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## Transparency in Plea Bargaining

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## TRANSPARENCY IN PLEA BARGAINING

Jenia I. Turner\*

*Plea bargaining is the dominant method by which our criminal justice system resolves cases. More than ninety-five percent of state and federal convictions today are the product of guilty pleas. Yet the practice continues to draw widespread criticism. Critics charge that it is too coercive and leads innocent defendants to plead guilty, that it obscures the true facts in criminal cases and produces overly lenient sentences, and that it enables disparate treatment of similarly situated defendants.*

*Another feature of plea bargaining—its lack of transparency—has received less attention, but is also concerning. In contrast to the trials it replaces, plea bargaining occurs privately and off the record. Victims and the public are excluded, and the defendant is typically absent. While the Sixth and First Amendments rights of public access extend to a range of pretrial criminal proceedings, they do not apply to plea negotiations. For the most part, rules and statutes also fail to require transparency in the process. As a result, plea bargaining is largely shielded from outside scrutiny, and critical plea-related data are missing.*

*There are some valid reasons for protecting aspects of plea negotiations from public scrutiny. Confidentiality fosters candor in the discussions and may encourage prosecutors to use their discretion more leniently. It can help protect cooperating defendants from retaliation. And it may expedite cases and conserve resources.*

*Yet the secrecy of the process also raises concerns. It prevents adequate oversight of coercive plea bargains, untruthful guilty pleas, and unequal treatment of defendants. It can hinder defense attorneys from providing fully informed advice to their clients. It can also potentially impair victims' rights and interests. Finally, the absence of transparency leaves judges with few guideposts by which to evaluate plea bargains and inhibits informed public debate about criminal justice reform.*

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*This Article reviews plea-bargaining laws and practices across the United States and argues that we can do more to enhance the documentation and transparency of plea bargaining. It then proposes concrete areas in which transparency can be improved without significant costs to the criminal justice system.*

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INTRODUCTION

For several decades, plea bargaining has been the dominant method of resolving cases in U.S. criminal courts. Today, over ninety-five percent of convictions at the state and federal levels are the product of guilty pleas.<sup>1</sup> As

1 See MARK MOTIVANS, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 248470, FEDERAL JUSTICE STATISTICS, 2012—STATISTICAL TABLES 17 tbl.4.2 (2015) (finding that ninety-seven percent of federal convictions were disposed of via guilty plea). For state statistics, see *State Court Sentencing of Convicted Felons 2004—Statistical Tables: Felony Case Processing in State Courts*, BUREAU OF JUST. STAT., <https://www.bjs.gov/content/pub/html/scscf04/tables/scs04401tab.cfm> (Dec. 16, 2020) (finding that ninety-five percent of state convictions were obtained through a guilty plea); *2018 Criminal Caseloads—Trial Courts: 2018 Gen. Jurisdiction Criminal Jury Trials and Rates*, NAT’L CTR. FOR STATE CTS.: CT. STAT. PROJECT, [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx) [hereinafter Ct. STAT. PROJECT] (choose

the Supreme Court has acknowledged, “[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>2</sup>

Yet despite its prevalence, plea bargaining remains controversial. Critics charge that it is too coercive and leads innocent defendants to plead guilty, that it obscures the true facts in criminal cases and produces overly lenient sentences, and that it enables disparate treatment of similarly situated defendants.<sup>3</sup>

Another feature of plea bargaining—its lack of transparency—has received less attention, but is also troubling.<sup>4</sup> Unlike the trials it replaces, plea bargaining occurs privately and off the record.<sup>5</sup> Victims and the public are excluded from the negotiations, and even the defendant is typically absent. Plea offers are often not documented, and the final plea agreements are not always in writing or placed on record with the court.<sup>6</sup> Plea hearings—at which a judge reviews the validity of a defendant’s guilty plea—are public, but they tend to be brisk, rote affairs that often fail to reveal all of the concessions exchanged between the parties.<sup>7</sup> As a result, plea bargaining is largely shielded from outside scrutiny, and critical plea-related data are missing.

The opacity of plea bargaining stands in marked contrast to the constitutional commitment to public criminal proceedings, enshrined in the Sixth Amendment right to a public trial and the First Amendment right of public access to the courts.<sup>8</sup> Courts have uniformly held that these rights extend to

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“Criminal” tab from top bar, then select “Gen. Jurisdiction Criminal Jury Trials and Rates” from the “Select Chart/Table” menu) (last visited Nov. 1, 2020) (showing that for most states, jury trials amounted to only about one to two percent of criminal dispositions).

2 Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

3 For a review of plea-bargaining critiques, see Jenia I. Turner, *Plea Bargaining*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 73, 80–88 (Erik Luna ed., 2017).

4 See, e.g., STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 26–27 (2012); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 302 (2011) (“Guilty pleas, especially ones that happen early in the process, are largely invisible. So is the bargaining that lies behind them.”). For a more in-depth discussion of the lack of transparency in the criminal process generally or in plea bargaining more specifically, see generally Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006); Michael P. Donnelly, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 OHIO ST. J. CRIM. L. 423 (2020); Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409 (2003) (arguing that charge bargains, even more than sentencing bargains, suffer from a lack of transparency).

5 See BIBAS, *supra* note 4, at 34–35; see also United States v. Alcantara, 396 F.3d 189, 191 (2d Cir. 2005) (plea hearing conducted in judge’s robing room).

6 See *infra* Part I.

7 See *infra* Part I.

8 See *infra* Part II.

arraignments, plea hearings, and sentencing hearings.<sup>9</sup> But plea negotiations and plea offers have been shielded from such access, without sufficient analysis of the justification for secrecy.

To be sure, there are valid reasons for protecting aspects of plea negotiations from public scrutiny. Confidentiality fosters candor in negotiations and encourages prosecutors to use their discretion to provide leniency in appropriate cases.<sup>10</sup> It also helps shield cooperating defendants from retaliation.<sup>11</sup> Finally, the informality and lack of documentation of plea offers may help conserve resources and expedite case processing.<sup>12</sup>

Yet the secrecy of the process also raises a number of concerns. First, it prevents adequate oversight of a procedure that has been broadly criticized as enabling coercion, concealment of facts, and disparate treatment. Non-transparency makes it more difficult for defense attorneys to assess the reasonableness of plea offers they receive and to provide fully informed advice to their clients. It can give rise to unnecessary disputes after the fact about the terms of the bargain and the quality of assistance provided by defense counsel. The lack of transparency also frustrates the ability of victims to provide meaningful input, and it leaves judges with few guideposts by which to evaluate the fairness of plea bargains and the validity of guilty pleas. More broadly, it limits the public's understanding of plea bargaining and inhibits informed public debate about criminal justice reform.

Given the significant costs of secrecy, it is time to revisit the issue. This Article reviews U.S. plea-bargaining laws and practices and argues that courts and legislatures across the country can and should do more to enhance the documentation and transparency of plea bargaining. There are four areas in which transparency can be improved without imposing significant costs.

First, states across the country can adopt rules requiring that plea agreements be in writing and placed on record with the court. Many states and the federal system already do so, and the requirement has not proven burdensome. Concerns about the safety of cooperators have been addressed by sealing portions of the plea records that relate to cooperation.<sup>13</sup> The recording requirement helps reduce disputes about the terms of plea agreements,

9 See *infra* Part II; see also Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2174 (2014).

10 See *infra* Sections III.A–B.

11 See *infra* Section III.C.

12 See *infra* Section III.D.

13 Memorandum from J. Wm. Terrell Hodges, Chair, Comm. on Ct. Admin. & Case Mgmt., and J. Roger W. Titus, Privacy Subcomm. Chair, Comm. on Ct. Admin. & Case Mgmt., to C.J.J., U.S. Dist. Cts., Dist. J.J., U.S. Dist. Cts., Dist. Ct. Execs., and Clerks, U.S. Dist. Cts. (June 30, 2016), in ADVISORY COMM. ON CRIM. RULES, COOPERATOR SUBCOMMITTEE REPORT 243, 245, 250–51 (2016), [http://www.uscourts.gov/sites/default/files/2016-09-criminal-agenda\\_book\\_0.pdf](http://www.uscourts.gov/sites/default/files/2016-09-criminal-agenda_book_0.pdf) [hereinafter Interim Guidance for Cooperator Information] (discussing sealing practices to address the problem of cooperator safety); Memorandum from Michelle Morales, Acting Dir., Off. Pol'y & Legis., to Hon. Lewis A. Kaplan, Chair, Rules Subcomm. on Cooperators (July 12, 2016), in ADVISORY COMM. ON CRIM. RULES, *supra*, at 309, 310–12 (same).

and it promotes fairness by ensuring that defendants understand the consequences of pleading guilty. By making plea agreements a matter of public record, it also better aligns with our constitutional commitment to open criminal proceedings.

Second, lawmakers can adopt rules requiring that plea offers be placed on record with the court whenever a defendant rejects the offer and the case is set for trial. Some courts have already used this recording practice to ensure that defense counsel has conveyed a plea offer to her client and to reduce disputes about counsel's assistance in the process.<sup>14</sup> The practice has proven workable and has been generally well received by the participants. Because plea offers that are placed on file with the court become public records, this rule also advances the constitutional commitment to open criminal proceedings. It exposes plea bargaining to additional scrutiny and gives the public a better understanding of the penalties imposed on defendants who reject plea offers and exercise the right to trial. Such knowledge can help inform criminal justice debates and proposals for reform.

A third way to enhance transparency in plea bargaining is to require the recording of plea offers, charging decisions, sentencing outcomes, and other key facts about a criminal case in digital databases that are searchable and available to prosecutors, defense attorneys, and judges. The adoption of such databases would help promote fairness and equal treatment of defendants by educating lawyers and judges about plea precedents and facilitating a more informed analysis of plea offers.<sup>15</sup> Widely available and cost-effective case management software makes such digital documentation practical, and the growing support for better data collection in the criminal process makes it politically viable.<sup>16</sup>

Finally, states and the federal system should encourage more probing judicial review of plea agreements and require that any plea discussions that involve the court occur on the record.<sup>17</sup> By strengthening judicial oversight of plea bargains and exposing key aspects of the plea negotiations to the public, these reforms would help improve oversight of coercive practices, disparate treatment, and untruthful plea bargains. While more active judicial intervention is likely to consume some additional time, states that have introduced this practice have found it workable.<sup>18</sup> Placing judicial participation on the record may add minor logistical burdens, but would reduce the risk of judicial coercion and increase public confidence in the process.

In brief, there are various ways to improve transparency in plea bargaining that would enhance the fairness and legitimacy of the process without

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14 See *Missouri v. Frye*, 566 U.S. 134, 146–47 (2012); see also Joel Mallord, Comment, *Putting Plea Bargaining on the Record*, 162 U. PA. L. REV. 683, 685 (2014); Stephanie Stern, Note, *Regulating the New Gold Standard of Criminal Justice: Confronting the Lack of Record-Keeping in the American Criminal Justice System*, 52 HARV. J. ON LEGIS. 245, 250–51 (2015).

15 See *infra* Section V.D.

16 See *infra* Section V.D.

17 See *infra* Section V.E.

18 See *infra* Section V.E.

imposing undue burdens on the criminal justice system. In a time when most criminal cases are resolved through plea bargains, we need to bring the process out of the shadows and reaffirm our longstanding commitment to open criminal proceedings.

## I. LACK OF TRANSPARENCY IN PLEA BARGAINING

Although plea bargaining is the standard method by which criminal cases are resolved today, its operation remains informal and obscure. Any negotiations between the parties remain off the record and closed to the public.<sup>19</sup> Neither the victim nor the defendant is typically present during the negotiations,<sup>20</sup> and the judge is usually not privy to them either.<sup>21</sup> In most jurisdictions, judges are expressly prohibited from participating in negotiations out of concern that their involvement might be too coercive and might prejudice them in the event the negotiations fall apart and the case proceeds to trial.<sup>22</sup>

Typically, plea offers are not publicly announced or placed on the record. They are often not even reduced to writing, but are instead conveyed informally—over the phone, in the courtroom corridor, or in the prosecutor’s office.<sup>23</sup> Even when written down, they are rarely entered into a database that could be searched to compare results.<sup>24</sup> Instead, any records of plea offers typically remain in the prosecutor’s paper file (which is closed to

19 See, e.g., NAT’L ASS’N OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 16 (2018).

20 See Thea Johnson, *Public Perceptions of Plea Bargaining*, 46 AM. J. CRIM. L. 133, 139 (2019).

21 Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMPAR. L. 199, 202–03 (2006).

22 *Id.* at 202–03, 202 n.6.

23 See Bibas, *supra* note 4, at 34–35; Ronald F. Wright, Jenny Roberts & Betina Cutaia Wilkinson, *The Shadow Bargainers*, 41 CARDOZO L. REV. (forthcoming) (manuscript at 48 tbl.8) (finding in a multistate survey of public defenders that the most common channel of communication for plea negotiations is “in person, in courthouse,” followed by email, then telephone, then “in-person, in office”); Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), <https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html> (“While many states require plea agreements to be written and presented before a judge, plea offers are often verbal and made in informal settings.”). In only one state—New Jersey—rules expressly require that plea offers be in writing. N.J. CT. R. 3:9-1 (“Any plea offer to be made by the prosecutor shall be in writing and shall be included in the post-indictment discovery package.”). In California, caselaw recommends that offers be memorialized. *In re Alvernaz*, 830 P.2d 747, 756 n.7 (Cal. 1992) (encouraging parties to “memorialize in some fashion prior to trial (1) the fact that a plea bargain offer was made . . . (2) that the defendant was advised of the offer [and] its precise terms, . . . and (3) the defendant’s response to the plea bargain offer”).

24 See Kay L. Levine, Ronald F. Wright, Nancy J. King & Marc L. Miller, *Sharkfests and Databases: Crowdsourcing Plea Bargains*, 6 TEX. A&M L. REV. 653, 664 (2019). This practice was also confirmed through informal interviews with practitioners in Texas, Georgia, Ohio, and in federal court.

outsiders), or in an email shared only with the defense attorney working on the case.<sup>25</sup> Recording remains haphazard and highly variable from prosecutor to prosecutor and from office to office.<sup>26</sup>

If an offer is accepted, the resulting plea agreement is more likely to be written down and filed with the court. Yet even this custom is not uniform across jurisdictions. Only about half of the states require that the agreement be disclosed on the record, and an even smaller group mandate that the agreement be placed in writing.<sup>27</sup> Both caselaw and anecdotal accounts confirm that oral plea agreements are not uncommon,<sup>28</sup> even in jurisdictions that require the agreement to be in writing.<sup>29</sup> It is only when a plea agree-

25 See NICOLE ZAYAS FORTIER, *ACLU SMART JUST., UNLOCKING THE BLACK BOX: HOW THE PROSECUTORIAL TRANSPARENCY ACT WILL EMPOWER COMMUNITIES AND HELP END MASS INCARCERATION* 9 (2019); BESIKI KUTATELADZE, WHITNEY TYMAS & MARY CROWLEY, *RACE AND PROSECUTION IN MANHATTAN* 6, 9 n.10 (2014).

26 See, e.g., FORTIER, *supra* note 25, at 9.

27 See, e.g., FED. R. CRIM. P. 11(c)(2) (requiring disclosure of plea agreements “in open court” or, on showing of good cause, in camera); ALA. R. CRIM. P. 14.3(b) (“[T]he court shall require the disclosure of the [plea] agreement in open court . . .”); ARIZ. R. CRIM. P. 17.4(b) (“The terms of a plea agreement must be in writing and be signed by the defendant, defense counsel (if any), and the prosecutor. The parties must file the agreement with the court.”); IND. CODE § 35-35-3-3(a) (2017) (“No plea agreement may be made by the prosecuting attorney to a court on a felony charge except: (1) in writing . . . . The plea agreement shall be shown as filed . . . .”); MD. CODE ANN., CRIM. PROC. § 4-243(d) (West 2020) (“All proceedings pursuant to this Rule, including the defendant’s pleading, advice by the court, and inquiry into the voluntariness of the plea or a plea agreement shall be on the record.”); TENN. R. CRIM. P. 11(c)(2) (“The parties shall disclose the plea agreement in open court on the record . . . .”).

28 See, e.g., *Williams v. State*, 502 S.W.3d 168, 172 (Tex. Crim. App. 2016) (finding oral addendum to written plea agreement ambiguous); *Fraser v. Commonwealth*, 59 S.W.3d 448, 457 (Ky. 2001) (“Oral plea agreements are not uncommon.”); *State v. D’Amico*, 2000 MT 63, ¶¶ 7–15, 997 P.2d 773, 775 (noting the existence of an oral plea agreement, which was later modified by a written plea agreement); *State v. Silvers*, 620 N.W.2d 73, 77 (Neb. 2000) (“It appeared that the plea agreement was to be ‘informal’ in nature . . . .”); *State v. Farrell*, 2000 ND 26, ¶¶ 12–16, 606 N.W.2d 524, 529 (“Not all plea agreements are reduced to writing.”).

29 A Westlaw search uncovered hundreds of federal cases featuring oral plea agreements. Some of these were placed on the record at the plea hearing, but many were not, leading to subsequent disputes about their enforcement. See, e.g., *United States v. Hughes*, 726 F.3d 656, 663 (5th Cir. 2013) (“The confusion this case brings was seeded by the government’s oral plea agreement with Hughes . . . .”); *United States v. James*, 54 F. App’x 681, 681 (10th Cir. 2003) (noting that defendant pleaded guilty “pursuant to a verbal plea agreement with the United States”).

