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All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants

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ALL ABOARD! THE SUPREME COURT, GUILTY PLEAS, AND THE RAILROADING OF CRIMINAL DEFENDANTS

JULIAN A. COOK, III*

> *I implore you, Judge Fidler, to allow me to withdraw my guilty pleas. . . . After deeper reflection, I realize that I cannot plead guilty when I know I am not. . . . The attacks on our country created genuine fear in the public, and, consequently, the jury pool. . . . I am not second guessing my decision as much as I have found the courage to take what I know is the honest course.*
>
> —Declaration of Sara Jane Olson, dated November 12, 2001, as she attempted to withdraw her plea of guilty to two counts of Attempted Explosion of a Destructive Device with Intent to Murder.[1]

When Sara Jane Olson, the former member of the 1970s radical group the Symbionese Liberation Army[2] (SLA), was arrested in 1999[3] for her role in connection with the placement of two pipe bombs beneath two Los Angeles, California, police ve-

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1. Motion to Withdraw Guilty Plea, State v. Olson, No. A325036 (Cal. Super. Ct. Nov. 13, 2001), *available at* http://www.courttv.com/trials/soliah/docs/plea5.html.

2. The SLA is perhaps best known for its 1974 kidnapping of Patricia Hearst, the daughter of media entrepreneur Randolph A. Hearst. James Sterngold, *70's Radical Pleads Guilty in Bomb Plot*, N.Y. TIMES, Nov. 1, 2001, at A18.

3. *70's Radical Is Arrested*, N.Y. TIMES, June 17, 1999, at A27.

hicles in 1975,[4] it ended a search for the fugitive, previously known as Kathleen Ann Soliah, which had exceeded two decades.[5] It was alleged that the destructive devices (which failed to detonate) were planted in retaliation for the previous deaths of six SLA members who were killed during a violent confrontation with the police at "an SLA hideout" in Los Angeles.[6] When Olson, who had maintained her innocence since her arrest, entered a guilty plea on October 31, 2001, the case came to an apparent and unexpected conclusion.[7] However, when Olson reversed course and filed a motion on November 12, 2001, seeking to withdraw her guilty plea[8] she touched off a new round of legal controversy that, yet again, tweaked the curiosity of a watchful public. Whether Olson was legally entitled to withdraw her guilty plea was the subject *du jour* amongst legal experts and television commentators.[9] However, when the court rendered its decision on December 3, 2001[10] denying Olson's request, the court not only sealed Olson's trial hopes, but it also ended the public discourse about plea withdrawal.

As a criminal procedure law professor and a former federal prosecutor, I had privately hoped that the Olson dialogue would evolve into a more exhaustive and unremitting discussion about the merits and demerits of plea withdrawal in general. Though simply stated, the rules pertaining to federal plea withdrawal have been profoundly influential, having an extensive, unjust, and deleterious impact upon the defendant popu-

4. Indictment, State v. Olson, No. A325036 (Cal. Super. Ct. 1975), *available at* http://www.courttv.com/trials/soliah/docs/indict_01.html.

5. *Woman Acknowledges Being Fugitive Radical*, N.Y. TIMES, July 10, 1999, at A11.

6. People's Preliminary Trial Brief, State v. Olson, No. A325036 (Cal. Super. Ct. Oct. 22, 1999), *available at* http://www.courttv.com/trials/soliah/docs/trial brief.pdf.

7. James Sterngold, *70's Radical Reaffirms Guilty Plea*, N.Y. TIMES, Nov. 7, 2001, at A16; *Sara Jane Olson Pleads Guilty*, The KCRA Channel.com, *at* http://www.thekcrachannel.com/news/1036625/detail.html (Oct. 31, 2001).

8. Motion to Withdraw Guilty Plea, *supra* note 1.

9. Jeff Adler, *Changes of Heart Lead Olson In, Out of Court*, WASHINGTON POST, Dec. 1, 2001, at A3 (noting assessments proffered by U.S.C. Law School Professor Erwin Chemerinsky and Sandi Gibbons, a district attorney spokeswoman, regarding the merits of Olson's plea withdrawal motion); Harriet Ryan, *For Olson, Chances Slim for Trial*, *at* http://www.courttv.com/trials/soliah/11300 1_ctv.html (Nov. 30, 2001) (quoting U.C.L.A. School of Law Professor Peter Arenella and Loyola Law School Professor Laurie Levenson regarding their respective assessments of Olson's plea withdrawal motion).

10. *Judge Rejects Olson's Plea-Change Request*, The KCRA Channel.com, *at* http://www.thekcrachannel.com/news/1100972/detail.html (Dec. 3, 2001).

lous, while serving as a necessary and vital anchor to an efficient plea process that deceptively encourages the entry of binding guilty pleas and prevents defendants from fairly pursuing more optimal alternative strategies. In December 2002, this inequitable practice was further entrenched when Rule 11 of the Federal Rules of Criminal Procedure, which governs judicial practice during a guilty-plea hearing, adopted its most significant revisions since the rule was radically amended in 1975[11] after the landmark Supreme Court decision in *Boykin v. Alabama.*[12] Underlying the most salient of the recent amendments was the 1997 Supreme Court decision in *United States v. Hyde.*[13] In that case, the Court addressed whether a defendant who seeks to withdraw a guilty plea prior to sentencing must comply with the "fair and just reason" standard, which was then embodied in Rule 32(e) of the Federal Rules of Criminal Procedure,[14] when the court has accepted the plea but has yet to accept the accompanying plea agreement.[15] Answering in the affirmative, the Court relied primarily upon a textual construction of Rule 11 and noted that a contrary holding, such as that adopted by the Ninth Circuit Court of Appeals in the underlying litigation, "would degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess."[16]

This article will demonstrate the fallaciousness of the *Hyde* decision, how an overriding concern for judicial economy underlied its reasoning, and how *Hyde* and the recent revisions to Rule 11 contribute to a guilty plea process that is deceptive, inequitable, and violative of substantive due process; a process rife with constitutional and contractual inconsistencies that encourages guilty pleas at the expense of standard notions of fairness. Throughout, this article will detail the systematic betrayal of unsuspecting defendants through the illusory entice-

11. *See* Act of July 31, 1975, Pub. L. No. 94-64, § 3(5)–(10), 89 Stat. 370, 372–73. The procedures became effective in December, 1975. *Id.* at § 2.

12. Boykin v. Alabama, 395 U.S. 238, 242 (1969) (holding that a trial court erred when it accepted a guilty plea without an affirmative indication that it was entered "voluntarily and understandingly").

13. United States v. Hyde, 520 U.S. 670 (1997).

14. When *Hyde* was decided, Rule 32(e) was the rule that governed federal plea withdrawal. For a more comprehensive discussion of Rule 32(e) and the subsequent amendments to Rule 11, see *infra* notes 27–47 and accompanying text.

15. *Hyde*, 520 U.S. at 671–73.

16. *Id.* at 673–680. For additional discussion of *Hyde* and its judicial construction, *see infra* notes 48–67 and accompanying text.

ment of an enforceable plea agreement, explain why this subterfuge of enforceability unfairly binds defendants to unaccepted plea offers and constricts their ability to pursue more optimal strategies in a manner unseen in standard marketplace contracts, and illuminate the vital role that the federal plea withdrawal rules play in this process.

Current Department of Justice estimates indicate that in excess of 95 percent of all federal convictions are resolved via a guilty plea.[17] This vast dependency upon the existent guilty plea structure has exacted significant legal and social costs upon the system's least learned and resourceful participants—the defendants—that have rendered the current plea system, in whole or in part, unjust in the view of many academics. Regarding the prefatory plea negotiation phase, for example, some vigorously insist that the bargaining process is so skewed against a defendant's interests that it should be abandoned altogether.[18] They maintain that defendants are at such a bargaining disadvantage that the notion that the subsequently negotiated plea agreement was the product of a fair exchange between interested participants is illusory. Employing contrac-

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17. In the year 2000, over 95 percent of cases involving federal convictions were settled through the entry of a guilty plea. Bureau of Justice Statistics, U.S. Dept. of Justice, *Compendium of Federal Justice Statistics 2000,* 51, 59 (2000). Indeed, as observed by Ronald Wright and Marc Miller, Professors of Law at Wake Forest University and Emory University respectively, the criminal justice system's dependence upon the guilty plea structure has greatly increased in recent years:

> The proportion of guilty pleas has been moving steadily upward for over thirty years, and has seen a dramatic increase of over eleven percentage points just in the past ten years, from 85.4% in 1991. Indeed, the aggregate national guilty plea rate in federal cases remained under 92% until 1997, in line with the rough national norm for all criminal systems of about 90%; it is only in the past five years that we have witnessed the rise to a bizarrely high plea rate. In some districts now, the percentage of convictions attributable to guilty pleas reaches over 99%.

Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (citation omitted).

18. *See* Stephen Schulhofer, *Criminal Justice Discretion as a Regulatory System,* 17 J. LEGAL STUD. 43 (1988) [hereinafter Schulhofer, *Criminal Justice Discretion*]; Stephen Schulhofer, *Is Plea Bargaining Inevitable,* 97 HARV. L. REV. 1037 (1984); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981) [hereinafter Alschuler, *The Changing Plea Bargaining Debate*]; Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining,* 76 COLUM. L. REV. 1059 (1976); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining,* 84 YALE L.J. 1179 (1975) [hereinafter Alschuler, *The Defense Attorney's Role*]; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. CHI. L. REV. 50 (1968).

tual principles, they argue that such plea arrangements should be voided on account of, inter alia, duress and unconscionability.[19]

Moreover, in a recent critique of the next phase of the plea process—namely, the guilty plea hearing—I argue that Rule 11 is ineffectual in ensuring that defendants who enter a guilty plea are doing so knowingly and voluntarily. More specifically, I discuss how judicial sanction of certain questioning techniques,[20] the absence of sufficient economic incentives among appointed attorneys,[21] and recent amendments to Rule 11 involving appellate waiver[22] and harmless error provisions,[23] have adversely impacted the personal and strategic interests of defendants as well as the ability to accurately assess a defendant's acumen regarding his guilty plea decision. In the end, I conclude that the current Rule 11 process is unjust; that the ideal envisioned after the 1969 *Boykin* decision of a more fair and accurate assessment of a defendant's knowledge and voluntariness is being systematically compromised by an immoderate interest in judicial economy.[24]

University of Chicago Law Professor Albert W. Alschuler—a leading critic of plea bargaining—has decried plea bargaining

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19. *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2071–72 (2000) (noting that academics have regarded the bargaining imbalance between the prosecution and defendant as resembling "a contract made under duress"); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1918 (1992) (stating that Professor Albert Alschuler has proffered various reasons in support of the notion that plea bargaining is "contractually deficient"; cited among the reasons are that "many of the bargains are unconscionable; defendants accept prosecutors' offers under duress; the poor and ignorant suffer disproportionately; [and] the bargains are the product of irrationality and mistake").

20. Julian A. Cook, III, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post-*Boykin *Era*, 77 NOTRE DAME L. REV. 597, 615–624 (2002) (demonstrating how judicial employment of leading and compound questioning during the Rule 11 hearing fails to ensure the entry of knowing and voluntary guilty pleas).

21. *Id.* at 624–28 (explaining how the representation of indigent defendants is compromised by various factors, including an inadequate compensatory system and a resource-plagued public defender system).

22. *Id.* at 628–32 (discussing why defendants neither comprehend nor understand the true impact of appellate waiver language in plea agreements).

23. *Id.* at 633–38 (explaining why the inclusion of a harmless error provision in Rule 11 has contributed to the erosion of the "ideals evinced by the Supreme Court in *McCarthy* and *Boykin* and the congressional intent underlying the 1975 revision of Rule 11").

24. *Id.* at 597–600, 612–640.

as "an inherently unfair and irrational process."[25] Building upon this premise and related scholarship, this article will demonstrate why the final facet of the guilty plea process—the federal plea withdrawal phase—is an unjust and indispensable aspect of an inequitable but efficient guilty plea procedure. This article will commence, however, with a discussion of Rule 32(e) and its historical underpinnings, including a review of the rule's enactment, amendments, judicial construction, and eventual demise, as well as the recent amendments to Rule 11. Thereafter, the *Hyde* case will be reintroduced. In reviewing *Hyde*, this article will refrain from relitigating the niceties of the Court's strained statutory interpretation. Instead, through a contractual and theoretical critique, it will demonstrate how the Supreme Court, rather than providing a fair and equitable interpretation of Rule 32(e), opts instead to protect its own interests—interests shared by the system's other non-defendant participants—and perpetuate the injustice and irrationality confronting defendants during the guilty plea process. To that end, it will explain why the conventional interpretation of plea agreements as either unilateral or conditional contracts between the prosecution and the defendant is erroneous[26] and how such correlations run counter to basic constitutional and contractual norms. In displacing these common contractual misconceptions, this article will argue that an analogue between a plea agreement and a tripartite contractual arrangement that seeks a promissory exchange more aptly describes the effectuated plea agreement, and explain why this construction is consistent with well-established contractual principles and due process fairness concerns. It will further demonstrate how *Hyde* and the recent Rule 11 amendments might ultimately promote inefficiency and frustrate the very plea system so heavily guarded by its key participants. Finally, this article will offer a statutory solution—one that advocates a revision of Rule 11—that will help return fairness and rationality to a fractured plea withdrawal process.

25. Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 18, at 652.

26. *See infra* notes 68–167 and accompanying text. In its discussion of conditional contracts, this article will detail and discount the arguments that plea agreements should be construed as either contracts subject to a condition precedent or as contracts subject to a condition subsequent.

I. HISTORICAL BACKGROUND

As a prelude to this article's contractual and analytical critique, the historical context presented in Part I provides the necessary foundation for the forthcoming sections. Through an examination of the pertinent federal criminal procedure rules, coupled with an in-depth review of *United States v. Hyde*, the statutory and chronological context, as well as the due process concerns that underlie the federal plea withdrawal controversy, will become more manifest.

A. Relevant Rules of Federal Criminal Procedure

Originally designated under subsection (d) of Rule 32 of the Federal Rules of Criminal Procedure, the federal plea withdrawal statute then provided:

> A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.[27]

Enacted to "modif[y] existing practice,"[28] which, pursuant to Rule II(4) of the Rules of Practice and Procedure, had limited judicial review of withdrawal motions to those submitted within ten days of the plea,[29] Rule 32(d) established a more forgiving norm, allowing judicial consideration provided the motion was tendered anytime prior to sentencing.[30] Though void of a textually supplied standard, neither Rule II(4) nor Rule 32(d) were generally construed by the courts as permitting withdrawal as a matter of right. Instead, a threshold had to be

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27. FED. R. CRIM. P. 32(d) (1946). The Federal Rules of Criminal Procedure were enacted in 1946 and Rule 32(d) became effective that same year.

28. FED. R. CRIM. P. 32(d) ACN (1944).

29. Rule II(4) of the Rules of Practice and Procedure provided: "A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed." *Rules of Practice and Procedure, After Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases Brought in the District Courts of the United States and in the Supreme Court of the District of Columbia*, 292 U.S. 661, 662 (1934). The Rules of Practice and Procedure were adopted by the U.S. Supreme Court in 1934 and addressed, inter alia, proceedings that occur after the entry of a guilty plea. The rules became effective on September 1, 1934. *Id.* at 661.

