

# The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations

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*This Article, the most comprehensive study of judicial participation in plea negotiations since the 1970s, reveals a stunning array of new procedures that involve judges routinely in the settlement of criminal cases. Interviewing nearly one hundred judges and attorneys in ten states, we found that what once were informal, disfavored interactions have quietly, without notice, transformed into highly structured best practices for docket management. We learned of grant-funded problem-solving sessions complete with risk assessments and real-time information on treatment options; multicase conferences where other lawyers chime in; settlement courts located at the jail; settlement dockets with retired judges; full-blown felony mediation with defendant and victims; felony-court judges serving as lower court judges; and more. We detail the reasons these innovations in managerial judging have developed so recently on the criminal side, why they thrive, and why some judges have not joined in. Contrary to common assumptions, the potential benefits of regulated involvement of the judge include more informed sentencing by judges, as well as less coercion and uncertainty for defendants facing early plea offers. Our qualitative evidence also raises intriguing hypotheses for future research.*

## Introduction

In our criminal justice system of negotiated guilty pleas, the job description of the trial judge remains in flux. Should the judge work alongside the negotiating parties in settling criminal cases? The debate has escalated in the past few years. Recently, for example, the Committee that drafts amendments to the Federal Rules of Criminal Procedure narrowly defeated a proposal that would have allowed the limited participation of

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judges in plea negotiations,<sup>1</sup> while Massachusetts moved in the other direction, adopting a new rule authorizing and regulating the same practice.<sup>2</sup>

Unfortunately for policy makers hoping to make informed decisions, the rhetoric about judicial participation in plea bargaining far outstrips the little empirical information that exists about the practice—and that information mostly dates from the 1970s. Back then, when plea bargaining was just emerging from the shadows, Professor Albert Alschuler revealed in a definitive field study that judges engaged in this back-room horse trading with a wink and a nod, or in secret.<sup>3</sup> Forty years later, the phrase “judicial participation in plea bargaining” still carries with it the same nefarious image—trial judges cajoling and threatening defendants to take the deal rather than pay the consequences of asserting the right to trial.<sup>4</sup> With only a smattering of efforts since the 1970s to document what judges actually do,<sup>5</sup> the assumption that nothing has changed is understandable. But it is wrong.

In this Article we report surprising findings from nearly one hundred detailed interviews about judicial participation in negotiations in felony cases, interviews we conducted with trial judges, prosecutors, and defense attorneys in ten states.<sup>6</sup> We learned that judicial involvement in negotiations is now institutionalized and embedded in the very structure of many court systems in ways never dreamed of in the 1970s. With no fanfare from scholars, “managerial judging,” the philosophy that transformed civil litigation in the late twentieth century,<sup>7</sup> has finally taken hold in criminal litigation, more than thirty years later. Along with this shift in philosophy,

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1. Minutes, Advisory Comm. on the Fed. Rules of Criminal Procedure 3–9 (Nov. 4–5, 2014) [hereinafter Minutes, Advisory Comm. on Criminal Rules]. The Federal Rules have prohibited judicial involvement since 1975. Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, 89 Stat. 370–71 (approving a precursor of FED. R. CRIM. P. 11(c)(1)).

2. See MASS. R. CRIM. P. 12 (as amended Jan. 29, 2015, effective May 11, 2015). The amendment was adopted “to promote fair and efficient plea bargaining and to establish rules to govern the previously unregulated and widely varying practice of lobby conferences.” *Id.* (Reporter’s Notes).

3. See Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1087–99 (1976) [hereinafter Alschuler, *The Trial Judge’s Role*] (describing “forthright” off-the-record judicial bargaining as well as “[s]ystems of . . . [i]ndirection and [c]ajolery”). For related studies, see Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter Alschuler, *The Defense Attorney’s Role*] and Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

4. See, e.g., *United States v. Davila*, 133 S. Ct. 2139, 2149 & n.5 (2013) (discussing a magistrate judge’s conduct in encouraging a defendant to plead guilty).

5. See *infra* notes 49–51 and accompanying text.

6. The law in each of these states—California, Florida, Kansas, Maryland, Michigan, Missouri, North Carolina, Ohio, Oregon, and Utah—shares two characteristics: it permits at least some type of judicial participation in plea negotiations, and it includes sentencing rules, such as voluntary or presumptive sentencing guidelines or other limits, that could reduce uncertainty about the sentences that judges will impose. See *infra* subpart I(B) and section III(B)(4).

7. For the classic treatment, see generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

the judge's participation in negotiations has matured into a standard managerial tool. What once were informal, sometimes-illicit interactions between judges and parties in criminal cases have in many courts evolved into highly structured best practices for docket management.

After detailing these developments, we turn to what might explain them.<sup>8</sup> Our interviews uncovered two sets of explanations. First, the revolution in information technology in state courts since the 1990s, together with the budget pressures of the recent Great Recession, have jump-started new forms of managerial judging in criminal cases, including the institutionalization of the judge's involvement in plea negotiations.<sup>9</sup> The technology to track and report the daily progress of a criminal case leaves trial judges exposed: court administrators can now hold individual trial judges accountable for each tiny variation in docket speed and related administrative cost.<sup>10</sup>

In addition, we learned that judges and lawyers value judicial contributions to negotiations for many reasons other than efficiency.<sup>11</sup> Our interviewees turned upside down some of the well-worn objections to judges' involvement. Information deficits and potential coercion of the defendant, for example, raised concerns only for a small portion of our interviewees.<sup>12</sup> Instead, defense attorneys, prosecutors, and judges alike explained to us how the judge's involvement often mitigated the uncertainty and compulsion a prosecutor's early offer can present.<sup>13</sup> Prosecutors accepted the judge's input, sometimes grudgingly, as an additional route to settlement; meanwhile, many defense attorneys felt confident that they could use the judge's presence to benefit their clients, while shielding them from coercion.<sup>14</sup>

The interviews also upended some of our own expectations about this practice. For example, we thought that judicial sentencing guidelines or other structured-sentencing laws might shrink the parties' uncertainty about an expected sentence and, with it, their appetite for judicial input in their negotiations. But structured-sentencing laws generally did not push judges away from negotiations. Where judicial involvement allowed participants to avoid compliance with unwelcome legal requirements, those constraints in sentencing law may have had the opposite effect.<sup>15</sup> We also thought that the advent of victims' rights and impact statements might deter judges from discussing sentences with the parties early on. Instead, a sentence that the parties and the judge hammer out together may include more of the victim's

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8. *See infra* Part III.

9. *See infra* subpart III(A).

10. *See infra* section III(A)(2).

11. *See infra* subpart III(B).

12. *See infra* sections III(B)(5)–(7).

13. *See infra* sections III(B)(4)–(6).

14. *See infra* sections III(B)(2)–(3).

15. *See infra* subsection III(B)(4)(a).

input than a stipulated sentence that the parties tender to the judge as a done deal.<sup>16</sup> Some prosecutors told us that victims, too, value the certainty a judge's input provides.<sup>17</sup> The judge's participation provided many other benefits for these participants as well—some of them completely missed in previous scholarship—which for them outweighed any potential costs.