States with rules requiring written agreements also continue to feature violations of this rule. See, e.g., *Freeman v. State*, No. 20A04-1111-CR-619, 2012 WL 1073636, at\*1 (Ind. Ct. App. Mar. 30, 2012) (unpublished table decision) (“[C]ourts must enforce agreements between the prosecution and a defendant, even if those agreements are oral and therefore outside the statutory framework, either if the State has materially benefitted from the terms of the agreement or if the defendant has relied on the terms of the agreement to his substantial detriment.” (quoting *Badger v. State*, 637 N.E.2d 800, 804 (Ind. 1994))); *State*

ment is filed with the court or disclosed on the record that it becomes accessible to the public.<sup>30</sup>

Even when a plea agreement is disclosed on the record, it does not always provide adequate transparency, for several reasons. First, it may not contain the full terms of the bargain.<sup>31</sup> Omissions are especially likely if the parties are attempting to conceal a fact bargain from the court.<sup>32</sup> Even when a plea agreement is in writing and lays out all the applicable terms, it usually does not provide a justification for the terms negotiated.<sup>33</sup> Nor does it disclose the steps that led to the final agreement, including terms rejected or modified.

The failure to record plea offers and plea agreements is part of a broader problem of lack of transparency in the criminal justice system, particularly with respect to prosecutorial decisionmaking. Prosecutors are not required to provide reasons for their charging or plea-bargaining decisions, nor are they required to publicize any policies that they may follow in reaching those decisions.<sup>34</sup> Even when prosecutors do record the charging and plea decisions, these data often remain “buried” in paper files.<sup>35</sup> And while criminal case data are becoming increasingly digitized, information about

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v. Thomas, No. W1999-00337-CCA-R3-CD, 2001 WL 721054, at \*1 (Tenn. Crim. App. June 26, 2001) (discussing a motion to enforce a verbal plea agreement).

30 See *infra* Part II.

31 See *United States v. Alexander*, 736 F. Supp. 1236, 1240 (N.D.N.Y. 1989), *aff'd*, 901 F.2d 272 (2d Cir. 1990) (“This informal understanding, characterized as a ‘Gentlemen’s Agreement’ during the June 20 hearing, although referred to in the first draft of the plea agreement, see Government’s Exh 5, did not find its way into the final plea agreement.”); *United States v. A Parcel of Land Located at 5185 S. Westwood Drive, Republic, Mo.* 65738, No. 09-03357-CV-S-DGK, 2012 WL 1113197, at \*2 (W.D. Mo. Apr. 2, 2012) (“In addition to the written terms of the Plea Agreement, the United States verbally agreed to dismiss the forfeiture action against the Defendant \$17,305.00 in United States currency and to return the money to Bishop.”); BIBAS, *supra* note 4, at 31 (“Pleas result from back-room discussions, the terms of particular bargains often remain hidden, and prosecutors neither follow clear rules nor offer clear explanations for offering particular deals or not.”).

32 On the attempts by parties to conceal certain bargains from the court, see generally Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855 (2019); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1289–90 (1997).

33 See BIBAS, *supra* note 4, at 31.

34 Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1027–28 (2006) (“Prosecutors . . . need not explain why they agreed to reach a deal with one defendant but refused to do so with another defendant guilty of the same crime. Indeed, because prosecutors need not make the terms of their plea bargains available to the public through publication and because prosecutorial law enforcement is largely exempt from open government laws like FOIA, a defendant might not even know that another similarly situated defendant received a particular deal. Nor may defendants be aware that a prosecutor is diverging from office policy.” (footnotes omitted)); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 35 n.106 (1998) (“Prosecutors are not routinely required to justify or give reasons for charging or other discretionary decisions.”).

35 See, e.g., FORTIER, *supra* note 25, at 9.

different steps in the process often remains spread across multiple systems and databases. As a result, tracking how a plea offer fits with other decisions made in the course of a case, from pretrial to sentencing, and comparing cases based on their characteristics remains a daunting task.<sup>36</sup> Detecting and analyzing patterns in prosecutorial charging and plea decisions is likewise a continuing challenge.<sup>37</sup>

The stage at which the defendant formally tenders a guilty plea before the court—known as a plea hearing or plea colloquy—occurs in public and can provide some transparency.<sup>38</sup> At this hearing, the court must ask questions to determine whether the guilty plea is voluntary, knowing, and factually based.<sup>39</sup> If sufficiently probing, these questions could reveal the full terms of the underlying bargain.

But in practice, the public plea hearing fails to compensate for the many unknowns earlier in the bargaining process. Plea hearings tend to be brief affairs and usually do not unearth less visible charge and fact bargains or the reasons behind any plea concessions.<sup>40</sup> Furthermore, because plea hearings occur only after the parties have agreed on a disposition, the parties have every incentive to keep from the court facts that may disturb the agreement.<sup>41</sup> Defendants thus give “scripted responses” to the judge’s formulaic questions and read statements prepared by their lawyers ahead of time.<sup>42</sup>

Sentencing hearings provide another opportunity for the public to learn the factors that shaped the outcome of a negotiated case. But sentencing hearings are also frequently brief and uninformative—particularly when the parties have agreed upon a sentence. These hearings often fail to clarify whether and in what way the negotiations influenced the ultimate sentence. They rarely reveal whether or what charges were dropped, reduced, or declined.<sup>43</sup> In a negotiated case, the parties have agreed on a sentence or sentence recommendation, so they often have no incentive to argue about the sentence at the hearing. Furthermore, if the defendant rejects a plea offer and is convicted after a trial, the sentencing hearing does not disclose

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36 See, e.g., ROBIN OLSEN, LEIGH COURTNEY, CHLOE WARNBERG & JULIE SAMUELS, *URB. INST., COLLECTING AND USING DATA FOR PROSECUTORIAL DECISIONMAKING: FINDINGS FROM 2018 NATIONAL SURVEY OF STATE PROSECUTORS’ OFFICES* 11–12 (2018).

37 See, e.g., FORTIER, *supra* note 25, at 1–2.

38 See *infra* notes 72–79 and accompanying text.

39 See *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969); FED. R. CRIM. P. 11; FLA. R. CRIM. P. 3.170(k); 21 AM. JUR. 2D *Criminal Law* § 596 (2020); 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 21.4(f), Westlaw (database updated Dec. 2019).

40 See, e.g., Wright & Miller, *supra* note 4, at 1411–12; *infra* notes 264–66 and accompanying text.

41 For an example of a judge learning facts about a case from the presentencing report which the parties had not presented to the court at the plea hearing in an effort not to undermine a charge bargain, see *In re Ellis*, 356 F.3d 1198, 1232 (9th Cir. 2004).

42 See BIBAS, *supra* note 4, at 26; Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 751 (2010).

43 See Wright & Miller, *supra* note 4, at 1411–12.

the differential between the rejected plea offer and the posttrial sentence. In brief, much plea-related information is absent from the sentencing hearing, so its publicity does not make up for the opacity of the process that precedes it in negotiated cases.

## II. CONSTITUTIONAL COMMITMENT TO PUBLIC CRIMINAL PROCEEDINGS

The lack of transparency in plea bargaining contrasts sharply with our longstanding legal commitment to public criminal proceedings. This commitment is rooted in the English common law<sup>44</sup> and enshrined in the Sixth Amendment, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial.”<sup>45</sup> State constitutions, statutes, and judicial decisions have long affirmed the same principle.<sup>46</sup> Open criminal proceedings were conceived as a fundamental right for criminal defendants because of the recognition that transparency helps ensure fair treatment: “The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”<sup>47</sup>

The publicity of criminal proceedings is further safeguarded by the First Amendment.<sup>48</sup> As the Supreme Court has explained, the rights to free speech and free press presuppose the right to receive information about the workings of the government—including how criminal proceedings are handled.<sup>49</sup> The First Amendment thus “goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the

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44 *In re Oliver*, 333 U.S. 257, 266–68 (1948) (“This nation’s accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage.”).

45 U.S. CONST. amend. VI.

46 As the Supreme Court explained:

In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution’s Sixth Amendment, which commands that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .” most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.

*In re Oliver*, 333 U.S. at 266–68 (omission original) (footnotes omitted); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567 (1980); Kenneth Katkin, “Incorporation” of the Criminal Procedure Amendments: The View from the States, 84 NEB. L. REV. 397, 444–45 (2005) (discussing state law protecting the right to public trial).

47 *In re Oliver*, 333 U.S. at 270.

48 See U.S. Const. amend. I.

49 *Richmond Newspapers*, 448 U.S. at 575 (“These expressly guaranteed freedoms [of speech, press, and assembly] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court.”); see also *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

stock of information from which members of the public may draw.”<sup>50</sup> Today, courts frequently view the Sixth and First Amendment rights to a public criminal proceeding as coextensive.

In deciding how broadly to apply the constitutional provisions on publicity, courts examine the functions and purposes of these provisions. According to the Supreme Court, the right to a public trial helps ensure fair treatment of the defendant and advances the truth-seeking goal of the justice system.<sup>51</sup> Public proceedings can enhance the accuracy of the outcome by encouraging witnesses to come forward.<sup>52</sup> The possibility of public scrutiny also encourages participants to follow the rules, remain impartial, and stay “keenly alive to a sense of their responsibility” in dispensing justice.<sup>53</sup> As Justice Harlan remarked, “the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.”<sup>54</sup> By promoting the fairness and integrity of the proceedings, public access benefits not only the defendant, but also “society as a whole.”<sup>55</sup>

Openness is also critical to ensuring that the proceedings are *perceived* as fair and legitimate. As the Supreme Court has explained, “public access to the criminal trial fosters an appearance of fairness, thereby heightening pub-

50 *Richmond Newspapers*, 448 U.S. at 575–76 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

51 *See, e.g.*, *Globe Newspaper Co. v. Superior Ct. for the Cnty. of Norfolk*, 457 U.S. 596, 606 (1982) (“Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.”).

52 *In re Oliver*, 333 U.S. at 270 n.24 (first citing 6 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1834, at 435 (rev. vol. 1976); and then citing *Tanksley v. United States*, 145 F.2d 58, 59 (9th Cir. 1944)).

53 *Id.* at 270 n.25 (quoting 1 THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 379 (Boston, Little, Brown & Co. 6th ed. 1890)). In other words, publicity reduces the risk of misconduct, false statements, and biased judgments. *See Richmond Newspapers*, 448 U.S. at 569 (“Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.” (first citing MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND AND AN ANALYSIS OF THE CIVIL PART OF THE LAW* 343–45 (London, Henry Butterworth 6th ed. 1820); and then citing 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*372–73)).

54 *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring); *see also In re Oliver*, 333 U.S. at 270 n.25 (“The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions[.]” (quoting 1 COOLEY, *supra* note 53, at 379)).

55 *Globe Newspaper*, 457 U.S. at 606.

lic respect for the judicial process.”<sup>56</sup> Writing for a plurality in *Richmond Newspapers v. Virginia*, Chief Justice Burger noted the longstanding common-law position that openness of criminal proceedings has a “therapeutic value” for the community and enhances “public acceptance of both the process and its results.”<sup>57</sup> As he elaborated, “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>58</sup>

Critically, publicity allows citizens to monitor judicial proceedings for unfairness and injustice and to hold governmental officials accountable for such abuses. The Supreme Court has repeatedly called attention to this longstanding function of publicity, noting that the public trial “guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”<sup>59</sup> Public criminal proceedings allow the community to hear and evaluate the reasons given for acquitting or convicting a defendant of particular charges and, in the event of a conviction, the reasons for a particular punishment. Such transparency of reasoning is important to ensuring that a verdict is based on the facts and the law and not on partiality or incompetence. As legal philosopher Jeremy Bentham declared, “Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.”<sup>60</sup>

Finally, public proceedings inform citizens about the functioning of the criminal justice system. This knowledge allows them to “effectively participate in and contribute to our republican system of self-government.”<sup>61</sup> Citizens who have seen firsthand the imperfections and injustices of the criminal process are better able to advocate for reforming it.<sup>62</sup> Public access not only ensures a fair proceeding for the defendant, but also guarantees to the public a right to witness how criminal justice in its name is dispensed. For that reason, the right to a public trial does not belong merely to the accused, but is rather “a shared right of the accused and the public, the common concern being the assurance of fairness.”<sup>63</sup>

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56 *Id.*; see also *In re Oliver*, 333 U.S. at 270 n. 24 (noting as a benefit of public access that “spectators learn about their government and acquire confidence in their judicial remedies” (first citing 6 WIGMORE, *supra* note 52, § 1834, at 435; then citing *State v. Keeler*, 156 P. 1080 (Mont. 1916); and then citing 1 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 525 (London, Hunt & Clarke 1827))).

57 *Richmond Newspapers*, 448 U.S. at 570–71.

58 *Id.* at 572.

59 *In re Oliver*, 333 U.S. at 270.

60 *Id.* at 271 (quoting 1 BENTHAM, *supra* note 56, at 524).

61 *Globe Newspaper*, 457 U.S. at 604.

62 See Simonson, *supra* note 9, at 2200–01, 2211 (arguing that public access to criminal proceedings “enhances self-government and democracy among local citizenry”).

63 *Press-Enterprise Co. v. Superior Ct. of Cal. for Riverside Cnty. (Press-Enterprise II)*, 478 U.S. 1, 7 (1986).

While the text of the Sixth Amendment speaks of the defendant's right to a public *trial*, courts have extended both the Sixth Amendment and the First Amendment rights of public access to a range of nontrial proceedings, including some relating to plea bargaining. In determining whether public access applies to a nontrial judicial proceeding, courts have applied the "experience and logic" test. Under it, they examine "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question."<sup>64</sup> Public access is more likely to be granted if it "would serve as a curb on prosecutorial or judicial misconduct or would further the public's interest in understanding the criminal justice system."<sup>65</sup>

Courts have generally "protect[ed] access unless its denial is longstanding and functionally necessary."<sup>66</sup> Grand jury proceedings, for example, remain secret because they have historically been exempt from public access and secrecy is necessary for their proper functioning.<sup>67</sup> By contrast, under the logic and experience test, courts have extended the right of access to other nontrial criminal proceedings, including jury selection<sup>68</sup> and preliminary,<sup>69</sup> suppression,<sup>70</sup> and sentencing hearings.<sup>71</sup>

Courts have also applied the right of public access to plea hearings.<sup>72</sup> Accordingly, governments must take all reasonably available measures to accommodate such access.<sup>73</sup> The extension of publicity rights to plea hearings makes sense in a world where jury trials are the exception and guilty

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64 *Id.* at 8.

65 *Oregonian Publ'g Co. v. U.S. Dist. Ct. for the Dist. of Or.*, 920 F.2d 1462, 1465 (9th Cir. 1990).

66 6 LAFAYE ET AL., *supra* note 39, § 24.1(a).

67 *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219 (1979) (explaining that publicity would discourage witnesses to come forward and "testify fully and frankly," as they would fear retribution and would be subject to inducements; that publicity would increase the risk that the suspect would flee or try to tamper with the grand jury; and that suspects who are ultimately exonerated do not suffer "public ridicule" during the proceedings (footnote omitted)).

68 *See generally Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017); *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (per curiam); *Press-Enterprise Co. v. Superior Ct. of Cal., Riverside Cnty.*, 464 U.S. 501 (1984).

69 *Press Enterprise II*, 478 U.S. at 7 ("[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the preliminary hearing functions much like a full-scale trial.").

70 *See generally Waller v. Georgia*, 467 U.S. 39 (1984).

71 *See Simonson, supra* note 9, at 2195, 2208, 2216–19; Memorandum from Sara Sun Beale & Nancy King to the Cooperator Subcomm. (July 21, 2016), *in* ADVISORY COMM. ON CRIM. RULES, *supra* note 13, at 217 [hereinafter Beale & King Memorandum].

72 *See, e.g., In re Copley Press, Inc.*, 518 F.3d 1022, 1027 (9th Cir. 2008); *United States v. Alcantara*, 396 F.3d 189, 199–202 (2d Cir. 2005); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988); *In re Wash. Post Co.*, 807 F.2d 383, 389 (4th Cir.1986); *Lilly v. State*, 365 S.W.3d 321, 331–32 (Tex. Crim. App. 2012).

73 *See Lilly*, 365 S.W.3d at 332; *Alcantara*, 396 F.3d at 202–05.

pleas are the norm.<sup>74</sup> In fact, the bypass of the jury, which during trial serves as “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,” makes public access to plea-related proceedings “even more significant.”<sup>75</sup> The presence of the public at plea hearings can help ensure fairness by “monitoring the administration of justice by plea.”<sup>76</sup> It helps “discourag[e] either the prosecutor or the court from engaging in arbitrary or wrongful conduct.”<sup>77</sup> Public access to plea hearings and sentencing hearings also “reveals the basis on which society imposes punishment.”<sup>78</sup> It informs the community about the operation of the criminal justice system and enables more effective public participation in democratic government.<sup>79</sup>

A number of courts have also confirmed a Sixth Amendment and First Amendment right of public access to plea agreements and plea hearing transcripts.<sup>80</sup> This result flows out of caselaw affirming that the right of public access to criminal proceedings “extends to the documents filed in connection with those proceedings.”<sup>81</sup> Besides the Constitution, the common law further protects access to judicial documents.<sup>82</sup>

The right of access to public plea agreements hinges on the agreements being judicial records—that is, being filed with the court or disclosed on the record at the plea hearing.<sup>83</sup> Accordingly, in jurisdictions where plea agreements are not placed on record with the court, the doctrine of public access does little to ensure transparency in plea bargaining. Likewise, the right of public access does not extend to plea *offers*—at least not to those offers that, as is the custom, have not been placed on the record.<sup>84</sup>

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74 *In re Copley Press*, 518 F.3d at 1027 (noting that “it stands to reason that plea colloquies, which ‘serve[ ] as a substitute for a trial,’ should also be open to the public” (alteration original) (quoting *In re Wash. Post*, 807 F.2d at 389)); *Oregonian Publ’g Co. v. U.S. Dist. Ct. for the Dist. of Or.*, 920 F.2d 1462, 1465 (9th Cir. 1990); *In re Wash. Post*, 807 F.2d at 389; 6 LAFAVE ET AL., *supra* note 39, § 24.1(a); Simonson, *supra* note 9, at 2174–78, 2194–95.