30. FED. R. CRIM. P. 32(d) (1946).

met; absent establishment of a "fair and just reason" in support of the withdrawal request, a defendant would remain bound to his plea.[31]

The genesis of the "fair and just reason" standard can be traced to a 1927 U.S. Supreme Court case, *Kercheval v. United States*,[32] which predated the enactment of both Rule II(4) and Rule 32(d). There, the Court addressed whether a trial court that had previously accepted a defendant's guilty plea and later, upon defendant's request, allowed it to be withdrawn, committed reversible error when it allowed the jury to consider his previous guilty plea and subsequent withdrawal as substantive evidence.[33] In the course of finding the court's action improper, the Supreme Court made the seemingly innocuous observation that a "court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."[34] This dicta was eventually adopted by courts across the country as the standard by which plea withdrawal requests in federal court would be governed.[35] Indeed, the "fair and just reason" verbiage was eventually added to Rule 32(d) in 1983.[36] Subsequently reclassified as Rule 32(e), the provision provided:

> If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and

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31. United States v. Barker, 514 F.2d 208, 219 (D.C. Cir. 1975) (noting that the "federal courts relying on *Kercheval v. United States* have uniformly ruled that presentence motions should be granted wherever such would be 'fair and just'") (citations omitted). In *Swift v. United States*, 148 F.2d 361, 362 (D.C. Cir. 1945) the court observed that

> [p]rior to 1934 [it was] within the discretion of the court to permit an accused to substitute a plea of not guilty and to have a trial, if for any reason the granting of the privilege seemed to be fair and just. But since May, 1934, Rule II(4) of the Criminal Rules of the Supreme Court has provided that a motion to withdraw a plea of guilty shall be made within ten days from entry of such plea and before sentence is imposed. Since the promulgation of the rule it has been consistently held that the motion, even when made within the ten-day period, is not allowed as a matter of right.

(citations omitted).

32. Kercheval v. United States, 274 U.S. 220 (1927).

33. *Id.* at 221–23.

34. *Id.* at 224.

35. *See supra* note 31.

36. FED. R. CRIM. P. 32(d) ACN (1984).

> just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. Sec. 2255.[37]

As part of an effort to "restyl[e] the Criminal Rules to make them more easily understood," the plea withdrawal rules delineated in Rule 32(e) were ultimately discarded in 2002 and supplanted with a revised and more simplified version that now appears in Rule 11.[38] Citing *United States v. Hyde* and the judicial confusion that predated that decision,[39] Rule 11 was amended, in part, "to more clearly spell out" the contours of a defendant's plea withdrawal rights prior to sentencing.[40] Admittedly, the new rule achieved that limited objective. However, by opting to merely codify the result in *Hyde*, an opportunity was forfeited to reverse the misfortune attendant to that decision. Rule 11(d) now provides, in pertinent part:

> (d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:
>
> (1) before the court accepts the plea, for any reason or no reason; or
>
> after the court accepts the plea, but before it imposes sentence if:
>
> . . . .
>
> (B) the defendant can show a fair and just reason for requesting the withdrawal.[41]

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37. FED. R. CRIM. P. 32(e), *amended by* FED. R. CRIM. P. 11(d) (2002). In 1994, "32(d)" was redesignated as "32(e)." FED. R. CRIM. P. 32(e) ACN (1994).

38. FED. R. CRIM. P. 11 ACN (2002).

39. For a discussion about the divide between the circuits prior to *Hyde*, see *infra* notes 54–55 and accompanying text.

40. FED. R. CRIM. P. 11 ACN (2002).

41. FED. R. CRIM. P. 11(d) (2002). Rule 11(c) and Rule 11(e) were respectively revised and created to address other aspects of a defendant's plea withdrawal rights. The pertinent portions of section (c) provide:

> (3) Judicial Consideration of a Plea Agreement.
>
> (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.
>
> (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.
>
> (4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of

The criterion employed by the courts to gauge whether a proffered reason is "fair and just" has produced little discord among the circuits. *United States v. Barker*,[42] a celebrated case arising from the infamous Watergate scandal of the mid-1970s,[43] involved the assessment of various plea withdrawal motions submitted on behalf of several defendants who contended that their guilty pleas were the product of a misunderstanding regarding their underlying criminal activity as well as their subsequent responsibilities before the trial court. Specifically, the defendants asserted that a "government intelligence agency" led them to believe that the Watergate break-in was a "national security" mission aimed "to examine alleged ties between the Democratic Party and the Castro regime in Cuba," and that they were required to forego their trial right and remain silent about their activities.[44] The *Barker* court denied the respective motions, finding that the reasons proffered failed to satisfy the "fair and just reason" standard.[45] But it was the court's lucid discussion of the underlying legal criteria—factors invariably considered by the respective circuits when assessing such claims—that is instructive. Observing that "the terms

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the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

FED. R. CRIM. P. 11(c)(3), (4), and (5) (2002). Section (e) provides:

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

FED. R. CRIM. P. 11(e) (2002).

42. *Barker*, 514 F.2d at 208.

43. The defendants had burglarized the headquarters of the Democratic National Committee located within the Watergate office complex. The underlying purpose of the burglary was to obtain information about the Democratic Party that might assist then President Richard Nixon in his reelection campaign. *Id.* at 211.

44. *Id.* at 211–12, 216–18.

45. *Id.* at 221.

'fair and just' lack any pretense of scientific exactness," the court detailed an array of "rough guidelines [that] have emerged in the appellate cases,"[46] including whether legal innocence had been asserted, whether the plea was entered in contravention of either the federal Constitution or Rule 11, whether prejudice or inconvenience would be sustained by either the prosecution or the judiciary, and whether the withdrawal motion was filed close in time to the defendant's change of plea.[47]

While the identification of assessment criteria has been relatively non-problematic, a more vexing judicial issue had been agreement upon the situational contours of Rule 32's applicability. *United States v. Hyde* considered one such divisive issue in the context of a plea-agreement-induced guilty plea.

B. United States v. Hyde

This appeal from the Ninth Circuit Court of Appeals asked the Supreme Court to decide whether a defendant who had en-

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46. *Id.* at 220.

47. Regarding these factors, among others, the *Barker* court provided the following detailed account:

> Whether the movant has asserted his legal innocence is an important factor to be weighed. If the movant's factual contentions, when accepted as true, make out no legally cognizable defense to the charges, he has not effectively denied his culpability, and his withdrawal motion need not be granted. On the other hand, where the motion does assert legal innocence, presentence withdrawal should be rather freely allowed. . . .
>
> The reasons given by the movant for "delaying" assertion of his defenses by means of an intervening guilty plea must be weighed according to the circumstances of his particular case. It should go without saying that the standard is very lenient when the plea was entered unconstitutionally or contrary to Rule 11 procedures. Such pleas should almost always be permitted to be withdrawn . . . .
>
> Even where the plea was properly entered, however, the standard for judging the movant's reasons for delay remains low where the motion comes only a day or so after the plea was entered. . . . By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force. The movant's reasons must meet exceptionally high standards where the delay between the plea and the withdrawal motion has substantially prejudiced the Government's ability to prosecute the case. . . . That withdrawal would substantially inconvenience the court is also a proper factor for consideration.

Id. at 220–222 (internal citations omitted).

tered a guilty plea pursuant to a plea agreement, and who, prior to sentencing, had sought to withdraw his guilty plea, was subject to Rule 32(e) when the trial court had accepted the defendant's guilty plea but had deferred acceptance of the underlying plea agreement.[48] Robert Hyde, who was indicted on eight fraud-related counts, agreed to plead guilty to four of the counts in exchange for the government's promise to request the dismissal of the remaining charges.[49] Upon entry of his plea, the district court stated that it would accept Hyde's guilty plea, but that it would defer acceptance of the plea agreement pending its review of a presentence report.[50] About one month after the Rule 11 hearing, and prior to his scheduled sentencing, Hyde filed a motion seeking to withdraw his guilty plea, alleging that his plea had been entered under duress.[51] After conducting a hearing, the court rejected Hyde's claim, finding that the defendant had not provided a "fair and just reason" in support of his withdrawal petition.[52] Thereafter, the court accepted the plea agreement and imposed sentence.[53]

The Ninth Circuit reversed the trial court, concluding that since the plea of guilty and the plea agreement were "'inextricably bound up together,'" Hyde was not required to comply with Rule 32(e)'s "fair and just reason" standard:

> [T]he government argues, the district court did accept Hyde's plea even if it did not accept the plea agreement. That is a distinction without a difference. As we have held, "[t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated it accepted [the] plea." *United States v. Cordova-Perez,* 65 F.3d 1552, 1556 (9th Cir. 1995). . . .
>
> If the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement. Only after that

48. *Hyde*, 520 U.S. at 671.
49. *Id.* at 671–72.
50. *Id.* at 672.
51. *Id.*
52. *Id.* at 672–73.
53. *Id.* at 673.

> must a defendant who wishes to withdraw show a reason for his desire.[54]

In reversing the Ninth Circuit,[55] the Supreme Court relied primarily upon the text of Rule 11 to support its view that guilty pleas and plea agreements are not intertwined and can be accepted separately. Specifically, the Court noted that both sections (c)[56] and (d)[57] of Rule 11 made explicit reference to a trial court's ability to accept a "plea of guilty" and made no mention of having to accept an accompanying plea agreement.[58] Additional textual support was found in section (e), which the Court described as "critical" to its holding.[59] Referencing the various plea agreement categories,[60] as well as the judicial authority to accept or reject a proposed disposition,[61] the Court

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54. United States v. Hyde, 92 F.3d 779, 780–81 (9th Cir. 1996).

55. When the Supreme Court accepted certiorari, at least two other circuits that had considered this issue had reached opposite conclusions from that of the Ninth Circuit. *See* United States v. Ewing, 957 F.2d 115, 118–19 (4th Cir. 1992) (holding that a trial court properly held the defendant to the "fair and just reason" standard); United States v. Ellison, 798 F.2d 1102, 1106 (7th Cir. 1986) (finding that defendant was required to comply with Rule 32's "fair and just reason" threshold).

56. Section (c) then provided, in pertinent part:

> Before accepting a plea of guilty . . . the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands [various consequences stemming from a guilty plea].

FED. R. CRIM. P. 11(c) (2001) (amended 2002).

57. Section (d) then stated:

> The court shall not accept a plea of guilty . . . without first, by addressing the defendant personally in open court, determining that the plea is voluntary . . . .

FED. R. CRIM. P. 11(d) (2001) (amended 2002).

58. *Hyde*, 520 U.S. at 673–74.

59. *Id.* at 675–76.

60. The *Hyde* Court described the three types of agreements as follows:

> That subdivision [(e)(1)(A)] divides plea agreements into three types, based on what the Government agrees to do: In type A agreements, the Government agrees to move for dismissal of other charges; in type B, it agrees to recommend (or not oppose the defendant's request for) a particular sentence; and in type C, it agrees that the defendant should receive a specific sentence.

Id. at 675.

61. Subsection (e)(2) then provided:

> If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the

noted that section (e) required that a defendant be informed of his right to withdraw his plea in the event the court rejected the proffered agreement.[62] Therefore, the Court reasoned that free withdrawal was permitted only in those instances when the court declined to accept the proffered plea agreement.[63] In other words, until a court rejected a proposed plea disposition, a defendant was bound to his guilty plea unless a "fair and just reason" was provided. Given that the district court in *Hyde* had yet to either accept or reject the plea agreement at the time of the withdrawal request, the Court reasoned that Hyde could not withdraw his plea as a matter of right.[64]

Finally, the Court presented various non-textual rationales for its decision. The Court noted, for example, the gravity of the guilty plea process and claimed that adoption of a free withdrawal interpretation "would debase[] the judicial proceeding at which a defendant pleads and the court accepts his plea."[65] The Court also reasoned that adoption of the Ninth Circuit interpretation would "leave little, if any, time in which the 'fair and just reason' standard would actually apply" given that the courts typically defer acceptance of the plea agreement

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acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

FED. R. CRIM. P. 11(e)(2) (2001) (amended 2002).

62. *Hyde*, 520 U.S. at 675–76; Subsection (e)(4) provided, in pertinent part:

If the court rejects the plea agreement, the court shall . . . advise the defendant personally . . . that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea . . . the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

FED. R. CRIM. P. 11(e)(4) (2001) (amended 2002).

63. In furtherance of this contention, the Court stated:

[T]he text of Rule 11(e)(4) gives the rejection of the agreement a great deal of significance. Only "then" is the defendant granted "the opportunity" to withdraw his plea. The necessary implication of this provision is that if the court has neither rejected nor accepted the agreement, the defendant is not granted "the opportunity to then withdraw" his plea. The Court of Appeals' holding contradicts this implication, and thus strips subdivision (e)(4) of any meaning.

Hyde, 520 U.S. at 676.

64. *Id.* at 671–76.

65. *Id.* at 676.

until the time of sentencing.[66] This, in the Court's view, would render Rule 32(e) virtually meaningless.[67]

Thus, *Hyde* and Rule 11 mandate that a defendant seeking to withdraw a guilty plea provide a "fair and just reason" whenever such withdrawal is sought prior to the court's acceptance of an accompanying plea agreement. As will be demonstrated in this article's forthcoming sections, however, this requirement is of dubious contractual and constitutional validity.

II. A CONTRACTUAL ANALYSIS OF PLEA AGREEMENTS

To reiterate, this article will not attempt a nuanced dissection of the *Hyde* opinion, which, I submit, reflects a strained and non-altruistic textual construction. Rather, this article will demonstrate how *Hyde* and Rule 11 further judicial (including prosecutorial and defensive) self-interests in the current plea structure and preserve a plea process that unjustly and expeditiously shepherds uninformed and less resourceful defendants through the federal criminal courts. To see this, a review of some basic contractual principles is necessary.

A. Foundational Principles

It is a fundamental tenet of contract law that mutuality of assent underlies an enforceable contract, and, characteristically, this is premised upon the extension of an offer, an assent to the offer, and consideration. The Second Restatement defines an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[68] Thus, an offer constitutes a proposal extended to another person or entity that, if accepted, can create an enforceable agreement.

For an acceptance to be valid, the offeree must manifest "assent to the terms thereof . . . in a manner invited or required by the offer."[69] The "manner invited or required," thus dictates the type of contract intended by the offeror. When the offeror seeks a return performance, as opposed to a mere promise of

66. *Id.* at 678–79.
67. *Id.*
68. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).
69. RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (1981).

action, the offeror is seeking what is commonly termed a "unilateral contract."[70] Though comparatively rare,[71] unilateral contracts still persist, perhaps most notably in reward cases.[72] Thus, when a police department offers a reward of $1,000 for information leading to the arrest and conviction of a sought after criminal, a unilateral contract is sought, for the offeror is seeking acceptance by performance as opposed to a mere promise to perform. In contrast, offers not seeking performance but simply a return promise have traditionally been referred to as "bilateral contracts."[73] For example, if A says to B, "I will pay you $20 if you agree to cut my lawn next week," then an enforceable contract is created if B merely manifests his assent through a promise to the terms offered.

