasons given by judges for rejecting agreements included: (1) concern about the constraint on judicial discretion imposed by a stipulated sentence agreement;¹⁶⁸ (2) concern about the defendant not fully understanding the terms or consequences of the agreement;¹⁶⁹ (3) a change in the circumstances leading the court to conclude that there was no longer a meeting of the minds about the agreement;¹⁷⁰ and (4) concern that the agreement featured an overly broad waiver that the court believed was not in the public interest.¹⁷¹

Notably, in only a few of the thirty-two cases did appeals courts conclude that the district court had improperly rejected a plea agreement or involved itself in the negotiations.¹⁷² Most appellate decisions emphasized that district

167. *See, e.g.*, *United States v. Richmond*, 845 F. App'x 223, 227 (4th Cir. 2021) (per curiam) (“The district court rejected the plea agreement due to the concern that the advisory Guidelines range sentences they produced were ‘too lenient in light of the circumstances.’” (quotation omitted)) (indicating the court was concerned both about a dismissed count and about unpursued charges, and emphasizing the need for deterrence in imposing the sentence); Defendant-Appellant’s Opening Brief at 9, *United States v. Piñeda-Picasso*, 829 F. App'x 819 (9th Cir. 2020) (mem.) (No. 19-10369), 2020 WL 2045313, at *9 (noting that judge rejected plea agreement after noting that he was “not persuaded that a sentence of 33 months is a sentence that would meet the statutory purposes of sentencing in the circumstances of this case”); *United States v. Sabit*, 797 F. App'x 218, 221–22 (6th Cir. 2019) (stating the district court judge properly exercised his discretion when he “told the parties he had no categorical rule against Rule 11(c)(1)(C) agreements, [b]ut he couldn’t accept *their* agreement because the stipulated sentence did not ‘adequately provide[] [him] with discretion to sentence given the facts of [Sabit’s] case’” (quoting the district court judge)); *United States v. Godínez-Martínez*, 693 F. App'x 691, 692 (9th Cir. 2017) (rejecting the agreement because the sentence it stipulated did not adequately reflect the need to deter the defendant given his extensive criminal history).

168. *E.g.*, *Sabit*, 797 F. App'x at 221–22; *United States v. Martínez*, 777 F. App'x 709, 714 (5th Cir. 2019) (per curiam); Transcript of Sentencing Hearing, *supra* note 110, at 3–8.

169. *E.g.*, *United States v. Carrillo-Juarez*, No. 19-CR-1346, 2020 WL 3639741, at *3 (D.N.M. July 6, 2020); *García v. United States*, No. CV 16-05581, 2018 WL 6118546, at *1 (C.D. Cal. May 3, 2018); *United States v. Walker*, No. 19-CR-283-A, 2020 WL 1000086, at *7 (N.D. Tex. Feb. 28, 2020).

170. *See, e.g.*, *United States v. Gelin*, 811 F. App'x 22, 25 (2d Cir. 2020) (stating there was “too much dissension” between the parties and defendant request to reject the agreement); *United States v. Carlton*, No. 15CR31, 2016 WL 9211759, at *1 (E.D. Va. Mar. 2, 2016) (implying that the parties could not agree on the scope of the appeals waiver); *Tovar-Rivas v. United States*, No. A-12-CA-617, 2013 WL 12221934, at *3 (W.D. Tex. Jan. 23, 2013) (suggesting defendant refused to acknowledge factual basis of guilty plea).

171. *In re United States*, 32 F.4th 584, 595 (6th Cir. 2022).

172. *United States v. Schneider*, 40 F.4th 849, 854–57 (8th Cir. 2022) (finding that district court had improperly involved itself in the negotiations by “telling parties what sentence it would find acceptable,” but concluding that the involvement did not constitute reversible error (quoting *United States v. Thompson*, 770 F.3d 689, 685 (8th Cir. 2014))); *In re United States*, 32 F.4th at 590 (concluding that the court abused its discretion in rejecting the plea agreement because it provided no case-specific reason for the rejection, but rather a broad policy disagreement with certain waivers); *United States v. Wilson*, No. 19-10404, 2021 WL 6116631, at *1 (9th Cir. 2021) (holding that rejection must be related to the specific circumstances of the case, not general disagreement with Type C bargains); *United States v. Cota-Luna*, 891 F.3d 639, 648 (6th Cir. 2018) (holding that court abused its discretion when it “did not reach a ‘rational decision’ based on ‘all relevant factors’” to reject a plea agreement (quoting *United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990))).

courts had broad discretion to reject plea agreements, including charge bargains.¹⁷³

Table 3: Reasons Given for Rejecting Plea Agreements

Reason Given	District Court Decisions (Random Sample of Decisions Involving Agreement Rejection, 2012–22)	Appeals Court Decisions (Involving Agreement Rejection, 2017–22)
Results in sentence/disposition that is too lenient	23	25
Results in sentence/disposition that is too harsh	3	2
Other	5	6

These findings, in a jurisdiction (federal) that follows the *most* restrictive model with respect to judicial involvement in plea deals, illustrate the argument made throughout this Article. Judges can and do reject plea agreements based on disagreements with their substance. Paired with their unquestioned authority to select the ultimate sentence for the most common Type A and B deals, this gives judges a clear mechanism for influencing outcomes across the broad array of criminal cases.