75 *Press-Enterprise Co. v. Superior Ct. of Cal. for Riverside Cnty. (Press-Enterprise II)*, 478 U.S. 1, 12–13 (1986) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

76 *United States v. DeJournett*, 817 F.3d 479, 485 (6th Cir. 2016); *see also Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991); *Oregonian Publ’g Co.*, 920 F.2d at 1465.

77 *In re Wash. Post*, 807 F.2d at 389.

78 *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir. 1989).

79 Simonson, *supra* note 9, at 2200–01, 2211.

80 *See, e.g., In re Copley Press, Inc.*, 518 F.3d 1022, 1027 (9th Cir. 2008); *DeJournett*, 817 F.3d at 485; *Wash. Post*, 935 F.2d at 288; *Oregonian Publ’g Co.*, 920 F.2d at 1465; *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988).

81 Beale & King Memorandum, *supra* note 71, at 220 (citing authorities).

82 *See Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).

83 *See, e.g., United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997); *United States v. Ring*, 47 F. Supp. 3d 38, 41–42 (D.D.C. 2014); *cf. Ex parte Birmingham News Co.*, 624 So. 2d 1117, 1131 (Ala. Crim. App. 1993) (“Until such time as a defendant is about to enter a guilty plea, however, there is no requirement of disclosure.”).

84 *See, e.g., El-Sayegh*, 131 F.3d at 163; *Ring*, 47 F. Supp. 3d at 41–42.

The few courts that have considered the question have also refused to extend the First and Sixth Amendment rights of public access to plea negotiations.<sup>85</sup> As one court explained, such negotiations are “private matters between the parties,” they have not “historically been open to the press and general public,” and “public access to such negotiations could obviously play a significantly harmful role, rather than ‘a significantly positive role[,] in the functioning of the [negotiation] process.’”<sup>86</sup> The court never elaborated why public access would “obviously” harm plea negotiations, leaving the function and desirability of secrecy in such negotiations unexamined.

In brief, while constitutional rights of access extend to proceedings and records that document the final outcome of plea negotiations, the negotiations themselves remain shielded from access under the assumption that neither experience nor logic calls for greater disclosure. The next two Parts critically examine the reasons for and against transparency in plea bargaining, showing the limits to the assumption that secrecy in plea negotiations is functionally necessary.

### III. REASONS FOR NONTRANSPARENCY

The lack of transparency of plea bargaining was not the product of reasoned deliberation about its costs and benefits. Rather, it reflected uncertainty about the legality and desirability of plea bargaining itself.<sup>87</sup> Plea deals were not officially sanctioned by the Supreme Court and state legislatures until the early 1970s.<sup>88</sup> As the 1967 report of a task force of the President’s Commission on Law Enforcement and Administration of Justice explained:

There [wa]s ordinarily no formal recognition that the defendant has been offered an inducement to plead guilty. Although the participants and frequently the judge kn[e]w that negotiation ha[d] taken place, the prosecutor and defendant . . . ordinarily [had to] go through a courtroom ritual in which they deny that the guilty plea is the result of any threat or promise.<sup>89</sup>

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85 See, e.g., *Birmingham News Co.*, 624 So. 2d at 1131; *State v. Lopez*, 497 A.2d 390, 397 (Conn. 1985) (holding that “neither the defendant nor the public is entitled to attend” plea negotiations); cf. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n. 23 (1980) (Brennan, J., concurring) (“Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.”); *United States v. Verdooden*, 528 F.2d 103, 107 (8th Cir. 1976) (noting judicial policy to encourage plea negotiations, which makes it “essential that . . . negotiations remain confidential to the parties if they are unsuccessful”).

86 *Birmingham News Co.*, 624 So. 2d at 1131 (alterations in original) (quoting *Press-Enterprise Co. v. Superior Ct. of Cal. for Riverside Cnty.* (*Press-Enterprise II*), 478 U.S. 1, 8 (1986)).

87 See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5–6, 19–21 (1979). See generally William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435 (2020).

88 See *Brady v. United States*, 397 U.S. 742, 758 (1970); Alschuler, *supra* note 87, at 40.

89 U.S. DEP’T OF JUST., PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUST., TASK FORCE REPORT: THE COURTS 9 (1967), *quoted in In re Ellis*, 356 F.3d 1198, 1231 (9th Cir. 2004).

Given the disapproval and sometimes outright illegality of plea bargaining, the parties conducted their discussions behind closed doors and created no documentation of the agreements they reached.<sup>90</sup>

In the 1970s, as plea bargains became accepted by the courts, a movement toward documenting at least some elements of these bargains arose. The Supreme Court required that a court must examine the knowledge and voluntariness of guilty pleas on the record.<sup>91</sup> Many jurisdictions further mandated courts to determine the factual basis of a guilty plea on the record.<sup>92</sup>

Yet the process of negotiating a plea agreement remained shielded from outside scrutiny. The following Sections examine the justifications given for continued lack of transparency in plea bargaining.

### A. *Encouraging Candor in Negotiations*

A common reason given for confidentiality in plea negotiations is that it is necessary to encourage candor among the participants. If the parties were concerned that their statements and offers would become public, the reasoning goes, they may not be as forthcoming or flexible in the negotiations. Under this view, publicity may discourage some parties to engage in the process altogether. As the Eighth Circuit explained:

Plea bargaining has been recognized as an essential component of the administration of justice. “Properly administered, it is to be encouraged.” If such a policy is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful. Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence.<sup>93</sup>

In most cases, courts make these arguments in favor of confidentiality when rejecting demands to introduce evidence of a plea offer in a subse-

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90 Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 82 (2015) (quoting the Federal Rules of Criminal Procedure, Rule 11 advisory committee notes to 1974 amendment and noting that plea bargaining at the time was “informal and largely invisible”).

91 *Brady*, 397 U.S. at 747 n.4; *Boykin v. Alabama*, 395 U.S. 238, 241–44 (1969).

92 See FED. R. CRIM. P. 11(b)(3); 5 LAFAVE ET AL., *supra* note 39, § 21.4(f).

93 *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (citations omitted) (quoting *Santobello v. New York*, 404 U.S. 257, 260 (1971)); see also *Jenkins v. State*, 493 S.W.3d 583, 607–08 (Tex. Crim. App. 2016) (“[A]llowing a defendant to introduce evidence at trial of a sentence offered by the State during plea negotiations clearly militates against public policy favoring the conclusion of litigation by compromise and settlement because it discourages the State from making such offers in the future.”); *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997) (“Public access to unconsummated plea agreements cannot be squared with the confidentiality required for candid negotiations.”); *Motion to Quash Subpoenas Improperly Seeking Irrelevant and Protected Material from Criminal Case at 8, United States v. BNP Paribas SA*, No. 4:11-CV-3718, 2013 WL 10197924 (S.D. Tex. Oct. 3, 2013) (“As noted by many courts, such disclosure would also discourage other parties from being as forthright and candid in future plea negotiations.”).

quent civil or criminal proceeding.<sup>94</sup> Rules of evidence and related caselaw already prohibit such use of plea offers and plea-related statements and therefore mitigate the risk that disclosure would inhibit negotiations.<sup>95</sup> These rules also help protect the defendant's right to a fair trial should negotiations fall apart.<sup>96</sup>

Still, concerns about inhibiting candor have merit when it comes to the idea of conducting negotiations entirely in public. Requiring the parties to negotiate in public would, at least in some cases, impair their ability to be fully forthcoming and reach a compromise. For example, if the parties had to bargain in public, they would likely be wary of conceding weakness in the evidence supporting their case or strength in the evidence supporting the opponent's case. Such concessions are often key to the success of plea negotiations, and discouraging the parties from making them would stand in the way of compromise. Publicity would be particularly problematic in high-profile cases where media coverage of the negotiations could also taint the jury pool should the negotiations fall apart and the case proceed to trial.<sup>97</sup> Finally, public negotiations would also be problematic in cases where the prosecution is seeking the cooperation of the defendant, a point discussed further in Section III.C. Proposals to open plea bargaining to the public must take these concerns into account.

### B. *Protecting Prosecutorial Discretion*

Secrecy may also be defended on the ground that it enables prosecutors to use their discretion to exercise mercy where the circumstances warrant it. The lack of transparency limits oversight of prosecutorial decisions, so it gives

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94 See, e.g., *United States v. Robertson*, 582 F.2d 1356, 1365 (5th Cir. 1978); *Verdoorn*, 528 F.2d at 107; *Jenkins*, 493 S.W.3d at 607–08. But cf. *El-Sayegh*, 131 F.3d at 163 (making this argument in the context of a media request to access a draft plea agreement).

95 See, e.g., FED. R. EVID. 410; FED. R. CRIM. P. 11(f); *Robertson*, 582 F.2d at 1365 (stressing that even before the enactment of the Federal Rules of Evidence, courts recognized “the inescapable truth that for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him” (quoting *United States v. Herman*, 544 F.2d 791, 796 (5th Cir. 1977)); and citing *United States v. Ross*, 493 F.2d 771, 775 (5th Cir. 1974)); *Jenkins*, 493 S.W.3d at 607–08 (“[A]llowing a defendant to introduce evidence at trial of a sentence offered by the State during plea negotiations clearly militates against public policy favoring the conclusion of litigation by compromise and settlement because it discourages the State from making such offers in the future.”); *id.* at 607 (“We have held that a State’s plea offer, presented by a capital defendant at the punishment phase, might be ‘minimally relevant’ as tending to show the District Attorney’s office’s belief that the defendant is not a future danger. Nevertheless, such evidence is not admissible under Rule 403 because it is ‘substantially outweighed by the danger of both unfair prejudice and of misleading the jury.’ Admitting evidence of plea negotiation also runs the risk of confusing the issues by leading the jury down a path of inquiry into the motivations behind each party’s plea offer.” (footnotes omitted)).

96 Cf. *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 WL 501321, at \*18 (S.D. Tex. Feb. 21, 2008).

97 *Id.*

prosecutors greater freedom to reduce or modify charges to provide leniency in the face of rigid criminal laws.

Many commentators view prosecutorial discretion to dispense mercy during plea bargaining as necessary in light of the severity of our sentencing laws and the draconian collateral consequences that may accompany criminal convictions.<sup>98</sup> This view rests on the assumption that, based on their expertise and their understanding of the facts and the law in a particular case, prosecutors are better situated to determine what disposition is in the public's interest than other relevant actors, such as legislatures, judges, or the public.

American prosecutors have historically enjoyed broad discretion in charging decisions because principles of separation of powers have been interpreted to prevent judges from interfering with those decisions.<sup>99</sup> As part of plea bargaining, prosecutors may agree to reduce or modify charges to ameliorate the harshness of the penalty that the defendant faces—a severe mandatory sentencing minimum, a harsh sentencing enhancement, or a drastic collateral consequence, such as deportation.<sup>100</sup> The lack of transparency means that prosecutors do not need to justify their charging choices to the public; very often, their charging choices also remain effectively hidden from supervisors and the court.<sup>101</sup>

Some worry that if the parties were forced to expose plea negotiations to public scrutiny, prosecutors might be more reluctant to agree to “creative” plea bargains that stretch the law to provide leniency.<sup>102</sup> Such bargains might be perceived by superiors or by the public as underenforcing the law or “going easy” on a defendant for improper reasons. Accordingly, while transparency does not formally limit prosecutorial discretion, it may effec-

98 Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087, 1104 (2005) (“Perhaps the only way to remove some of the severity [of our sentencing laws] is to allow prosecutors to operate quietly, dispensing mercy in a few cases, even if it is done inconsistently.”); see also Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 853–56 (2018) (quoting and agreeing with Wright).

99 Judges can reject charges that are not supported by probable cause, but cannot prevent a prosecutor from dismissing or reducing charges. See, e.g., Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 63–66 (2017) (noting that this is the standard role of judges in the federal and most state systems, but then proceeding to outline ways in which judges could influence prosecutorial decisions to reduce or decline charges in certain states and certain contexts).

100 See BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING—TECHNICAL REPORT* 47–48, 176–79, 195–98 (2012); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1215–16 (2016); Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 930–33 (2017); Wright et al., *supra* note 23 (manuscript at 5–6, 22–26).

101 FORTIER, *supra* note 25, at 1–2, 9.

102 Cf. Bellin, *supra* note 98, at 853–56; Johnson, *supra* note 32, at 875 (noting the benefits of the lack of transparency for prosecutors who wish to “enforce the criminal law, while not having defendants ‘suffer enormous and disproportionate consequences’”); Wright, *supra* note 98, at 1104.

tively do so in practice by discouraging prosecutors from entering into plea bargains that stretch the facts or the law to protect defendants from unduly punitive consequences.

### C. *Shielding Cooperators from Harm*

Another argument for confidentiality in plea bargaining is that it is necessary to protect cooperating defendants from retaliation. Cooperation is vital to the success of many complex prosecutions; at the federal level, cooperation agreements are used in at least ten percent of criminal cases.<sup>103</sup> Yet recent studies have revealed that cooperators frequently face threats and sometimes actual violence (especially in detention) if it becomes known that they have assisted the government.<sup>104</sup> Some observers have therefore argued against making plea agreements or plea-related documents public, to the extent that these might disclose the cooperation of a defendant and place him at risk or discourage future defendants from cooperating.<sup>105</sup>

The experience of the federal system with publicly filed plea agreements illustrates some of the problems with exposing plea agreements to the public. Plea agreements generally disclose whether a defendant has agreed to cooperate, as this is a critical concession on which the government's promises to drop charges or recommend a sentence reduction might hinge. Consequently, when a plea agreement is placed on the record, and the record is made available to the public electronically, criminal associates can find out that a defendant has cooperated and may threaten to harm him or his family.<sup>106</sup> This in turn jeopardizes the success of ongoing investigations that depend on the cooperation of those who are threatened and deters other defendants from assisting the government.

In a 2015 Federal Judicial Center "Survey of Harm to Cooperators," 976 federal judge respondents reported "571 instances of harm or threat" to defendants and witnesses and 31 murders of cooperating defendants within the preceding three years.<sup>107</sup> The survey found further that "[t]he plea agreement or plea supplement was the document most frequently used to identify a defendant/offender as a cooperator—a minimum of 135 instances."<sup>108</sup> Intimidation is not a concern in every case in which there is cooperation, and in many cases, the risk of intimidation cannot be eliminated by confidentiality, as "there will often be alternative sources of informa-

103 D. Brock Hornby, *Can Federal Sentencing Remain Transparent?*, JUDICATURE, Spring 2019, at 46, 47.

104 MARGARET S. WILLIAMS, DONNA STIENSTRA & MARVIN ASTRADA, FED. JUD. CTR., SURVEY OF HARM TO COOPERATORS: FINAL REPORT 8, 10 (2016). See generally *Panel Five: Cooperation and Plea Agreements—Judges' Roundtable*, 79 FORDHAM L. REV. 85 (2010) [hereinafter *Cooperation and Plea Agreements*].

105 E.g., *Cooperation and Plea Agreements*, *supra* note 104, at 92–95.

106 David L. Snyder, Note, *Nonparty Remote Electronic Access to Plea Agreements in the Second Circuit*, 35 FORDHAM URB. L.J. 1263, 1265, 1271–72 (2008).

107 WILLIAMS ET AL., *supra* note 104, 8, 10.

108 *Id.* at 13.

tion about cooperators.”<sup>109</sup> Still, the data from the survey of harm to cooperators indicate that this is a concern that must be taken seriously.

#### D. *Conserving Criminal Justice Resources*

Some commentators have advanced practical arguments in favor of continued secrecy. They have argued that documenting plea discussions or plea offers would be time consuming and unfeasible.<sup>110</sup> Particularly in large urban jurisdictions, prosecutors and defense attorneys carry heavy caseloads and depend on quick and informal bargaining to dispose of cases efficiently.<sup>111</sup>

Memorializing plea offers and providing reasons for the offers would mean taking time away from completing other prosecutions. Placing offers on the record with the court would also absorb valuable time and resources of the court as well as the parties. Additionally, the installation, maintenance, and proper use of digital databases in which plea data would be recorded may have significant startup costs. The challenges of operating digital databases are likely to be particularly daunting for smaller, rural offices, which tend to lack resources and qualified staff to maintain and operate the necessary data management systems.<sup>112</sup> States will need to consider these burdens in assessing whether and how to record and disclose plea-bargaining data.

### IV. THE COSTS OF NONTRANSPARENCY

While legitimate reasons support maintaining some aspects of plea bargaining confidential, lawmakers and courts must also consider the important interests that weigh against such secrecy. These concern the very fairness and legitimacy of plea bargaining and will therefore often outweigh at least the practical and logistical considerations in favor of maintaining plea-bargaining confidentiality.

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109 Beale & King Memorandum, *supra* note 71, at 237. For example, cooperation frequently requires testimony against a codefendant, and such testimony, unless closed to the public (which is rare), reveals the cooperator’s assistance to the government.