Consideration is defined by the Second Restatement as "a performance or return promise" that is "bargained for."[74] Implying the ease with which the consideration requirement can be satisfied, the Second Restatement notes:

> In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration. Here, as in the matter of mutual assent, the law is concerned with the external manifestation rather than the undisclosed mental state: it is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement.[75]

Thus, whether in a unilateral or bilateral setting, a contractual agreement that is the product of a bargained-for ex-

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70. RESTATEMENT (SECOND) OF CONTRACTS § 50(2), (3) (1981); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS §§ 17, 38 (4th ed. 2001) (indicating that a unilateral contract is formed upon successful completion of the contemplated performance, and at the time of contract formation, "there is only one right and one correlative duty").

71. Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 551 (1983).

72. RESTATEMENT (SECOND) OF CONTRACTS § 50 cmt. b (1981).

73. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).

74. RESTATEMENT (SECOND) OF CONTRACTS § 71(2) (1981). The Second Restatement adds: "A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." *Id.*

75. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981).

change is enforceable even in the absence of any significant benefit or detriment to the contracting parties.[76]

B. *The Plea Agreement as a Contract: Understanding Who the Parties Actually Are*

Though an imperfect fit due to various constitutional protections afforded criminal defendants,[77] plea agreements have been interpreted largely pursuant to contract law principles.[78] Academics and the judiciary have traditionally correlated plea agreements with unilateral contracts,[79] and have construed

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76. *See* MURRAY, *supra* note 70, at § 56, 241 ("While the typical contract provides benefits and exacts detriments from both parties, benefit *and* detriment are not essential, i.e. if either is present, the 'value' element of consideration is present."); JOSEPH M. PERRILLO & HELEN HADJYANNAKIS, 2 CORBIN ON CONTRACTS § 5.25, 129 (rev. ed. 1993):

> Detriment to the promisee is only one of the factors leading to enforcement of a promise; it is still an important one. But the "detriment" need not be suffered by the promisee, and promises may be enforceable without the suffering of any "detriment" by anybody. We need no longer say that a promise is consideration for a return promise because the making of it is a detriment. We need not attempt to find detriment in the muscular effort involved in making a promise or in the fact that a promise is legally binding. Bilateral promissory agreements became enforceable because people made them and relied upon them and performed them. Mutual promises are consideration for each other because the courts have chosen to so hold on grounds of public policy and

77. As noted by Judge Frank H. Easterbrook:

> The analogy between plea bargains and contracts is far from perfect. Courts use contract analogy when addressing claims for the enforcement of plea bargains, excuses for nonperformance, or remedies for their breach. But plea bargains do not fit comfortably all aspects of either the legal or the economic model. *Courts refuse to enforce the promises to plead guilty in the future*, although the enforcement of executory contracts is a principal mission of contract law.

Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1974 (1992) (emphasis added); *see* Illinois v. Hare, 734 N.E.2d 515, 518 (Ill. App. Ct. 2000) ("Plea agreements are governed to some extent by principles of contract law, subject to considerations of constitutional due process.").

78. *See* United States v. Conner, 930 F.2d 1073, 1076 (4th Cir. 1991), *cert. denied*, 502 U.S. 958 (1991) (noting that plea agreements are largely subject to contract law standards); United States v. Mandell, 905 F.2d 970, 973 (6th Cir. 1990) (observing that a plea bargain is subject to contract law).

79. Gov't of Virgin Islands v. Scotland, 614 F.2d 360, 364 (3d Cir. 1980) ("Plea agreements are often likened to unilateral contracts—consideration is not given for the prosecutor's promise until the defendant actually enters his [or her] plea of guilty."); State v. Collins, 265 S.E.2d 172, 176 (N.C. 1980) ("When viewed in light of the analogous law of contracts, it is clear that plea agreements normally arise in the form of unilateral contracts."). Similarly, academics have either argued or

them as contracts involving only two parties—the prosecution and the defendant.[80] However, this conventional wisdom misstates the extent and alignment of the contractual party configuration.

While it is true that a plea bargain involves an exchange of contractual obligations between the prosecution and the de-

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acknowledged this analogy. John Barrette, *Plea Bargains and New York's Newly Created Right of Prosecutors,* 34 SYRACUSE L. REV. 575, 581–82 (1983) ("Frequently, the plea bargaining process has been analogized to entering into a unilateral contract. The defendant's consideration or obligation pursuant to the agreement is his or her act of pleading guilty. At the moment the plea is entered, the defendant has fulfilled his or her part of the agreement."); JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS § 2.11(a), 2–34 (2d ed. 1983) (recognizing that plea agreements have generally been construed as unilateral contracts); Pettit, *supra* note 71, at 569 (observing that most judges prefer to construe plea bargains pursuant to a unilateral analysis); Peter Westen & David Westin, *Constitutional Law of Remedies for Broken Plea Bargains,* 66 CAL. L. REV. 471, 525 n.189 (1978) (claiming that most plea agreements are unilateral contracts). In addition, other commentators have made the same contention. Ty Alper, *The Danger of Winning: Contract Law Ramifications of Successful Bailey Challenges for Plea-Convicted Defendant,* 72 N.Y.U. L. REV. 841, 858 (1997) (arguing that plea agreements are unilateral contracts); David J. Lekich, *Broken Police Promises: Balancing the Due Process Clause Against the State's Right to Prosecute,* 75 N.C. L. REV. 2346, 2365 (1997) (observing that the North Carolina Supreme Court construes plea agreements as essentially a unilateral contract); Daniel F. Kaplan, *Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains,* 52 U. CHI. L. REV. 751, 756 n.23 (1985) ("Under Mabry, plea bargains are analogous to unilateral contracts because an enforceable contract is not created until the offeree performs."); Recent Decision, *Enforcing Plea Bargains: A Step Beyond Contract Law,* 40 MD. L. REV. 90, 96 (1981) (observing that most courts recognize plea agreements as unilateral contracts).

80. United States v. Allen, 2002 U.S. App. LEXIS 27194, 18 (6th Cir. 2002) ("A plea bargain is a contract between the prosecution and the defense and is interpreted using contract law principles."); United States v. Williams, 184 F.3d 666, 671 (7th Cir. 1999) ("[W]e have repeatedly indicated that 'a plea agreement is a contractual arrangement between two parties, the defendant and the government. The court is not a party to the contract.'"); United States v. Conway, 81 F.3d 15, 17 (1st Cir. 1996) ("A plea agreement is a contract under which both parties give and receive consideration. The government obtains a conviction that it otherwise might not have. The defendant, correspondingly, receives less, or a chance at less, than he otherwise might have."). Various academics and commentators have made this claim as well. Larry A. Dimatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory,* 24 HOFSTRA L. REV. 349, 427 (1995) ("The plea bargaining process requires agreement between the two contract parties, the accused and the prosecutor, and approval by the court."); Martin Marcus, *Above the Fray or Into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice,* 57 BROOK. L. REV. 1193, 1208 (1992) (observing that "opposing parties" must subject their agreement to a court for approval); Westen & Westin, *supra* note 79, at 525 n.189 (discussing plea agreements in the context of unilateral and bilateral arrangements between the prosecutor and the defendant).

fense, it is also true that an enforceable plea agreement cannot exist independent of judicial assent to the agreement's terms. In other words, absent judicial acceptance, the prosecution and the defense are incapable of effectuating a contractual plea-based disposition.[81] The notion that the prosecution and the defense enter into a "plea agreement" is somewhat of a misnomer. The term implies that the prosecution and the defendant are empowered to enter into an enforceable plea arrangement. As noted above, however, such is not the case. The "plea agreement" is really a "plea offer." It is an offer presented by both the prosecution and the defendant that seeks acceptance by the court.[82] The offer—to settle the criminal case pursuant to the stipulated terms in exchange for the court's promise to implement the agreement—if accepted by the court, creates the binding contractual relationship between the respective parties.[83] Thus, the traditional conception of plea contracts as dual-party agreements is erroneous.[84] Instead, plea agreements should be construed as tripartite arrangements with the judiciary as the accepting party.

References to the defendant's acceptance of an offer from the prosecution, though accurately descriptive of the parties' relative positions during the "plea bargaining" phase,[85] do not

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81. United States v. Alvarez-Tautimez, 160 F.3d 573, 577 (9th Cir. 1998) (noting that a plea agreement can be enforced by neither the prosecution nor the defendant until such time that the agreement has been accepted by the court). Though not an exception to the rule, a defendant could require a prosecutor to keep an offer open if the defendant can demonstrate that he detrimentally relied upon the prosector's promise. *See* United States v. Pleasant, 730 F.2d 657, 664 (11th Cir. 1984) (observing that a prosecutor is free to withdraw a plea offer "at any time, unless, perhaps, the defendant has relied on the offer and the prosecutor should be estopped from withdrawing it").

82. Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 773 (2001) (recognizing that "the court is the party that accepts the offer, which comes from both the prosecutor and the defendant").

83. When the court indicates its assent to the proposed plea offer, the court, in turn, obligates itself to implement the agreement's terms. The court necessarily must refrain from making findings—legal or factual—or imposing sentencing conditions that are inconsistent with the agreement. *See* United States v. Livingston, 941 F.2d 431, 436 (6th Cir. 1991) ("[A] district court is 'bound by the bargain' once the district court accepts the plea agreement.").

84. United States v. Standiford, 148 F.3d 864, 868 (7th Cir. 1998) ("[A] plea agreement is a contractual arrangement between two parties: the government and the defendant. The court is not a party to the contract.").

85. Rule 11(c)(1) prohibits the judiciary from participating in plea negotiations. Instead, the rule authorizes the prosecution and either defendant's counsel or the defendant, if acting pro se, to engage in such discussions. FED. R. CRIM. P. 11(c)(1).

accurately depict the eventual contractual alignment when it comes to effectuating the proposed disposition.[86] The court, not the defendant, is the accepting party. In fact, the plain language of Rule 11 makes explicit reference to the court's authority to "accept" plea agreements.[87] Rule 11(c)(3)(A) and (c)(4) provide:

> (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court *may accept the agreement*, reject it, or defer a decision until the court has reviewed the presentence report.[88]
>
> . . . .
>
> (4) Accepting a Plea Agreement. *If the court accepts the plea agreement*, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.[89]

Moreover, Rule 11 is devoid of any verbiage remotely suggestive of the notion that the prosecution and the defendant are somehow empowered to create an enforceable plea agreement independent of the judiciary. Indeed, absent judicial assent, it is impossible for a valid plea agreement contract to exist.[90] Consider *United States v. Papaleo*.[91] There, the defendant and prosecution *actually signed* a plea agreement whereby the defendant agreed to plead guilty to a single count of a multi-count indictment in exchange for the government's dismissal of the remaining charges.[92] Prior to a rescheduled guilty plea hearing, the government filed an informative mo-

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86. Rule 11 anticipates that, upon the conclusion of negotiations between the prosecution and defense, the trial court may then become a participant in the process.

> The [1974] amendment makes clear that the judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court.

FED. R. CRIM. P. 11 advisory committee notes, 1974 Amendments.

87. *Id.* (the advisory committee notes further provide that "[u]pon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report").

88. FED. R. CRIM. P. 11(c)(3)(A) (emphasis added).

89. FED. R. CRIM. P. 11(c)(4) (emphasis added).

90. *See supra* note 81 and accompanying text.

91. 853 F.2d 16 (1st Cir. 1988).

92. *Id.* at 17.

tion with the court indicating that it was withdrawing from the plea agreement.[93] At issue was "whether the government [could] unilaterally withdraw a plea agreement when it [had] not been approved by the court nor relied upon by the defendant."[94] Rejecting the defendant's claim that "the agreement was a valid contract which the government could not unilaterally breach,"[95] the First Circuit held:

> Thus, pursuant to general contract principles, we hold that a plea agreement of this type is no more than an offer by the government: if the defendant pleads guilty and if that plea is accepted by the court, then the government will perform as stipulated in the agreement. Until performance took place by [the defendant], the government was free to withdraw its offer.[96]

Therefore, a plea agreement, even if signed by the prosecution and the defendant, is completely without force until it has been judicially accepted. If—and only if—the court accepts the proffered terms does the plea agreement become a binding instrument entitling the parties to their negotiated benefits. In the absence of judicial assent, a plea agreement constitutes nothing more than a mere offer by the prosecution and the defendant to settle a case. In the following section, this article will turn its attention to another common contractual misconception regarding plea agreements; namely, the notion that plea agreements should be construed as unilateral contracts.

C. Plea Agreements as Bilateral Rather than Unilateral Contracts

Underlying the academic and judicially preferred unilateral construction discussed above is a dual concern attendant to an alternative bilateral interpretation—namely that binding a defendant to a "promise" to plead guilty might infringe that defendant's Fifth Amendment constitutional rights and create "practical difficulties" when ensuring compliance with Rule 11's

93. *Id.* at 17–18.
94. *Id.* at 18.
95. *Id.*
96. *Id.* at 20 (citations omitted).

knowing and voluntary plea requirements.[97] In addition, it has been suggested that Rule 11 plainly contemplates a unilateral approach because Rule 11 statutorily mandates defendant performance as a prerequisite to the receipt of his promised return.[98] Though short of a direct adoption, *Hyde* indirectly referenced Rule 11's purported unilateral conception:

> [Rule 11] explicitly envision[s] a situation in which the defendant performs his side of the bargain (the guilty plea) before the Government is required to perform its side (here, the motion to dismiss four counts). If the court accepts the agreement and thus the Government's promised performance, then the contemplated agreement is complete and the defendant gets the benefit of his bargain.[99]

With unilateral contracts, once performance is complete an acceptance has occurred and a valid contract is formed.[100] Thus, a promisee is entitled to demand his promised contractual return upon satisfaction of his performance obligation. However, in the context of plea agreements, the courts, though adoptive of the unilateral classification, deviate noticeably from its normative conceptions.

When a defendant enters a guilty plea and the court accepts that plea, the court has made a determination that the defendant has fully performed his contractual obligation. At that moment, the Rule 11 requirements have been satisfied and the defendant's performance is complete. Indeed, there is nothing more a defendant can do but wait for the promised return. Yet contrary to the law attendant to unilateral contracts,

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97. Pettit, *supra* note 71, at 569 (stating that the reason that courts prefer a unilateral analysis is because "binding the defendant to his promise to enter a plea would create practical difficulties" when ensuring that a guilty plea was entered knowingly and voluntarily, and "because it accords with their view that plea agreements between prosecutors and criminal defendants do not call for the defendant to undertake any legally enforceable obligation to enter a plea").

98. *Hyde*, 520 U.S. at 677–78.

99. *Id.* at 677.

100. *See* Hyatt v. Robb, 114 F.3d 708, 712 (8th Cir. 1997) (quoting Garrity v. A.I. Processors, 850 S.W.2d 413, 417 (Mo. App. 1993)):

> A unilateral contract, by its very nature, is one where only one of the parties makes a promise; and the consideration for such a promise is not another promise, but performance .... A unilateral contract becomes enforceable upon performance, and the promise is then entitled to its full bargain.