C. *Influencing Plea-Bargained Sentences*

As the last section discussed, judges have several tools that allow them to shape sentences in negotiated cases. Of course, individual judges differ in the degree to which they use these tools. But as explained below, empirical studies by social scientists suggest that, on the whole, even in an era of plea bargains, judges matter at sentencing.¹⁷⁴

Empirical studies show judicial influence on sentencing even in jurisdictions that formally prohibit judges from taking part in plea negotiations and attempt to structure sentencing through guidelines and statutory minimums. A study of cases resolved in 1999 and 2000 and sentenced under the

173. *E.g.*, *United States v. Musselwhite*, 709 F. App'x 958, 971 (11th Cir. 2017) (per curiam) (finding no abuse of discretion where district court rejected charge bargain because it did not “adequately reflect the seriousness of the actual offense behavior”); *United States v. Doggart*, 947 F.3d 879, 882 (6th Cir. 2020) (same).

174. Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 722 (2008).

1997 Pennsylvania sentencing guidelines found that, while “legal variables, such as offense severity, prior criminality, and presumptive sentence recommendation, dominate” the sentencing calculus, “for both incarceration and sentence length, the effects of virtually all the explanatory factors vary significantly across judges and courts.”¹⁷⁵ The study’s author concluded that

approximately 5 percent of the total variation in the likelihood of incarceration can be attributed to differences between judges, and an additional 5 percent is accounted for by counties. Similarly . . . about 6 percent of the total variance [in sentence length] is attributable to judges, compared to about 7 percent for counties.¹⁷⁶

Pennsylvania judges are formally prohibited from involving themselves in the plea negotiations and are constrained in their sentencing by guidelines and statutes.¹⁷⁷ Yet they nonetheless influenced sentencing—through their sentencing decisions after trials or open guilty pleas, decisions to accept or reject plea agreements, and decisions to accept or depart from sentencing recommendations.

Likewise, a 2016 study of sentences in Texas, another state that prohibits judicial participation in plea bargaining,¹⁷⁸ found that the sentences imposed, which were “to a very large extent plea-bargained sentences,” were “strongly influenced by the judges deciding the case.”¹⁷⁹ The authors added:

[T]he effect attributed to any given judge tends to be relatively constant across the counties over which such a judge has jurisdiction. That our estimated judge-specific effects do not seem to vary with the counties where the cases are prosecuted provides further support for the interpretation that they indeed reflect the sentencing behavior of the judges, rather than the influence of prosecutors or other agents involved in the plea negotiations.¹⁸⁰

A 2012 analysis of the sentences in over 370,000 cases in the federal courts (where more than 95% of convictions result from guilty pleas and where judges are prohibited from becoming involved in the negotiations) similarly found

175. Brian D. Johnson, *The Multilevel Context of Criminal Sentencing: Integrating Judge- and County-Level Influences*, 44 *CRIMINOLOGY* 259, 279 (2006).

176. *Id.*

177. *Commonwealth v. Johnson*, 875 A.2d 328, 331–32 (Pa. Super. Ct. 2005) (“[A] trial judge is forbidden from participating in any respect in the plea bargaining process prior to the offering of a guilty plea.”).

178. *Perkins v. Ct. of Appeals*, 738 S.W.2d 276, 282 (Tex. Crim. App. 1987) (en banc).

179. Claire S.H. Lim, Bernardo S. Silveira & James M. Snyder, *Do Judges’ Characteristics Matter? Ethnicity, Gender, and Partisanship in Texas State Trial Courts*, 18 *AM. L. & ECON. REV.* 302, 318 (2016).

180. *Id.* We should note, however, that Texas does not have any sentencing guidelines to guide judicial discretion and instead has very broad statutory sentencing ranges. Even though the federal sentencing guidelines are no longer binding, arguably they constrain federal judges’ sentencing decisions to a greater degree than statutes do in Texas.

significant disparities based on the sentencing judge, concluding that “the typical sentence handed down by a federal district court judge can be very different than the typical sentences handed down for similar cases by other judges within the same courthouse.”¹⁸¹ Likewise, both a 2008 study and a 2019 study of federal sentences uncovered sentencing variations based on the party of appointment of the district court judge.¹⁸² These variations were due in part to judicial adjustments to the offense base level and in part to judges’ decisions to depart from the presumptive sentencing guidelines range.¹⁸³ The 2019 study specifically controlled for the effects of prosecutorial discretion (such as the decision to charge offenses with mandatory minimum sentences and the decision to offer a substantial assistance departure) and found that judge-specific variation persists even after controlling for prosecutorial decisions.¹⁸⁴

A 2022 study likewise found judicial influence over sentencing in negotiated sentences in North Carolina where judges are constrained by sentencing guidelines. The authors found that “judge-specific effects vary substantially across judges, in accordance with the idea that judges exert an essential influence on sentencing.”¹⁸⁵ This influence occurs even though 97% of criminal cases in the authors’ dataset were “resolved via plea bargain.”¹⁸⁶ The influence can be explained in part because North Carolina judges are permitted to participate in plea negotiations.¹⁸⁷ While involvement in the negotiations likely strengthens judicial influence on the sentence, in many cases, it simply lays out in the open the influence that judges exercise indirectly through approval (or rejection) of plea deals and sentence recommendations.¹⁸⁸ Interviews with North Carolina plea bargaining participants reveal that the parties value judicial involvement precisely because it provides certainty in a

181. Susan B. Long & David Burnham, *Trac Report: Examining Current Federal Sentencing Practices: A National Study of Differences Among Judges*, 25 FED. SENT’G REP. 6, 6 (2012); see also Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 41 (2010) (studying federal sentencing in the District of Massachusetts and finding that “after *Kimrough* and *Gall*, the judge account[ed] for 6.1% of variation in sentence length (8.0% in cases not subject to a mandatory minimum), and 6.6% of variation in distance from the guideline range (9.4% for discretionary sentences)”).

182. Schanzenbach & Tiller, *supra* note 174, at 733–35; Alma Cohen & Crystal Yang, *Judicial Politics and Sentencing Decisions*, AM. ECON. J.: ECON. POL’Y 160, Feb. 2019, at 160, 173–78.