We report here one further feature of the negotiation landscape in these ten states. Although judicial involvement in plea negotiations is now built into the framework of some courts in the states we examined, the practice is not universal, even where the law makes it possible.<sup>18</sup> In two states we studied, rules leave a narrow opening for judges to work with lawyers before a plea is tendered, but judges generally have not grasped that opportunity.<sup>19</sup> In the other states where judges contribute more frequently, some judges jump into negotiations with gusto while others stay on the sidelines.<sup>20</sup> We share several explanations that lawyers and judges in the field offered for this variety in practice. Some interviewees worried that judges in smaller districts, once assigned to settlement duties, would later need to preside over the trial of that same case.<sup>21</sup> Others discussed the political vulnerability or inexperience of some judges, judicial personality, and relationships between the bench and bar.<sup>22</sup>

This unprecedented view of contemporary judicial participation in plea negotiations provides a reality check for outdated assumptions about how judges and lawyers actually negotiate. Our study also raises dozens of intriguing hypotheses for future research—a major advantage of qualitative research. Part I of this Article reviews past empirical portraits of judicial negotiation activity and describes the methodology of our field study. We then catalog in Part II our most important findings: the various institutionalized forms of judicial involvement in plea negotiations. Part III examines why these new features of criminal-case processing have taken root and why courts now treat judicial negotiation—once a covert, ad hoc activity—as a routine best practice. Subpart III(A) discusses how recent trends in court administration and information technology have facilitated these new forms of judicial negotiation: better case-tracking and cost-accounting measures have made judges more committed than ever to clearing their dockets quickly. Subpart III(B) details other reasons why these innovations may be thriving, some of which run contrary to received wisdom: according to our interviewees, the judge's involvement during negotiations

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16. See *infra* notes 303–07 and accompanying text.

17. See *infra* note 303.

18. See *infra* Part IV.

19. See *infra* notes 385–88 and accompanying text.

20. See *infra* notes 363–66 and accompanying text.

21. See *infra* notes 373–74 and accompanying text (discussing constraints on rural courts generally).

22. See *infra* notes 367–84 and accompanying text.

gives the judge a chance to add new charging and sentencing ideas and to correct the attorneys' legal errors before the guilty plea hearing; it gives the prosecutor a way to manage police, victims, and public perceptions about the sentence; it often gives the defendant a more lenient sentence; and it gives attorneys, defendants, and victims more certainty about the likely outcome—among other benefits. Part IV describes the flip side—those judges who do not use these managerial techniques, along with their explanations for holding out.

Finally, in Part V, we speculate about the long-term implications for criminal justice when judges involve themselves, openly and as a matter of institutional routine, as negotiators. On balance, we believe routine or selective judicial participation in plea negotiation can add value, particularly in jurisdictions with multiple judges and when carefully limited in scope. In many of the courts that have normalized judicial involvement, the rules regulating the process and the participants involved take steps to prevent known risks such as coercion of the defendant or sentencing decisions based on incomplete information. With its ill effects neutralized, the many benefits of judicial input—a counterweight to intransigent prosecutors, a safeguard against overstretched defense counsel, and a source of more complete information for defendants during negotiations and for judges deciding sentences—can be compelling.

#### I. Filling the Empirical Void

There is no shortage of scholarship rehashing the *normative* arguments over the judge's appropriate role in plea bargaining. Both in the 1970s and

'80s<sup>23</sup> and more recently,<sup>24</sup> this commentary concentrated on two somewhat competing claims about the effects of judicial participation: that it could

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23. See Graham Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 760 (1981) (characterizing judicial involvement in plea bargaining as an “impermissible pressure[]” on a defendant to plead guilty); Thomas D. Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509, 514–18 (1971) (asserting that judicial involvement leads to “a more informed and meaningful plea” and discounting the coercion concern); Stephen R. Schlesinger & Elizabeth A. Malloy, *Plea Bargaining and the Judiciary: An Argument for Reform*, 30 DRAKE L. REV. 581, 587–93 (1980–1981) (outlining and answering the standard objections in arguing for institutionalized judicial involvement); Michael A. Hiser, Comment, *State v. Byrd: Judicial Participation in Plea Bargaining—Fundamental Fairness?*, 8 OHIO N.U. L. REV. 212, 219–22 (1981) (arguing for a defendant’s constitutional right to counsel in plea negotiations with judicial involvement); Daniel Klein, Note, *Judicial Participation in Guilty Pleas—A Search for Standards*, 33 U. PITT. L. REV. 151, 156 (1971) (discussing the coercive potential of judicial involvement); Lowell B. Miller, Comment, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L.J. 241, 254–55, 254 n.93 (1974) (arguing that, while the judge should have discretion to reject a negotiated plea, direct involvement in negotiations should be avoided as “rais[ing] many constitutional and practical difficulties”); Ursula Odiaga, Note, *The Ethics of Judicial Discretion in Plea Bargaining*, 2 GEO. J. LEGAL ETHICS 695, 721–23 (1989) (rearticulating a proposal of mandatory judicial involvement so as to “afford some of the protections derived from trial”); Note, *Plea Bargaining: The Case for Reform*, 6 U. RICH. L. REV. 325, 329–33 (1972) (criticizing the “officially nonexistent” contemporary practice of plea bargaining as failing to protect the constitutional rights of the accused); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 296–98 (1972) (proposing adoption of a preplea conference managed by judge).

24. See RICHARD L. LIPPKE, *THE ETHICS OF PLEA BARGAINING* 16–28 (2011) (proposing judge-run “settlement hearings,” with “waiver rewards” to defendants who settle, and discussing attendant incentive and ethical issues); Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 572–79, 587–96 (2015) (surveying state rules regarding judicial involvement and making normative recommendations); Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1069 (2016) [hereinafter Bibas, *From the Ground Up*] (recommending judicial involvement in part to counterbalance “prosecutors’ unilateral offers and threats”); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2542–43 (2004) [hereinafter Bibas, *Outside the Shadow of Trial*] (supporting increased judicial involvement as a corrective of agency cost problems); Isaac Borenstein & Erin J. Anderson, *Judicial Participation in Plea Negotiations: The Elephant in Chambers*, 14 SUFFOLK J. TRIAL & APP. ADVOC. 1, 29–33 (2009) (making specific recommendations “designed to aid in ensuring a fair and just resolution of criminal cases through plea agreements, with the appropriate participation of a judge”); Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1423 (2004) (arguing for a bright-line prohibition on judicial involvement); Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEXAS L. REV. 2023, 2049–53 (2006) (suggesting increased judicial scrutiny of negotiated pleas as a means of curtailing prosecutorial discretion in plea bargaining); Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL’Y REV. 61, 64–66 (2015) (outlining a “thought experiment” for the federal system: “letting defendants request from the court, early in the case, two indicated sentences: one for a guilty plea and another for a post-trial sentence . . . [after engaging] in litigation similar to a sentencing proceeding, with the help of a pre-plea presentence report”); Rachel Broder, Comment, *Fair and Effective Administration of Justice: Amending Rule 11(c)(1) to Allow for Judicial Participation in Plea Negotiations*, 88 TEMP. L. REV. 357, 376–82 (2016) (asserting that judicial involvement would restore integrity to the plea bargaining process); Jennifer Marquis, Casenote, *State of Connecticut v. D’Antonio: An Analysis of Judicial Participation in the Plea Bargain Process*, 25 QUINNIPIAC L. REV. 455, 494 (2006) (arguing for the minimal involvement of judges in plea negotiations).

coerce a defendant into pleading guilty, and that it could moderate prosecutorial excess that would otherwise go unchecked.