110 See *In re Alvernaz*, 830 P.2d 747, 756 n.7 (Cal. 1992) (“[M]emorializing plea bargain discussions in this particular manner could be burdensome in high-volume courts were it to be followed as a general practice.”); Schneider & Alkon, *supra* note 4, at 454–59 (noting commentators’ concerns about resources in implementing more robust plea data collection by courts); Graham C. Polando, *Being Honest About Chance: Mitigating Lafler v. Cooper’s Costs*, 3 HLRE: OFF REC. 61, 66 (2013).

111 See *In re Alvernaz*, 830 P.2d at 756 n.7; Polando, *supra* note 110, at 66. See generally Adam M. Gershowitz & Laura R. Killinger, Essay, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011).

112 OLSEN ET AL., *supra* note 36, at 10; see also P. Leila Barghouty, *The Police Avoid Requests for Their Records by Simply Not Keeping Any*, THE OUTLINE (Sept. 3, 2019), <https://theoutline.com/post/7901/the-police-avoid-requests-for-their-records-by-simply-not-keeping-any?zd=1&zi=eucwm7jr> (noting difficulties that law enforcement agencies, especially in rural areas, have had in maintaining digital databases).

### A. *Concealing Disparate Treatment of Similarly Situated Defendants*

The lack of transparency makes it difficult for attorneys, judges, and the public to monitor the process and detect when similarly situated defendants are not treated equally in the plea-bargaining process. Because there are no searchable databases of plea offers, defense attorneys often do not know what the “going rate” for plea bargains in particular cases are, particularly if the attorneys are not part of a public defender’s office, are relatively inexperienced in handling the type of case at issue, or are new to the jurisdiction.<sup>113</sup> Accordingly, they cannot be sure whether an offer they have received for a client is reasonable and consistent with the norm. Nor can they point to plea precedent in arguing for equal treatment of their clients.

The lack of transparency also makes it more difficult for judges to evaluate the fairness of plea bargains in deciding whether to accept a guilty plea and whether to go along with the parties’ sentencing recommendation. In most U.S. jurisdictions today, judges cannot easily search plea or sentencing precedents. While average statistics might be available, databases that allow them to compare case characteristics are not.<sup>114</sup>

The lack of transparency thus allows disparate treatment to remain hidden. There is some preliminary evidence to suggest that similarly situated defendants are not treated consistently in plea bargaining. When scholars have been able to access and review plea, charging, and sentencing data, they have found disparities on the basis of wealth and race.<sup>115</sup> These results suggest that better documentation and transparency measures are necessary to uncover and address unequal treatment in plea bargaining.

### B. *Hiding Ineffective Assistance of Counsel During Plea Bargaining*

The Supreme Court has held that the Sixth Amendment right to effective assistance of counsel extends to plea negotiations.<sup>116</sup> At a minimum, counsel must inform her client of any plea offer by the prosecution and must provide competent advice about the consequences of accepting or rejecting the offer.<sup>117</sup>

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113 See Levine et al., *supra* note 24, at 667.

114 See, e.g., Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1366 (2005) (“No state provides sufficient information to answer the basic question: What distribution of sentences has been imposed by other judges for similar cases?”); Samuel R. Wiseman, *The Criminal Justice Black Box*, 78 OHIO ST. L.J. 349, 372–79, 382–83 (2017).

115 See generally KUTATELADZE ET AL., *supra* note 25; Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018); Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 JUST. Q. 223 (2018); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014).

116 *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

117 *Id.* at 145; *Laffler v. Cooper*, 566 U.S. 156, 162–163 (2012).

As the Supreme Court has recognized, however, it is difficult to ensure that defendants are receiving effective assistance if plea bargaining occurs off the record.<sup>118</sup> If offers made and concessions exchanged are not properly documented, a court reviewing an ineffective assistance claim would have a difficult time resolving, after the fact, whether a prosecutor did in fact extend a plea offer that the attorney failed to convey, and if so, what the terms of that offer were.

Going beyond constitutional claims of ineffective assistance, the lack of searchable plea records inhibits proactive efforts by defense attorneys to improve the assistance they provide during plea negotiations.<sup>119</sup> Without information about the standard plea deal for certain crimes, defense attorneys are likely to be less effective in negotiating with the prosecution.<sup>120</sup> As negotiation scholars Andrea Kupfer Schneider and Cynthia Alkon explain, “In plea bargaining, defense counsel either can make the opening offer or will be responding to the prosecutor. In order to know what would be a good and legitimate outcome . . . one needs information about other similarly situated defendants.”<sup>121</sup>

More broadly, the lack of information about what occurs during plea negotiations—and how that affects outcomes—hinders efforts to develop standards of quality representation.<sup>122</sup> Pamela Metzger and Andrew Ferguson have argued that public defenders need to collect and analyze data about defense inputs and outcomes to identify what strategies work and what competent representation looks like.<sup>123</sup> When information about a critical stage of the process—plea bargaining—is missing, neither defender’s offices nor bar associations have reliable measures by which to develop standards for adequate representation.

### C. *Disguising the Trial Penalty*

The lack of transparency also prevents the public from understanding what trial penalties are imposed on those defendants who refuse plea offers and proceed to trial. Analysis of the average sentences received by those who plead guilty and those who go to trial on particular charges suggests that defendants are frequently penalized for exercising their Sixth Amendment right to trial and that the penalty can be significant.<sup>124</sup> Yet comparing aver-

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118 See *Frye*, 566 U.S. at 146; Stern, *supra* note 14, at 250–51.

119 See generally Levine et al., *supra* note 24; Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057 (2015); Schneider & Alkon, *supra* note 4.

120 Schneider & Alkon, *supra* note 4, at 478 (quoting Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 105–06 (1995)).

121 Schneider & Alkon, *supra* note 4, at 477–78.

122 *Id.* at 473–74.

123 Metzger & Ferguson, *supra* note 119, at 1097, 1113.

124 See, e.g., Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT. REP. 256, 257 (2019) (“[O]n average, trial conviction increases the odds of incarceration by two to six times and produces sentence lengths that

age sentences is not a perfectly reliable way to measure the trial penalty, as the groups of defendants who have pleaded guilty may be qualitatively different from the groups of defendants who go to trial. It is important, therefore, to examine records of plea offers in cases where defendants proceed to trial and to compare the plea offer to the posttrial sentence in the same case. Until records of plea offers in cases that go to trial are publicly available, we cannot determine with precision the size of trial penalties or the circumstances under which they are imposed. The lack of data in turn limits public discussion about whether and how to address factors that contribute to significant trial penalties.

#### D. *Concealing the True Facts*

The lack of transparency in plea bargaining also permits the parties to conceal facts in the case from the public—and sometimes the court—to achieve a mutually agreed upon result. To obtain a less punitive outcome while ensuring a quick and certain resolution of the case, the parties often negotiate charge bargains that omit or misrepresent relevant facts.<sup>125</sup> For example, to avoid lifetime sex-offender registration, the parties may agree to reduce a felony sexual assault charge to simple assault or a series of misdemeanor sex offenses.<sup>126</sup> To avoid deportation or the loss of occupational licenses, felonies may be negotiated down to misdemeanors.<sup>127</sup> To skirt harsh mandatory minimum sentences, the presence of a gun during the commission of a drug sale might be omitted or the quantity of drugs might be recalculated and charges negotiated accordingly.<sup>128</sup> Likewise, the prior

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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. Soulé, 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%); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 89–90 (2005) (finding an average trial penalty 44.5 months greater than the sentence imposed after a guilty plea in state felony cases); HUM. RTS. WATCH, AN OFFER YOU CAN’T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 102 (2013) (reporting that “the mean sentence for all drug trafficking offenses in which conviction was obtained by plea was 5 years, 4 months, and the mean sentence for cases in which conviction was obtained at trial was 16 years, i.e., three times longer” (footnote omitted)).

125 See HUM. RTS. WATCH, *supra* note 124, at 86–87; Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961, 2964 (2010); Donnelly, *supra* note 4, at 430–35; Johnson, *supra* note 32, at 855; Schulhofer & Nagel, *supra* note 32, at 1293; Turner, *supra* note 21, at 212–23.

126 Johnson, *supra* note 32, at 856–57.

127 See *id.* at 858.

128 *Id.* at 862–63.

record of the offender might be minimized to evade very severe penalties for recidivism.<sup>129</sup>

The practice of fact bargaining allows the parties to avoid the harsh consequences dictated by rigid sentencing schemes and resolve the case with less effort.<sup>130</sup> Yet it can also subvert legislative and judicial authority to set appropriate criminal punishment. Particularly when done off the record, fact bargaining also conflicts with a central purpose of the criminal process—to seek the truth about the case.<sup>131</sup> In turn, this deepens public mistrust and disapproval of plea bargaining.<sup>132</sup>

Even if fact bargains might be justifiable in some cases, the secrecy of plea bargaining prevents outsiders from learning how often and under what circumstances fact bargains occur.<sup>133</sup> And because the negotiations are off the record, prosecutors do not need to concern themselves with providing

129 *Id.* at 863.

130 *See id.* at 858.

131 *Id.* at 859.

132 The few surveys that have examined public views of plea bargaining have generally found high levels of disapproval. *See, e.g.,* DAVID FOGEL, “. . . WE ARE THE LIVING PROOF . . .”: THE JUSTICE MODEL FOR CORRECTIONS 309 (2d ed. 1979) (noting a Michigan survey finding public disapproval of plea bargaining between 67–70% in the years 1973–75); CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS’ RIGHTS IN CALIFORNIA 64–65 (1993) (discussing nationwide and California surveys finding that a majority of the public disapproved of plea bargaining); Robert F. Rich & Robert J. Sampson, *Public Perceptions of Criminal Justice Policy: Does Victimization Make a Difference?*, in 5 VIOLENCE AND VICTIMS 109, 113–14 (1990) (noting a 1983 survey of Chicago residents finding that 64% of respondents would like to see plea bargaining abolished); Ronald W. Fagan, *Public Support for the Courts: An Examination of Alternative Explanations*, 9 J. CRIM. JUST. 403, 408 (1981) (noting a Washington public opinion survey showing 82% support for the statement that prosecutors “should try to convict the offender of the crime committed, not reduce the charge to a less serious offense”). *But cf.* Johnson, *supra* note 20, at 153 (describing a survey of law students finding that “respondents tended to describe plea bargaining in neutral to positive terms”).

A major reason for the disapproval is the secrecy of the process, which makes it “impossible to tell what the person had really done . . . or to understand if the punishment really fit the crime.” MCCOY, *supra*, at 65; *see also id.* at 67; Sergio Herzog, *Plea Bargaining Practices: Less Covert, More Public Support?*, 50 CRIME & DELINQ. 590, 590–92 (2004) (describing survey of Canadian public opinion and Israeli experimental study finding that lack of transparency is a major reason for public disapproval of the practice). In a report encouraging other countries to adopt the U.S. federal rules of publicly filed plea agreements in cases involving business crimes, the Department of Justice likewise acknowledged that lack of transparency is likely to breed public mistrust of plea bargaining. Scott D. Hammond, Deputy Assistant Att’y Gen., Dep’t of Just., *The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All* 7 (Oct. 17, 2006) (transcript available at <https://www.justice.gov/atr/file/518421/download>) (“[I]f corporate defendants were regularly allowed to enter into secret deals with the government, investors, members of the public, and the victims of the charged crime would naturally question the fairness and transparency of the sentence imposed.”).

133 Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 524 (2002).

any justification for factually baseless bargains. In the end, lack of transparency in the negotiations inhibits public discussion about the costs and benefits of fact bargains, and it also cuts short debate about the underlying problem—the severity of sentencing and collateral consequences that fact bargains seek to avoid.

### E. *Undermining Victims' Ability to Provide Input*

Victims in criminal cases also have legitimate interests that can be affected by plea bargaining. These include the interests in uncovering the facts of the case, seeing the criminal law properly enforced, and, if applicable, obtaining redress for injuries inflicted by the defendant.<sup>134</sup> When plea bargaining occurs in private, between the prosecutor and defense attorney only, victims' interests can be overlooked. Recognizing this risk, many states and the federal government have adopted laws that require prosecutors to inform victims of plea agreements, either before the agreements are finalized by the parties or at least before they are presented to the court.<sup>135</sup> However, these laws have not been followed consistently in practice.<sup>136</sup> The lack of transparency in plea bargaining means that when a failure to follow the victim notification law occurs, it is often not uncovered in time to permit victims to provide meaningful input into the process.

Consider the case of Jeffrey Epstein, the wealthy financier charged with sexually assaulting and trafficking dozens of minor girls.<sup>137</sup> Relying on his political connections, wealth, and high-powered attorneys, Epstein was able

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134 See generally Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987).

135 See, e.g., 18 U.S.C. § 3771(a)(9) (2018); see also Paul G. Cassell, *Crime Victims' Rights*, in 3 REFORMING CRIMINAL JUSTICE, *supra* note 3, at 227, 236–37. Several states have recently amended their laws to introduce or strengthen victim participation in plea bargaining. See, e.g., ARIZ. CONST. art. II, § 2.1(A)(4); ME. STAT. tit. 15, § 812 (2019); MO. CONST. art. I, § 32(1)(2); NEB. REV. STAT. § 23-1201 (2020); S.D. CONST. art VI, § 29(7); see also Kathy Leigh Berkowitz, *Polk Woman Says Plea Deal Violated Rights as Victim Under Marsy's Law—Constitutional Amendment Passed by Florida Voters Intended to Increase Rights of Victims to Be Informed, Participate in Criminal Cases*, THE LEDGER (Feb. 22, 2019), <https://www.theledger.com/news/20190221/polk-woman-says-plea-deal-violated-rights-as-victim-under-marsys-law—constitutional-amendment-passed-by-florida-voters-intended-to-increase-rights-of-victims-to-be-informed-participate-in-criminal-cases>; *Marsy's Law Summary*, OHIO CRIME VICTIM JUST. CTR., <https://www.ocvjc.org/marsys-law-summary> (last visited Nov. 3, 2020); Erin McCarthy Holliday, *Pennsylvania Voters Approve Marsy's Law Victims' Rights Amendment with Constitutionality Question Pending*, JURIST (Nov. 6, 2019), <https://www.jurist.org/news/2019/11/pennsylvania-voters-approve-marsys-law-victims-rights-amendment-with-constitutionality-question-pending/>.

136 See, e.g., BIBAS, *supra* note 4, at 35; U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-54, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT (2008); Cassell, *supra* note 135, at 249–50.

137 See Julie K. Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, MIAMI HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article220097825.html>.

to negotiate a plea deal that would spare him from federal prosecution and net him a lenient sentence in state court.<sup>138</sup> Critically, Epstein’s lawyers were also able to negotiate that the deal be kept secret from both the public and the alleged victims until it was too late for anyone to object.<sup>139</sup> The lack of transparency permanently affected the victims’ ability to receive redress for their harms and the ability of the victims and the public to understand what occurred.<sup>140</sup>

The failure to keep victims informed of proposed plea bargains affects not only the victims’ interests, but also the public’s concern in uncovering the truth and ensuring that justice is done. It can also limit the court’s understanding of the facts in the case and its ability to evaluate a plea bargain fairly and accurately. And it can diminish public confidence in the criminal process. Public opinion surveys about plea bargaining suggest that when victims and the public are kept in the dark about how the process operates, this can deepen “citizen dissatisfaction with plea bargaining.”<sup>141</sup>

#### F. Frustrating Criminal Justice Reform Efforts

Over the last several years, the United States has witnessed the rise of a broad social and political movement for transparent, data-based criminal justice. The availability of new technology, from body cameras and cell phones to big data analytics and social media, has made injustices in the criminal justice system more apparent to the public. At the same time, it has encouraged a broad coalition of activists,<sup>142</sup> prosecutors,<sup>143</sup> lawmakers,<sup>144</sup>

138 *Id.*; Paul G. Cassell, Nathanael J. Mitchell & Bradley J. Edwards, *Crime Victims’ Rights During Criminal Investigations?: Applying the Crime Victims’ Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 68 (2014).

139 *Brown*, *supra* note 137; *Doe 1 v. United States*, 359 F. Supp. 3d 1201, 1218 (S.D. Fla. 2019) (finding that federal prosecutors concealed the bargain from the victims until after its approval by the court and that this violated the Crime Victims’ Rights Act).

140 *Brown*, *supra* note 137; *Doe 1*, 359 F. Supp. 3d at 1218–19.

141 *See* ME. STAT. tit. 15, § 812(1) (2019); *see also supra* note 132.

142 *See, e.g.*, FORTIER, *supra* note 25, at 9 (advocating for greater transparency in prosecutorial decisionmaking and noting that similar calls for transparency “have come from all sides: from voters, academics, public defenders, county legislatures . . . , and even from prosecutors”); *Harnessing Data To Improve Lives*, ARNOLD VENTURES (Dec. 1, 2017), <https://www.arnoldventures.org/stories/harnessing-data-to-improve-lives/> (noting the foundation’s support for “evidence-based policymaking,” including in criminal justice); *Our Story*, MEASURES FOR JUST. [hereinafter MEASURES FOR JUST.], <https://measuresforjustice.org/about/overview/> (last visited Nov. 3, 2020) (noting as its mission to facilitate reform by “collect[ing], standardiz[ing], and publiciz[ing] . . . criminal justice data”); Joe Luppino-Esposito, *Conservative Criminal Justice Reform Is Alive and Well on Capitol Hill*, TEX. PUB. POL’Y FOUND. (Oct. 26, 2015), <https://www.texaspolicy.com/conservative-criminal-justice-reform-is-alive-and-well-on-capitol-hill/> (“Thanks to data-driven approaches that maximize efficiencies, conservatives are leading the way toward several key reforms.”).