(alteration in original).

a defendant, despite having fully performed, is *not* entitled to demand performance under the contract.[101] As noted, *Hyde* observed that a court, after having accepted a guilty plea, retained the discretion to defer acceptance of a plea agreement.[102] The Court then somewhat blithely added that should the court reject the agreement, the defendant would then be afforded the opportunity to withdraw his guilty plea.[103] This is akin to holding that an individual who, in exchange for a promise to receive $100 if he crossed a bridge, could not enforce the agreement upon crossing and could simply return across the bridge if the promised return was not eventually honored. Whereas a promisee under any other unilateral contract is entitled to enforce the agreement, a criminal defendant is not. The fact that a defendant must perform and then wait until some future moment before learning whether he will get the promised benefit is flatly inconsistent with the law attendant to unilateral contracts, and it is flatly inconsistent because a plea agreement is not a unilateral contract.

A unilateral analysis further fails when considering the tripartite nature of the plea contract. Unilateral agreements contemplate the extension of an offer that an offeree can accept only through actual performance as opposed to a mere promise.[104] As noted, the prosecution and the defendant (the offerors) present a joint offer in the form of a plea agreement to the court (the offeree) for acceptance.[105] However, the joint offer contemplates judicial acceptance in the form of a promise as opposed to performance. Thus, what is proffered is a bilateral arrangement—the defendant and prosecution promise that a guilty plea will be entered pursuant to the delineated terms in the proffered contract, if the court will promise to implement the agreement's terms. A verbal commitment from the court is what is sought; it is the judicial assent or promise to implement the contractual terms, rather than the actual judicial performance, that creates the binding obligations. Indeed, the contemplated conduct by the judiciary must necessarily succeed its promise to effectuate the contractual terms.[106]

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101. *See Hyde*, 520 U.S. at 677.
102. *Id.* at 675, 678.
103. *Id.* at 678.
104. RESTATEMENT (SECOND) OF CONTRACTS §50(2)–(3) (1981).
105. *See supra* notes 77–96 and accompanying text.
106. Moreover, a unilateral theory fails given that the defendant/offeror's performance precedes all others under the contract. A unilateral process, however,

Relatedly, the conception of a plea agreement as a unilateral arrangement runs counter to the defendant's precontractual bilateral understanding. The Sixth Amendment to the U.S. Constitution affords a defendant a right to a trial by jury.[107] When a defendant elects to waive that right, among other constitutional protections, and enter a plea of guilty, it is typically prompted by the defendant's decision to pursue a negotiated disposition. In other words, the defendant has determined that it is in his optimal interest to waive his trial right and proceed with a guilty plea pursuant to the terms detailed in a proposed plea arrangement. It is the defendant's understanding that there is a "deal," and, but for this contractual "deal" he would have persisted in enforcing his right. It is a promissory exchange—the promise of certain benefits, including possible penal compromises, in exchange for the defendant's promise to enter a guilty plea—that prompted his decision to change his plea.[108] Such an exchange is characteristic of a classic bilateral arrangement—a promise has been exchanged for another promise. Yet, the system promotes an alleged and flawed unilateral structure that deceives, encourages, and requires unwitting defendants to perform under the mistaken belief that an enforceable agreement is in place.[109] However, as detailed in this article's forthcoming sections, construction of a plea agreement pursuant to a tripartite bilateral conception will yield results that are procedurally fair and more equitable in outcome.[110]

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contemplates performance on the part of the offeree, the judiciary, as opposed to the defendant/offeror. *See supra* notes 70–72 and accompanying text.

107. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

108. A plea agreement should be "interpret[ed] . . . consistently with what the defendant reasonably understood when he entered the plea." United States v. Harvey, 869 F.2d 1439, 1451 (11th Cir. 1989) (Clark, J., dissenting).

109. *See* Matter of T & B General Contracting, Inc., 833 F.2d 1455, 1459 (11th Cir. 1987) (observing that a meeting of the minds on the essential terms of the contract is prerequisite to an enforceable agreement).

110. As noted, any contractual analogy is imperfect on account of the constitutional protections afforded defendants during the criminal process. *See supra* note 77 and accompanying text; United States v. Skidmore, 998 F.2d 372, 375 (6th Cir. 1993) ("A guilty plea, however, involves the waiver of at least three constitutional rights by a defendant. Therefore, the analogy of a plea agreement to a traditional contract is not complete or precise, and the application of ordinary contract law principles to a plea agreement is not always appropriate.") (citations omitted). Some commentators have suggested that a bilateral contractual theory

D. Contractual Principles of Revocable Offers and Their Absence in the Plea Context

Another contractual principle central to the understanding of plea agreements as bilateral tripartite contracts are the doctrinal rules pertaining to revocable offers. It is well established that unless an offer is supported by consideration it is terminable at will up until the moment of acceptance.[111] This is true even if the offer expressly provides that it will remain open for a specified period.[112] As stated by Professor E. Allan Farnsworth:

> [T]he common law view that an offer is freely revocable is accepted throughout the United States, with rare exceptions. . . . The rule of revocability is more properly regarded as a consequence of the aversion to allowing one party to speculate at the expense of the other. For if the offeror were

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cannot be applied to plea agreements given the non-enforceability of a defendant's promise to plead guilty. *See* Easterbrook, *supra* note 77 (observing that "[c]ourts refuse to enforce the promises to plead guilty in the future, although the enforcement of executory contracts is a principal mission of contract law"). Though it is conceivable that such bilateral promises could be mutually enforced, *see* Westen & Westin, *supra* note 79 (stating that if the prosecutor and defendant negotiate a bilateral agreement, then the "doctrine of mutuality can be given its full effect" and if Rule 11 was satisfied at the agreement stage "there would be no constitutional bar to holding the defendant to the agreement to plead guilty. . . "), I do not advocate a plea process that might abrogate or in any way compromise constitutional principles. In light of the multitude of problems attendant to the current Rule 11 process, *see* Cook, *supra* note 20, the problems associated with satisfying the Rule 11 tenets outside the courtroom walls would be, in my view, inestimable and incurable. Without any discernable method to ensure compliance with Rule 11, a defendant's due process protections would be seriously jeopardized. Thus, I agree that this article's bilateral tripartite conception is, in fact, imperfect in that constitutional protections serve to limit the strict application of contract law. However, this limitation is one that I gladly accept and believe to be appropriate.

111. McPhail v. L.S. Starrett Co., 257 F.2d 388, 393 (1st Cir. 1958):

> [I]t is elementary law that an option is not always a contract but an offer to enter into a contract coupled with a promise to hold the offer open for a given period of time, which promise is or is not binding on the offeror depending on whether or not it is supported by consideration. . . . The only effect on an option of lack of consideration is to make the promise to keep the offer open unenforceable against the optionor. Thus an option without consideration is only an offer which like any other offer may be revoked by the offeror at will at any time before the offer is accepted . . . .

112. The Comment to § 42 of the Second Restatement of Contracts states that "[m]ost offers are revocable. . . . [T]he ordinary offer is revocable even though it expressly states the contrary, because of the doctrine that an informal agreement is binding as a bargain only if supported by consideration." RESTATEMENT (SECOND) OF CONTRACTS § 42 cmt. a (1981).

> not free to revoke the offer, the offeror would be bound though the offeree would not be bound . . . .[113]

Therefore, to avoid the "aversion" referenced by Professor Farnsworth, offerors are granted the freedom to renege on their offers, irrespective of the reason underlying the revocation. Indeed, such freedom to renege is deemed preferable to a system that automatically binds the offeror. Yet, the current plea system belies this basic contractual principle—the defendant is, essentially, bound to his original bilateral offer to plead guilty (and his subsequent performance) up until the moment the court decides whether to accept the proposal.[114]

Prior to a guilty plea hearing, a defendant believes that satisfaction of the Rule 11 process—including the presentation of the joint offer and the change of plea—signifies that the proposed agreement to settle the case short of trial has been accepted by all relevant parties. After all, but for the proposed plea agreement, presumably the defendant had no intention of simply showing up on the courthouse steps and entering a binding guilty plea. The proposed deal is what prompted him to change his plea, as he was not intending to enter an irrevocable guilty plea unless he believed that there was an enforceable contract and that he would be in receipt of reciprocal promises.[115] Yet, unbeknownst to the defendant, at the close of the Rule 11 hearing—when the offer has been presented, the defendant has performed, and the court has accepted his guilty plea—there is still not an enforceable deal when acceptance of the plea agreement has been deferred.[116] The joint offer re-

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113. E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.17 (3d ed. 2004).

114. It is binding in the sense that a defendant is bound to his guilty plea unless he can satisfy Rule 11's "fair and just reason" standard. FED. R. CRIM. P. 11(d)(2)(B); United States v. Hyde, 520 U.S. 670, 674 (1997).

115. Assuming, arguendo, that the defendant was intending to enter an irrevocable plea, this is a distinction without a difference. Irrespective of the defendant's mindset, an enforceable contract does not exist. In other words, because the court has not accepted the joint offer, the defendant/offeror retains the right to withdraw his offer, and the existence of this right is not dependent upon the defendant's mental state.

116. Indeed, such deferral is typical. As noted by the Court in *Hyde*:

> If the Court of Appeals' holding were correct, it would also be difficult to see what purpose Rule 32(e) would serve. Since 1983, that Rule has provided: "If a motion to withdraw a plea of guilty . . . is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Under the Court of Appeals'

mains open and it will remain open until the court decides to act.[117]

On the one hand, subject to constitutional constraints, plea agreements are construed as contracts;[118] on the other hand, contractual principles are blatantly suspended if they are deemed antagonistic to the interests of the judiciary. The defendant and the prosecution present a joint bilateral offer, the enforceability of which is wholly dependent upon the court's assent and promise to implement the contractual terms. In other words, absent the court's acceptance there cannot be an enforceable agreement.[119] The doctrine permitting free revocability of unaccepted offers would seemingly dictate that a defendant would retain similar freedoms, thus allowing him to revoke an unaccepted plea offer without having to comply with Rule 11's "fair and just reason" requirement. However, *Hyde* dispenses entirely with this well-established contractual doctrine and holds the defendant to his promise. When the burdened party is the judiciary, suddenly the "aversion" referenced by Professor Farnsworth is now sufferable. After all, as *Hyde* indignantly observes, the courts could not tolerate a plea system that would permit a "defendant to withdraw his guilty plea simply on a lark."[120] What *Hyde,* of course, fails to acknowledge is that offerors are authorized to revoke unaccepted offers on a lark. Revocation on a lark is the law.

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holding, the "fair and just reason" standard would only be applicable between the time that the plea agreement is accepted and the sentence is imposed. Since the decision whether to accept the plea agreement will *often* be deferred until the sentencing hearing, *see* Rule 11(e)(2); USSG § 6B1.1(c), at which time the presentence report will have been submitted to the parties, objected to, revised, and filed with the court, *see* FED. RULE CRIM. P. 32(b)(6), the decision whether to accept the plea agreement will *often* be made at the same time that the defendant is sentenced. This leaves little, if any, time in which the "fair and just reason" standard would actually apply.

520 U.S. at 678–79 (emphasis added).

117. In *Hyde,* at least "one month" had elapsed between the date of the Rule 11 hearing and the date of sentencing. *Id.* at 672. *See also* United States v. Ewing, 957 F.2d 115, 117 (4th Cir. 1992) (noting that the defendant entered his guilty plea on October 3, 1990 and was sentenced on December 13, 1990; the court had accepted the guilty plea during the Rule 11 hearing, but did not accept the plea agreement until sentencing).

118. *See* Easterbrook, *supra* note 77.

119. *See supra* note 81 and accompanying text.

120. 520 U.S. at 676.

As previously discussed, *Hyde* was decided primarily on a strained textual construction, particularly of those sections of Rule 11 referencing a court's authority to accept a guilty plea and to accept or reject plea agreements.[121] Three types of plea agreements are detailed in Rule 11: (1) type A agreements, which involve the dismissal of other charges;[122] (2) type B agreements, which include agreements involving non-binding sentencing recommendations;[123] and (3) type C agreements, which involve specific sentence arrangements.[124] With respect to type A and C agreements, Rule 11(c)(3)(A) provides that a court "*may* accept the agreement, reject it, or *may* defer a decision" pending the court's review of the presentence report.[125] This statutory discretion to defer, however, is tempered by Section 6B1.1(c) of the United States Sentencing Guidelines, which generally mandates deferral of type A and C agreements until the court has had an opportunity to review a presentence report.[126]

Admittedly, the courts often have valid reasons to defer acceptance. Particularly, with type A and type C agreements,[127]

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121. *Id.* at 672–79.

122. FED. R. CRIM. P. 11(c)(1)(A). The agreement in *Hyde* was a type A agreement. 520 U.S. at 675.

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

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

125. FED. R. CRIM. P. 11(c)(3)(A) (emphasis added).

126. The United States Sentencing Guidelines provide, in pertinent part:

> The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1.

U.S. SENTENCING GUIDELINES MANUAL § 6B1.1(c) (2003).

127. Type A and type B plea agreements constitute the overwhelming majority of all negotiated plea dispositions. Joseph S. Hall, *Rule 11(E)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?*, 87 IOWA L. REV. 587, 589 (2002) (observing that binding pleas are "rare"); Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1054 (1997) (noting that the "vast majority" of plea agreements in the judge's jurisdiction were type B agreements); PRACTICING LAW INSTITUTE, *Federal Judicial Center In-Court Educational Program on Guideline Sentencing Orientation for United States District and Circuit Judges, United States Magistrates, United States Probation Officers, Supporting Staff, Federal Public Defenders*, *in* FEDERAL SENTENCING GUIDELINES 589, 785–86 (1987), *available at* 146 PLI/Crim 589. ("Traditionally, most federal judges have been willing to accept charge agreements [type A] and nonbinding sentence recommendation agreements [type B], but have not been willing to accept binding sentence agreements [type C].").

the courts want to ensure that the charges to be dismissed or the specific sentence to be imposed are warranted under the circumstances. Indeed, there are sentencing issues to consider, including, but not limited to, issues involving mandatory minimums,[128] sentencing guideline base offense levels, and criminal history categories.[129] However, such judicial preferences hardly justify the decision in *Hyde* to bind defendants to their promise and subsequent performance. It is hardly atypical that a potential contracting party might be covetous of additional time to contemplate a pending offer. The individual or entity, for example, might seek to gather additional information or seek competing offers. Yet, only in the context of plea agreements does an offeree's mere desire or need for additional time trump the well-established doctrine affording an offeror the right to revoke.

In contrast to dispositions entered pursuant to subsections (A) and (C), Rule 11 exempts type B agreements from its judicial acceptance mandates.[130] Irrespective of this textual distinction, however, the federal judiciary invariably accepts type

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128. Minimum mandatory sentences have been established for various federal crimes, including firearm offenses and narcotic-related offenses. 18 U.S.C. § 924(c) and § 929(a) (2000) (minimum term of five years for firearm offenses); 21 U.S.C. § 841 (2000) (minimum terms of five and ten years for narcotic offenses).

129. The Federal Sentencing Guidelines establish the parameters within which federal sentences are established. As described by the United States Sentencing Commission:

> The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. . . .
>
> Pursuant to the [Sentencing Reform Act of 1984], the sentencing court must select a sentence from within the guideline range.

FEDERAL SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2000).