Our qualitative study investigates these and other familiar hypotheses, providing a close look at how judicial participation actually works in the twenty-first century in multiple states. But this study goes well beyond reporting information that could help policy makers evaluate these familiar contentions. Unlike any previous discussion of judicial participation, empirical or not, we also investigate how the most significant changes over the last thirty years in the institutional context for judicial negotiations—including developments in information technology, sentencing law, victims' rights, and court administration generally—have affected what judges do.<sup>25</sup>

#### A. *Past Empirical Studies*

Considering the amount of commentary on judicial participation in plea negotiation, empirical studies of the practice are surprisingly scarce. The most comprehensive research dates from almost half a century ago, when Al Alschuler ventured out into the criminal courts in ten cities, determined to see for himself the shadowy world of plea bargaining.<sup>26</sup> At the time, accounts of criminal “compromises” or “bargain justice” were based on limited efforts to collect lawyer anecdotes and a handful of appellate opinions,<sup>27</sup> as well as reports of a statistical shift away from trials toward pleas.<sup>28</sup> To find out more,

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25. A few articles, however, have noted the connections between judicial negotiation and the more central role of the judge in an inquisitorial system. See Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 560 (1997) (describing various types of bargaining in German criminal proceedings); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 266, 284–85 (2006) (comparing due process standards of adversarial and inquisitorial systems and calling for a stronger role for judges in plea colloquies); Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 720–723 (2014) (citing studies of inquisitorial judging and suggesting improvements to the plea bargaining process).

26. See *supra* note 3 and accompanying text.

27. See generally Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927) (discussing various ways in which criminal cases are resolved through compromise and not taken to jury trial); Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928) (surveying the increased rate of plea deals against the backdrop of prosecutorial discretion); Donald J. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 780 (1956) (describing trends in plea bargaining based on interviews with parties involved); Ruth G. Weintraub & Rosalind Tough, *Lesser Pleas Considered*, 32 J. CRIM. L. & CRIMINOLOGY 506 (1942) (reviewing prosecutor statements in New York explaining decisions to endorse guilty pleas to lesser offenses); Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1964) (examining prosecutorial and judicial inducements on defendants to plead guilty, in light of the constitutional requirements of knowing and voluntary waiver). For an exceptional empirical effort to explore typical prosecutorial actions and motives, see Dominick R. Vetri, Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 app. at 896–908 (1964).

28. See, e.g., DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 231 (Frank J. Remington ed., 1966) (“The guilty plea process,

Alschuler talked with a wide range of practicing lawyers and judges about their precise roles in the plea-negotiation process and their motives for avoiding trial.<sup>29</sup> His in-depth interviews uncovered a world where judicial negotiation was largely covert—an unsanctioned coping mechanism judges used on an unsystematic basis to manage a growing volume of cases.<sup>30</sup>

He found that some judges remained on the sidelines, ceding to prosecutors the power to determine sentences.<sup>31</sup> Others included a predictable trial penalty in the sentences of any defendant who failed to reach an agreement, but never directly voiced this expected plea discount to the negotiating parties.<sup>32</sup> Forthright judicial negotiation was a third approach, where the judge, when asked, held a chambers conference with both lawyers, and after hearing what they had to say about the case, announced what sentence he would impose if the defendant pleaded guilty.<sup>33</sup> The most common approach, however, was for judges to bargain through “[h]ints, [i]ndirection and [c]ajolery.”<sup>34</sup> Such judges might signal displeasure with the prosecutor’s inflexibility, hoping to persuade the prosecutor to make a more favorable offer, or opine about a likely sentence for the defendant if he were to plead guilty.<sup>35</sup>

With one exception,<sup>36</sup> Alschuler found that participating in negotiations was the individual choice of each judge rather than a formalized aspect of case processing.<sup>37</sup> When he asked why individual judges involved themselves in the negotiations, the overriding reason he heard was efficiency—“the need to process large caseloads with seriously inadequate resources.”<sup>38</sup> Judges were aware of their caseload statistics, and those who did not move their cases at an acceptable pace faced pressure from the presiding judge and the parties to catch up.<sup>39</sup> Judicial bargaining could also give the prosecutor and judge a forum for deciding who would take political

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frequently occurring and of great administrative significance, has grown without much formal attention . . .”).

29. Alschuler, *The Trial Judge’s Role*, *supra* note 3, at 1060–61.

30. *Id.* at 1059–60, 1099.

31. *Id.* at 1061–62.

32. *Id.* at 1076.

33. *Id.* at 1087–88.

34. *Id.* at 1092.

35. *Id.* at 1092–93, 1096.

36. *Id.* at 1090 n.98. In Brooklyn state court at the time, a felony case would be scheduled immediately after indictment for a five-minute session in the court’s “conference part,” which had a full-time judge. *Id.* Cases that did not resolve by agreement at this stage would be assigned to another judge in the court’s “trial part.” *Id.*

37. *See id.* at 1099–1103 (describing the factors that influenced judges to participate in plea negotiations).

38. *Id.* at 1099.

39. *Id.* at 1100–02.



responsibility among the voters for a less severe sentence.<sup>40</sup> Alschuler, who generally favored the abolition of plea bargaining, criticized efforts by the organized bar and mainstream legal academy of that era to eradicate the judicial participation they found unseemly.<sup>41</sup> The real effect of formal restraints on negotiation, he maintained, was to create a system of “studied indirection” that left defendants confused and deprived them of a valuable counterweight to the exercise of sentencing authority by prosecutors.<sup>42</sup>

The only empirical study that has rivaled the scale of Alschuler’s groundbreaking work arrived right on its heels. Professors John Ryan and James Alfini surveyed felony and misdemeanor trial judges nationwide about their typical methods of involvement in plea negotiations, then supplemented those surveys with interviews and data from fifteen states.<sup>43</sup> Their findings, published in 1979, reinforced one aspect of Alschuler’s thesis: judicial bargaining remained exceptional, a tool that a few judges in some places used episodically.<sup>44</sup> More than two-thirds of the judges declared that they were not involved in the negotiations at all and simply ratified the agreement of the parties at a later guilty-plea hearing.<sup>45</sup> Only 7% of responding felony judges stated that they took the most active role of “recommend[ing]” dispositions to the parties, while 20% said that they “review[ed]” proposals from the parties.<sup>46</sup> Judges in urban courts were more likely to get involved in negotiations than judges in rural districts, as were judges with more confidence in their own negotiating skills.<sup>47</sup> The surveys also confirmed that

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40. *See id.* at 1096–97 (noting the political pressure on judges not to undercut the prosecutor’s recommendation too often).

41. *Id.* at 1153–54 (characterizing these reform efforts as “not only hypocritical but harmful”); *see also* FED. R. CRIM. P. 11(e)(1) advisory committee’s note to 1974 amendment (outlining the mainstream position); A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3(1) (AM. LAW INST. 1975) (providing that “the court shall not participate” in plea discussions); STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a) (AM. BAR ASS’N, Approved Draft 1968) (same); ABA Comm. on Prof’l Ethics, Informal Op. C-779 (1964) (“The judge, of course, should not be a party to any arrangements in advance [of a plea] for the determination of sentence.”).

42. Alschuler, *The Trial Judge’s Role*, *supra* note 3, at 1153–54.

43. John Paul Ryan & James J. Alfini, *Trial Judges’ Participation in Plea Bargaining: An Empirical Perspective*, 13 LAW & SOC’Y REV. 479, 484–85 (1979) (twenty jurisdictions in fifteen states).