143 *See, e.g.* Olsen et al., *supra* note 36, at 10; SUFFOLK CNTY. DIST. ATT’Y’S OFF., THE RACHAEL ROLLINS POLICY MEMO 2, 9, 24 (2019) [hereinafter ROLLINS MEMO], <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> (committing to leading a data-driven office, collecting and analyzing data to shape prosecutorial decision-

and scholars<sup>145</sup> to call for solutions that big data enables, specifically, broader collection and analysis of criminal justice information. A few state legislatures have recently passed laws requiring the gathering of data about criminal investigations, prosecutions, and adjudications.<sup>146</sup> Nonprofit organizations have also begun compiling criminal justice data in a more centralized and accessible format.<sup>147</sup> This trend reflects a growing understanding that improved data collection can enhance public safety, encourage more efficient criminal case processing, and address injustices in the system.<sup>148</sup>

Because the great majority of criminal cases are resolved through guilty pleas, the lack of data about plea bargaining frustrates efforts toward evidence-based criminal justice reform. Some of the plea-related data (about charges filed, charge amendments, and case dispositions) may be available, but are not easily accessible by the public<sup>149</sup> and are often isolated from other case information, making them difficult to analyze.<sup>150</sup> Other plea-related information, such as the terms and timing of a plea offer, is not systematically recorded.<sup>151</sup> Even when it is, the records are not public and are often spread across multiple sources, from prosecutors' files to emails and texts, and are therefore difficult to gather and study.<sup>152</sup> Better documenta-

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making); Sarah Lustbader, *Spotlight: 'A New Wave of Prosecutorial Transparency,'* THE APPEAL (June 7, 2019), <https://theappeal.org/spotlight-a-new-wave-of-prosecutorial-transparency>. *But cf.* FORTIER, *supra* note 25, at 10–11 (noting that “[w]hile some prosecutors have voluntarily made greater transparency a priority, others have worked against such reform” and giving examples).

144 See Jason Tashea, *Liberating Criminal Justice Data: How a Florida Law Provides a Blueprint for the Nation*, A.B.A. J. (June 18, 2019), <https://www.abajournal.com/web/article/liberating-criminal-justice-data-how-a-florida-law-offers-a-blueprint-for-the-nation> (“Going into effect statewide Jan. 1, 2020, new data will be collected across courts, corrections, police, prosecutors and public defenders. While not retroactively affecting historic data, the new dataset will include charges and case outcomes, [including plea deals,] and any alternative programs used in lieu of trial, conviction or incarceration.”); see also An Act Increasing Fairness and Transparency in the Criminal Justice System, G.B. 880, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019); KY. REV. STAT. ANN. § 27A.420 (West 2020) (requiring a record, for purposes of maintaining statistics, of the sentencing and charging concessions made in exchange for a guilty plea).

145 See generally, e.g., RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 2 (2019); Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771 (2017); Metzger & Ferguson, *supra* note 119; Wiseman, *supra* note 114.

146 See *supra* note 144.

147 See MEASURES FOR JUST., *supra* note 142.

148 See Amy Bach, *Missing: Criminal Justice Data*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/opinion/missing-criminal-justice-data.html>.

149 *Id.*; Crespo, *supra* note 145, at 2053; Wiseman, *supra* note 114, at 372–84.

150 E.g., Wiseman, *supra* note 114, at 372–84, and accompanying text.

151 See *supra* Part I.

152 Scholars have commented on the difficulty of gaining access to information related to plea bargaining. See, e.g., Besiki L. Kutateladze, Victoria Z. Lawson & Nancy R. Andiloro, *Does Evidence Really Matter? An Exploratory Analysis of the Role of Evidence in Plea Bargaining in*

tion and access to organized and searchable plea data are therefore necessary to allow meaningful analysis and discussion of areas of the criminal justice system that “might well merit reform.”<sup>153</sup>

## V. TRANSPARENCY PROPOSALS

While certain aspects of plea bargaining may need to remain confidential in order to protect candor in the negotiations, to shield cooperators, and to conserve resources, broader transparency in plea bargaining promises to make the process fairer, more truthful, and more legitimate. Enhancing transparency in plea bargaining would also be consistent with our constitutional commitment to open criminal proceedings. This Part addresses several concrete ways in which transparency can be enhanced without unduly burdening the criminal justice system or harming reasonable interests in confidentiality.

### A. *The Multiple Dimensions of Transparency*

Transparency is not an all-or-nothing proposition. Rather, it can vary in degree along several dimensions.<sup>154</sup> Lawmakers and courts can consider these various dimensions as they decide which types of transparency best balance the competing values and interests at stake.<sup>155</sup>

The first relevant dimension concerns timing—the question of *when* transparency is provided. For example, transparency may be provided in real time, as soon as decisions are made, or it may be provided later, in a digital or paper record summarizing the process or the outcome.<sup>156</sup> In the plea-bargaining context, an example of real-time transparency is when the public is permitted to attend plea hearings or plea negotiations happening in open court.<sup>157</sup> By contrast, retrospective transparency occurs when records of plea offers or agreements are made available to others to review after the negotia-

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*Felony Drug Cases*, 39 LAW & HUM. BEHAV. 431, 431 (2015) (“Unfortunately, these negotiated processes are not formally recorded in court records, and even when they are, researchers seldom are granted access to them.”).

153 Bach, *supra* note 148.

154 Andrew Keane Woods, *The Transparency Tax*, 71 VAND. L. REV. 1, 6–9 (2018).

155 The literature on costs and benefits of transparency is vast and spans diverse legal and policy areas. For a sampling, see generally TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? 25, 32 (Christopher Hood & David Heald eds., 2006); TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION (David E. Pozen & Michael Schudson eds., 2018); Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. (forthcoming 2021) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3552240](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552240)); Nathan Cortez, *Regulation by Database*, 89 U. COLO. L. REV. 1 (2018); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006); Woods, *supra* note 154.

156 Bloch-Wehba, *supra* note 155 (manuscript at 22–23); David Heald, *Varieties of Transparency*, in TRANSPARENCY: THE KEY TO BETTER GOVERNANCE?, *supra* note 155, at 25, 32.

157 See *supra* note 72 and accompanying text (noting that rights of public access extend to plea hearings); *infra* note 285 and accompanying text (discussing state rules requiring judicial participation in negotiations to occur on the record).

tions are over. In some cases, transparency can be delayed for a longer period—for example, to address concerns about the safety of cooperating defendants.<sup>158</sup>

The second dimension of transparency concerns its subject—transparency about *what*.<sup>159</sup> Does the audience get to see the content of the entire process, or does it only see the outcome, or part of the outcome? For example, publicizing a plea agreement or the resulting sentence uncovers merely the end point of negotiations.<sup>160</sup> Disclosing plea offers provides a glimpse into the steps leading up to the final agreement.<sup>161</sup> Opening up the negotiations themselves to outside scrutiny provides the most transparency, but at a higher cost to efficiency and effectiveness.<sup>162</sup>

Another dimension of transparency that policymakers must consider relates to the level at which disclosure is provided. Transparency could be provided on an individual basis, documenting and making available the details of each case, or it could occur on an aggregate basis, where data are anonymized and provided in bulk. Providing aggregate data about plea-bargaining inputs and outputs facilitates analysis of trends and precedents in plea bargaining, while preserving the privacy of the individuals involved in cases. On the other hand, disclosing individual case information helps interested parties to ensure that aggregation is done properly and that justice is being done in each case. Because transparency in individual cases is more likely to threaten the privacy and safety of the defendant, victims, and third parties, however, it needs to be handled more carefully, with redactions of sensitive information and limitations on who can access detailed case-level data.<sup>163</sup>

Another choice that drafters of transparency rules must make is whether to require that the reasons for a particular decision be made transparent—

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158 See *infra* notes 188–89 and accompanying text; *cf.* Woods, *supra* note 154, at 56 (giving examples of different areas of the law where “[r]ather than face an absolute choice between total transparency and total secrecy, regulators instead choose to keep a policy secret for a limited period of time”).

159 Bloch-Wehba, *supra* note 155 (manuscript at 18–20); Woods, *supra* note 154, at 18–19.

160 See *infra* Section V.B.

161 See *infra* Sections V.C–D.

162 Heald, *supra* note 156, at 31 (“Transparency of process may sometimes be damaging to efficiency and effectiveness, because it directly consumes resources and . . . induces defensive behavior in the face of what is perceived as oppressive surveillance.”). If plea negotiations were to be public, participants would likely be less candid and less flexible in their positions; furthermore, special measures would need to be taken to protect sensitive information from disclosure. See *supra* Part III.

163 Public records laws have developed sophisticated approaches to balancing the interests in government transparency and individual privacy and can provide guidance in this area. See *Long v. Off. of Pers. Mgmt.*, 692 F.3d 185, 192 (2d Cir. 2012); see also Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135, 141–71 (2009) (identifying techniques through which courts can protect sensitive information while maintaining transparency in court records).

transparency about the *why*.<sup>164</sup> A transparency policy at one end of the spectrum might demand that prosecutors explain why they reduce or dismiss charges or recommend a particular sentence.<sup>165</sup> A less demanding policy may simply ask the prosecutor to check off boxes listing different possible reasons for charge reductions and plea offers.<sup>166</sup> And on the other end of the spectrum, prosecutors may not need to provide any justification for the plea offers they make, as is the current practice.<sup>167</sup>

The last dimension of transparency concerns the audience to which decisions are revealed—transparency *to whom*?<sup>168</sup> Are decisions disclosed to the entire public or to just a select group (for example, other defense attorneys, prosecutors, judges, and/or victims)? Broader exposure of plea-related decisions brings additional benefits—such as expanded oversight and accountability for those decisions—but also additional costs. For example, while the disclosure of cooperation agreements to other prosecutors, defense attorneys, or judges does not raise significant concerns about retaliation against cooperating defendants, making the same disclosure to the public at large does.<sup>169</sup> The scale of transparency therefore needs to be adjusted in some contexts to ensure that individual safety and privacy interests are adequately protected.

The proposals in the subsequent Sections build on the understanding that transparency has several dimensions and gradations, and that different levels and types of transparency bring different costs and benefits. This gives flexibility to policymakers to design transparency rules in a way that fosters openness, accountability, and public engagement with criminal justice, while recognizing the limits that may at times be imposed on transparency in an effort to protect candor in plea negotiations, the safety of cooperating defendants, and the resources of the criminal justice system.

### B. *Requiring That Plea Agreements Be in Writing and on the Record*

Perhaps the easiest and most straightforward transparency measure that legislators across the United States can introduce is to require that plea agreements be in writing and filed with the court. This rule is already in place in a number of states, and if adopted more broadly, it would enhance the predictability, fairness, and public understanding of plea-bargaining outcomes.

About half of the states and the federal system already demand that plea agreements be disclosed on the record in some fashion.<sup>170</sup> Many of these states follow the model of Federal Rule of Criminal Procedure 11(c)(2),

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164 Woods, *supra* note 154, at 19.

165 See *infra* notes 247–51 and accompanying text.

166 See *infra* note 251 and accompanying text.

167 See *supra* note 33.

168 Bloch-Wehba, *supra* note 155 (manuscript at 20–22); Woods, *supra* note 154, at 20–22.

169 See *supra* Section III.C.

170 See *supra* note 27 and accompanying text.

which provides that plea agreements must be disclosed “in open court” or, on showing of good cause, in camera, at the time the plea is offered.<sup>171</sup> While Rule 11(c)(2) does not expressly require that plea agreements be in writing or be filed with the court, in practice, this is the norm in federal court.<sup>172</sup>

Yet in some states with equivalent rules, the parties regularly enter into verbal agreements and simply disclose them to the court at the plea hearing.<sup>173</sup> This introduces the risk that terms of the oral agreement would be forgotten or misinterpreted by the parties and would lead to disputes when the agreement is presented to the court.<sup>174</sup> Furthermore, members of the public interested in learning about the terms of the bargain must either be present at the hearing or request (and pay for) a transcript after the fact. Given the logistical difficulties of attending numerous plea hearings or gathering multiple transcripts for comparison of plea terms, this type of transparency is of limited use for those wishing to monitor plea agreements more systematically.

A more promising model rule is therefore one that further requires that the plea agreement be reduced to writing. An example is Arizona Rule of Criminal Procedure 17.4(b), which provides that “[t]he terms of a plea agreement must be in writing and be signed by the defendant, defense counsel (if any), and the prosecutor” and that “[t]he parties must file the agreement with the court.”<sup>175</sup> Criminal procedure rules in Indiana and New Mexico likewise specify that plea agreements must be in writing and filed with the court.<sup>176</sup>

Adopting a rule that requires plea agreements to be in writing and on the record would yield several important benefits. First, it would offer greater predictability to the parties and reduce disputes about the terms of the agreement.<sup>177</sup> Second, it would allow the public to better monitor plea

171 FED. R. CRIM. P. 11(c)(2).

172 See *supra* notes 27–28 and accompanying text; see also *Cooperation and Plea Agreements*, *supra* note 104, at 90 (“[T]here is no rule . . . in the federal criminal context that requires the filing of a plea agreement . . . . It has been a practice in many districts around the country, but it is just that. It has been a practice.” (statement of Judge K. Michael Moore)).

173 See *State v. Padilla*, No. 98187, 2012 WL 6515118, at \*7 (Ohio Ct. App. Dec. 13, 2012) (“A written plea offer and agreement can greatly limit problems, like here, where an oral offer is made and then is subsequently rescinded on the morning that the plea is to be taken in open court.”); *Ex parte Cassady*, 486 So. 2d 453, 456 (Ala. 1986); see also Jenia I. Turner, Lecture at the Cleveland-Marshall College of Law Criminal Justice Forum & Constitution Day Lecture: Should Plea Bargaining Be More Transparent? (Sept. 19, 2019).

174 See *Cassady*, 486 So. 2d at 456.

175 ARIZ. R. CRIM. P. 17.4(b).

176 IND. CODE § 35-35-3-3(a) (2017) (“No plea agreement may be made by the prosecuting attorney to a court on a felony charge except: (1) in writing . . . . The plea agreement shall be shown as filed . . . .”); N.M. R. CRIM. P. 5-304(B) (“If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or no contest it shall be reduced to writing substantially in the form approved by the Supreme Court. The court shall require the disclosure of the agreement in open court . . . .”).

177 See *Cassady*, 486 So. 2d at 456; *Padilla*, 2012 WL 6515118, at \*7.

bargaining because once a plea agreement is placed on record with the court, the public has a right of access to it.<sup>178</sup> The mere possibility of such monitoring would in turn encourage the parties to follow the rules and provide fair and consistent treatment to defendants. By making the records of plea agreements publicly accessible (particularly if they are also electronic and searchable), the rule would also facilitate empirical analysis of plea bargaining and thus more informed discussion about areas that merit reform.<sup>179</sup>

Requiring that plea agreements be in writing and placed on the record is not likely to impose significant costs. Plea agreements have long been placed in writing and made part of the record in federal court and in states like Arizona, Indiana, and New Mexico. There is no evidence to suggest that this has overwhelmed courts or prosecutors in these states or that it has impeded plea negotiations.<sup>180</sup> With the advent of technology, including case management systems that help auto-populate standard plea agreement forms, any burden in reducing an oral plea agreement to writing is likely to be minimal.<sup>181</sup>

Placing plea agreements on the record can have one significant cost: it can increase the risk of harm to cooperating defendants. When the defendant's cooperation is recorded in a plea agreement, which is then publicly disclosed on an electronic platform, criminal rivals or associates of the defendant can use information about the defendant's cooperation to threaten or harm him. Courts must therefore take additional precautions to address this concern.

Courts have traditionally sealed plea agreements where the prosecutor shows that disclosure poses a risk of physical harm to the cooperator or his family.<sup>182</sup> Because the sealing itself can signal that the defendant has cooperated, however, some judges have more recently experimented with a more radical approach. In 2016, the federal Committee on Court Administration and Case Management recommended a blanket policy under which *all* plea agreements would include a sealed supplement, and that supplement would indicate whether the defendant cooperated with the government or not.<sup>183</sup> Several courts have followed this recommendation.<sup>184</sup>

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178 See *supra* notes 80–83 and accompanying text.

179 To permit such analysis, plea-agreement data must be integrated with charging and sentencing information in each case. See generally Crespo, *supra* note 145; Schneider & Alkon, *supra* note 4.

180 Jury and bench trial rates in these three states were one to three percent of total criminal dispositions in 2016, consistent with rates in most other states. See CT. STAT. PROJECT, *supra* note 1.

181 See, e.g., *Electronic Docket: Setting Control Lets You Manage Your Dockets*, PROSECUTOR BY KARPEL, <http://www.prosecutorbykarpel.com/features/electronic-docket/> (last visited Nov. 3, 2020) [hereinafter KARPEL, *Electronic Docket*]. The system also permits the prosecution to easily share the written plea agreement with the defense. *Id.*

182 See, e.g., Wash. Post v. Robinson, 935 F.2d 282, 291 (D.C. Cir. 1991).

183 Interim Guidance for Cooperator Information, *supra* note 13, at 245.

184 See *id.*

Sealing of plea agreements does not mean complete lack of transparency. Even when plea agreements—or their supplement—are sealed and inaccessible to the public, they are available to prosecutors, defense attorneys, and judges, providing a measure of internal transparency.