130. *See supra* note 41 (reviewing Rules 11(c)(3)(A) and (B)). In addition, the Advisory Committee Notes plainly state:

> [T]here must ultimately be an acceptance or rejection by the court of a type (A) or (C) agreement so that it may be determined whether the defendant shall receive the bargained-for concessions or shall instead be afforded an opportunity to withdraw his plea. But this is not so as to a type (B) agreement; there is no "disposition provided for" in such a plea agreement so as to make the acceptance provisions of subdivision (e)(3) applicable . . . .

FED. R. CRIM. P. 11 advisory committee notes. Section 6B1.1 of the Federal Sentencing Guidelines makes a similar distinction between the respective agreement types. *See supra* note 126.

B agreements.[131] Nevertheless, the statutory distinction is explainable given that the distinguishable risks that inspire the Rule 11 and sentencing guideline acceptance and deferral provisions are largely absent in the type B context.[132] Type B arrangements possess neither the specific sentence nor charge dismissal features that underlie the preference to defer judicial plea agreement acceptance. In fact, type B agreements typically present judicial risks that are largely indiscernible. Given that type B agreements provide the court with virtually limitless sentencing discretion, any risks attendant to such agreements are, at best, negligible. Thus, district courts not only possess an uninhibited authority to readily accept type B contracts, but there exists no credible justification for a court to delay the exercise of its discretion. When considered concomitantly with the judicial regularity with which such agreements are deferred,[133] *Hyde* and the recent Rule 11 amendments binding defendants to their offer and subsequent performance in the absence of an enforceable agreement become even more difficult to rationalize.

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131. United States v. Siedlik, 231 F.3d 744, 748 n.1, 749 (10th Cir. 2000) (observing that the district court had accepted a type B plea agreement); United States v. Grant, 117 F.3d 788, 792 n.5 (5th Cir. 1997) (recognizing that courts accept type A, B, and C plea agreements); United States v. Graibe, 946 F.2d 1428, 1432 (9th Cir. 1991) ("Unlike other plea agreements made pursuant to Rule 11, type (B) agreements, once accepted by the court, foreclose forever the defendant's other options."); United States v. Cimino, No. 00CR. 632-07(WHP), 2002 WL 31000001, at *2 (S.D.N.Y. Sept. 5, 2002) (holding that the parties had entered into a type B plea agreement and that the court had "accept[ed] the plea agreement in full") (alteration in original). Assuming, arguendo, that the courts attempted to adhere to the Advisory Committee suggestion, an informal acceptance of the agreement would nevertheless have to occur if the agreements were to become effective. As stated by Professor Farnsworth, there are an array of methods by which assent can be manifested:

> The fact that an offer invites acceptance by a promise does not mean that the promise must be in words. A promise may be implied from other conduct, such as a nod of the head, and in some circumstances beginning performance or even preparing for performance may as effectively indicate a commitment to finish as a promise of words.

FARNSWORTH, *supra* note 113, § 3.13, at 270.

132. Admittedly, the court still must consider the imposition of mandatory minimums and the sentencing guidelines. However, type B agreements allow the court discretion to impose a sentence largely free of any charge-based and sentencing-based contractual constrictions. *See supra* notes 127–28 and accompanying text.

133. *Grant*, 117 F.3d at 792 n.5 (having discussed type A, B, and C agreements, the court observed that "[r]egardless of the type of [plea] agreement at issue, the district court usually must review the presentence report before accepting the agreement").

E. An Alternative Analogy: Plea Agreements as Contracts Subject to a Condition

Aside from the analogy to unilateral contracts, some courts and commentators have also incorrectly likened plea agreements to contracts subject to either a "condition precedent" or a "condition subsequent."[134] Given the uncertainty of definition and confusion that has often accompanied contracts with conditions,[135] some introductory instruction is warranted. Traditionally classified as contracts subject to either a "condition precedent" or a "condition subsequent," the Second Restatement has since recast these designations.[136] The term "conditions" is now used in lieu of "condition precedent,"[137] and is defined as "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."[138] Thus, "conditions" pertain to events yet to occur under an existing contract.[139] In other words, the "conditions" attendant to a contract, if fulfilled, do not act to create an enforceable contract; rather, the "conditions" assume an underlying enforceable agreement.[140] As stated in Section 224 of the Second Restatement:

> *Necessity of a contract.* In order for an event to be a condition, it must qualify a duty under an existing contract. Events which are part of the process of formation of a con-

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134. United States v. Hyde, 520 U.S. 670, 677–78 (comparing plea agreements to contracts subject to a condition subsequent); State v. Howington, 907 S.W.2d 403, 407 (Tenn. 1995) (stating that plea agreements are contracts subject to the condition precedent of the trial court's acceptance of the proposed bargain); Shayna M. Sigman, *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317 (1999) (analogizing plea agreements to contracts subject to a condition subsequent).

135. Hope Furnace Associates, Inc. v. F.D.I.C., 71 F.3d 39, 43 (1st Cir. 1995) (noting the "confusion" that has often accompanied the "distinctions between conditions subsequent and conditions precedent").

136. RESTATEMENT (SECOND) OF CONTRACTS § 224 reporter's note (1981) ("This section revises former § 250 to eliminate the terms 'condition precedent' and 'condition subsequent.' This terminology has long been criticized and has caused confusion . . . .").

137. RESTATEMENT (SECOND) OF CONTRACTS § 224 reporter's note (1981) ("Conditions precedent are referred to simply as 'conditions.'").

138. RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981).

139. *Id.* cmt. a ("*'Condition' limited to event.* 'Condition' is used in this Restatement to denote an event which qualifies a duty under a contract.").

140. FARNSWORTH, *supra* note 113, § 8.2, at 417 ("The Restatement Second uses *condition* in the context of a contract that already exists.").

> tract, such as offer and acceptance, are therefore excluded under the definition in this section. It is not customary to call such events conditions.[141]

Therefore, a valid, enforceable contract exists independent of the condition. It is the performances due under an existing contract, rather than the contract's underlying validity, which are subject to condition.[142]

In the plea agreement context, the purported condition precedent—judicial acceptance of the plea agreement—does not qualify a performance under an *existing* contract.[143] As noted, a plea agreement that has not been judicially accepted is nothing more than a mere offer that is freely revocable by the offeror.[144] Thus, neither the government nor the criminal defendant are empowered to enforce a plea agreement until that agreement has been accepted by the court.[145] It is the court's assent to the agreement that creates the contractual relationship. It is that assent that makes the contract enforceable and, in turn, obligates the parties to their promised performances.[146] Given this creative function and its failure to trigger an enforceable contractual performance, judicial assent is not a qualifying condition within the meaning of the Second Restatement.

Moreover, normative doctrine attendant to conditional agreements mandates that the occurrence of the conditional event precede the performance of any contractual duties. The Second Restatement explicitly provides that "[p]erformance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused."[147] During the Rule 11 process, however, an inverted sequence is followed; the defendant is required to perform his duty—enter his guilty

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141. RESTATEMENT (SECOND) OF CONTRACTS § 224 cmt c.

142. RESTATEMENT (SECOND) OF CONTRACTS § 224 cmt. b ("Performance under a contract becomes due when all necessary events, including any conditions and the passage of any required time, have occurred so that a failure of performance will be a breach.").

143. *See supra* notes 77–96 and accompanying text.

144. *See* United States v. Papaleo, 853 F.2d 16, 20 (1st Cir. 1988) (holding that a signed plea agreement constituted a mere offer by the prosecution that was revocable until the defendant performed and the agreement was accepted by the court).

145. *See supra* note 81 and accompanying text.

146. *See supra* notes 77–96 and accompanying text.

147. RESTATEMENT (SECOND) OF CONTRACTS § 225(1) (1981); FARNSWORTH, *supra* note 113, § 8.2, at 418 ("The Restatement Second also limits *condition* to an event that must occur before a duty of performance arises.").

plea—under the contract prior to the alleged conditional court approval of the plea agreement.[148]

It is also a fundamental contractual tenet that neither party may withdraw from a conditional agreement prior to the occurrence of the subject event.[149] Therefore, if on Monday A and B agree that A will mow B's lawn on Tuesday for $20 so long as it does not rain on Tuesday, neither A nor B may freely withdraw from the agreement prior to the occurrence or non-occurrence of the conditional event. The exchanged promises are binding from the moment of agreement. Such is not the case with plea agreements. Though *Hyde* held that a defendant is subject to Rule 32(e)—and thus may not renege freely—if he seeks to withdraw his plea *after* his guilty plea has been accepted,[150] it is well-established that either the prosecution or the defendant may freely withdraw from a plea agreement prior to satisfaction of the Rule 11 process.[151]

Consider the seminal case of *Mabry v. Johnson*. There, the prosecution and the defense discussed a possible settlement to a murder charge.[152] However, after the defendant's assent to the proffered agreement was conveyed, the prosecution withdrew the offer, claiming "that a mistake had been made."[153]

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148. United States v. Hyde, 520 U.S. 670, 677–79 (1997) (stating that Rule 11 envisions that the defendant plead guilty prior to receiving his promised return from the prosecution; that the promised return is dependent upon the court's acceptance of the plea agreement; and that courts "often" defer acceptance of plea agreements).

149. Professor Alice M. Noble-Allgire, in discussing contracts with "conditions" in the context of real estate contracts with attorney approval clauses, states that parties to a contract are bound, subject to the fulfillment or non-fulfillment of the contingency:

> It is more appropriate, therefore, to interpret attorney approval clauses as a "condition" in the sense dictated by the second *Restatement*. In other words, a binding agreement is formed at the time the parties sign the contract, but the duty to perform does not arise until the attorney approves the contract. Because a binding contract was formed, however, neither party could refuse to perform simply because of a change of heart or other reason unrelated to an attorney's advice.

Alice M. Noble-Allgire, *Attorney Approval Clauses in Residential Real Estate Contracts—Is Half a Loaf Better Than None?*, 48 KAN. L. REV. 339, 363 (2000).

150. *Hyde*, 520 U.S. at 676.

151. *See* Mabry v. Johnson, 467 U.S. 504, 510 (1984).

152. *Id.* at 505–06. The proposed disposition required the defendant to plead guilty to a felony murder charge in exchange for a recommended twenty-one year sentence. The recommended sentence was to run concurrently with another sentence—for burglary and assault—then being served by the defendant. The burglary, assault, and murder charges arose from the same set of facts. *Id.*

153. *Id.*

Though a subsequent agreement was ultimately negotiated, the case was settled pursuant to terms different from the original offer.[154] At issue was whether the defendant had a constitutional right to have the initial plea bargain enforced.[155] Rejecting this claim, the Supreme Court held that, despite the earlier acceptance, the prosecution was free to revoke its earlier offer, finding that the defendant's subsequently entered guilty plea was not "induced by the prosecutor's withdrawn offer" and was entered into knowingly and voluntarily.[156] If the plea agreement were truly a contract subject to a condition, the prosecution in *Mabry* should not have been permitted to withdraw from the initial agreement; it should have been held to its promised performance[157] subject to the contract's conditional event—the court's approval. Normative doctrine would have dictated that the plea agreement, being an enforceable contract, prohibited free withdrawal irrespective of the agreement's date in relation to the Rule 11 hearing.

The Supreme Court in *Hyde* also likened the plea agreement and the accompanying judicial approval/rejection requirement to a contract subject to a condition subsequent. Specifically, the Court stated:

> If the court accepts the agreement and thus the Government's promised performance, then the contemplated agreement is complete and the defendant gets the benefit of his bargain. But if the court rejects the Government's promised performance, then the agreement is terminated and the defendant has the right to back out of his promised per-

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154. *Id.* at 506.

155. *Id.* at 505.

156. Specifically, the Supreme Court stated:

> Respondent's plea was in no sense induced by the prosecutor's withdrawn offer .... Respondent does not challenge the District Court's finding that he pleaded guilty with the advice of competent counsel and with full awareness of the consequences .... Respondent's plea was thus in no sense the product of governmental deception; it rested on no "unfulfilled promise" and fully satisfied the test for voluntariness and intelligence.
>
> Thus, because it did not impair the voluntariness or intelligence of his guilty plea, respondent's inability to enforce the prosecutor's offer is without constitutional significance.

Id. at 510.

157. That the agreement was apparently unsigned is without significance here. As noted, even signed agreements are unenforceable absent judicial approval. *See supra* notes 90–96 and accompanying text.

> formance (the guilty plea), just as a binding contractual duty may be extinguished by the nonoccurrence of a condition subsequent.[158]

Thus, *Hyde* construed the plea agreement as a contract between the prosecution and the defendant subject to a subsequent condition—judicial acceptance/rejection of the proffered disposition—that could potentially terminate the agreement. This comparison is similarly misplaced.

In lieu of the term "condition subsequent,"[159] the Second Restatement has since substituted the following language: "[I]f under the terms of the contract the occurrence of an event is to *terminate an obligor's duty of immediate performance* or one to pay damages for breach, that duty is discharged if the event occurs."[160] Irrespective of whether a "condition" or a terminating events clause is affixed to the agreement, however, underlying the condition must be a contract capable of independent enforcement. In other words, if the subject condition were excised from the contract, the resulting agreement must be able to stand on its own; it must be fully enforceable assuming the detachment of the conditional clause.[161] As noted, such independence apart from the purported condition does not exist in the plea agreement context.[162] It is undeniable that if the alleged contingency—judicial acceptance/rejection of the plea agreement—were removed it would be impossible for either party to

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158. United States v. Hyde, 520 U.S. 670, 677–78 (1997).

159. RESTATEMENT (SECOND) OF CONTRACTS § 224 reporter's note (1981) ("This Section revises former § 250 to eliminate the terms 'condition precedent' and 'condition subsequent.'").

160. RESTATEMENT (SECOND) OF CONTRACTS § 230(1) (1981) (emphasis added). In defining the "scope" of this conditional contract, comments to the Restatement also provides, in pertinent part:

> Parties sometimes provide that an obligor's matured duty will be extinguished on the occurrence of a specified event, which is sometimes referred to as a "condition subsequent." They may, for example, provide that an obligor's duty to reimburse the obligee for some loss or to compensate him for a breach will be extinguished if the obligee does not take some action, such as bringing suit, within a stated period of time. Under such a provision, the duty is generally discharged if the event occurs. . . . The rule stated in this Section applies only to matured duties and to duties to make compensation.

RESTATEMENT (SECOND) OF CONTRACTS § 230 cmt. a (citation omitted).

161. *See* Noble-Allgire, *supra* note 149, at 359 (stating that "condition[s] precedent" and "condition[s] subsequent" both "describe an event that may occur after a contract is formed and affects a party's duty to perform under the contract").

162. *See supra* notes 77–96, 144–46 and accompanying text.

enforce the purported contract.[163] Given the absence of an underlying enforceable agreement, a plea agreement cannot possibly satisfy the Restatement definition.