183. Schanzenbach & Tiller, *supra* note 174, at 733–35; Cohen & Yang, *supra* note 182, at 173.

184. Cohen & Yang, *supra* note 182, at 183–85.

185. David Abrams, Roberto Galbiati, Emeric Henry & Arnaud Philippe, *When in Rome... On Local Norms and Sentencing Decisions*, 20 J. EUR. ECON. ASSOC. 700, 709 (2022).

186. *Id.*

187. N.C. GEN. STAT. § 15A-1021(a) (2023) (LEXIS through Sess. Laws 2023-122 of the 2023 Reg. Sess. of the Gen. Assemb.) (“The trial judge may participate in the discussions.”).

188. *Cf.* Abrams et al., *supra* note 185, at 709 (noting that judges “can influence the bargaining process by their presence” and that “[t]he mere threat of a rejection [of the sentence by the judge] . . . plays an important role” in the parties’ decisions).

regime where, despite guidelines, judges retain significant discretion over sentences.¹⁸⁹

Finally, a recent study of plea and sentencing practice in Berkshire, Massachusetts, found that judges influenced sentencing in a significant number of negotiated cases.¹⁹⁰ Judges changed the outcome in about 24% of negotiated misdemeanor and low-level cases, typically by imposing a more lenient sentence than that recommended by the prosecution.¹⁹¹ Judges also influenced 17% of the more serious felony cases, and they did so “by changing the disposition, sentence, or probation terms and conditions.”¹⁹² Once again, in most of these cases, judicial intervention resulted in a more lenient outcome for defendants, even though Massachusetts constrains judges’ sentencing discretion through a large number of mandatory minimum statutes.¹⁹³

Studies have also found that demographic factors—such as the judge’s race, gender, party of political appointment, length of experience, or military background—influence sentences.¹⁹⁴ Other analyses conclude that the relative severity of the cases that judges are exposed to also affects judges’ sentencing practices.¹⁹⁵

These empirical studies support the argument that judges influence sentences, even in negotiated cases. Judges think so too. In an anthropological study of guilty plea colloquies, Susan Philips noted that the judges who invested the most time on guilty plea colloquies explained their motivation as a “commitment to ‘tailoring’ the plea to the individual defendant”¹⁹⁶—a sentiment that makes no sense if the judges acted as a rubber stamp. This is not to say that judges have exclusive control over sentencing in negotiated cases. Prosecutors’

189. King & Wright, *supra* note 87, at 374–75 (noting that the “sentence preview” that judicial involvement in negotiations provided was especially important in certain cases; in those cases, a defense attorney noted: “[I]f I’m dealing with an open plea, I’m not doing my job. A charge bargain without a sentence recommendation is just way too much leeway to allow the judge, even with structured sentencing.” (quoting anonymous interviews of North Carolina and Ohio judges)).

190. Garrett et al., *supra* note 151, at 1413.

191. *Id.*

192. *Id.*

193. *Id.* at 1403, 1413

194. Johnson, *supra* note 175, at 283 (finding that military background influenced sentence lengths given by Pennsylvania judges); Schanzenbach & Tiller, *supra* note 174, at 733–35 (finding that Democratic appointees sentenced federal drug and violent crime offenders less severely than Republican appointees); Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge’s Gender Affect the Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163, 1174 (1999) (finding, in studies of Pennsylvania sentences, that female judges were likely to be harsher than male judges).

195. Johnson, *supra* note 175, at 274–75; Adi Leibovitch, *Punishing on a Curve*, 111 NW. U. L. REV. 1205, 1225 (2017) (“Judges with initial exposure to low-gravity caseloads imposed sentences that were on average two months [or 25%] longer than those of judges initially exposed to more serious caseloads.”).

196. SUSAN U. PHILIPS, IDEOLOGY IN THE LANGUAGE OF JUDGES: HOW JUDGES PRACTICE LAW, POLITICS, AND COURTROOM CONTROL 58 (Bright et al. eds., 1998).

charging and bargaining decisions, defense attorneys' bargaining strategies and mitigation arguments, and probation officers' reports all shape sentencing directly or indirectly.¹⁹⁷ In the next part, we discuss in greater detail the main limits on judicial influence over negotiated sentences. While we acknowledge these limits, we ultimately maintain (and we believe the empirical data discussed in this section supports this point) that judges influence sentences in a world of guilty pleas, even when they are constrained by sentencing guidelines and statutes or excluded from plea negotiations.

III. LIMITS ON JUDICIAL INFLUENCE OVER NEGOTIATED SENTENCES

Judges have the authority to reject plea bargains and to depart from the sentencing recommendations that accompany them. Yet, there is a widespread perception in the scholarly literature that judges reflexively approve plea deals.¹⁹⁸ This part explores this perception of judicial passivity. It explains that there are contexts where judges are, in fact, powerless to intervene. Yet, those contexts are narrower than the current discourse suggests. To the extent judges decline to interfere in plea deals, that inaction is not a function of the inability to do so. Instead, as this part explains, it reflects agreement with the terms of