Yet the blanket sealing of plea agreement supplements raises concerns as it conceals a high number of judicial records that are presumed to be open to the public under constitutional law. Such categorical sealing policies rest on shaky constitutional grounds. As a memo to the Advisory Committee on the Federal Rules of Criminal Procedure explained, “the Supreme Court and circuit courts have to date rejected categorical, across-the-board closure policies and required case-by-case justifications.”<sup>185</sup>

Courts have generally disfavored categorical sealing practices because they risk diminishing fairness and public confidence in the criminal process. The process by which prosecutors solicit and reward cooperation by defendants is opaque, inconsistent, “unregulated[,] and insulated from internal and external review.”<sup>186</sup> If the ultimate cooperation agreements are also systematically hidden from the public, one of the few existing checks on the process would disappear. And, as Federal District Judge Brock Hornby has argued, “if cooperation can be successfully disguised, the public will be unable to ascertain whether a federal judge’s explanation for any sentence is forthright and complete. Potentially all federal sentences and their rationales will seem veiled.”<sup>187</sup>

Given the high costs of blanket sealing policies to the fairness and legitimacy of the criminal process, it is important to consider more targeted approaches to the problem of harm to cooperating defendants. For example, supplements to plea agreements may be presumptively sealed for only a limited time, becoming public records after a set period (e.g., five years), unless the prosecutor shows a continuing risk to the defendant. Such a scheme would be similar to the deferral of declassification of sensitive national security information, where the information becomes accessible to the public only after a fixed period of time.<sup>188</sup> Temporary sealing would also be consistent with constitutional law on public access by ensuring that sealing is no broader than necessary to protect legitimate government interests.<sup>189</sup>

Another way in which jurisdictions could narrow and focus sealing practices is by using sealed supplements only for certain types of cases where retaliation is likely to occur, such as cases involving drug trafficking or organ-

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185 Beale & King Memorandum, *supra* note 71, at 226.

186 Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 756 (2016).

187 Hornby, *supra* note 103, at 47.

188 *See, e.g.*, Exec. Order No. 13,526, § 1.5, 3 C.F.R. 298 (2010) (setting out the duration of national security classifications).

189 ROBERT TIMOTHY REAGAN, FED. JUD. CTR., SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 21–22 (2010).

ized crime.<sup>190</sup> In other cases, courts can continue to use a case-by-case approach to sealing.

In brief, courts have a range of techniques at their disposal to deal with the risk of harm to cooperators when plea agreements are placed on the record. Given the range of benefits that result from the writing and recording of plea agreements—increasing predictability, promoting fairness, and strengthening public confidence in the process—states across the country should mandate such recording.

### C. *Placing Plea Offers on the Record*

Another way in which plea-bargaining transparency can be enhanced is to require that, before proceeding to trial, prosecutors set on the record any plea offer that they extended and the defendant rejected. The defendant would hear the offer in open court and have the opportunity to raise questions and concerns before deciding whether to proceed with trial. This requirement would help ensure that the defendant has been informed of the plea offer, a basic element of receiving effective assistance.<sup>191</sup>

Placing the offer on the record would also trigger rights of public access, allowing the public to scrutinize the plea-bargaining process more effectively.<sup>192</sup> This would be consistent with our constitutional commitment to public criminal proceedings and facilitate more informed criminal justice policy. In particular, it would permit the public to understand the true size of the trial penalty because the case record would reflect both the plea offer made and the disposition after trial.<sup>193</sup> The public could then discuss and determine whether and how much defendants should be penalized for rejecting a plea offer and choosing to exercise their right to trial.

Recent Supreme Court jurisprudence recognizes the benefits of recording plea offers. In *Missouri v. Frye*,<sup>194</sup> the Supreme Court held that criminal defendants have a right to competent counsel during plea bargaining and that, “as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”<sup>195</sup> The Court established remedies for defendants whose rights to competent representation in plea negotiations

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190 The data show that cooperation is most common in white-collar crime cases and drug trafficking cases. Roth, *supra* note 186, at 750 (“[T]hose charged with drug trafficking and fraud accounted for the largest number of [sentencing reductions for cooperation] in the aggregate, representing approximately 74% of all downward departures for cooperation.”). Because white-collar crime cases rarely feature threats to cooperating defendants, however, one could limit blanket sealing policies to drug trafficking and organized crime cases.

191 See *Missouri v. Frye*, 566 U.S. 134, 145 (2012).

192 See *supra* note 83 and accompanying text.

193 See *supra* note 124 and accompanying text.

194 566 U.S. 134 (2012).

195 *Id.* at 145.

are violated,<sup>196</sup> and it recommended certain measures to prevent such violations. The Court encouraged prosecutors to memorialize plea offers and place them on the record in order to reduce the risk that a defense attorney may fail to convey a plea offer.<sup>197</sup> Such measures would “help ensure against late, frivolous, or fabricated claims” of ineffective assistance and improve defense representation at the plea negotiation stage:

First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence.<sup>198</sup>

Some commentators have expressed concerns that memorializing plea offers and placing them on the record before the case proceeds to trial would be too burdensome.<sup>199</sup> Yet existing practice suggests that that it is feasible. Even before *Frye*, a few jurisdictions had begun encouraging or requiring the parties to document plea offers.<sup>200</sup> After *Frye*, many more followed suit: prosecutors in federal and state courts across the country began filing motions asking courts to conduct hearings before trial so as to ensure that defendants were aware of plea offers made by the prosecution.<sup>201</sup> Some courts began conducting such hearings on their own initiative.<sup>202</sup> As an Illinois appeals court recommended, “trial courts [should] make a record of

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196 *Lafler v. Cooper*, 566 U.S. 156, 170–71 (2012).

197 *Frye*, 566 U.S. at 146.

198 *Id.* (citation omitted).

199 *See, e.g., In re Alvernaz*, 830 P.2d 747, 756 n.7 (Cal. 1992); Polando, *supra* note 110, at 66.

200 *See* N.J. Ct. R. 3:9-1; *In re Alvernaz*, 830 P.2d at 756 n.7.

201 *See, e.g., United States v. Morgan*, 294 F. Supp. 3d 1218, 1222, 1226 (D.N.M. 2018) (mem.) (granting prosecution’s motion to conduct a “*Frye* hearing” to place plea offer on the record and noting practice of “district courts across the country” to conduct such hearings); *Stevens v. United States*, No. 2:15cv28, 2015 WL 4361560, at \*3 (E.D. Va. July 13, 2015); *People v. Grimes*, 378 P.3d 320, 346 (Cal. 2016); *see also The Supreme Court’s Decisions in Lafler and Frye*, WARRINER L., <http://www.warrinerlaw.com/articles/the-consequences-of-the-supreme-courts-decisions-in-lafler-and-frye-ineffective-assistance-of-counsel-in-plea-negotiation/> (last visited Nov. 3, 2020).

202 *See United States v. Hopkins*, No. 14-CV-0596, 2015 WL 3772622, at \*16–17 (N.D. Okla. June 17, 2015); *United States v. Slane*, No. 14-938, 2015 WL 728481, at \*20 (W.D. Pa. Feb. 19, 2015); *State v. Easterling*, 139 N.E.3d 497, 505–506 (Ohio Ct. App. 2019); *What Is a Lafler Frye Hearing in Georgia?*, LAWSON & BERRY, <https://www.georgiacriminallawyer.com/what-is-a-lafler-frye-hearing-in-georgia> (last visited Nov. 3, 2020) (“The purpose of [a *Lafler/Frye*] hearing is for the court to inquire whether a plea offer has been made, whether the plea offer has been communicated to the client, and what the plea offer is. This is typically done on the record which means that a transcript will be done for the hearing and parties can look through the transcript later on.”).

plea negotiations ‘at a pretrial hearing so that if problems arise, corrective action can be taken prior to the scheduled trial.’”<sup>203</sup> Such a record, the court explained, would help guard against “reversal of a judgment for an otherwise error-free trial” and “allow for efficient adjudication of postconviction proceedings.”<sup>204</sup>

These so-called *Frye* hearings take somewhat different forms depending on the jurisdiction and its openness to judicial involvement in plea negotiations. But they generally focus on the following questions: (1) “[w]hether the Government has made any formal plea agreement offer(s) to the defense”; (2) “[w]hether the defense attorney has communicated the plea agreement offer(s) and explained it to the defendant”; and (3) “[i]f there was an offer, whether the defendant rejected it.”<sup>205</sup>

The growing number of jurisdictions in which offers are placed on the record and *Frye* hearings are conducted shows that this type of procedure is not unduly lengthy or burdensome. As two practitioner authors commented, “[t]his type of allocation could be accomplished in under 10 minutes on the eve of jury selection.”<sup>206</sup> Not only are they not lengthy, but they are seen by many courts, prosecutors, and defense attorneys as an efficient and advisable measure to reduce the incidence of ineffective assistance of counsel.<sup>207</sup>

Another potential critique of the practice is that it may encourage improper judicial participation in plea negotiations.<sup>208</sup> Indeed, courts must take some precautions to address this concern. What shape the precautions take depends largely on the jurisdiction’s approach to judicial participation in plea negotiations. If a jurisdiction prohibits participation altogether, judges must be careful not to make any comment on the merits of the plea offer or inquire into the reasons for it.<sup>209</sup> For example, when the offer is placed on the record, the judge may not compare the outcomes of pleading guilty to those of going to trial and may not “offer[ ] guidance about favorable plea agreement terms.”<sup>210</sup>

203 *People v. Morgan*, No. 2-17-0988, 2019 WL 962804, at \*8 (Ill. App. Ct. Feb. 14, 2019) (Birkett, J., dissenting) (quoting *People v. Williams*, 54 N.E.3d 934, 942 (Ill. App. Ct. 2016)).

204 *Id.* (quoting *Williams*, 54 N.E.3d at 942).

205 *Slane*, 2015 WL 728481, at \*20 n.14 (citing *United States v. Kubini*, Crim. No. 11-14, 2017 WL 2573872, at \*4 (W.D. Pa. Sept. 18, 2014) (mem.)); *see also* *United States v. Dodge*, No. 1:16-CR-1697, 2018 WL 3352965, at \*2 (D.N.M. July 9, 2018).

206 *See, e.g.,* Maranda E. Fritz & Gabrielle Y. Vazquez, *Effective Assistance of Counsel in Plea Negotiations After Lafler*, N.Y.L.J. (Sept. 29, 2014), <https://www.law.com/newyorklawjournal/almID/1202670910273/effective-assistance-of-counsel-in-plea-negotiations-after-lafler/?slreturn=20201105094444>.

207 *See supra* notes 201–06 and accompanying text; Goode, *supra* note 23.

208 *See* *United States v. Broombaugh*, No. 14-40005-10, 2014 WL 3107963, at \*4 (D. Kan. July 8, 2014).

209 *See Slane*, 2015 WL 728481, at \*20 n.14.

210 *United States v. Morgan*, 294 F. Supp. 3d 1218, 1223 (D.N.M. 2018); *see also* *Black v. State*, No. 63880, 2014 WL 1424587, at \*2 (Nev. Apr. 10, 2014) (“[J]udge’s statement that he is ‘the toughest sentencer in the building,’ his opinion that the State would now have a

Placing the offer on the record is easier in jurisdictions where judicial participation in the negotiations is allowed.<sup>211</sup> But even in those jurisdictions, courts must ensure that judicial involvement does not coerce a defendant into pleading guilty or otherwise compromise the court's impartiality.<sup>212</sup> Because any statements that judges make in this context would be on the record, appellate courts can review the remarks closely for evidence of threats or other pressures placed on the defendant.<sup>213</sup>

As long as courts take these precautions (as many already do), placing a plea offer on the record should not raise concerns about judicial impartiality or coercion. Judges must also refrain from asking any details about the discussions between counsel and the defendant concerning the offer so as not to interfere with the attorney-client relationship.<sup>214</sup>

#### D. *Creating Searchable Plea Databases*

States and the federal system can further increase fairness in plea bargaining by requiring the recording of plea offers in digital databases that are searchable and accessible to prosecutors, defense attorneys, and judges.

The digital plea records should include, at a minimum, the date of the offer, the terms of the offer, and the date on which it expires.<sup>215</sup> This information would be entered into a digital file that also contains charging information, other relevant information about the case (such as the defendant's prior record and detention status), and the final disposition of the case. The data would be shared between prosecutors and defense attorneys and would later be accessible by judges.

The infrastructure for such databases is already available, and versions of them are being used by prosecutors across the country to manage cases, store digital evidence, and share information with the defense.<sup>216</sup> These case man-

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less difficult time proving the charges against Black, and his suggestion that Black consider taking an *Alford* plea were not required under *Frye* and were arguably coercive.”)

211 See Turner, *supra* note 21, at 238 & n.223.

212 See, e.g., Foth v. State, No. 03-18-00085, 2019 WL 1474674, at \*5 (Tex. Dist. Ct. Apr. 4, 2019); State v. McNeir, No. 105417, 2018 WL 386618, at \*2 (Ohio Ct. App. Jan. 11, 2018).

213 See Turner, *supra* note 21, at 262–64.

214 See United States v. Pirk, 236 F. Supp. 3d 796, 801 (W.D.N.Y. 2017); *Slane*, 2015 WL 728481, at \*20 n.14; Ellen Podgor, *DOJ's Lafler/Frye Motion Goes Too Far*, WHITE COLLAR CRIME PROF BLOG (Apr. 4, 2012), [https://lawprofessors.typepad.com/whitecollar-crime\\_blog/2012/04/dojs-laflerfrye-motion-goes-too-far.html](https://lawprofessors.typepad.com/whitecollar-crime_blog/2012/04/dojs-laflerfrye-motion-goes-too-far.html) (noting that judges should not ask defense attorneys how they advised their clients to respond to a plea offer).

215 See ROLLINS MEMO, *supra* note 143, at 37 (establishing guidelines for prosecutors in Suffolk County to follow in memorializing plea offers).

216 See, e.g., *Criminal Case Management: Designed by Prosecutors for Prosecutors*, PROSECUTOR BY KARPEL [hereinafter KARPEL, *Criminal Case Management*], <http://www.prosecutorbykarpel.com/> (last visited Nov. 3, 2020); *eProsecutor*, J. TECHS., <http://journaltech.com/eProsecutor/> (last visited Nov. 3, 2020); *Integrated Criminal Justice Solutions*, TECHSHARE [hereinafter TECHSHARE], <https://techsharetx.gov/> (last visited Nov. 3, 2020); *Odyssey Attorney Manager*, TYLER TECHS., <https://www.tylertech.com/products/odyssey/attorney->

agement platforms allow prosecutors to enter a plea offer into a digital file and, with just the click of a button, convey the offer to the defense.<sup>217</sup> The software can also generate plea agreements by auto-populating the template with the correct case information.<sup>218</sup> Defense attorneys get an email notification whenever an offer is entered or a file (such as an item of evidence or a draft plea agreement) is uploaded for their review.<sup>219</sup> Alerts by the system can also help prosecutors remember to send timely notifications about steps in the case to defense attorneys, victims, or others involved in the management of the case.<sup>220</sup>

The digital platforms keep records of the entries made and can generate data that permit analysis of plea-bargaining decisions and trends.<sup>221</sup> While they are currently not searchable, the platforms can be configured to allow users to consult past plea offers that fit specified criteria.<sup>222</sup> This would permit prosecutors, defense attorneys, or judges to compare an offer to plea precedents. Because records of plea offers are digitally preserved, at some point, anonymized data could also be analyzed as part of internal audits of prosecutorial decisions.

The creation of searchable plea databases would have several important benefits. First, it would reduce the time and effort that prosecutors expend to keep track of cases. As one software maker advertises,

As a prosecutor, you need to focus your razor-like wit to winning cases—not keeping track of files, court dates, and other administrative tasks. . . . Our

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manager (last visited Nov. 3, 2020); *see also* OLSEN ET AL., *supra* note 36, at 10 (“Almost all offices report having at least one electronic case management system, except among the small offices, where 32 percent report they do not have one.”).

217 For example, TechShare.Prosecutor allows the prosecutor to enter a plea offer into the system and share it as a document on a mirror TechShare defense attorney portal. The defense attorney receives an email whenever a new document is shared. *See* TECHSHARE, *supra* note 216. A conversation with a Karpel sales agent on June 28, 2019, confirmed that the Karpel software allows entry of plea information and the sharing of this information with the defense. Prosecutors using Odyssey can generate plea agreements and share this information with public defenders via the Odyssey Portal, which allows attorneys to access this information any time of day online, including on mobile platforms. TYLER TECHS., ODYSSEY CASE MANAGER: THE MOST COMPLETE COURT SYSTEM AVAILABLE 11, 13 (2017) [hereinafter ODYSSEY CASE MANAGER], <https://www.tylertech.com/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=0&moduleid=13937&articleid=504&documentid=46>.

218 *See* KARPEL, *Electronic Docket*, *supra* note 181. The case management interface stores plea offers and generates documents that can be quickly shared by email. *See* KARPEL, *Criminal Case Management*, *supra* note 216.

219 *See supra* note 217.

220 *See, e.g., Case Management Software for Prosecutors*, ABACUSNEXT [hereinafter ABACUSNEXT], <https://www.amicusattorney.com/solutions/prosecutor-case-management-software/> (last visited Nov. 3, 2020).

221 *See* ODYSSEY CASE MANAGER, *supra* note 217, at 26; *see also Reporting: Real Time Reporting*, PROSECUTOR BY KARPEL, <http://www.prosecutorbykarpel.com/features/reporting/> (last visited Nov. 3, 2020).