44. *See id.* at 485–87 (discussing variations in judicial involvement in the plea bargaining process). Three smaller empirical studies, roughly contemporaneous with Alschuler’s work, each focused on only a single jurisdiction. *See* MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 7, 147, 198 n.25 (1978) (noting that some Connecticut trial judges offered to “pre-try” cases to facilitate negotiations); LYNN M. MATHER, PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL-CASE DISPOSITION 5, 31–33 (1979) (describing Los Angeles judges “chamberizing” cases during negotiations); James Klonoski et al., *Plea Bargaining in Oregon: An Exploratory Study*, 50 OR. L. REV. 114, 117, 129 (1971) (surveying Oregon prosecutors; 59% said that a judge would never discuss sentencing).

45. Ryan & Alfini, *supra* note 43, at 485–86.

46. *Id.* at 486.

47. *Id.* at 493, 497. The factors that might influence the choice of an individual judge to engage in bargaining became clearer in a later study of North Carolina trial courts by Allen Anderson. *See*

procedural rules or appellate decisions that flatly banned judicial involvement were quite effective: reports of judicial involvement in states with such bans were notably less frequent than in other states.<sup>48</sup>

Since these studies of 1970s practice, despite the extraordinary changes in criminal justice over the past four decades, few empirical studies on the topic have appeared.<sup>49</sup> The only recent empirical study of more than one jurisdiction was published a decade ago by Jenia Iontcheva Turner, based on interviews and questionnaires of judges from Germany and two states: Florida and Connecticut.<sup>50</sup> Leading commentaries continue to rely on 1970s sources for accounts of what judges actually do in plea bargaining.<sup>51</sup>

### B. Methodology

To help fill the widening gaps in knowledge about what judges do during negotiations and why, we chose to conduct in-depth, semistructured

Allen F. Anderson, *Judicial Participation in the Plea Negotiation Process: Some Frequencies and Disposing Factors*, 10 HAMLINE J. PUB. L. & POL'Y 39, 43–47 (1989) (describing “informational,” “environmental,” and “situational” factors affecting judicial involvement). One judge explained his involvement in plea negotiations as an effort “to get more complete information to render a more adequate sentence.” *Id.*

48. Ryan & Alfini, *supra* note 43, at 489, 492.

49. From time to time, legal scholars canvassing the law have created updated *legal* inventories of those states with rules, statutes, and appellate opinions that encourage, tolerate, limit, or ban judicial participation in plea negotiations. For recent examples, see generally Batra, *supra* note 24 (surveying state rules regarding judicial involvement), and Borenstein & Anderson, *supra* note 24 (describing rules regarding judicial involvement both nationally and in Massachusetts). Mention should also be made of articles using experimental evidence from psychology to draw inferences about the possible performance by judges under a more expansive role in negotiations. See Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 207–10 (2007) (arguing that judicial involvement can “mitigat[e] the distorting effects” of a prosecutor’s cognitive biases); Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1973–86 (2013) (discussing the implications of empirical findings regarding cognitive bias and procedural justice); Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1701–15 (2013) (suggesting that judicial involvement would reduce anchoring-effect distortions); Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 461 & n.217–18 (2008) (proposing judicial involvement to overcome fairness-heuristic distortions to the perceived legitimacy of plea-negotiation outcomes).

50. See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 199–200 (2006) (arguing for a greater judicial role in plea negotiations). This well-constructed study stressed differences between the adversarial and inquisitorial traditions. *Id.* at 213–14. Turner concluded that the moderate forms of judicial involvement she found in Florida and Connecticut made positive contributions to the fairness of criminal justice. *Id.* at 243–47, 252–56. Other recent empirical investigations have focused on single jurisdictions. See, e.g., Anderson, *supra* note 47, at 43 (North Carolina); R.L. Gottsfeld & Bob James, *Criminal Settlement Conferences On Demand: Worth It?*, ARIZ. ATT’Y, March 2014, at 26, 32 (Maricopa County, Arizona).

51. See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 42 & 189 n.27 (2012) (citing HEUMANN, *supra* note 44); GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 129–33 & 301 n. 74, 302 n.81 (2003) (citing MATHER, *supra* note 44 and Alschuler, *The Trial Judge’s Role*, *supra* note 3).

interviews of both judges and lawyers, as Alschuler did, rather than counting responses to formal questionnaires containing preset questions general enough to apply in all jurisdictions. This design permitted us to tailor questions to the idiosyncrasies of each state's system, to ask open-ended questions, and to discover and pursue surprising new topics (which, it turned out, were plentiful).<sup>52</sup> We wanted to learn not only what judges actually do when they participate in deal making in criminal cases but also when that practice started and what judges and attorneys see as the pros and cons of that approach today, given the revolution in sentencing law and other developments in state criminal justice since the 1970s. And we wanted to reach a large number of states, not just one or two.

Anticipating that legal bans succeeded to some degree,<sup>53</sup> we focused on states in which the law does not absolutely prohibit judicial involvement in plea negotiations.<sup>54</sup> From among these states, we selected those that use guidelines or other legal constraints on judicial sentencing discretion: California, Florida, Kansas, Maryland, Michigan, Missouri, North Carolina, Ohio, Oregon, and Utah.<sup>55</sup>

We chose states with some form of structured sentencing for at least two reasons. First, of all the trends in state criminal justice since the 1970s, restrictions on the sentencing discretion of judges is one of the most prominent.<sup>56</sup> These limitations increase the predictability of sentencing, so

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52. See TOM WENGRAF, *QUALITATIVE RESEARCH INTERVIEWING: BIOGRAPHIC NARRATIVE AND SEMI-STRUCTURED METHODS* 112–13 (2001) (discussing lightly structured, narrative-based interviews).

53. See *supra* note 48 and accompanying text (showing that such bans were effective in the 1970s).

54. Although Batra, *supra* note 24, at 573–75, categorizes Kansas and Utah as states that prohibit judicial participation in negotiation, and Broder, *supra* note 24, at 370, categorizes Utah as such, we read the law in those states to leave room for the practice. UTAH R. CRIM. P. 11(i)(1) sets a general rule against judicial participation, but Rule 11(i)(2) creates an exception for stipulated sentence agreements, allowing the judge to “indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.” In Kansas, the statute neither prohibits nor condones judicial participation. See KAN. STAT. ANN. 22-3210 (2007). Appellate opinions recognize that the practice sometimes occurs, but caution against a judge remaining involved in a case after participating in the negotiations. See, e.g., *State v. McCray*, 87 P.3d 369, 372–73 (Kan. Ct. App. 2004) (describing it to be “better practice” for judges to avoid plea discussions, but affirming a conviction in a case where a judge was involved).

55. See, e.g., CAL. PENAL CODE § 1170 (West 2016); FLA. R. CRIM. P. 3.704; FLA. R. CRIM. P. 3.992; KAN. STAT. ANN. § 21-6804 (West 2015); MD. CODE ANN., CRIM. PROC. § 6-208 (LexisNexis 2008); MICH. COMP. LAWS ANN. § 777.21 (West 2016); MO. ANN. STAT. § 557.011 (West 2016); N.C. GEN. STAT. ANN. § 15A-1340.13 (LexisNexis 2015); OHIO REV. CODE ANN. § 2929.12 (West 2016); OR. REV. STAT. ANN. § 137.700 (2015); UTAH CODE ANN. § 77-18-4 (LexisNexis 2012). For additional details about our selection of these jurisdictions, see the Methodology Appendix for this Article, available upon request from the authors.