197. Ashna Arora, *Too Tough on Crime? The Impact of Prosecutor Politics on Incarceration* 19 (Dec. 31, 2018) (unpublished manuscript), <https://www.aeaweb.org/conference/2019/preliminary/paper/9bQ48ZTA> [<https://perma.cc/SXK3-NMAH>] (studying the effects of the politics of DAs elected in contested races and finding that “while [elections of] Republican District Attorneys lead to large increases in sentence length in the period 1980–2004, these effects are absent in the period 2005–15” after the *Blakely* decision, strengthening judicial discretion at sentencing; then concluding that “the judicial branch may be capable of blocking, and in fact, entirely offsetting the influence of political preferences of prosecutorial offices”); Cohen & Yang, *supra* note 182, at 183–85 (finding that both prosecutorial discretion and judicial decision-making contribute to racial and gender disparities in federal sentencing); Leslie A. Cory, Comment, *Looking at the Federal Sentencing Process One Judge at a Time, One Probation Officer at a Time*, 51 EMORY L.J. 379, 429–33 (2002) (discussing the influence of probation officers on federal sentencing); Chantale Lacasse & A. Abigail Payne, *Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow of the Judge?*, 42 J.L. & ECON. 245, 262–64 (1999) (conducting study of E.D.N.Y. and S.D.N.Y. sentences between 1981–95 and finding that sentencing variation attributable to judges was higher in sentences post-trial than sentences post-plea, suggesting that prosecutors as well as judges have an important influence on post-plea sentences); Meixner, *supra* note 119, at 1407–18 (discussing the important sentencing effects of certain mitigation arguments by defense attorneys); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1344–51 (2014) (finding that federal prosecutors' initial charging decisions, particularly the decision to bring charges carrying a mandatory minimum, explain more than half of the racial disparity in federal sentencing that is not attributable to pre-charge characteristics).

198. See *supra* note 131 and accompanying text.

those deals, general indifference, or the prioritization of other considerations, such as efficiency.¹⁹⁹

The legal authority to reject a plea deal or to substitute a judicially selected sentence for the one recommended by the parties does not mean that judges can exercise that authority effectively. That is because the plea-bargaining dynamic is not static. Judicial intervention may be met with a reaction from the parties, either in the same case or future cases, and that reaction can frustrate the judge's goal. For example, if a trial court rejects a plea agreement it believes is too harsh, the prosecutor can decline to renegotiate and instead push for a trial. Typically, this will be a poor tactic because the same judge will preside over that trial and, even if the prosecutor obtains a conviction, that judge can then impose a lenient sentence.²⁰⁰ But if the judge's hands will be tied after trial by a statutory minimum, the judge's leverage diminishes. The foreseeable result of the judge's effort to decrease the severity of the plea deal becomes an even higher post-trial sentence. If a prosecutor's reaction would ultimately frustrate the judge's intent in this manner, the judge may decline to intervene in the first instance and be cowed into passivity in future cases.

This part explores this dynamic nature of plea bargaining to illustrate the many plea-bargaining scenarios where judges retain control over sentences and the few where they do not.

A. *The Default Position: Judicial Influence over Sentences*

In every American jurisdiction, a plea deal only becomes effective with the assent of three parties: the prosecutor, defendant, and judge.²⁰¹ As explained in the previous part, even in jurisdictions where judges are prohibited from intervening in plea negotiations, judges possess the legal authority to reject any deal reached by the parties. And in the typical plea deal with a sentence recommendation, the judge's authority is made plain as the judge, in fact, selects the sentence imposed.

The judge's influence over plea deals is further enhanced because whatever position the judge takes will likely find an ally in one of the parties. If we make the pedestrian assumption that a plea deal represents a compromise between the defendant's desire for less punishment and the prosecutor's desire for more,

199. See HEUMANN, *supra* note 131, at 146–47, 150 (discussing efficiency pressures on judges that encourage them to approve plea bargains, but also noting that: “[J]udges accept most plea bargaining outcomes . . . because they are in fundamental agreement with both the process used to obtain these settlements and with the actual outcome of the settlement. Their cooperation with the parties . . . is not simply an expedient to lessen their work loads.”); Darryl K. Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH L. REV. 133, 144–45 (2012) (noting that “judges often face significant pressure to move their dockets efficiently”).

200. In the few jurisdictions that utilize jury sentencing, this element of the calculus does not apply.

201. See *supra* Section II.A.

the judge's preferences—seeking either more or less punishment—will parallel the wishes of one of the parties. If the judge seeks more punishment, the prosecutor will be a willing partner, and if the judge seeks less punishment, the defendant will be eager to accommodate. Having one of the parties as an ally plus the ultimate authority to reject pleas and recommended sentences should mean that judges can influence initial sentences, at least within the sentencing ranges provided for the charged offense.

When presented with a plea deal perceived as lenient, a judge who seeks more severity can reject the deal, leaving the parties two options. They can renegotiate a more severe deal that the judge will approve. Or they can try the case, but now with the expectation that the judge, upon conviction, will impose the judicially desired, more severe sentence.²⁰² Expressed enough times, the judge's preference for more severity will inevitably push sentences higher in similar cases as prosecutors and defense attorneys negotiate the more severe plea deals necessary to obtain the judge's approval.²⁰³

A similar dynamic should play out when judges seek less severity. Presented with a too-severe plea deal, the judge can reject the deal. The parties can then renegotiate a less severe deal or go to trial. The defendant will be eager to renegotiate a more lenient deal, and the prosecutor will likely acquiesce since going to trial will seem futile. Even if the prosecutor obtains a conviction at trial, the judge can just impose the less severe sentence at that point. Again, the judge's lenient preferences should lead to a new, less severe equilibrium.²⁰⁴

B. *Limits on the Judge's Ability To Reject Plea Deals*

Statutory sentencing ranges and mandatory sentencing laws can diminish judicial influence over plea bargaining by reducing judges' sentencing authority. If the judge does not have the power to select a sentence after trial, or the judicially desired sentence does not fall within the prescribed range, the parties can enforce their sentencing preferences, even without judicial approval, by going to trial.²⁰⁵

The pressure that mandatory minimum sentences place on defendants during plea negotiations is widely recognized. But mandatory minimums also limit *judges'* ability to reject plea agreements. By design, a mandatory minimum allows the prosecutor to charge an offense in a way that constrains the judge's sentencing authority. This changes the plea-bargaining dynamic. If the charged offense triggers a mandatory sentence, the judge's statutory authority to reject

202. Defendants can also plead guilty without any plea deal, but the absence of an agreement only increases the judge's sentencing discretion.