222 *Cf. Crespo*, *supra* note 145, at 2070.

prosecutor case management software stays at the office while you're out doing what you do best—enforcing the law and bringing criminals to justice.<sup>223</sup>

Another company boasts that a customer who “used to take . . . 4–6 hours to update cases after a large docket . . . now only takes 20–30 minutes.”<sup>224</sup> Others also highlight testimonies by prosecutors about the efficiencies that their systems create; for example, TechShare quotes a Texas prosecutor as saying that her office “can now process Misdemeanor Dockets in less than two minutes per case by generating the required plea and judgment paperwork in TechShare.Prosecutor system directly in the courtroom.”<sup>225</sup>

In addition to saving prosecutors time, the software would permit chief prosecutors to review the operations of the office more effectively, ensuring that “nothing falls through the cracks”<sup>226</sup> and that line prosecutors are following office guidelines and policies. If disparities are found, supervisors can adjust office policies to address the problem.<sup>227</sup> Because of these benefits of systematic documentation, some chief prosecutors required the documentation of charging and plea decisions even before digital filing systems were available.<sup>228</sup> With the advent of modern technology, more head prosecutors are interested in “data-based” prosecutions and would welcome the insights into office operations that plea databases can provide.<sup>229</sup>

Another benefit of the systematic recording of plea offers into databases is that it can reduce disputes between the parties about the existence or terms of the offers. In jurisdictions without routine recording practices, defense attorneys can lose offers when one prosecutor leaves a case (for example, because the prosecutor rotates to a different courtroom or has a scheduling conflict) and the next prosecutor who takes the case fails to honor the initial plea offer because it was not documented.<sup>230</sup> Even when the same prosecutor handles a case throughout, the parties may forget or misinterpret the terms of offers that have not been reduced to writing. Regular plea offer documentation can minimize such misunderstandings and disputes.

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223 ABACUSNEXT, *supra* note 220.

224 KARPEL, *Electronic Docket*, *supra* note 181.

225 Melissa Hicks, *TechShare.Prosecutor: Team Attends 2014 Elected Prosecutors Conference Hosted by TDCCA*, TEX. CONF. OF URB. CNTYS. (Feb. 11, 2015), <https://cuc.org/blog/2015/02/11/techshare-prosecutor-team-attends-2014-elected-prosecutors-conference-hosted-by-tddcaa/> (quoting Laura Nodolf, District Attorney, Midland County, Texas).

226 ABACUSNEXT, *supra* note 220.

227 See, e.g., WAYNE MCKENZIE, DON STEMEN, DEREK COURSEN & ELIZABETH FARID, PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 6–7 (2009) (noting that prosecutors in Wisconsin adjusted their charging policies in response to finding racial disparities in certain types of drug prosecutions).

228 See, e.g., Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 134 (2008).

229 See *supra* note 143.

230 See, e.g., Interview with Kevin Fisher, Criminal Defense Attorney, in Atlanta, Ga. (July 8, 2019).

Digital recording of offers can also improve prosecutors' compliance with victim consultation laws and policies. In many jurisdictions, prosecutors are required to notify victims of offers made and upcoming plea hearings.<sup>231</sup> Indeed, the number of states requiring such notifications is growing.<sup>232</sup> Even when notification is not expressly required, it can help bolster the legitimacy of the process in the eyes of the victims and the public.<sup>233</sup> Yet past practice suggests that victim notification laws are often poorly implemented.<sup>234</sup> Digital plea records—and the scheduled reminders they can generate—can help address this problem. A digital recording that automatically reminds the prosecutor to send a notification to the victim—and generates a standard notification message—could help prevent delays and omissions that leave victims with no opportunity to object to the plea deal.<sup>235</sup>

Plea databases can also promote fairness in plea bargaining by enabling participants to assess how a plea offer in one case measures against prior offers in similar cases.<sup>236</sup> Prosecutors could consult the database to ensure they are providing consistent treatment of defendants. Defense attorneys could likewise compare plea precedents and assess the reasonableness of offers they are receiving. This would allow them to be more informed and effective advocates for their clients.<sup>237</sup>

Consider a recent headline-grabbing criminal defense tactic that shows the potential of plea databases to promote effective representation and equal treatment of defendants. In July 2019, billionaire Henry Nicholas negotiated an unusually favorable plea deal on charges of drug possession and drug trafficking in Las Vegas.<sup>238</sup> He was to serve no jail time, but would instead “go

231 See *supra* note 135 and accompanying text.

232 *Id.*

233 See, e.g., Cassell, *supra* note 135, at 237–38; Michael M. O’Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 328 (2007).

234 See *supra* note 136 and accompanying text.

235 See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 136, at 34 (finding that a major reason for delay in notifying victims involves the time it takes to collect mailing addresses, write, and post letters).

236 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2532 (2004) (“A database of past trial and plea-bargain outcomes would give lawyers access to information that some repeat players already know . . . . Plea bargains, however, are often complex, multidimensional agreements in which the parties need to know the defendant’s criminal history and the strength of the evidence as well as the likely sentence. While a database could not capture these facts fully, it could at least provide a starting point or relevant anchor for researching, comparing prices, and bargaining.” (footnote omitted)).

237 See Schneider & Alkon, *supra* note 4, at 452–54.

238 *California Billionaire, Friend Spared Prison Time in Las Vegas Drug Case After Taking Plea Deal*, KTLA5 (July 31, 2019),

on informal probation, perform 250 hours of community service, attend regular drug counseling sessions and . . . make a \$500,000 contribution to drug counseling programs in Clark County,” a sum representing a mere 0.0128% of his net worth.<sup>239</sup> Seizing on the news of the deal, public defenders in Vegas began demanding similar bargains for their indigent clients, noting that “[b]illionaire Defendant Nicholas and Defendant XXX are similarly situated and should be similarly treated by the prosecution and the courts.”<sup>240</sup> The unusual publicity of the plea bargain in the Nicholas case, made possible by the defendant’s near-celebrity status, permitted public defenders to make the comparison between him and their clients and insist on equal treatment. A database would allow defense attorneys to research and compare plea offers in *all* cases, not only those that make the headlines. In turn, this would promote more effective defense representation and more evenhanded treatment of defendants by courts.

As the next Section elaborates, plea databases can also strengthen monitoring of the plea process by judges.<sup>241</sup> Like prosecutors and defense attorneys, judges could consult the database to evaluate how an offer compares to precedent and determine whether to accept any sentencing recommendations that accompany the offer. Judges may also be able to consult the database to determine whether prosecutors used potentially coercive tactics (e.g., whether they reduced charges or sentencing recommendations drastically, without any change in the evidence available; or made an “exploding” offer with an unusually short timeframe for acceptance; or linked an offer to the guilty plea of the defendant’s relative).<sup>242</sup> Such information might prompt the judge to probe more deeply into the voluntariness of the guilty plea. Even if judges only rarely engage in such oversight during their review of the guilty plea, the possibility of judicial scrutiny would incentivize prosecutors to refrain from improper negotiating tactics in the first place.

The entry of a plea offer into the digital system would not trigger public access under the common law or the Constitution; if a plea offer has not been filed with the court, it does not generally become a judicial record simply by being entered into a database that the court can consult.<sup>243</sup> Even in the few jurisdictions where, under state common law, a plea offer’s entry into

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evadaindependent.com/article/public-defenders-to-use-generous-plea-deal-offered-to-billionaire-henry-nicholas-as-model-for-future-plea-deal-requests.

239 Snyder, *supra* note 238.

240 *Id.*; see also David Ferrara, *Lawyers Want Billionaire Treatment for Las Vegas Man in Drug Case*, LAS VEGAS REV.-J. (Aug. 22, 2019), <https://www.reviewjournal.com/crime/courts/lawyers-want-billionaire-treatment-for-las-vegas-man-in-drug-case-1832689/>.

241 See *infra* Section V.E.

242 For a discussion of coercive prosecutorial tactics in plea bargaining, see generally Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401 (2017); Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 FED. SENT’G REP. 284 (2019).

243 *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997); *Ex parte Birmingham News Co.*, 624 So. 2d 1117, 1131 (Ala. Crim. App. 1993); see also *Wash. Legal Found. v. U.S. Sent’g Comm’n*, 89 F.3d 897, 905 (D.C. Cir. 1996) (noting that records that are “prelimi-

a database might render the offer a public record, disclosure would be circumscribed by a balancing of interests.<sup>244</sup> This means that, for example, work product, information whose disclosure might interfere with the investigation and prosecution of crime, and information protected under privacy laws would not be subject to disclosure.<sup>245</sup>

If digital plea databases were adopted, researchers and journalists might also be able to obtain some of the plea data *after* cases have closed, consistent with the requirements of public information acts. The researchers could then analyze the data for patterns in plea bargaining. Some might be concerned that such access would compromise legitimate government or individual interests in keeping criminal case information confidential. But public information acts already provide for exemptions to protect such legitimate interests. They exempt from disclosure information concerning cooperation by defendants, sensitive or private information, work product of prosecutors, and any other information the disclosure of which could interfere with prosecutions or investigations.<sup>246</sup>

A more ambitious transparency regime may require prosecutors to record not only the terms of plea offers in the database, but also the reasons for those offers.<sup>247</sup> A reason-giving requirement would encourage a more deliberate and thoughtful approach to the process by prosecutors. Recording the reasons for offers would also allow for a more thorough and accurate comparison of plea-bargaining inputs and outputs.

One concern with the reason-giving requirement, however, is that prosecutors might not be fully forthcoming in the explanations that they provide if they know that the database is accessible by defense attorneys or judges.<sup>248</sup> For example, prosecutors might be reluctant to acknowledge that they are

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nary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken” are not judicial records).

244 See, e.g., *Higg-A-Rella, Inc. v. Cnty. of Essex*, 660 A.2d 1163, 1168–72 (N.J. 1995).

245 See *id.* at 1171–72; see also *infra* note 246.

246 Information that is otherwise subject to disclosure under public information acts law may nonetheless be withheld if: (1) other law, such as privacy law or rules of procedure and evidence, mandates confidentiality; (2) disclosure would create a risk of physical harm; (3) the information falls within the scope of the informer’s privilege; (4) disclosure would interfere with the investigation or prosecution of crime; (5) the information is protected as work product. See, e.g., OFF. OF THE ATT’Y GEN. OF TEX., PUBLIC INFORMATION ACT HANDBOOK 2018, at 61–62, 66, 71–72, 73–74, 82–84, 86 (2018); *Department of Justice Guide to the Freedom of Information Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/oip/doj-guide-freedom-information-act-0> (Sept. 29, 2020) (notably Exemptions 3, 6, and 7, and Exclusions (c)(1) and (c)(2)).

247 The New Orleans DA’s Office required prosecutors to record the reasons for declining charges. Miller & Wright, *supra* note 228, at 134. Vermont rules on guilty pleas require prosecutors in felony cases to “disclose the reasons for entry into the plea agreement” on the public record during the plea colloquy. VT. R. CRIM. P. 11(e)(2).

248 Cf. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 66 (2002) (noting that because data about prosecutorial charging decisions, including reasons for those decisions, is used only for internal administrative reasons and are not made public, “there is little temptation to obscure important decisions in the data”).

making a plea offer based on concerns about the credibility of a witness or based on resource constraints. To ensure candor, therefore, this part of the database ought to be made accessible only internally, for purposes of audits and supervision within the prosecutor's office.

While defense attorneys would not have access to this part of the database, they could create a mirror image on their end, where they would enter the reasons *they* believe underlie the offers extended by the prosecution.<sup>249</sup> Particularly within a public defender's office or defense firms with multiple attorneys, this database could amass valuable detail over time.<sup>250</sup>

Another concern about this feature of the database may be that it would be too time-consuming for prosecutors or defense attorneys to write out the reasons behind each plea offer. To address this concern, offices can develop a digital checklist of reasons for the plea offers, which can be easily marked with the reasons that influenced the offer.<sup>251</sup>

Regardless of whether a database contains only the plea terms or also the reasons for a plea offer, some may worry that such databases are too expensive to create or maintain. In light of technological advances, however, the adoption of plea databases is increasingly feasible. Technology has "open[ed] up powerful new opportunities" in the administration of criminal justice, permitting the creation of digital repositories that are easily "organizable, searchable, and accessible."<sup>252</sup> Digital case management platforms are already widely available and increasingly used by prosecutors' offices, which makes recording easy, quick, and inexpensive.<sup>253</sup> As noted earlier, chief prosecutors themselves are becoming more interested in collecting data about the operation of their offices and even sharing some of it (usually in aggregate form) with the public.<sup>254</sup> Likewise, several states have passed legislation requiring the systematic collection and analysis of criminal justice data, including, more recently, data about charging, plea bargaining, and sentencing.<sup>255</sup> More are likely to follow,<sup>256</sup> showing the feasibility of the idea in light of technological advances.

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249 See Levine et al., *supra* note 24, at 664; Mallord, *supra* note 14, at 708–09, 716–17.

250 While a useful complement to prosecutor databases, public defender databases would not be a sufficient solution to the plea-bargaining data problem. Public defender's offices are not available throughout the country, and individual appointed counsel are unlikely to have the institutional framework to create such a database; even in areas with public defender's offices, the databases would likely not be available to appointed or retained defense counsel.

251 See Miller & Wright, *supra* note 228, at 134 ("The screening prosecutors chose their reasons from a standardized office list and recorded their reasons in computerized format, allowing managers to monitor each prosecutor's work."); see also Levine et al., *supra* note 24, at 664 (developing such a checklist as part of a proposal for public defender databases).

252 Crespo, *supra* note 145, at 2070.

253 See *supra* notes 216–22 and accompanying text.

254 See *supra* note 143.

255 See, e.g., Daniela Altimari, *Lamont Applauds Final Legislative Approval of Prosecutorial Transparency Bill*, HARTFORD COURANT (June 4, 2019), <https://www.courant.com/politics/capitol-watch/hc-pol-prosecutorial-transparency-20190605-fkv7piu5ove5phw2jh4n2wwqni->

To be sure, administrative concerns will need to be addressed as plea databases are adopted more widely. State or federal support may be necessary for smaller, rural offices, which have fewer information technology resources at their disposal.<sup>257</sup> As with other governmental databases containing sensitive and private information, plea database design will also need to prioritize data security to ensure that the information is protected from hacking and misuse.<sup>258</sup>

Another concern is that better internal transparency would limit the flexibility of line prosecutors to provide leniency in deserving cases.<sup>259</sup> Yet unlike binding sentencing laws, transparency would not prevent prosecutors from offering such leniency. If leniency is in fact appropriate, prosecutors can still provide it and then simply justify their decision. And even if transparency diminishes somewhat the willingness of prosecutors to be merciful in their plea offers, it will still bring substantial benefits for the criminal justice system. Notably, the better oversight that comes with such transparency can help ensure that prosecutorial flexibility does not lead to problematic disparities, does not subvert the truth-seeking function of the criminal process, and does not undermine democratically enacted criminal laws.<sup>260</sup>

#### E. *Strengthening Judicial Review of Plea Bargains on the Record*

Another way to enhance transparency in plea bargaining is to strengthen judicial review of the plea process and ensure that such review occurs on the

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story.html (noting that the Connecticut Office of Policy and Management will collect data “relating to charges, diversionary programs, bail requests, plea deals, contact with victims, sentencing recommendations, and demographics”); Bill Wichert, *NJ Criminal Justice Data Law Could Spur Reforms Elsewhere*, LAW360 (Nov. 15, 2020), <https://www.law360.com/access-to-justice/articles/1328633/nj-criminal-justice-data-law-could-spur-reforms-elsewhere> (reporting on recent New Jersey law that requires the state’s Attorney General to gather and analyze charging, plea bargaining, and sentencing data).

256 See *Racial Disparities in Utah Prisons Need Study, Lawmaker Says*, SALT LAKE TRIB. (Nov. 3, 2019), <https://www.sltrib.com/news/2019/11/03/racial-disparities-utah/> (noting that Utah state representative is “working on a prosecution transparency bill that would require the collection of data about arrest, charging, sentencing and parole decisions to determine how they may be contributing to racial disparities”). Continued advocacy by nonprofit organizations like Measures for Justice and the ACLU is likely to encourage more states to follow suit. See generally FORTIER, *supra* note 25; *Florida Passes Historic Legislation to Help Close the Criminal Justice Data Gap*, MEASURES FOR JUST. (Mar. 10, 2018), <https://www.measuresforjustice.org/news/2018-03-11-florida-passes-historic-legislation>.

257 See Olsen et al., *supra* note 36, at 9; Wiseman, *supra* note 114, at 393, 396.

258 See COLO. REV. STAT. § 24-37.5-407 (2020); IND. SUP. CT., DIV. OF STATE CT. ADMIN., PUBLIC ACCESS TO COURT RECORDS HANDBOOK 7 (2010); ADMIN. OFF. OF THE U.S. COURTS, INFORMATION SYSTEMS AND CYBERSECURITY—ANNUAL REPORT (2018), <https://www.uscourts.gov/statistics-reports/information-systems-and-cybersecurity-annual-report-2018>; Levine et al., *supra* note 24, at 669; Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 315, 326–27 (2004).

259 See *supra* Section III.B.

260 See *supra* Sections IV.A, V.D & V.E.

record. Judicial review exposes plea bargains to analysis by a more neutral figure with the knowledge and authority to influence the outcome of the case. And when judicial oversight occurs on the record, it can expose critical elements of the plea to broader scrutiny.