56. See generally LAFAVE, ISRAEL, KING & KERR, 6 CRIMINAL PROCEDURE § 26.3 (4th ed. 2015).

they might reduce the demand for the judicial input during negotiations.<sup>57</sup> If judicial negotiation thrives even in these dry conditions, we imagine that it would flower in any jurisdiction that authorizes the practice. Second, information about judicial participation in guidelines states could inform the ongoing debate about amending the Federal Rules of Criminal Procedure to allow the practice in the federal courts.<sup>58</sup>

In order to obtain a broader view of state practice, as well as to explore whether the differences between urban and rural jurisdictions reported in the 1970s persisted today, we sought interviewees within each state from a mix of urban, suburban, and rural counties. We completed a total of ninety-seven interviews, with a minimum of three judges, three prosecutors, and three defense attorneys from each state.<sup>59</sup> We also spoke with court administrators and others knowledgeable about criminal dockets and plea-negotiation practices generally. The interviews took place by telephone. We promised anonymity to each interviewee: identifications would include only state, position (i.e., prosecutor, defense attorney, trial judge), and, on occasion, the type of jurisdiction (i.e., large urban, smaller).<sup>60</sup>

We formulated initial hypotheses to pursue in our interviews based upon earlier research and commentary. For example, we were interested in learning whether judges get involved in negotiations to improve their docket control, and whether defense attorneys favor it (and prosecutors disfavor it) as a counterweight to prosecutorial power. We also wanted to learn why some judges decline to participate or defer more often to the parties on sentencing deals. Potential concerns keeping them out, we thought, could include political vulnerability, a lack of information needed for sentencing, or the potentially coercive effects on defendants.

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57. See, e.g., *Item #2 – 2006-16 – Proposed Adoption of the Amendment of Rules 6.302 and 6.310 of the Michigan Court Rules: Hearing Before the Mich. Sup. Ct.* (2008) (statement of Timothy Baughman, Chief of Research, Training, and Appeals for the Wayne County Prosecutor’s Office) [hereinafter *Statement of Timothy Baughman*] (testifying in favor of an amendment that would bar judicial participation in plea bargaining in Michigan: “With sentence guidelines that are now mandatory . . . that’s enough information for the parties without the judge’s involvement to make an intelligent decision about a plea.”); see also Bibas, *Outside the Shadow of Trial*, *supra* note 24, at 2533 (suggesting that guidelines benefit defendants by reducing uncertainty).

58. See Minutes, Advisory Comm. on Criminal Rules, *supra* note 1, at 3–9 (discussing and rejecting a rules amendment that would have allowed trial judges to participate, on a limited basis, in plea negotiations); Broder, *supra* note 24, at 358 (proposing a similar amendment); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/656C-65HE>] (advocating that federal courts follow Florida and Connecticut in allowing judicial involvement).

59. See Methodology Appendix tbl.1 (on file with authors) (summarizing the number of interviews in each state).

60. The anonymity extends to our citation form. In this Article, interviews are coded by state abbreviation, a letter indicating the interviewee’s position (P, D, or J), and an interview number. For example, “CA-J-1” indicates a judge from California. In addition, if an unidentified interviewee is referenced by a pronoun, we use “he” and not “she” in order to preserve anonymity.

Each interview covered the interviewee's professional experience, the structure of the local courts, the sentencing options normally available to the judge, the charge bargains or sentence bargains that the parties typically discussed during their negotiations, the timing and location of plea discussions, who was present, the statements and actions of judges and lawyers during these discussions, and the typical sequence of events. We discussed the information normally available to the parties and the judge at that stage and how the parties selected cases in which to solicit the judge's opinion. We talked to our interviewees about the objectives that prosecutors, defense attorneys, and judges hoped to achieve by involving the judge in plea negotiations, as well as their concerns about the practice.<sup>61</sup>

Although this is the most comprehensive study of state judicial participation in plea negotiation since the 1970s, it is subject to the same limitations that affect any research based on interviews. We should remain cautious when drawing inferences. Interviewees might have consciously or unconsciously distorted actual events, the sample is small, and practices and participants change over time. Moreover, because practices are so idiosyncratic and varied, it is likely that very different practices could be discovered in other localities within a state and in states not included in this study. Finally, interviewees may consciously or unconsciously respond in ways that tend to justify rather than question what they do, or to overlook the downsides of a familiar practice.<sup>62</sup> Despite these caveats, what we uncovered is new—and essential to informed policy making. The extent of these practices within each state, a point on which our study provides only sketchy information, is not as important as the fact that these practices exist, and that we now better understand the experiences and motivations of those who engage in them.

## II. Institutionalized Judicial Involvement: Judges as Caseflow Managers, Criminal Style

Civil procedure scholar Judith Resnik long ago noted the sea change in the work of judges in civil cases: a fundamental shift from the passive umpire, adjudicating facts and law only when asked, to the proactive, even aggressive, manager of a growing caseload.<sup>63</sup> Our study revealed that the same shift is taking place in criminal cases; it is just taking longer. And just as courts that embrace proactive management of civil dockets have not

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61. The interview guide is available from the authors upon request. Additional interview quotations supporting the footnotes throughout this Article appear in the Supplemental Interview Material Appendix, also available upon request from the authors.

62. On insider incentives to "plead cases out quickly," see BIBAS, *supra* note 51, at 30–34 & 182–84 nn.1–7, 53–54 & 196–98 nn.52–55 and Bibas, *Outside the Shadow of Trial*, *supra* note 24, at 2470–86.

63. See Resnik, *supra* note 7, at 376–78.

returned to their former, more passive approach, criminal courts are unlikely to abandon the new techniques we describe here.<sup>64</sup>

In this Part we detail the surprising variety of new, more aggressive approaches to managing criminal cases in the ten states we examined, many of which include the judge in plea negotiations. All of these novel procedures share a goal: to resolve the cases that will not be tried as early in the process as possible.

#### A. *Mandatory Early Meetings with the Judge*

Among the many policies we encountered, one of the more modest was mandating judicial conversations with parties about the status of settlement early in the process, in every case. As one attorney put it, “[s]ettlement conferences are part of the machinery.”<sup>65</sup> Scheduling the conference accelerates disposition by forcing the prosecutor to decide what, if anything, to offer on the case, and by forcing both parties to articulate their positions earlier than they otherwise might.<sup>66</sup> Routine, early conferences are incorporated into normal case processing in at least some counties in eight of the ten states we examined.<sup>67</sup>

For example, several counties in California conduct “pre-preliminary hearings” at which the judge discusses possible early disposition and probable sentence, based on the facts represented to the court by the parties.<sup>68</sup>

64. See generally David Steelman, *Caseflow Management*, in NAT’L CTR. FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS 2008*, at 8 (Carol L. Flango et al. eds., 2008) (discussing the evolution and continued importance of proactive caseflow management).

65. OR-D-2; see also Interview with William Raftery, Knowledge & Info. Servs. Analyst, Nat’l Ctr. for State Courts (Nov. 11, 2015) (“Everybody gets pretrial conference no matter what.”).