Moreover, judicial rejection of a plea agreement does not discharge a matured contractual duty, but terminates a duty that has already been performed under a non-existent contract. The *Hyde* Court's construction is plainly not contemplated by the Second Restatement, which limits application of the concept to preexisting contracts containing clauses that can potentially terminate duties of "*immediate* performance."[164] The Restatement provides the following illustrative example:

> A, an insurance company, insures the property of B under a policy providing that no recovery can be had if suit is not brought on the policy within two years after a loss. A loss occurs and B lets two years pass before bringing suit. A's duty to pay B for the loss is discharged and B cannot maintain the action on the policy.[165]

A and B had a valid contract that was subject to a subsequent event—the bringing of a lawsuit within two years—that could operate to discharge a matured duty, namely, the duty to pay under the policy. It is important to note the unrendered status of the insurance company's performance. Upon the loss sustained by B to his property, the insurance company's duty to perform had matured and had become immediate. In the event the policy was not honored, B would essentially bear the burden of bringing an action against the company within two years or risk forfeiting any claim against the loss. The insurance company's matured duty and immediate obligation to pay was now contingent upon B's subsequent conduct. Thus, "the obligor's [A's] duty of immediate performance" was abated until the occurrence/nonoccurrence of the conditional event.[166] In the

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163. *See supra* note 81 and accompanying text.

164. RESTATEMENT (SECOND) OF CONTRACTS § 230(1) (1981) (emphasis added).

165. RESTATEMENT (SECOND) OF CONTRACTS § 230 illus. 1 (1981).

166. Aside from duties yet to be performed (illustrated in the above example), a duty that is in the process of being performed is also encompassed within the meaning of the Second Restatement. For example, assume that A and B agree that A will replace the roof on B's home in January for $2,400. They further agree that the $2,400 will be paid in twelve installments of $200 due at the beginning of each month, subject to the condition that B's duty to make payments under the contract will be terminated if B loses his job in November or December. If B subsequently loses his job in either November or December, then "[the] obligor's [B's]

plea agreement context, however, there is no "duty of immediate performance" to terminate since the defendant's full performance precedes the alleged conditional event. Rather than suspending defendant performance, Rule 11 mandates defendant performance prior to the fulfillment/non-fulfillment of the alleged condition. Therefore, even assuming the viability of a plea contract between the prosecution and the defendant, the purported conditional clause cannot properly be classified as an event within the meaning of the Restatement given its failure to terminate a matured and immediate contractual duty.[167]

III. DEFENDANT IGNORANCE AND THE EFFICIENCY OF THE CURRENT PLEA BARGAINING SYSTEM

The *Hyde* decision is emblematic of a lamentable plea process designed to further judicial economy at the expense of individual due process.[168] As discussed above, contractual principles will be suspended and due process compromised if the burden on the judiciary becomes too heavy. Indeed, defendant ignorance about the realities of the plea process is necessary if the current plea structure is to maintain its vibrancy, for if defendants truly comprehended the process and its attendant consequences, the efficiency of the guilty plea system would likely be compromised.

Given the high degree of dependency on the part of the judiciary, prosecutors, and defense attorneys upon the current plea structure,[169] there exists a strong disincentive to permit any substantive changes to the system that might diminish its efficiency. Underlying this refrain is a need by each of the principal participants to maximize scarce resources and/or achieve certain economic benefits. Private defense attorneys, compromised by low compensation for indigent representation,

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duty of immediate performance" is terminated and B will be relieved of having to make additional payments. RESTATEMENT (SECOND) OF CONTRACTS § 230(1).

167. Admittedly, contracting parties could properly draft an agreement requiring full performance by a party, yet subject that full performance to some sort of termination or reimbursement clause. However, contracts containing such clauses still necessitate an underlying enforceable agreement. As noted, plea agreements are unenforceable in the absence of judicial assent. Thus, regardless of the conditional label affixed to the contract, a plea agreement cannot properly be classified as a contract subject to any sort of condition.

168. *See* Cook, *supra* note 20, at 599, 637–38.

169. *See supra* note 17 (noting that in 2000, over 95 percent of federal convictions were obtained via a guilty plea).

and public defenders, pressured by excessive caseloads, inadequate resources, and internal office concerns, benefit from a system that encourages out-of-court dispositions.[170] Prosecutors and the judiciary are similarly subjected to excessive caseloads and therefore also benefit under a structure that mitigates such pressures.[171] As detailed in a recent article by Nancy Amoury Combs, each of these players interact to perpetuate a plea process that will further their respective and mutually-held interests:

> Plea bargaining concentrates enormous power in the hands of prosecutors who, in order to bargain effectively, must be afforded broad discretion over virtually all prosecutorial decisions, and who, by reaching agreements with defendants as to the punishment to be imposed, largely assume the role of judge in both guilt determination and sentencing. . . . Similarly, plea bargaining serves the interests of assistant prosecutors, whose goals often coincide with those of their superiors and who also desire to manage their case loads efficiently.
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> As for defense attorneys, plea bargaining offers substantial financial advantages; some defense attorneys virtually never have to try a case yet earn substantial fees.

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170. *See* Cook, *supra* note 20, at 625–27 (making several observations: that due to inadequate compensation rates, appointed counsel are inclined to plead indigent cases in order to pursue more fruitful representation matters; and that the strategic choices pursued by public defenders, who are subjected to "[c]ase load concerns—attributable, in part, to limited office resources, coupled with individual retentive, promotional, and salary considerations—will often conflict with the litigative interests of the clients they represent. Accordingly, plea deals will often be pursued in order to promote these organizational and/or individual objectives"); Kevin C. McMunigal, *The Cost of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 858 (1990) ("Analysis of the work of criminal defense lawyers has highlighted the many factors which incline the defense attorney to prefer guilty pleas over trials, such as financial incentives, heavy caseloads, and pressure from prosecutors and judges to process cases efficiently."); Schulhofer, *Criminal Justice Discretion*, *supra* note 18, at 54–56 (arguing that public defenders are motivated to obtain guilty pleas—even if it is not in their client's best interests—given their competing interests in "peer approval, promotion, salary increases, or simply job retention"). Schulhofer further claims that court-appointed attorneys in federal court are subject to strong incentives to plead cases given the low-rate of compensation that accompanies such appointments. "The economic theory of agency costs provides powerful reasons for predicting that settlements will occur in cases that a reasonably well-counseled defendant would prefer to see tried." *Id.* at 56.

171. Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 199 UTAH L. REV. 205, 234–36, 239–241 (1999) (observing that prosecutors, judges and defense attorneys are subject to various influences, including caseload pressures, that necessarily encourage the settlement of cases through plea bargaining).

> Retained defense attorneys typically charge a flat fee for their representation. That fee is always sufficient, and frequently generous, for the work involved in securing a guilty plea, but it is often woefully inadequate as compensation for taking a case to trial. Plea bargaining is also attractive to public defenders, who, although not laboring under intense financial conflicts, often labor under heavy caseloads which give them an institutional interest in resolving their cases expeditiously. Plea bargaining also serves the interests of judges, though perhaps to a lesser extent. Judges, like the other professionals in the criminal justice arena, are concerned about backlogs; thus, many happily acquiesce in plea bargaining as a means of efficient case disposition. Plea bargaining also relieves judges of the sole responsibility for sentencing, a responsibility that some find burdensome. Finally, by eliminating the trial, plea bargaining eliminates the possibility of errors in the trial and thereby protects trial judges' reputations by shielding them from appellate reversals.
>
> In sum, prosecutors, defense attorneys, and judges each have their own good reasons for favoring plea bargaining. Indeed, although they have largely divergent formal interests and role obligations, their mutual interest in processing cases efficiently exerts a potent pressure to cooperate and thus to subvert the conflict norms on which the adversary system is based.[172]

Thus, from the perspective of its key participants, an efficient plea process is indispensable, for without it the system's economy would be compromised and, as posited by some, the criminal system would simply "collapse."[173] A plea process has been adopted and the rules governing it have been interpreted to encourage efficiency during each stage of the process: plea bargaining, plea entry, and plea finality. Rules attendant to plea withdrawal pertain to plea finality, and serve to anchor the settlement incentives encouraged during the earlier phases.

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172. Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 22–25 (2002) (footnotes omitted).

173. Harman v. Mohn, 683 F.2d 834, 836–37 (4th Cir. 1982) ("Without plea bargains the state and federal criminal courts would collapse under the burden of cases waiting the time consuming jury selection and trial. The Supreme Court approved plea bargaining in *Santobello v. New York*, 404 U.S. 257 (1971) and found it to be 'an essential component' of the criminal process and that it should be encouraged when properly administered.") (some internal citation omitted).

As noted, it is a well-established principle of contract law that an offeror is entitled to freely revoke an offer prior to acceptance.[174] This power of revocation is, indeed, an enviable authority, one that an offeror would be reluctant to relinquish. With this authority comes a reduction in investigational costs, for an offeror is fully aware that he retains the authority to renege if his assessment as to the value of the proffered arrangement changes in the future. The offeror is fully cognizant that if, upon reassessment or changed circumstances, the proffered contractual situation is less appealing and that another alternative approach is preferable, the offeror may freely revoke up until the time of acceptance. Such authority casts the risk of expenditures and investigation upon the offeree.[175] It is the offeree who, given his awareness that a delay in acceptance increases the risk of revocation, must expend greater resources in the short term to ascertain the value of the proposed offer. Unlike the offeror, the offeree does not have the freedom of time; rather, time is of the essence. If the offeree wants the deal, he must investigate and accept with some degree of promptness or else risk revocation.

Conversely, a rule binding an offeror would, at a minimum, increase hesitancy to proffer contractual arrangements. To ensure that an offer was in his optimal interest, the offeror, prior to communicating a proffered arrangement, would seek to remove the risks attendant with an inadequately investigated offer by delaying the communication of the offer and expending additional resources during the investigational stage. Surety about, inter alia, the terms of the agreement as well as alternative contractual or non-contractual arrangements, would be of paramount concern to an offeror who was aware that he would be bound for a predetermined period.[176] Thus, under this sce-

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174. *See supra* notes 68–76, 111–13 and accompanying text.

175. *See* Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L. J. 1249, 1273–75 (1996) ("Conversely, a rule that leaves the offeror free to revoke places the costs of wasted preparations on the offeree. The offeror will then have little incentive to delay her offer or otherwise to restrain the offeree from relying.").

176. In an article about promissory estoppel in the context of pre-contractual negotiations, Professor Katz makes the following instructive comments:

> Suppose, then, that the two parties have equally good information about the costs and benefits of reliance and about the risk that the bargain will fail to be executed. Then a rule that binds the offeror to an option contract as soon as she makes an offer . . . makes reliance safe for the offeree. . . . Under a rule of either expectation damages or reliance dam-

nario, the offeror—not empowered with the authority to freely revoke—bears the risk of non-investigation and would become more circumspect about freely pursuing new contractual ventures.

In contrast to the contractual rights applicable in the free marketplace, *Hyde* has determined that a criminal defendant may not freely withdraw his offer (and performance) even in the absence of judicial assent to the proffered disposition.[177] Ordinarily, it might be surmised that such a rule would increase defendant cautiousness in extending proffered settlements, just as it would have an adverse impact upon the extension of offers in the marketplace. It would be assumed that a defendant, aware that his decision to plead guilty is binding, would exercise greater restraint and expend additional time and resources investigating the merits of a proffered disposition in light of other available alternatives. However, for reasons detailed below, such is not the case under the existing plea structure.

When a true bill is returned by a grand jury, it reflects that body's determination that sufficient evidence exists to suggest that a defendant committed the crime(s) alleged in the indictment. Though the applicable standard falls well beneath that of reasonable doubt,[178] and certainly no inference of ade-

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ages, the offeree gets full insurance against the offeror's nonperformance. Accordingly, if he gets any benefit at all from the productive value of reliance, he will have an incentive to rely as soon as possible.

By the same token, however, liability for reliance damages imposes the costs of wasted reliance on the offeror. She will therefore have an incentive to control these reliance costs by delaying her offer. If she can capture the full productive benefits of reliance, which she can accomplish if she has all the bargaining power, she will have the appropriate incentive to weigh costs against benefits. This position will induce her to wait to make an offer until the very moment it is socially optimal to rely, leading to the desired outcome. If the offeror cannot capture the full benefits of reliance, on the other hand, she will weigh the wasted reliance too heavily from the social viewpoint, and her incentive will be to wait too long before making an offer.

Id. at 1273 (footnote omitted).

177. United States v. Hyde, 520 U.S. 670, 676 (1997).

178. There is some division among the courts regarding the precise standard that the grand jury should apply when making an indictment decision:

There is a sharp division among the states as to the quantum of proof needed to indict. Approximately a third of the states provide for indictment upon a finding of "probable cause" to believe that the accused has committed the crime charged. A slightly smaller group of states utilize a "prima facie evidence standard," authorizing indictment only "when all

quate proof could be inferred by such a finding, no prosecutor should ethically indict a case under an impression that insufficient evidence exists to convict at trial.[179] Thus, the prosecutor generally pursues a case with an expectation that convictions should be maximized and a sufficiently harsh penalty should be imposed to vindicate the public interest.[180] On the other hand, the defense attorney seeks, among other objectives, to either avoid conviction or, at the very least, to limit the impact of conviction upon her client.[181] Though unquestionably compro-

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> the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant." Another group of states, consisting largely of information states, have no clear precedent as to the applicable standard. In the federal courts, the governing standard apparently is the probable cause standard, but some judges use a prima facie instruction. Since the trial jury may convict only if convinced of the accused's guilt beyond a reasonable doubt, it generally is assumed that the prima facie evidence standard is a substantially more rigorous test than the traditional probable cause standard.

WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 742 (3d ed. 2000).

179. American Bar Association Model Rules of Professional Conduct § 3.8(a) provides:

> The prosecutor in a criminal case shall:
> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

MODEL RULES OF PROF'L. CONDUCT R. 3.8(a).

180. As stated by Professor Stephen Shulhofer:

> The prosecutor's objective in each case is to obtain the optimum level of punishment at the least cost, in order to free litigation resources for other prosecutions that can bring additional deterrence benefits. By tailoring each plea offer to the expected costs of trial, the likelihood of success, and the expected trial sentence, the prosecutor can maximize the deterrence obtainable from the finite resources at her disposal.

Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992) [hereinafter Schulhofer, *Plea Bargaining as Disaster*]; Scott & Stuntz, *supra* note 19, at 1914 (noting that the prosecutor, who is entitled to seek the "maximum sentence for the maximum offense," when effectuating a plea contract, "bears the risk that she could have obtained the maximum (or at least a greater) sentence if the case had gone to trial").

181. As Joseph W. Vanover notes:

> Defense lawyers . . . have, or should have, as their primary objective the interest of their client. As one commentator relays, defendants are most interested in reducing the sentence. Criminal defense lawyers are aware that if a defendant's case goes to trial, their clients are likely to receive a more severe sentence if convicted than if the defendant had pleaded guilty. The message that defendants who go to trial will get stiffer sentences if convicted is sent from trial judges.

Joseph W. Vanover, *Utilitarian Analysis of the Objectives of Criminal Plea Negotiation and Negotiation Strategy Choice*, 1998 J. DISP. RESOL. 183, 189 (footnotes omitted); James J. Fyfe, *Testing the Limits of Law Enforcement*, 82 MICH. L. REV. 1113, 1116 (1984) (quoting author Han Zeisel, who contends that "[d]efendants

mised by various competing interests, both the prosecutor and defense attorney typically spend at least some minimal time negotiating a deal in furtherance of these objectives.