Judges have a constitutional duty to verify that a defendant who pleads guilty does so voluntarily and with a sufficient understanding of the rights she is giving up and the consequences of the guilty plea.<sup>261</sup> Criminal procedure rules further require judges to ascertain that guilty pleas rest on a sufficient factual basis.<sup>262</sup> The court's evaluation of the guilty plea must occur on the record, at a hearing open to the public.<sup>263</sup>

In practice, however, judges often handle the plea colloquy in a "rote and perfunctory" manner, and as long as "the defendant parrots the correct phrases, the judge is unlikely to scrutinize the plea any further."<sup>264</sup> Judges tend to defer to the parties to tell them the facts of the case, which allows the parties to omit key facts to fit the negotiated outcome<sup>265</sup> and increases the risk that innocent persons plead guilty and are convicted.<sup>266</sup>

The first way in which states and the federal system can strengthen judicial oversight and transparency of plea bargaining is by encouraging or requiring judges to review the terms of the plea agreement at the plea hearing. Rules should further mandate that judges conduct a careful dialogue with the defendant to ensure that the guilty plea is voluntary, knowing, and factually based. In some states, rules or practice already encourage judges to inquire into the terms of any agreement associated with a guilty plea.<sup>267</sup>

261 *Brady v. United States*, 397 U.S. 742, 748 (1970).

262 *See, e.g.*, FED. R. CRIM. P. 11(b)(3); 5 LAFAVE ET AL., *supra* note 39, § 21.4(f) (discussing the factual basis requirement in state and federal jurisdictions).

263 *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (requiring that a record of the inquiry into the validity of the guilty plea be made); *supra* notes 72–79 and accompanying text (discussing the requirement that plea hearings be open to the public).

264 Appelman, *supra* note 42, at 751; *see* 5 LAFAVE ET AL., *supra* note 39, § 21.4(f) nn. 210–21 (listing cases permitting the court to find factual basis based on stipulations of the parties or written records); Barkow, *supra* note 34, at 1026 (describing the typical inquiry into plea validity as "cursory"); Allison D. Redlich, *The Validity of Pleading Guilty*, in 2 *ADVANCES IN PSYCHOLOGY AND LAW* 1, 13–14, 20–21 (Brian H. Bornstein & Monica K. Miller eds., 2016) (discussing studies showing that plea hearings last on average less than ten minutes and that most tender-of-plea forms omit mention of factual guilt).

265 *See supra* Section IV.D; Redlich, *supra* note 264, at 20–21 (discussing studies showing that judges frequently fail to inquire into factual basis of guilty plea); Turner, *supra* note 21, at 212–13.

266 *See, e.g.*, Laurie L. Levenson, *Unmerging the Judges: Judicial Responsibility for the Rampart Scandal*, 34 *LOY. L.A. L. REV.* 787, 791–92 (2001) ("It has now become common practice for judges in California courts to rely on prosecutors to inquire about or set forth the factual basis for guilty pleas. Judges rarely engage in probing questioning to determine whether a defendant is pleading guilty because he is actually guilty, or whether the defendant is pleading guilty because he feels there is no way to contest trumped-up charges and fears imposition of the maximum sentence if he proceeds to trial." (footnote omitted)).

267 *See* 9 CHRISTINE M. WISEMAN & MICHAEL TOBIN, *WISCONSIN CRIMINAL PRACTICE AND PROCEDURE* § 23:21 (2d ed. Westlaw 2020) ("[T]he court must ascertain the terms of the

Going over the terms of the plea agreement with the defendant can help the court determine whether any of the concessions exchanged might have coerced the defendant to waive his right to trial.<sup>268</sup> When reviewing the agreement's terms, the court is also better positioned to examine whether the defendant understands the consequences of pleading guilty, whether the guilty plea is factually based, and whether defense counsel has adequately advised the defendant about the plea agreement.<sup>269</sup>

In some jurisdictions, judges have been reluctant to conduct this type of review of the plea agreement because of concerns that their involvement would be considered improper and might violate rules prohibiting participation in plea negotiations.<sup>270</sup> In fact, caselaw suggests that neither reviewing the agreement's terms nor conducting a thorough plea inquiry to ensure that the plea is voluntary, knowing, and factually based amounts to improper judicial participation.<sup>271</sup> But to make this clear, legislatures should amend criminal procedure rules to encourage or require a more probing inquiry into the guilty plea and the plea agreement at the public plea hearing.

States should also expressly mandate that the court examine the factual basis of a guilty plea at the hearing—a requirement that the federal and most, but not all, state systems already impose.<sup>272</sup> Criminal procedure rules should further specify what type of inquiry or standard of proof is required to show that a plea is factually based. Consider, for example, the more robust plea review that occurs in our military criminal justice system. Military judges may not rely merely on stipulations of facts between the parties to establish a factual basis.<sup>273</sup> Instead, they must engage the accused in a “dialogue in which the military judge poses questions about the nature of the offense and the accused provides answers that describe his personal understanding of the

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agreement. . . . [T]he court should then address the defendant personally to ascertain whether any other promises were used to obtain the plea.”); Vt. R. CRIM. P. 11 reporter's notes to 1977 amendment.

268 See, e.g., *State v. Farrell*, 606 N.W.2d 524, 530 (N.D. 2000).

269 See *id.*; 5 LAFAVE ET AL., *supra* note 39, § 21.4(f) n. 209 (discussing cases showing that colloquy with the defendant is the preferred method of establishing factual basis).

270 See *supra* notes 209–14 and accompanying text.

271 See, e.g., *United States v. Andrade-Larrios*, 39 F.3d 986, 990 (9th Cir. 1994) (“In this case, the judge was not doing anything to pressure or persuade Andrade-Larrios to take the deal. The deal had been made, and the judge was trying to find out what it was.”); *United States v. Cone*, 323 F. App'x 865, 870–71 (11th Cir. 2009); *People v. Cobbs*, 505 N.W.2d 208, 212–13 (Mich. 1993); *State v. Bangert*, 389 N.W.2d 12, 29–31 (Wis. 1986); *Aguirre-Mata v. State*, 125 S.W.3d 473, 474–77 (Tex. Crim. App. 2003).

272 5 LAFAVE ET AL., *supra* note 39, § 21.4(f).

273 *United States v. Schrader*, 60 M.J. 830, 831 (C.G. Ct. Crim. App. 2005) (“The inquiry went no further than the stipulation of fact, which, in this case as well as most others we see, offered little more than a bare-bones recitation of the elements. All military judges should remind themselves that such stipulations, without a more detailed inquiry, are not an adequate factual basis supporting guilt. Furthermore, conclusory statements alone acknowledging guilt, without the facts establishing that guilt, will generally result in a deficient record.”).

criminality of his or her conduct.”<sup>274</sup> The dialogue is supposed to entail a genuine effort to elicit the true facts, and judges are not supposed to ask leading questions that produce simple “yes” and “no” responses.<sup>275</sup> Judges may also reject the guilty plea if the evidence presented at the hearing is inconsistent.<sup>276</sup>

In addition to the military justice system, some states have rules that expressly require judges to engage in a dialogue with the defendant as a means of establishing factual basis. In New Jersey, for example, the court may not accept a guilty plea “without first questioning the defendant personally . . . , and determining by inquiry of the defendant and others, in the court’s discretion, that there is a factual basis for the plea and that the plea is made voluntarily [and knowingly].”<sup>277</sup> Other state and federal rules should similarly make clear that written stipulations of facts are not sufficient to support a guilty plea and that judges must independently determine—preferably by questioning the defendant or witnesses—the plea’s factual basis. Caselaw should also discourage judges from asking leading questions at the plea colloquy, as the military justice system does.<sup>278</sup>

While the more careful colloquy would demand some additional time and effort, its costs would not be significant. Judges already must go through a list of explanations with the defendant during the colloquy, and it would take no more than several additional minutes to conduct the additional inquiries.<sup>279</sup>

274 *United States v. Hartman*, 69 M.J. 467, 469 (C.A.A.F. 2011).

275 *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004), *aff’d*, 64 M.J. 439 (C.A.A.F. 2007).

276 *United States v. Pinero*, 60 M.J. 31, 34 (C.A.A.F. 2004); MANUAL FOR COURTS-MARTIAL UNITED STATES app. at A8-7 (2012) (“The military judge should be alert to discrepancies in the accused’s description or between the accused’s description and any stipulation. If the accused’s discussion or other information discloses a possible defense, the military judge must inquire into the matter, and may not accept the plea if a possible defense exists.”).

277 N.J. Ct. R. 3:9-2; *see also In re Manosh*, 108 A.3d 212, 216–18 (Vt. 2014) (“A court cannot short-circuit the express requirement of personally addressing a defendant concerning these matters by relying on a written form signed by the defendant.”); *People v. Chung*, No. CRA02-002, 2004 WL 186292, at \*3–4 (Guam Jan. 26, 2004) (affirming that the court must “personally inquire whether the defendant understood the nature of the charge” in relation to the facts, and a recitation of the indictment to the defendant fails to meet this requirement); *State v. Bangert*, 389 N.W.2d 12, 24 (Wis. 1986) (“[I]t is no longer sufficient for a trial judge merely to perfunctorily question the defendant about his understanding of the charge. Likewise, a perfunctory affirmative response by the defendant . . . without an affirmative showing that the nature of the crime has been communicated to him . . . will not satisfy the requirement . . . .”); *State v. Feng*, 421 A.2d 1258, 1266–67 (R.I. 1980) (holding that the trial court must personally “engage in as extensive an interchange as necessary” so that the record “affirmatively disclose[s]” the defendant’s understanding of the factual nature of the charges).

278 For a similar proposal, see Julian A. Cook, III, *Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process*, 60 B.C. L. REV. 1073, 1120–21 (2019).

279 *Schneider & Alkon*, *supra* note 4, at 457 (proposing that during the colloquy, judges ask questions such as “How was the plea offer conveyed?” and “Was there any limit on the

A more probing judicial inquiry into the facts of the case and into the details of the plea agreement would better fulfill judges' responsibility to evaluate the constitutional validity of the guilty plea.<sup>280</sup> By improving oversight of plea bargaining, it would also encourage the parties to conduct negotiations more responsibly and would enhance the fairness of the plea bargain. Because plea colloquies are open to the public, a more thorough judicial inquiry into the plea bargain's terms at the colloquy would also permit members of the community and other interested parties to learn how plea bargaining works.<sup>281</sup>

In states that permit judges to participate in the negotiations, judges already tend to review the facts in the case and the reasonableness of the bargain more carefully because they become involved earlier in the process, before the parties have settled on a disposition.<sup>282</sup> As I have argued in greater depth in previous work, with the proper precautions to avoid coercive influences, judges who participate directly in the negotiations can make important contributions to the fairness and accuracy of plea bargains.<sup>283</sup> As a more neutral participant, the judge can ensure that the interests of all affected parties—defendants, victims, and the public—are fairly considered. Judicial participation also enhances transparency and accountability in the process.<sup>284</sup>

Yet in many states, judicial involvement still can—and often does—occur off the record. It would be preferable for states that permit judicial participation in the negotiations to require that such participation occur on the record, as a few states already do.<sup>285</sup> A recording requirement would increase the transparency and therefore the fairness and legitimacy of the

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plea offer?" and that adding these questions to the colloquy would "take less than a minute"); Redlich, *supra* note 264, at 13–14 (discussing studies finding that, on average, plea colloquies last less than ten minutes).

280 See *State v. Farrell*, 606 N.W.2d 524, 530 (N.D. 2000).

281 See Simonson, *supra* note 9, at 2178 (noting the value of opening plea hearings to the public).

282 See Turner, *supra* note 21, at 259–60.

283 *Id.* at 256–66.

284 *Id.* at 261–62.

285 See, e.g., MASS. R. CRIM. P. 12(b)(2) ("The judge may participate in plea discussions at the request of one or both of the parties if the discussions are recorded and made part of the record."); VT. R. CRIM. P. 11(e)(1) ("The court shall not participate in any such [plea] discussions, unless the proceedings are taken down by a court reporter or recording equipment."); see also *Cripps v. State*, 137 P.3d 1187, 1191 (Nev. 2006) ("First, because of the inherent risks involved, as well as the difficulties in reviewing claims on appeal of improper judicial coercion, we conclude that henceforth all off-the-record discussions between the parties and the judge respecting the plea negotiations shall be expressly prohibited. When the district court participates to any degree in the plea process, the judge shall ensure that such participation is placed on the record and transcribed."); *State v. Warner*, 762 So. 2d 507, 514 (Fla. 2000) ("A record must be made of all plea discussions involving the court."). For an argument in favor of such recording, see Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1148 (1976); Donnelly, *supra* note 4, at 429–31.

process. As the official comments to the Massachusetts rule on recording explain, transparency helps address concerns that “judicial participation in plea negotiations can be coercive and leave the impression of unfairness.”<sup>286</sup> When judicial remarks on plea agreements occur on the record, this allows the public and the appellate courts to monitor the remarks for statements that might pressure defendants to enter a guilty plea.<sup>287</sup> Transparency of these discussions can also help hold the participants in plea discussions more accountable and better ensure that similarly situated defendants are treated equally.<sup>288</sup> Finally, recording of the discussions with the judge can also help “[dissipate] the under-the-table aura surrounding [plea] agreements, and consequent public distrust of them.”<sup>289</sup>

While some may be concerned that recording would be too burdensome, the experiences of Massachusetts and Vermont suggest that it is neither too costly nor impractical.<sup>290</sup> Indeed, in some jurisdictions, judges have acted on their own initiative to ensure that their participation in negotiations is recorded.<sup>291</sup> Interviews of judges across ten states where judicial participation is permitted and regularly practiced reveal that discussions “in many of these states [are] now on the record, whether it be in a courtroom, at the bench, or recorded in chambers” and that this “appears to be a judicial preference, not a set practice,” in large part because on-the-record bench conferences are seen by many judges to be more efficient.<sup>292</sup>

Another concern with placing judicial involvement on the record is that it would disclose to the public cooperation and other sensitive matters that need to be kept confidential. Judges already have the tools to address this concern. In states with on-the-record plea conferences, they can limit public access through sidebar conferences to consider confidential matters, and they can seal the record after the fact as necessary.<sup>293</sup>

Should plea discussions fall apart, courts also have a range of tools to prevent potential prejudice to the fairness of a subsequent trial. Rules of

286 MASS. R. CRIM. P. 12(b)(2) reporter’s notes.

287 VT. R. CRIM. P. 11 reporter’s notes to 1977 amend.

288 See Donnelly, *supra* note 4, at 429, 431.

289 VT. R. CRIM. P. 11 reporter’s notes to 1977 amend.

290 See *Bos. Globe Media Partners, LLC v. Chief Just. of Trial Ct.*, 130 N.E.3d 742, 765 (Mass. 2019) (“We heard comparable concerns about requiring ‘lobby conferences’ with judges regarding a possible plea agreement to be conducted on the record. Those fears have not been realized in the four years since this requirement was added to our rules of criminal procedure.”). Vermont has had its recording rules since 1977 and has not amended them.

291 See, e.g., *State v. Poole*, 583 A.2d 265, 273 (Md. Ct. App. 1991) (“While, as we have stated, the Rule does not require that these discussions be recorded, we encourage trial judges to make a record of pertinent discussion and decisions reached.”); Donnelly, *supra* note 4, at 429.

292 Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 341 (2016).

293 See, e.g., HELLE SACHSE & TIM MAGUIRE, MASSACHUSETTS RULES OF CRIMINAL PROCEDURE (2019); *supra* notes 182–84 and accompanying text.

evidence already prohibit the parties from introducing at trial evidence of the negotiations or any statements made during the negotiations.<sup>294</sup> In high-profile trials, the parties and judges can also address the potential taint of the jury pool through careful jury selection, and if necessary, through a change of venue.<sup>295</sup> In some cases, however, the risk to the fairness of the trial may be so high as to permit closure of the plea hearings to the public.<sup>296</sup> Any such closure must be narrowly tailored.<sup>297</sup> And even when closure of a plea hearing is warranted, the judge's involvement in the plea discussions can still help ensure that the interests of all affected parties are fairly considered.

Another critique of the requirement that plea discussions with the judge be recorded is that such a rule would discourage candor in the negotiations.<sup>298</sup> While in some cases, recording may have this effect, experience with the rule suggests that it does not unduly inhibit negotiations.<sup>299</sup> The rule also does not preclude informal discussions between the parties to occur ahead of the judge's involvement. Importantly, the value that recording brings—increasing fairness and public confidence in plea bargaining—outweighs the relatively minor cost of reduced candor in plea negotiations involving the judge. Accordingly, states that permit judicial participation in the negotiations should follow the lead of Florida, Massachusetts, and Vermont, and require that any negotiations involving the court be recorded.

#### CONCLUSION

Plea bargaining has become the dominant method of resolving criminal cases in the United States, yet it remains opaque and insulated from public scrutiny. To better understand and address the persistent problems in the plea process, we must bring plea bargaining out of the shadows. As the Supreme Court has recognized in interpreting the constitutional right of public access, transparency is critical to ensuring the fairness, accuracy, and legitimacy of the criminal process.

Courts and legislatures can adopt a range of measures to improve the transparency of plea bargaining. They can mandate that plea agreements be in writing and filed with the court and that rejected plea offers be placed on record before a case proceeds to trial. Making use of widely available technology, states and the federal system can also create searchable plea databases accessible to prosecutors, defense attorneys, and judges. Finally, criminal procedure rules can encourage a thorough, independent, and on-the-record judicial inquiry into the validity of guilty pleas and the terms of

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294 See *supra* notes 93–95 and accompanying text.

295 Cf. Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 42–43 (1996) (noting the limits of these remedies in cases of “national notoriety”).

296 See *id.* at 82.

297 *Id.* at 84–85 (discussing *Globe Newspaper Co. v. Super. Ct. for the Cnty. of Norfolk*, 457 U.S. 596, 598, 607 (1982)).

298 King & Wright, *supra* note 292, at 342; Turner, *supra* note 21, at 242.

299 See Donnelly, *supra* note 4, at 429–31.

plea agreements. These reforms would improve the fairness and accuracy of plea bargaining, would be consistent with our constitutional commitment to open criminal proceedings, and would be realistic and manageable.