66. See, e.g., CA-P-2 (“[Scheduled conferences] force the sides to speak to another . . .”).

67. For example, one Florida prosecutor noted that the court “sets arraignment automatically to move things along,” and that the arraignment sees “negotiations happen in open court with the judge involved.” FL-P-1. “We make a plea offer at arraignments in roughly seventy-five percent of cases with lower penalties.” *Id.* This prosecutor also described another “status calendar” called a “sounding”: “It is kind of like a pretrial conference but it happens earlier with more emphasis on the plea negotiations so far.” *Id.*; see also OHIO COURT OF COMMON PLEAS, STARK COUNTY, R. 17.10(B) (“A date certain will be assigned for pre-trial at the arraignment . . .”). Even where an early conference is mandated, the attorneys might request to meet with the judge beforehand. See OH-J-2 (describing a process of “immediately mark[ing] on the file what I’m going to do, or am willing to do,” with the bailiff communicating these “first impression[s]” to counsel, who can request a conference). Other states that authorize judicial participation in plea negotiations, not included in our study, have also shifted to mandatory conferences. See, e.g., MASS. R. CRIM. P. 11. Just as the early articulation of negotiating positions changes the pretrial dynamic between the parties, the debiasing effects of articulating a position are useful in the search-warrant context. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1614 (2012) (recommending “a real warrant requirement” to force police to “stop and think”).

68. See CAL. SUPER. COURT, ALPINE COUNTY, R. 6.3.7 (mandating a “Pre Preliminary Conference (PPX),” to be set “generally two weeks after arraignment on complaint”); CAL. SUPER. COURT, KERN COUNTY, R. 5.2.1.2 (“At the pre-preliminary, and later at the readiness conference, the court will attempt to resolve the cases pending . . .”); *People v. Silva*, 42 Cal. Rptr. 2d 120, 121 & n.1 (Cal. Ct. App. 1995) (describing the pre-preliminary hearing process in Contra Costa County);

We learned that at least one county schedules judicial “interventions” for every case that has not settled in a timely way.<sup>69</sup>

In Michigan, mandated status conferences in felony cases began about ten years ago in some counties.<sup>70</sup> By 2014, the state had adopted a new court rule that required, within two weeks of arraignment, a conference including “discussions regarding a possible plea agreement.”<sup>71</sup>

While the details vary from place to place, these meetings, whether mandatory or based on a party request, all share some common features. Typically the only people present are the judge and the attorneys, although in a few jurisdictions a staff member who tracks cases for the judge,<sup>72</sup> or a probation officer to discuss available programming, will be on hand.<sup>73</sup> The defendant and the victim are generally not present.<sup>74</sup>

JOHN GREACEN & FREDERICK MILLER, CAL. ADMIN. OFFICE OF THE COURTS, FELONY HEARING AND TRIAL DATE CERTAINTY STUDY 19 (2011) (reporting that all but two courts in the study dispose of most felony cases at the pre-preliminary hearing, with some courts disposing of up to 75% of felonies at that stage).

69. One prosecutor described the process:

It was a way to force the sides to speak to another and talk before the intervention. . . . [The workload d]oesn't leave a lot of time during business hours to sit and talk about cases, so generally these conversations [between lawyers] would be in the hallway, or a phone call, sometimes an email. By creating [an] intervention hearing, that hearing coming up would force that communication to occur. And [the prosecutor] would have to justify the offer to the judge. If someone's position is unreasonable, the judge's role was to raise an eyebrow to that. CA-P-2.

70. MI-D-1.

71. MICH. CT. R. CRIM. P. 6.108(C); An Act to Amend 1927 PA 175, 2014 Mich. Pub. Acts 63, 64; *see also* MICH. STATE COURT ADMIN. OFFICE, CASEFLOW MANAGEMENT GUIDE 21 (2013) [hereinafter MICH. CASEFLOW MGMT.] (stating that screening conferences “would be appropriate for circuit court civil or criminal felony matters and some special proceeding cases”); MI-P-3 (“Felony settlement conferences are now set within a month of the preliminary hearing, because the State Court Administrator’s Office is putting . . . pressure on judges . . . to move these cases more quickly.”).

72. *See* OH-P-2 (“The only people present during the pre-trial conference are the judge, the defense attorney, the prosecutor, and the bailiff. The bailiff tracks all of the criminal cases for the judge . . .”).

73. *See* Philip H. Pennypacker & Alyssa Thompson, *Realignment: A View from the Trenches*, 53 SANTA CLARA L. REV. 991, 1025 (2013) (reporting that, in some jurisdictions, probation officers regularly sit in on plea discussions); *see also* Joan Petersilia et al., *Voices from the Field: How California Stakeholders View Public Safety Realignment* 145 (Nat’l Inst. of Justice, U.S. Dep’t of Justice, Award No. 2012-IJ-CX-0002, 2014) (“[J]udges have to know much more, often on a daily basis, about the capacity constraints in their local jails and the programs offered by probation.”).

74. *See, e.g.*, MD-P-2 (“I would be uncomfortable having the defendant present. He will be in shackles, need security. There is a level of intimacy in these conversations, they don’t lend themselves to having the defendant present. He could blurt something out. The defense attorney would hate that.”). *But see* OR-D-3 (“It is rare that I’ve had [a] client blurt out something harmful. Maybe once or twice, not that big of a deal. I’ll prep them before, I’ll say, ‘You can’t blame this on the victim,’ advice like that.”). Variations on who was in attendance were reported in Ohio. *See* OH-J-1 (“Sometimes the police officer is present at the conference. . . . The client is present in the hallway—the sheriff brings them over for the day—for consultation. . . . A Victim Advocate employee is also present in the meeting.”). These mandatory routine meetings for every case are

Client involvement in these conferences, however, is the norm in Oregon, and is also reported in some places in Missouri and North Carolina, at least where these discussions take place in open court.<sup>75</sup> The defendant's presence appears to serve two goals: it allows the defendant to hear directly from the judge,<sup>76</sup> and it "humanizes" the defendant for both the prosecutor and the judge.<sup>77</sup> Defendants who participate are protected from use of their statements later.<sup>78</sup>

At the meeting, if the parties have not yet agreed on a possible resolution, they usually present a short summary to the judge of important evidence, the defendant's criminal history, and the likely scoring under sentencing guidelines, if any, for the charges.<sup>79</sup> After listening to these summaries, the judge responds with language along the lines of, "Based on the information I have now, this is what I would give him if he decides to plead guilty."<sup>80</sup> When the parties float a proposed sentence deal, the judge indicates whether it is acceptable.<sup>81</sup> The conferences are generally short, but

different than the more selective mediations described in subpart II(D), *infra*, which often do involve the defendant and the victim.

75. See MO-D-1, NC-P-1, and OR-D-3, discussing client involvement.

76. See MO-D-1 ("I think the preference of the client is that it all happen in open court, because they want to hear what the judge has to say. . . . [They] feel more invested in the process if they are there for that.").

77. See OR-D-3 ("I want him to hear from the judge. And I want the prosecutor to lay eyes on my client, and see that he's a real human being. If my client is smart or likable, it will help.").

78. See OR-P-3 ("What the defendant says is not usable by state except or unless he said in [the conference], for example, 'I did this and I'm sorry,' then took the stand later and said 'I didn't do it.' If that happened, we can use it to impeach."); OR-D-3 ("I can't think of a time that something the client said at a conference undermined the defense. And the judge will say to him that the state can't use what you say at trial unless you were to take the stand and testify to something that [was] inconsistent."). For further discussion of the benefits of involving the defendant, see Batra, *supra* note 24, at 595–96 (citing Alschuler, *The Trial Judge's Role*, *supra* note 3, and Turner, *supra* note 50) and Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 426–32 (2008) (recommending plea negotiation process norms).

79. See, e.g., CA-P-2 (explaining how the prosecutor presents the facts and the offer, the defense responds, and the judge then "put[s] a finger on the scale"); NC-P-1 (describing a similar process).