In the context of plea bargains, rational choice theorists might posit that a negotiated disposition reflects a determination by the prosecution and the defendant that the utility of an out-of-court resolution outweighs that of a trial option.[182] Though a rational decision for one actor might be deemed irrational by another, it is a fair assumption that each participant, when entering a plea disposition, believes that utility is maximized through the exercise of this option.[183] Defendants seek a resolution that benefits them most. Ordinarily, a defendant who enters into a plea bargain does so under the impression that the promises contained in the plea offer will likely yield a more positive outcome than that likely to be obtained via the trial option. Thus, the defendant will often opt for the compromised result that typically accompanies a negotiated disposition and forfeit the possibility of acquittal, rather than risk a potentially harsher outcome at trial.[184] He deems the plea

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and their attorneys . . . seek the best possible disposition of their individual cases and plead guilty to avoid severe sentences and the inclusion of felony convictions on the defendant's record"); *see* Schulhofer, *Plea Bargaining as Disaster*, *supra* note 180, at 1980 ("Similarly, the defendant, who seeks to minimize punishment, will be better off accepting a plea offer if the contemplated punishment is lower than the anticipated posttrial sentence, discounted by the possibility of acquittal.").

182. Birke, *supra* note 171, at 210 & n.12 (observing a "basic economic assumption" as well as a tenet of "rational choice theory" that individuals seek to "maximize [their] personal utility"); *see* Howard Gensler, *The Competitive Market Model of Contracts*, 99 COM. L.J. 384, 384–85 (1994) ("A competitive market requires three conditions: many buyers and many sellers, rational behavior, and free choice. . . . The agents in the market, the buyers and sellers, must be rational. They must pursue economic profit in their own self-interest. . . . Random or irrational behavior will fail to properly exploit all market opportunities.").

183. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1551–54 (1998) (arguing that rational-choice economics encompasses behavior that is both rational and irrational; defining rational-choice economics not as choices made that are, in fact, rational, but simply as "choosing the best means to the chooser's ends").

184. Brady v. United States, 397 U.S. 742, 756 (1970) ("Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted."); Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 18, at 652 (noting that criminal defendants enter guilty pleas given their impression that they will receive more lenient sentences than if they persisted in their trial right).

agreement as the best avenue to minimize his punishment and the attendant stigmatization in the most cost-efficient manner.

Certainly rational choices are subjective. However, even with this realization, a rational subjective choice is certainly dependent upon sufficient knowledge. Indeed, to make an optimal, rational assessment the actor must possess sufficient information about all directly relevant and attendant circumstances. Anything less would necessarily risk a suboptimal selection.[185]

As in free markets, defendants, in making the mandatory election between trial and a negotiated settlement, must possess sufficient information if an optimal decision is to be expected. Thus, a defendant must be aware of the rules of the game. He must understand the trial process, the rules and personal rights associated with that option, as well as the likelihood of conviction or acquittal. Additionally, he must understand the consequences of sacrificing his trial right and the processes associated with a proposed plea disposition. To that end, he must comprehend the true meaning of the promises included in the agreement, as well as the roles of each of the contractual participants. Significantly, he must understand the true consequences of pleading guilty; not just the constitutional and penal consequences as required under Rule 11, but also the contractual implications. To make a truly informed choice, the defendant should understand that when he enters a guilty plea prompted by the promises bandied before him in a plea agreement, that typically upon the conclusion of the Rule 11 hearing he essentially has no more of a plea deal than he did prior to the hearing. He needs to understand that by changing his plea

185. Gensler, *supra* note 182, at 385–86 (stating that an efficient market requires the presence of multiple buyers and sellers, rational behavior, free choice, the absence of externalities, and "full information"). To illustrate this point, Gensler makes the following observation:

> If the agents do not have full information, then they are unable to determine the optimal quantity of goods to buy or to sell. For instance, the present period's demand depends upon next period's continued availability at similar prices. If supply is interrupted this period, agents would have demanded more goods in the prior period. If an unknown event occurs raising the price of an input, a supplier will be providing high cost final goods at too low a market price. This may be lucky for the buyer, but it is inefficient and suboptimal for the economy. These competitive market guidelines for an optimal economic result are reflected throughout the law of contracts.

Id. at 386.

he is essentially binding himself to a guilt admission for a protracted period, and that he will not be entitled to any of the benefits under the contract until the court decides whether it will assent to the agreement.

Unfortunately, few defendants are so aware. As noted, some academics have vigorously maintained that plea bargaining is so skewed against defendant interests that the process should be abolished altogether. They argue that the bargaining system is coercive,[186] resulting in plea dispositions that are uninformed and are of dubious contractual validity.[187] This view is only buttressed when considering the defendant populace, which is comparatively less resourceful than their prosecutorial and judicial counterparts. The Department of Justice has most recently indicated, for example, that among the federally convicted, over 70 percent had no more than a high school education, that a gross disproportion were either Hispanic or African-American,[188] and that in excess of 50 percent had appointed counsel.[189] Irrespective of the merits of the abolitionist contention—which I do not address in this article—it is difficult to deny that the plea bargaining process is epitomized by at least some element of coercion and a meaningful and significant resource and informational discrepancy.[190] Indeed,

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186. *See* Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 18, at 705 ("As uncomfortable as this fact sometimes may make us, the central purpose of the system is coercion, and the criminal law attempts to achieve its goals primarily through the deliberate infliction of suffering.").

187. *See supra* notes 18–19 and accompanying text.

188. Specifically, among defendants charged in U.S. District Courts in 2000, 76.8 percent of convicted defendants were white, 17.5 percent were black, and 5.6 percent were listed in other racial categories. Bureau of Justice Statistics, *supra* note 17. In addition, Hispanics comprised 40.3 percent of convicted defendants, while 59.7 percent were classified as non-Hispanic. *Id.* Also, slightly less than half (45.7 percent) of all convicted offenders had less than a high school education, 30.5 percent had a high school degree, 17.3 percent had some college, and 6.6 percent were college graduates. *Id.*

189. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 9 (2000) (noting that in 1997 the percentages of white defendants in state and federal court who had appointed counsel were 69 percent and 56.5 percent respectively; the percentages of African-American defendants in state and federal court who had appointed counsel were 76.6 percent and 64.7 percent respectively; and the percentages of Hispanic defendants in state and federal court who had appointed counsel were 73.1 percent and 56 percent respectively).

190. Professor Alschuler states that defendants "lack . . . sophistication concerning the ways in which the legal system operates," and claims that many defendants suffer either from an undue optimism regarding their trial chances and/or from a profound mistrust of the criminal justice system. Alschuler, *The*

unlike free-market contractors, defendants are not voluntary participants—their entry into the criminal justice market was mandated by virtue of their arrest—and there is no opportunity for choice among available prosecutors and judges.[191] Moreover, absent a dismissal of the pending charges, the defendant must make an election between a trial and a negotiated disposition, and this decision must be made within a limited time frame.[192] Such is rarely the case among free-market offerors who, typically, retain the option of contractual inaction, have a competitive market of available contracting parties, and have the freedom of time within which to assess their most optimal alternative.

Nor in most instances is this informational chasm appreciably mitigated by the presence of counsel. Admittedly, the retention of retained counsel can be an ameliorative influence. However, it is difficult to camouflage the compromising influences that adversely impact the quality of representation typically rendered by appointed attorneys.[193] Though most defen-

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Changing Plea Bargaining Debate, *supra* note 18, at 664–65; Alschuler, *The Defense Attorney's Role*, *supra* note 18 at 1313–14 (claiming that defendant interests in plea bargaining are compromised in order to further the interests of defense attorneys, prosecutors and judges).

191. As stated by Judge Easterbrook:

> Instead of engaging in trades that make at least one person better off and no one worse off, the parties dicker about how much worse off one side will be. In markets persons can borrow to take advantage of good deals or withdraw from the market, wait for a better offer, and lend their assets for a price in the interim. By contrast, both sides to a plea bargain operate under strict budget constraints, and they cannot bide their time. They bargain as bilateral monopolists (defendants can't shop in competitive markets for prosecutors!) in the shadow of legal rules that work suspiciously like price controls.

Easterbrook, *supra* note 77, at 1975.

192. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI. Pursuant to the Speedy Trial Act of 1974, a trial must "commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1) (2000). Also, unless the defendant's consent is obtained, the Act prohibits the commencement of a trial within thirty days "from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." 18 U.S.C. § 3161(c)(2). It should be noted, however, that certain factors can constitute excusable periods of delay within the meaning of the Act, and, thus, serve to effectively extend the seventy-day period. 18 U.S.C. § 3161(h).

193. *See supra* notes 168–173 and accompanying text.

dants, irrespective of race and ethnicity, have appointed counsel, the problems associated with indigent representation are particularly acute among African-American defendants, who rely to a greater extent upon the provision of such services.[194] Below-market compensation rates, an unfortunate accompaniment to appointive matters, create a disincentive to vigorously litigate indigent cases.[195] Instead, appointed counsel will be more inclined to devote substantial attention to those cases that yield a more profitable hourly return.[196] Though not all actors necessarily act in conformity with an economic-based utilitarian model, it is, nevertheless, a fair presumption that such influences generally encourage the expeditious resolution of indigent cases, irrespective of whether settlement best serves their indigent clients.[197] Thus, a thorough elucidation of

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194. *See supra* note 189 and accompanying text; *see also* Scott & Stuntz, *supra* note 19, at 1927 (stating that "poor and unsophisticated criminal defendants . . . surely describes a large portion of those who enter bargained-for guilty pleas").

195. *See* Alschuler, *The Defense Attorney's Role*, *supra* note 18, at 1262–67 (arguing that the poor compensation provided appointed defense attorneys serves to encourage plea dispositions in lieu of trials, even if such resolutions are not in their client's best interests).

196. The following relevant excerpt appeared in a recent New York Times article about the problem of inadequate funding plaguing the provision of indigent defense in various state court systems:

> There are three ways to provide lawyers for poor defendants.
>
> Most experts say that formal public defender offices, with their professional staffs, institutional continuity, opportunities for specialization and economies of scale, are preferable to the alternatives where there is enough work to justify them.
>
> The second alternative, appointing individual lawyers in given cases, is subject to cronyism and can be an incentive for lawyers to be less than zealous to move cases along to stay in an appointing judge's good graces, experts say.
>
> The third method, used in Quitman County, is the flat-fee contract. For $1,350 a month, Mr. Pearson [a criminal defense attorney in Mississippi] said he handled all the work that came his way, including trials and appeals, along with "travel, books, supplies, phones, secretarial, everything."
>
> "If I put too much time or money into these cases at these prices, I wouldn't be able to keep going myself," Mr. Pearson testified at a deposition in Quitman County v. Mississippi.

Adam Liptak, *County Says It's Too Poor to Defend the Poor*, N.Y. TIMES, Apr. 15, 2003, at A1.

197. Professor Vivian Berger makes the following observation:

> Among other things, the crushing caseloads of public defenders and the cut-rate fees for appointed counsel—which place a premium on in-court time and are subject to unrealistic limits—stamp a "stigma of inferiority" on the in forma pauperis bar. They also promote lackluster performance

the constitutional and contractual implications attendant to a guilty plea are flatly discouraged under the current structure and cannot be presumed to have been provided. The public defender, subject to excessive caseloads,[198] among other compromising influences, is also motivated to plea bargain cases often at the expense of other, more optimal alternative dispositions.[199] Accordingly, defendant informational interests are shortchanged to accommodate other external influences that inevitably plague even the best-intentioned public defender.

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by discouraging careful investigation and making the bargained-for guilty plea an attractive option that counsel (perhaps more than clients) find extremely hard to refuse.

Poor pay and working conditions aside, plainly the caliber of representation cannot exceed the caliber of counsel. Many members of the criminal defense bar are young, inexperienced defenders, who learn literally by trial and error when supervisory personnel lack time or incentive to train them properly. Some are older, career defenders, with a civil service mentality, who never aspired to skill in the first place. Yet another group is composed of private attorneys subsisting largely on judicial assignments, bondsmen's referrals, and courthouse hallway solicitations, who often possess the type of "know-how" distilled from years of slipshod practice. By contrast, there are "pro's," both private and public lawyers who were once able and dedicated champions but have burned out and become cynical about their work or frankly contemptuous of their clients. All this is not by way of attacking the numerous devoted and able attorneys who rise above their squalid environment and do their jobs at times superbly and always well. But their existence does not belie the circumstances I have described, which produce or permit institutional incompetence of worrisome dimensions in the defense of criminal cases.

Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 61–62 (1986) (footnotes omitted).

198. Birke, *supra* note 171, at 240:

> In the instance of a public defender on salary, the commodity of value is time. Each attorney in a public office must process a fair share of the office workload, which in turn is totally dependent on the number of arrested indigents. Public defenders tend to be as overwhelmed with cases . . . and as such, they have a large number of matters to attend to on a typical day. If they spend the entire day on a single trial, the rest of their cases languish . . . . Given such large caseloads, the overwhelmed public defender would lose lots of time by trying lots of cases, a condition that would make for a very long work week. Thus, the public defender benefits from pleas.

199. *See* Schulhofer, *Criminal Justice Discretion*, *supra* note 18, at 54 (noting that the public defender, subject to considerations such as "peer approval, promotion, salary increases, or simply job retention" might often "make rational opportunity cost calculations" and pursue plea settlements even if it runs counter to the best interests of her client).

Thus, defendants typically assess the value of trial, the various plea disposition alternatives, and the array of penal, constitutional, and contractual consequences associated with a proffered plea agreement largely in an informational vacuum. As argued previously, the sweeping amendments to Rule 11 and its appellate construction have, thus far, failed to fulfill the promise of *Boykin* and ensure the entry of knowing and voluntary guilty pleas.[200] This is due, largely, to the defendant's lack of sufficient information when making the election between trial and a negotiated disposition.[201] Similar informational concerns plague the defendant in regards to plea withdrawal. The defendant is unaware that the contractual principles applicable in the free market are largely inapplicable in the criminal context and that his plea process will be governed by a uniquely crafted set of contractual rules designed to safeguard not his interests but those of the system's most influential participants. They are typically devoid of any knowledge that they are being asked to submit a binding guilty plea in the absence of an enforceable agreement, and that their ability to revoke and pursue other, more optimal strategies will be severely constricted.

Indeed, the efficiency of the existent plea structure is dependent upon such contractual ignorance. Defendants will continue to plead guilty, and will continue to do so expeditiously and in large numbers, provided they remain uninformed about the contractual consequences attendant to their plea. Like marketplace offerors, criminal defendants who extend binding offers and who commence performance, necessarily assume substantial risks whenever such actions occur in the absence of an enforceable agreement.[202] The forgoing of more optimal trial and pretrial strategies, as well as the incurrence of tangential costs that often accompany judicial rejection of a plea agreement (e.g. loss of evidence, elongated incarceration, and increased financial and emotional tolls) are among the risks borne by defendants under the current plea system. Given this risk assignment, an increase in a defendant's pre-offer investi-

200. *See supra* notes 20–24 and accompanying text.

201. *See* Cook, *supra* note 20, at 615–640.