203. *See supra* notes 132–40 and accompanying text.

204. *See supra* notes 132–40 and accompanying text.

205. Parties can also avoid the necessity of judicial approval through a guilty plea to the charges without any agreement, or by dismissing the case entirely.

a severe plea deal is limited because the judge may not be able to choose a more lenient sentence after trial. If the judge rejects a plea deal that, while severe, nonetheless avoids a mandatory sentence, the judge risks generating more, not less, severity.

The dynamic described above actually requires more than a mandatory minimum sentence. To truly tie the judge's hands, the prosecutor needs to also deprive the judge of discretion under the plea deal. If the prosecutor leaves the judge with discretion either after trial *or* under the deal, the defendant (aware of the judge's potential preference for lenience) can simply push for the outcome that preserves the judge's discretion. To avoid this, the prosecutor will have to limit the judge's discretion at both junctures by negotiating a plea deal with a stipulated sentence as the defendant's only option for avoiding a mandatory minimum sentence.

The same dynamic can work in the opposite direction if the parties agree to a plea deal with a penalty that is lower than the judge prefers. If the judge rejects the plea deal, the prosecutor can refile charges that have a statutory *maximum* that is lower than the judge's sentencing preference.²⁰⁶ Then, whether the defendant pleads guilty to that charge (without a deal) or goes to trial, the judge cannot sentence the defendant more harshly due to the mandatory *maximum* sentence.²⁰⁷ Recognizing this, the severe judge will be less likely to reject plea deals since such intervention could backfire leading to less, not more, severity.

C. *Formal Obstacles to Restricting Judicial Sentencing Discretion*

Having sketched the broad contours of scenarios where judges should have strong influence over sentences and those where judges will not, it is important to discuss why we think the former will be more frequent than the latter.

Most importantly, the prosecutor can only take advantage of the dynamic necessary to cut off the judge's discretion when the statutory scheme permits. This requirement has two components. First, to impose severity unilaterally, the prosecutor must be able to charge the defendant with a provable offense that triggers a mandatory sentence above the judge's sentencing preference. And the mandatory sentence must, in fact, be mandatory. For example, it is common for one statute to present a seemingly mandatory sentence, while a

206. Some jurisdictions require the judge to approve the dismissal of a filed charge. But even in jurisdictions with such a requirement, the prosecutor could respond to judicial restrictions by waiting to file charges until plea deals are in place. In addition, there is only so much the judge can do if a prosecutor is unwilling to move forward on a particular case or charge.

207. See, e.g., *In re Vasquez-Ramirez*, 443 F.3d 692, 698 (9th Cir. 2006); *United States v. Martinez*, 777 F. App'x 709, 715 (5th Cir. 2019) (per curiam).

separate statute permits the judge to suspend part or all of that sentence.²⁰⁸ Indeed, some of the most impactful mandatory sentencing laws can be found in California. But those laws are not truly mandatory. By statute, California judges can dismiss “an action,” including a charge, enhancements, or even a “strike” under the state’s notorious three strikes law when doing so is “in furtherance of justice.”²⁰⁹ This law complicates California prosecutors’ efforts to force judges to impose mandatory sentences that judges view as unjust.²¹⁰ Similar laws allowing judges to dismiss charges in the interests of justice exist in close to a third of the states.²¹¹ And when judges retain discretion over the ultimate sentences, they can powerfully influence plea bargains.

Second, as suggested in the previous section, to force judges to go along with plea deals, the prosecutor must also bind the judge to a precise sentence identified in the deal. If they don’t, defendants can take advantage of the judge’s preference for leniency by simply agreeing to the deal and letting the judge impose their preferred low sentence. Prosecutors can avoid this either by finding another charge with a mandatory sentence that maps the plea terms or by reaching an agreement to a stipulated sentence. Again, however, prosecutors will only be able to take this approach if the facts and statutory framework support doing so, the jurisdiction permits such an approach, and judges are willing to accept plea deals with a binding, stipulated sentence.

The scenarios where the parties can easily impose leniency on an unwilling judge will also be limited. While judges cannot impose a sentence above a mandatory maximum, statutory schemes will not provide seamless options to a prosecutor who wishes to prevent a judge from imposing a more severe sentence. For example, imagine a sexual assault is punishable by up to ten years, and the prosecutor offers a plea deal of two years, but the judge prefers five. The prosecutor can only dictate a sentence lower than five years by dismissing the charge and charging the defendant with a different offense, such as a misdemeanor assault. But that offense may understate the offense to such a degree that it forces the prosecutor to drop the maximum sentence all the way down to one year or even 180 days. Such dramatic sentencing cliffs will often

208. *See, e.g.*, *Commonwealth v. Zack*, 33 Pa. D. & C.3d 595, 604 (Pa. Ct. Com. Pl. 1985) (“[T]he sentencing judge retains the power to suspend sentence even under a mandatory sentencing law, provided the legislature has not expressly prohibited the suspension of sentence in cases arising under such a law.”).

209. CAL. PENAL CODE § 1385(a)–(b)(1) (Westlaw through chapter 1 of 2023–24 1st Extraordinary Sess., and urgency legislation through chapter 888 of 2023 Reg. Sess.); *People v. Superior Court (Romero)*, 917 P.2d 628, 629 (Cal. 1996).

210. To the extent a trial court’s discretion is limited by appellate courts (despite a statutory grant of discretion), that is still a form of judicial influence.