80. See MI-P-5 ("[I]t is not a promise, but a suggestion, that if the information stays the same and the guidelines score is as represented to me, I would impose a sentence of X, or a cap, or a range."); FL-J-1 ("I need some legally recognized enumerated reasons to go below that minimum, and I have to articulate that reason in the sentence order."). One prosecutor described alternating scenarios. On the one hand, if the attorneys agree: "After explaining the background and the evidence problems to the judge, we all concluded that the judge would accept the plea at the hearing, assuming nothing new appeared in the case—although the judge didn't say this in so many words." NC-P-1. On the other hand, "a griping session for the defense lawyer": "Then the judge gives a reaction, saying which parts of the evidence seem to carry the most weight. . . . We're both spit-balling our case, trying to understand how a newcomer might see the case with fresh eyes." *Id.* For a description of a conference in California that mirrors the descriptions we heard from the field, see Pennypacker & Thompson, *supra* note 73, at 1020–22.

81. This indication may be more or less explicit depending on the judge. See NC-P-1. One interviewee reported a different negotiating dynamic in victimless or institutional-victim cases. See FL-P-2 ("[T]he conversation does not take the form of a real negotiation. The judge asks the



they could take anywhere from thirty seconds to an hour or more.<sup>82</sup> Some judges actively mediate through shuttle diplomacy, extending the negotiations for a longer time, while others take a much more passive approach.<sup>83</sup>

Some judges continue to do this off the record in chambers, at least some of the time, as was the practice fifty years ago.<sup>84</sup> But the discussion in many of these states is now on the record, whether it be in a courtroom, at the bench, or recorded in chambers.<sup>85</sup> The location of the conference appears to be a judicial preference, not a set practice.<sup>86</sup> Some interviewees noted that bench conferences are quicker,<sup>87</sup> or that the public and victims can be suspicious of the less transparent meetings in chambers.<sup>88</sup> Others favored chambers or

defendant, ‘Have you considered pleading to the bench?’ Then if the defense does ask, the judges say that they will beat the state’s offer.”).

82. OR-D-2.

83. OR-D-2; *see also* OR-D-3 (“Oftentimes the judge will ask the prosecutor to step out of the room. I’ll say, ‘This case deserves probation and here’s why,’ and I’ll have a foot of documents about my client’s brain injury and why incarceration would be wrong, and the judge would say, ‘That’s great, nice meeting you,’ then he’ll meet with the prosecutor separately in chambers.”). This approach, with its emphasis on information management and confidentiality, is sometimes known in negotiation literature as the “caucus” method. *See generally* Christopher W. Moore, *The Caucus: Private Meetings That Promote Settlement*, 16 *MEDIATION Q.*, Summer 1987, at 87.

84. *See* NC-P-1 (reporting chambers conferences when both parties want to give the judge a heads-up and when the defense seeks to get a better deal, but not when the defense lawyer has requested help with a difficult client); OH-J-1 (“It happens in chambers and is not transcribed. . . . If an agreement [is] reached, everyone moves right away into the courtroom for the plea hearing.”); OR-D-3 (stating that settlement conferences are not on the record); *see also* *People v. Hambeck*, No. C078974, 2016 WL 6518906, at \*4 n.3 (Cal. Ct. App. Nov. 3, 2016) (“[U]nreported chambers conferences, if held at all, should be immediately put on the record when the parties return to the courtroom to avoid faded recollections . . . and misunderstandings . . .”).

85. *See, e.g.*, CA-D-1; FL-D-1 (“You can specifically request a conference in chambers and still put the discussion on the record.”).

86. *See* MI-P-1 (“Some do it at [the] bench, some in chambers.”); NC-P-1 (reporting that a judge might indicate in open court, on the record or off, but no longer in chambers); OR-D-3 (“Depends on the judge’s preference.”); *see also* *Bryce v. Superior Court*, 252 Cal. Rptr. 443, 448 (Cal. Ct. App. 1988) (holding, when a judge bowed to a prosecutor’s threat not to attend settlement conferences unless they were held in open court, that the judge must make his own conference policy, and that, regardless of where the judge holds such conferences, “[a]ny litigant who willfully disobeys an order to attend a settlement conference is subject to appropriate sanctions”). More than one North Carolina defense attorney related that the proximity of judicial chambers to the courtroom made a difference. As one described it, in one building, “judicial negotiations were supported by the architecture”; in another, where judges reached their chambers by private elevators, there was “lots less day-to-day conversation. . . . That creates less opportunity to engage the judges.” NC-D-2. As another put it, “[t]he judges in small counties are a little more involved when the attorneys have more access to them, just walking in the back halls of the courtroom.” NC-D-3.

87. *See* MO-P-3 (“[N]o time to do this in chambers in advance.”); MI-D-4 (“Ninety-five percent of the time the defense attorney will say, ‘Judge, may we approach?’ then there will be discussions on the record at the bench.”).

88. *See* MI-D-4 (“Now we never go into chambers, we used to all the time. This county has made a commitment to transparency. We have these private quasi-conversations at the bench with the defense attorney, sometimes . . . off the record, . . . but not common. . . . If everybody agrees, we immediately go back and put it on the record what we just discussed at the bench.”); FL-D-1

more private meetings, which allow attorneys to avoid surprising the judge with an unusual deal (“[t]hey don’t want you to drop it on ’em in court”)<sup>89</sup> and permit candid discussion of sensitive issues such as mental health conditions that could be an embarrassment to the defendant’s family,<sup>90</sup> information that the defendant is cooperating in another case,<sup>91</sup> or evidentiary problems.<sup>92</sup> Some judges who said they included defendants in these discussions also said they would never speak with a defendant off the record; even if they meet with counsel in chambers, they go into the courtroom to speak with the defendant.<sup>93</sup>

It surprised us to learn that in several states, some judges hold these conferences in a group setting.<sup>94</sup> These judges meet with the attorneys for all of the cases on the day’s docket all at once: both retained and appointed counsel, as well as the public defender and the prosecutor.<sup>95</sup> The lawyers will crowd into chambers, or sometimes the jury room.<sup>96</sup> As each attorney works through her case with the prosecutor and the judge, the other attorneys listen, now and then chiming in.<sup>97</sup> Because there is no shuffling back and forth to

(“Experienced judges usually resort to the informal conferences in chambers more often than the younger judges . . . . A new judge comes into the division, and she wants everything on the record—‘Let’s talk out in the courtroom, not back in chambers.’”)

89. MO-D-1; *see also* MD-D-3 (stating that conferences are held in open court on the record with the defendant there, but that it is “not uncommon that the defendant and prosecutor would go back into chambers . . . ahead of time so that when they are on the record there are no surprises”).

90. *See* MO-J-1 (stating normally he talks in open court, but sometimes discusses cases in chambers with the lawyers in cases “with mental health issues,” and puts it on the record when it “could be an embarrassment to the family, could be that the person is uncontrollable in the court room. Or it could be someone who has snitched.”).

91. *See id.*; MD-J-2 (noting that although most conferences are on the record in the courtroom, sometimes an attorney will request to talk to the judge in advance in chambers if the defendant cooperated or if the agreement is for a below-guidelines sentence).

92. *See* MD-P-1 (“We can subtly convey this case is not great, and the judge gets it. Couldn’t do that in open court. . . . The defense attorney knows—he’s got discovery. I’m not fooling him.”); NC-D-1 (“We might have an offer of proof area, some touchy area where we want to prevent touchy testimony from coming into evidence.”). Several interviewees indicated that conferences in serious cases are held in chambers, while less serious cases proceed in open court. *See* NC-P-2 (“If the case is more complex, it is more likely that this consultation will happen in chambers so that we can have an easier and fuller discussion. Certainly if we have a big case, like a murder . . . we’ll take our discussion back into chambers.”); FL-P-1 (“For the less serious cases, the judge might address possible changes to the charges or the sentence in open court.”).