202. Conversely, the judiciary sustains few risks when presented with a binding plea offer. Given the open-ended time period within which a court can accept a plea agreement, the court necessarily minimizes any risks attendant to its acceptance. Accordingly, the court will incur only minimal investigational and resource expenditures.

gational costs would ordinarily be expected. In other words, a defendant faced with the prospect of a binding submission would ordinarily be expected to expend additional resources to ensure that the contemplated plea agreement was, in fact, in his best interest.[203] The resultant hesitancy would elongate plea negotiations, lessen plea system efficiency, and conceivably decrease the percentage of pleas annually entered in federal court. However, the realization of such inefficiencies cor-

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203. Consider the following from Stanford University Law Professor Richard Craswell:

> Since reliance involves both potential losses and potential gains, the efficient level of reliance—that is, the level of reliance that will maximize the total expected value of the proposed transaction—can be defined by the balance of the potential gains and losses. . . .
>
> . . . .
>
> How is efficient reliance relevant to the decision to enter into a binding commitment? If *S* [the seller] is not legally committed to *B* [the buyer], *B* may have an incentive to choose too low a level of reliance. This is because, if there is no legally enforceable commitment, reliance will make *B* more vulnerable to renegotiation by *S*.
>
> From the definition of reliance, any reliance by *B* must make consummation of the deal more important to him, since reliance increases the difference between the benefit *B* receives if *S* performs, and the loss *B* suffers if *S* fails to perform. But once consummation of the deal becomes more important to *B*, *S* can exploit this by threatening not to perform unless *B* agrees to pay her a higher price. . . . [I]f *S* is free to walk away from the deal without paying damages—in other words, if *S* is not legally committed to *B*—then *S* can credibly hold out for a larger share of *B*'s profits.
>
> *S*'s ability to hold out for a share of *B*'s profits is what distorts *B*'s reliance incentives in the absence of a binding commitment. *B must still bear all the downside risks of his reliance, for if it becomes inefficient for S to perform, then she will walk away from the deal without paying anything. . . . In short, unless B can induce S to commit, B will bear all the costs of unsuccessful reliance* but will not capture all of the benefits of successful reliance. . . .
>
> This efficient reliance argument can be viewed as a more general form of an older account of contractual commitments: an account which dates back at least as far as Hobbes. According to this account, advance commitments might be unnecessary when the exchange of goods or services is simultaneous, but an advance commitment is crucial when one party must perform before the other. *When performance is sequential, the party who performs first takes a huge risk if he or she does so without some assurance that the other party will provide the agreed-on return performance. . . .*
>
> [E]ven if the proposed exchange is to occur simultaneously, one party . . . may turn down alternatives that will be unavailable later.

Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 491–92 (1996) (emphasis added) (footnotes omitted).

relates directly with the extent of defendant learnedness. So long as defendants remain oblivious to the contractual consequences attendant to their pleas, defendants will not invest the additional investigational resources normally associated with such an inverted risk allocation. The false impression currently infecting the defendant populace will ensure conduct opposite to that expected of an offeror subject to such enormous potential adversities. Rather than engage in hesitant, more probing conduct, defendants will continue to pursue and enter guilty pleas at an expeditious rate. And, to date, defendant ignorance remains high, thereby ensuring the fluidity of the existent plea structure.

IV. PROPOSAL FOR REFORM

Pursuant to a contorted and, at times disingenuous, contractual construction, facial justification is extended to a plea withdrawal process that, in reality, bears little semblance to its proffered judicial justification. Motivated by judicial economy considerations, the *Hyde* Court and the recent Rule 11 revisions ignore the bilateral reality underlying plea agreement dispositions and mandate defendant performance wholly in the absence of an enforceable agreement. As a byproduct of this construction, the system's imposition of investigational costs and risks run counter to the assignments that typify free-market bilateral exchanges, thereby subjecting defendants to unnatural potential adversities. Moreover, the comparative bargaining and informational differentials and the lack of representational incentives inevitably contribute to, and further perpetuate, an unjust plea process; one that fails to illuminate attendant contractual realities and encourages the entry of binding pleas under a mistaken assumption about the enforceability of the plea's preconditions. To date, the plea process proceeds unimpeded, deviating noticeably from long-standing contractual norms while accepting uninformed guilty pleas at an astonishingly high pace.

By amending Rule 11, however, many of the inequities associated with the plea withdrawal process can be meaningfully abated. Through the addition of explicit language conditioning the application of Rule 11's "fair and just reason" standard to judicial acceptance of both the guilty plea and the underlying

plea agreement, proper recognition would be given to a plea agreement's bilateral underpinnings.[204] Such verbiage would essentially codify the well-entrenched contractual principle allowing an offeror to freely revoke an unaccepted offer. Admittedly, such an amendment would be somewhat more symptomatic in nature, in that the more deeply embedded resource and informational handicaps, epidemic among the defendant populace, would not be directly addressed. Undoubtedly, such problems are core issues and necessitate, among other reforms, a significant increase and reprioritization of public expenditures and resources if the informational and resource differentials, which plague the entire guilty plea process, including plea withdrawal, are to be meaningfully addressed. But even in the presence of such dysfunctions, the benefits of the amendment would constitute a significant systemic protection to defendant/offerors who seek to withdraw their unaccepted plea offers in order to pursue more optimal strategies. The protections routinely afforded offerors in the marketplace would now inure to criminal defendants and this protection would be extended irrespective of a defendant's pre-offer contractual awareness.

Rule 11 should also be amended to require defendant performance only after the court has accepted the plea agreement. Indeed, the current Rule 11 process requiring defendant performance prior to judicial assent to the proffered agreement is the equivalent of mandating offeror performance in the absence of consideration.

> The rule which requires mutuality of obligation with respect to contracts to be performed in the future where the promise of one party constitutes the sole consideration for the promise of the other arises from the inherent unfairness of enforcing a contract which requires performance by one of the parties while leaving the other party free to accept or reject performance. Both parties must be bound by the terms of a bilateral contract or neither is bound, inasmuch as a contract based upon mutual promises which are not mutually binding is lacking in consideration. The promises must be

204. United States Sentencing Guideline § 6B1.1 should also be amended. The mandate imposed upon district courts to defer acceptance of type A and type C agreements should be displaced in favor of language suggesting that a court merely consider deference. The suggestive language will grant district courts the necessary discretion to determine whether or not it is in the court's optimal interest to immediately accept a proffered plea disposition.

> concurrent and obligatory upon both at the same time, and there must be an absolute mutuality of engagement so that each party may have an action under the contract.[205]

When a defendant decides to perform and enter a guilty plea, he reasonably anticipates that upon completion of this act, the other contracting parties are obligated to perform under the agreement. He reasonably believes that when he pleads guilty and, thereby, forfeits his Sixth Amendment trial right that he is doing so not as a unilateral gratuitous act, but because he believes that he is receiving some enforceable concessions in return. Yet, only when judicial assent is provided is consideration present to support a plea agreement contract. Thus, to avoid "the inherent unfairness" referenced above, Rule 11 should reflect a process consistent with the bilateral nature of plea agreements. Specifically, when a court accepts a proposed plea bargain, then and only then should a defendant be expected to enter his guilty plea. Should the court elect to defer acceptance, then the defendant's performance should be deferred as well.[206]

Though the informational inequalities are systemic, deeply entrenched, and not subject to clear-cut solutions, another addendum to the Rule 11 mandate can help abridge this informational chasm. As part of an amended Rule 11 procedure, district courts should also be required to ensure that defendants understand the contractual consequences attendant to their plea. Specifically, prior to accepting a guilty plea, courts should be satisfied that defendants understand that they retain the right to freely withdraw their plea offers in the event the

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205. 17A AM. JUR. 2D *Contracts* § 139 (1991) (footnotes omitted).

206. The additional time necessarily incurred pursuant to such judicial deferment is excludable under the Speedy Trial Act of 1974. That Act provides, in pertinent part:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> . . . .
>
> (I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government . . . .

18 U.S.C. § 3161(h)(1)(I) (2000).

court elects to defer acceptance of the plea agreement. Conversely, should the court opt to accept the proposed disposition, the courts should ensure that defendants realize that Rule 11's "fair and just reason" standard will apply to any post-plea withdrawal attempt. As referenced earlier, the Rule 11 plea process is rife with statutory, procedural, and interpretive impediments that effectively encumber a true assessment of a defendant's knowledge and free will.[207] Thus, if this proposed Rule 11 amendment is to be optimally effective, these obstacles must be significantly lessened, if not eliminated. Nevertheless, any commencement of informational reform should, at a minimum, include this revision of Rule 11.

When assessing the propriety of the existent plea withdrawal rules as well as the proposed amendments, it is important to remember that the application of contract law must be consistent with constitutional expectations. In other words, contract law is not an independent controlling justification. Rather, it serves as a means through which individual due process protections can be assured. Even settled contractual norms must bend when they conflict with constitutional principles. For example, when a promisee detrimentally relies upon the promise of an offeror and the offeror anticipates such reliance, it is well accepted that the promisee is entitled to have the agreement enforced.[208] Due to constitutional protections and limitations, however, only a modified version of this principle applies in the plea agreement context. When the defendant and the prosecution have agreed to a proposed disposition, but the defendant's guilty plea has yet to be judicially accepted, the defendant may still require the prosecution to keep its offer of compromise open if he can demonstrate that he detrimentally relied upon the prosecution's promise.[209] On the other

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207. *See supra* notes 20–24 and accompanying text; *see also* Cook, *supra* note 20, at 615–640.

208. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."); MURRAY, *supra* note 70, § 66 at 309:

> Where the promise induces the detriment but the detriment does not induce the promise, there is no bargained-for-exchange and no consideration to support the promise. Where, however, a promisor expects a promisee to rely on the promise and the promisee does rely to its detriment, it would be unjust to refuse to enforce the promise.

209. *See supra* note 81 and accompanying text.

hand, this same right of enforcement does not inure to the prosecution irrespective of its ability to demonstrate detrimental reliance.[210] What explains the difference is that defendants are afforded certain Fifth Amendment protections, such as the privilege against self-incrimination,[211] that obviously do not extend to prosecuting entities.[212] Thus, contract law, when properly applied, should serve as a conduit through which interests in individual due process are either sustained or furthered, not as a device that detracts from these constitutional expectations.

The suggested amendments to Rule 11 propose a process that is contractually consistent, fundamentally fair and balanced, and protective of individual due process. The proposals reflect a fair and accurate application of contract law that, in turn, preserves the constitutional protections that undergird the legitimacy of the criminal justice process. Indeed, the Supreme Court has made repeated references to the importance of preserving public confidence in this arena.[213] The import of

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210. *See*, Easterbrook, *supra* note 77, at 1974 ("Courts refuse to enforce promises to plead guilty in the future, although the enforcement of executory contracts is a principal mission of contract law.").

211. The Fifth Amendment provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself. . . .

U.S. CONST. amend. V.

212. As the Third Circuit explained:

> When, however, the defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process guarantees. This basic estoppel principle was recognized by the Court in *Santobello*; when a defendant pleads guilty in reliance on an agreement with the prosecutor, that promise must be fulfilled. *Santobello* arguably could be extended to cover the situation where the defendant has not yet entered the plea, but has relied on the bargain in such a way that a fair trial would no longer be possible.

Gov't of Virgin Islands v. Scotland, 614 F.2d 360, 365 (3d Cir. 1980) (footnote omitted).

213. Cooper v. Oklahoma, 517 U.S. 348, 364 (1996):

> With the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a "fundamental component of our criminal justice system"—the basic fairness of the trial itself.

(quoting United States v. Cronic, 466 U.S. 648, 653 (1984)); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 811 (1987) ("Furthermore, appointment of an interested prosecutor creates an appearance of impropriety that

this objective should not be discounted, for it is critical to the effective functioning of the system that its processes be fair in fact, as well as in appearance. If the criminal justice system sincerely intends its expression of homage to this fairness notion and seeks to promote a plea process that truly respects individual due process, then it must enact reformative measures that reflect these aspirations. The amendments to Rule 11 proposed herein further these objectives and would allow the federal courts to promote curative measures that are both publicly perceptible and substantively meaningful.

V. CONCLUSION

The Supreme Court's reference to guilty pleas as a "grave and solemn act to be accepted only with care and discernment"[214] is, indeed, an apt pronouncement, for at such moment the defendant alone has decided to forego many constitutional rights, including his Fifth Amendment privilege against compelled incrimination[215] and his Sixth Amendment trial right.[216] The admission of guilt is for the defendant alone to decide. No one else is so empowered during the pretrial phase. And if the expression of graveness and solemnness is sincerely intended, then meaningful review of the legitimacy of the plea process and all its attendant rules, including those pertaining to plea withdrawal, should be expected if not encouraged.

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diminishes faith in the fairness of the criminal justice system in general."); Lockhart v. McCree, 476 U.S. 162, 174–75 (1986):

> We have never attempted to precisely define the term "distinctive group," and we do not undertake to do so today. But we think it obvious that the concept of "distinctiveness" must be linked to the purposes of the fair-cross-section requirement. In *Taylor*, . . . we identified those purposes as (1) "[guarding] against the exercise of arbitrary power" and ensuring that the "commonsense judgment of the community" will act as "a hedge against the overzealous or mistaken prosecutor," (2) preserving "public confidence in the fairness of the criminal justice system," and (3) implementing our belief that "sharing in the administration of justice is a phase of civic responsibility."

(quoting Taylor v. Louisiana, 419 U.S. 522, 530–31 (1975)); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.").

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

215. *See supra* note 211.

216. *See supra* note 107 and accompanying text.

Rule 11's recent codification of *Hyde* is difficult to digest given the Court's dubious statutory interpretation, its misguided constitutional and contractual construction, its judicial economy underpinnings, and the far-reaching and adverse impact the current rules have had upon the defendant populace. It is important to remember that, unlike free-market contractors, defendants are subject to coercive influences; their pending criminal charges mandate an election between trial and settlement with punishment as an appendage to either option.[217] Moreover, defendants must make this election in the face of considerable resource, bargaining, and representational differentials. Yet, with seeming indifference to such realities, the *Hyde* Court ignores well-established contractual norms and advances a strained statutory interpretation with the apparent aim of furthering its own interests in judicial economy. In this bilateral arrangement, the Court and the federal rules deem it just to grant the courts time to ponder, while holding the feet of defendants—the system's most vulnerable participants—to the ground. The existent plea withdrawal rules, thus serve as a necessary anchor to a plea process that is deceptive in design and inequitable in outcome; a structure that craftily entices defendants to enter binding guilty pleas under the guise that an enforceable contract is in place.

As evidenced herein, the defendant class suffers from enormous disadvantages throughout the guilty plea process—with the decision in *Hyde* and the Rule 11 revisions among the latest indicia of this disturbing reality. It is undeniable that the defendants are the real losers in this process. But, until meaningful reform occurs, the efficient operation of the existent plea structure will proceed without disturbance—and judicial economy will remain the winner.

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217. *See* Scott & Stuntz, *supra* note 19, at 1919–21 (acknowledging that the plea bargaining process is epitomized by at least some level of coercion; however, the authors conclude that the extent of duress sustained by criminal defendants is insufficient to prohibit plea bargaining on contractual grounds). This article does not purport to address the contractual legitimacy of "plea bargaining."