211. Beety, *supra* note 50, at 632; Roberts, *supra* note 50, at 330.

push prosecutors to acquiesce to the judge's preferences by renegotiating the plea deal.²¹²

D. *Informal Obstacles to Defying Judicial Preferences*

There are more than just formal barriers to the parties' attempts to structure plea deals to prevent judicial interference. Efforts to frustrate judges will make life difficult for both prosecutors and defense attorneys in less formal ways. Most obviously, such conduct will upset the judge. This is particularly important since one of the keys to enforcing a plea deal over a judicial objection is a willingness to go to trial.

Both prosecutors and defense attorneys can be expected to be averse to trial for logistical and tactical reasons. These disadvantages will be magnified for the attorney who pushes for trial to override judicial sentencing preferences. That attorney will now have to conduct the trial in front of a judge who blames the attorney both for the trial itself and the prospect of, in the judge's view, an unjust sentence imposed at its conclusion.

Consider the prototypical scenario of the prosecutor who seeks to sidestep the judge by refusing to renegotiate a plea deal that the judge has rejected and instead goes to trial on a mandatory charge to force the judge's hand. The prosecutor must now conduct the trial in front of a skeptical judge who will be making key decisions—all under a broad discretionary standard—on voir dire,²¹³ jury selection,²¹⁴ evidentiary rulings,²¹⁵ jury instructions,²¹⁶ and attorney argument.²¹⁷ Even matters as seemingly innocuous as scheduling can greatly

212. Another tactic the parties can use to try to push judges to accept lower sentences is depriving judges of relevant information. The parties can simply omit aggravating facts from their description of the offense. See Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 295–98 (2005); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 276–78 (1989). This tactic can backfire, however, if the judge learns of those facts from other sources, such as victim impact statements, police reports, or sentencing reports. Cf. Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1060 (1997) (“Prosecutors and defense attorneys all insist that the concerns of the probation officers that parties are ‘manipulating’ the guidelines are much inflated.”).

213. *United States v. Parker*, 872 F.3d 1, 7 (1st Cir. 2017) (“Trial judges enjoy much discretion about how to conduct voir dire. . .”).

214. See *Frazier v. United States*, 335 U.S. 497, 511 (1948) (“[I]n each case a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality. . .”).

215. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (“We have held that abuse of discretion is the proper standard of review of a district court’s evidentiary rulings.”).

216. *United States v. Marsh*, 26 F.3d 1496, 1502 (9th Cir. 1994) (“[A] district court has substantial latitude to tailor jury instructions. . .”).

217. See *United States v. Baptiste*, 596 F.3d 214, 226 (4th Cir. 2010) (“[T]he district court is afforded broad discretion in controlling closing arguments and is only to be reversed when there is a clear abuse of its discretion.” (quoting *United States v. Rhynes*, 196 F.3d 207, 236 (4th Cir. 1999))).

impact a case—and the attorney’s experience during that proceeding.²¹⁸ Judges can also bring attention to the prosecutors’ actions by highlighting the unreasonableness of the post-trial sentence in a subsequent published opinion.²¹⁹ And, as one reader of a draft of this Article noted, it is not uncommon for judges to take informal steps when they perceive a prosecutor to be acting unreasonably, like calling the prosecutor’s supervisor to complain. Considering that judges are often prominent members of the local legal community, such rebukes can have lasting consequences for a line prosecutor’s career.

The consequences of defying the judge extend beyond the instant case. Criminal practitioners are repeat players who regularly interact with the same judges. Repeated efforts to undermine the judge’s sentencing authority will sour judge-attorney relations leading to ongoing friction. Judges’ unquestioned authority over the courtroom can make life so unpleasant for the attorneys who must work in that courtroom that the attorneys quickly fall into line. There is a reason that attorneys use honorifics (“Your Honor”) to address the judges and not the other way around.²²⁰

The judge’s influence on the trial extends beyond judicial rulings. Jurors look to the judge as a respected and unbiased arbiter of the proceedings.²²¹ A judge implicitly broadcasting disagreement with the prosecutor throughout the trial will decrease the prospects of conviction.²²² Thus, while the prosecutor’s hand is strengthened by the mandatory sentence that awaits upon conviction, the prospect of that conviction wanes when the presiding judge is frustrated with the prosecution. And without a conviction, the prosecution’s leverage vanishes entirely.

Further, judges may not give up easily when the parties try to cut them out of the proceedings. Most obviously, the judge would still be well within the statutory authority to reject plea deals, forcing the parties to go to trial more frequently. While the judge too will suffer from the increased workload, the

218. See NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY 29–30 (2016) (highlighting judicial variation in the seemingly “arbitrary and unpredictable” nature of case scheduling); see also ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 169 (2018) (highlighting judges’ tools, including “setting the tone in the courtroom for what they deem an appropriate disposition for a given case”).

219. See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (describing mandatory post-trial sentence as “unjust, cruel, and even irrational” and calling on the President to commute the sentence).

220. Rex S. Heinke, *The Case for Raising Judicial Salaries*, L.A. LAW., Feb. 2001, at 11–12 (“When a judge assumes the bench, the litigants, lawyers, and others in the courtroom show their respect by standing. They also address the judge in a courteous fashion, using honorifics such as ‘your honor.’”).

221. Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281, 1290 (1993) (“It has been found that judges’ nonverbal behavior varies with the judge’s views of a case, and juries detect these nonverbal cues and tend to decide cases in line with them.”); Elizabeth A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 LAW & PSYCH. REV. 83, 84 (1984) (“The most authoritative person in a trial is the judge. The jury relies on the judge to instruct it in the procedure of the trial and, therefore, looks to the judge for guidance.”).

222. See Saks, *supra* note 221, at 1290.

prosecutor (who also suffers) might blink first, reworking plea agreements to win the judge's endorsement.²²³ Further, in many jurisdictions, judges must sign off on efforts to dismiss charges.²²⁴ Or, they can instruct the jury on offenses other than those formally charged and undermine the prosecutor's efforts to dictate severity.²²⁵

In sum, there are scenarios where judicial influence over plea deals reaches a low point. But these scenarios only arise when the statutory scheme aligns with the facts of the offense and the prosecutors' preferences to allow circumvention of judicial authority. And even then, repeated efforts to frustrate judicial authority over plea bargains by restricting judicial sentencing discretion will come at a cost to the parties. The parties will therefore aim to accommodate judicial preferences rather than attempt to override them through the tactics described above. That means that in most circumstances, judges will be able to substantially influence sentences even in plea-bargained cases, and even in jurisdictions that prohibit judicial involvement in plea negotiations.

IV. ENSURING JUDICIAL INVOLVEMENT IN SENTENCES

In a system dominated by plea bargaining, U.S. judges continue to hold significant influence over sentencing outcomes. States are increasingly acknowledging this fact and allowing judges to participate in the negotiations directly so that the judges' views are adequately considered as plea bargains are being shaped.²²⁶ That is how it should be. Judges are formally tasked with both the oversight of plea deals and the ultimate responsibility to set an individual's sentence. They should be encouraged to take that role seriously. Jurisdictions like the federal system, with its strict ban on judicial involvement in plea negotiations, but numerous tools that allow judges to influence plea deals create a strange tension.²²⁷ If judges do (and should) influence plea deals through their direct and indirect powers over the ultimate sentence, exercises of that power should be made transparent. In addition, the power should be preserved across the board so that it does not evaporate in idiosyncratic scenarios. Consequently,

223. Judges might be inclined not to disrupt plea deals because they like the efficiency of pleas. But that does not make prosecutors sentencers. That means that judges sign off on the sentences prosecutors select because they value something more than enforcing their sentencing preferences: efficiency. Prosecutors are likely doing the same thing. Similarly, a highway police officer might decide not to stop a speeding motorist at the end of the officer's shift because a stop would be personally inconvenient. That doesn't make the police officer powerless. It just means the officer is declining to exercise power in pursuit of a different goal.

224. See Crespo, *supra* note 78, at 1334–38.

225. See *United States v. Hatatley*, 130 F.3d 1399, 1403 (10th Cir. 1997) (“The decision of whether there is enough evidence to justify a lesser included offense charge rests within the sound discretion of the trial judge.” (quoting *United States v. Chapman*, 615 F.2d 1294, 1298 (10th Cir. 1980))).

226. See *supra* Section II.A.

227. See *supra* notes 117–118 and accompanying text.

we suggest two reforms: (1) allowing judges, on the defendant's request, to state openly their views on a proposed plea agreement; and (2) allowing judges, after trial, to reduce a sentence below a mandatory statutory minimum if the prosecution had previously proposed a bargain featuring a below-minimum sentence.

First, we argue that the sentencing influence that judges have in negotiated cases should be made explicit and exercised openly. The reality is that judges influence plea-bargained sentences whether or not a jurisdiction's rules formally acknowledge it. Consequently, prohibitions on judicial involvement only generate artificial distortions and make the process less transparent. Judges should either be allowed to participate in the negotiations directly, or at least permitted, at the defendant's request, to state their views on a proposed agreement on the record. Several states already permit such judicial comments on the request of the parties even as they continue to ban direct judicial involvement in the negotiations.²²⁸ More jurisdictions, including the federal system, should follow their example. All that would be required is a simple provision like the following:

If the parties reach a plea agreement, the court must, upon the defendant's request and prior to the defendant's entry of a guilty plea, inform the parties whether it will concur in the proposed disposition and, if not, the reasons therefor. The court may indicate a tentative position on the plea agreement, contingent on the receipt of further information, such as a presentence report.²²⁹

This approach eliminates much of the uncertainty and inefficiency that accompanies the current rules on judicial review of plea agreements in restrictive systems, such as the federal courts. Federal case law requires judges to state their reasons for rejecting a plea agreement but demands that the reasons be given in a way that does not influence ongoing negotiations.²³⁰ Trial judges therefore have to be careful about how they state their objections to an agreement, lest they be reversed on appeal for improperly participating in the negotiations.²³¹ In the event the parties wish to renegotiate the agreement to

228. See *supra* notes 92–97 and accompanying text.

229. See COLO. REV. STAT. § 16-7-302(2) (LEXIS through all legislation from the 2023 Reg. Sess. effective as of June 30, 2023) (permitting judicial comment on proposed plea agreements); see also ARK. R. CRIM. P. 25.3(b); MO. SUP. CT. R. 24.02(d)(2).

230. See, e.g., *United States v. Scott*, 877 F.3d 42, 48 (1st Cir. 2017) (“A district court necessarily walks a fine line in rejecting a plea agreement. On the one hand, it may perceive a need to explain why it is rejecting the agreement. On the other hand, it may need to avoid suggesting the particular terms upon which the parties need agree to secure approval.”).

231. See, e.g., *United States v. Schneider*, 40 F.4th 849, 857 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 814 (2023) (finding improper judicial participation where, upon rejecting plea agreement, judge stated the higher sentencing range within which he intended to impose a sentence); see also *supra* notes 117–118 and accompanying text (discussing this tension and citing cases).

satisfy the judge's concerns, they may not inquire how to do so because the judge is not allowed to comment on a hypothetical renegotiated agreement.²³² The tip-toeing around the judge's views on the agreement creates unnecessary unpredictability and inefficiency.

The current rules on judicial review of plea agreements contain another source of unpredictability and unfairness for defendants that our proposed reform would address. Under Federal Rule of Criminal Procedure 11(c)(1)(B) and analogous state rules, judges can accept a defendant's guilty plea and an accompanying agreement to a sentencing recommendation, but they can then depart from the recommendation in imposing a sentence.²³³ If the judge does depart in favor of a harsher sentence, defendants may not withdraw their guilty plea, leaving some defendants with little to no consideration for their admission of guilt.²³⁴

Allowing judges to comment on a proposed agreement *before* the defendant enters a guilty plea offers defendants more certainty in the punishment they will receive if they plead guilty, thus promoting fairness and predictability in the process. Judges could provide their tentative views on a proposed agreement at the defendant's request, and defendants could consider whether they wish to renegotiate another agreement or proceed to trial. This would eliminate the unfairness of defendants pleading guilty based on negotiated concessions that prove illusory and then being unable to withdraw their guilty plea when the court departs significantly from the sentence recommended and negotiated by the parties.²³⁵

Our proposal also fosters transparency. The hearing at which the judge and the parties would discuss a proposed plea agreement would be on the record, providing the public with the opportunity to learn how the system operates.²³⁶ Indeed, as our Article explains, even the legal scholarship presents a confusing picture of how American sentencing actually works.

232. See, e.g., *United States v. Crowell*, 60 F.3d 199, 204 (5th Cir. 1995) (“[A]fter the rejection of the first plea agreement, and before the second plea agreement was in its final form, the district court had another discussion with counsel regarding the range of punishment that would be required. The court’s comments . . . indicate the court’s feeling that a penalty significantly more severe than that allowed under the first plea agreement would be necessary for an agreement to be acceptable. The fact that this comment was injected into the discussions while the parties were still preparing the second agreement is critical. It is precisely this type of participation that is prohibited by Rule 11.”).

233. See FED. R. CRIM. P. 11(c)(1)(B); Michael D. Cicchini, *Deal Jumpers*, 2021 U. ILL. L. REV. 1325, 1350–52 (2021) (discussing analogous state rules).

234. See Cicchini, *supra* note 233, at 1350–52.

235. *Id.*; King & Wright, *supra* note 87, at 335, 335 n.54, 373 (“Despite guidelines, mandatory minimums, appellate review, and other restrictions on a judge’s sentencing discretion in the states we examined, a judge’s indication of sentence before the plea provides certainty that defendants continue to crave.”); Turner, *Judicial Participation*, *supra* note 91, at 202–03; Bellin, *Plea Bargaining’s Uncertainty Problem*, *supra* note 70, at 550.

236. See generally Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973 (2021) (arguing for increased transparency in plea bargaining).

While addressing concerns about the inefficiency, unpredictability, and unfairness of many current rules on judicial review of plea agreements, our proposed reform remains mindful of concerns about direct judicial involvement in plea negotiations.²³⁷ It allows the court to state its views on a tentative agreement only at the request of the defendant and in open court, thus reducing concerns about judicial coercion and partiality.

A second way to improve American plea bargaining is to remove an important constraint on judicial sentencing discretion. While judges have significant influence over sentencing in negotiated cases, in certain scenarios this influence is limited by mandatory minimum sentences.²³⁸ To restore judicial sentencing authority in these cases, we propose that legislatures permit judges, after trial, to reduce a sentence below a mandatory minimum if the prosecution had previously proposed a bargain that permitted a sentence below that minimum. Stated more precisely, the judge would be permitted (but not required) to sentence below the statutory minimum if the prosecutor's plea offer would have avoided that minimum and the defendant otherwise satisfies the terms of the proposed deal (apart from the trial waiver). This approach would reduce the coerciveness of excessive trial penalties.²³⁹ It would also expand judicial discretion to shape bargains in the direction of leniency and preserve judges' statutory authority to approve or reject plea deals and to select the ultimate sentence.

CONCLUSION

The scholarly literature includes two inconsistent generalizations about the foundational question of who sentences in America's criminal courts. One group of commentators contends that judges choose the sentence while another identifies prosecutors as playing that role. The truth is more complex. In a system dominated by plea bargains, prosecutors play an important role in shaping the ultimate sentence of a person convicted of a crime. But judges too have many levers through which they can affect the ultimate sentence, even in

237. See *supra* notes 91, 102 and accompanying text.

238. See *supra* Section III.B.

239. See, e.g., Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT'G REP. 256, 257 (2019) ("On average, trial conviction increases the odds of incarceration by two to six times and produces sentence lengths that are 20 to 60 percent longer." (citation omitted)); Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1202 (2015) (finding that "federal defendants convicted at trial receive sentences that are sixty-four percent longer than similar defendants who plead guilty, excluding the effects of charge and fact bargaining"); Nancy J. King, David A. Soule, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973–75, 992 (2005) (studying sentencing practices in five states and finding trial penalties ranging from 13% to 461%).

negotiated cases. Judges influence sentences directly by choosing a sentence term and type from the range of options left open in many plea deals. They also do so indirectly through their power to reject the plea deals and recommendations presented to them by the parties.

Recognizing this interplay reveals how judges continue to perform an important role in sentencing in a world of plea bargains. It also highlights that sentencing is a cooperative, not unilateral, exercise. Any plea deal offered by a prosecutor and accepted by a defendant will be influenced by the legislative framework, as well as the anticipated actions of the assigned judge and a parole board (if any). Thus, the answer to the question “who sentences” is more complicated than the literature suggests. And, as we have demonstrated, when considering the mix of actors who contribute to a sentence, the trial judge continues to play a central role. And, as we argue, that role should be made more transparent and applied across all cases.