93. OR-J-3; *see also* OH-D-2 (“Victims might talk to the judge, but only rarely and always in open court.”).

94. *See, e.g.*, FL-D-1 (“In [one county], judges will sometimes invite back to chambers multiple attorneys in multiple cases and discuss them all at the same time in chambers.”).

95. *See* CA-D-4 (“Typically all attorneys are in chambers sitting around, they talk about one case at a time. People from other cases will chime in.”).

96. *Id.*; MI-J-3.

97. One California judge described the scene:

It is one case at a time with everybody listening. . . . The front benchers are right in front of my desk, I’m listening to them, the other people are in the back. . . . [Interruptions] usually come[] up in a good-natured way . . . the defense lawyers will

the bench or in and out of chambers, this process enables the judge to deal with one case right after another, which could save time. But judges who do this reported liking it for other reasons: “There was hydraulic pressure to be reasonable when everyone is sitting there listening.”<sup>98</sup> Also, it helps the inexperienced attorneys (and, presumably, their clients). As one judge explained, “Someone’ll come in and say, ‘Guidelines? What Guidelines?’ At that moment, I’ll say to someone experienced in the room, ‘Could you please talk to ’em?’ And the experienced attorney will get out the book and walk ’em through it. It is a collective endeavor.”<sup>99</sup>

Some interviewees reported that during the settlement conference the defendant is easily accessible nearby, or that defense attorneys secure the client’s approval of terms or a sentence range in advance, so that the plea can be accepted and sentence entered immediately after the consultation with the judge.<sup>100</sup> Others indicated that the plea is usually postponed so that the defense attorney can speak again with the client before the plea was entered.<sup>101</sup>

Of course, judges can confer with counsel early in a case without participating in plea negotiations. Some states that prohibit judicial participation in negotiations have adopted early settlement conferences to provide the parties an incentive to negotiate earlier.<sup>102</sup>

#### B. *Differentiated Case Management: “Early Disposition” or “Settlement” Dockets*

In some counties with multiple judges, early conferences happen as part of a more formal process called Differentiated Case Management (DCM), which tracks cases that are more likely to settle to specialized dockets or to

say to the prosecutor, “Come on!,” or they’ll say, “Gee, Judge, you gotta do something.” And I’ll say, “I’m not looking to take a vote here!”

CA-J-3.

98. MI-J-3; *see also* Marc L. Miller & Samantha Caplinger, *Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions*, 41 CRIME & JUST. 265, 280–82 (2012) (commenting on the group dynamics of Yavapai County’s “Case Resolution Conference,” or “Sharkfest”).

99. MI-J-3. “Sometimes, when either side is being unreasonable, the attorneys would chime in and say, ‘Come on now, nobody ever gets that!’ . . . [The] public defender goes last. He’d have more cases . . . . And of course he has the most experience . . . .” *Id.*; *see also* CA-D-4 (“You have a mini trial in two minutes. Both sides in an adversarial process. . . . [J]udges do comment on the evidence. They’ll say, ‘This is serious,’ or, ‘This is not really serious.’”).

100. *See* CA-J-3; OH-J-1 (describing a practice of immediate sentencing once an agreement is reached).

101. *See* CA-P-1; CA-P-2 (“[T]here is another conversation between defense attorney and client, then if it’s going to resolve [it] would happen at the next meeting.”).

102. *See, e.g.*, WASH. REV. CODE § 9.94A.421 (“The court shall not participate in any [plea agreement] discussions.”); WASH. SUPER. COURT CRIM. R. 4.5 (mandating omnibus hearings and accelerated disclosure to encourage early disposition of cases through settlement).

judges other than those who handle cases headed for trial.<sup>103</sup> DCM has long been an approved method for improving docket efficiency in civil cases, but has taken longer to gain a foothold in criminal cases.<sup>104</sup> Early experiments with DCM in criminal cases began in the late 1980s as part of a federally funded study in four states, one of which, Michigan, was included in our study.<sup>105</sup> Free technical assistance for creating DCM programs in criminal courts became available in 2010.<sup>106</sup>

Most of the states we studied included counties that had adopted separate dockets for “settlement” cases, or had set timelines for resolving most cases by plea that were different from the timelines set for cases that went to trial.<sup>107</sup> In Oregon, for example, early disposition programs were authorized by statute in 2001.<sup>108</sup> In our study we found one county where an estimated 30 to 50% of cases are resolved at arraignment or shortly thereafter as part of Early Case Resolution (ECR).<sup>109</sup>

In other Oregon counties, thirty-five days after arraignment the attorneys must appear in court and declare the status of their negotiations.<sup>110</sup> On this “call” day the presiding judge assigns cases headed for trial to a trial judge, cases in which the parties request a conference to one of the judges

103. See VICTOR E. FLANGO & THOMAS M. CLARKE, REIMAGINING COURTS: A DESIGN FOR THE TWENTY-FIRST CENTURY 52–53 (2015) (defining DCM and demonstrating both the benefits and fallbacks of the process). For a collection of DCM resources, see *Caseflow Management Resource Guide*, NAT’L CTR. FOR ST. CTS., <http://www.ncsc.org/Topics/Court-Management/Caseflow-Management/Resource-Guide.aspx> [<https://perma.cc/UP4H-FP8K>].

104. See FLANGO & CLARKE, *supra* note 103, at 52–53 (praising DCM for efficiently resolving cases, but cabining that praise to the civil-case context).

105. See THOMAS A. HENDERSON ET AL., DIFFERENTIATED CASE MANAGEMENT 1 (1990) (describing Detroit’s application of DCM in this early test, “treat[ing] cases generically for management purposes and us[ing] DCM simply to accelerate the identification of cases which could be settled by plea”). For a more recent study of DCM practice, see MAUREEN SOLOMON, IMPROVING CRIMINAL CASEFLOW 7 (2008) (“[J]udges who conduct a case management conference within about 21–28 days after superior court arraignment have concluded that they obtain earlier dispositions, with better overall use of their and the lawyers’ time. . . . [It] should be clear that *effective, early identification of cases least likely to require a trial can result in earlier disposition of most of the caseload.*”).

106. See generally Special Caseflow Management Improvement Initiative, BUREAU JUST. ASSISTANCE (2010), <https://nacmnet.org/sites/default/files/CCTAP%20Project%20Announcement%20%20Logos%20YD%20CFL%20MGT%201%2025%2010.pdf> [<https://perma.cc/MH27-WCKB>].

107. See MO-J-4 (reporting that it is not uncommon for lawyers to say at arraignment, “Judge, put this on the settlement docket [before the administrative judge] instead of the trial division”; that about a third of the cases stay in the criminal division for settlement while the rest go to the trial division; and that, in addition to the settlement docket before the administrative judge there is an early disposition docket).

108. OR. REV. STAT. § 135.941 (2015).

109. As one attorney described the process in this county, a judge with specialized administrative duties arraigns everybody; if a case is not settled at arraignment, it is assigned to one of several judges who hear pretrial conferences, and if not settled there it is assigned to a trial judge. OR-D-1. For a similar process, see OR. CIR. CT., CLATSOP COUNTY, R. 7.007.

110. See, e.g., OR-J-1.

available to discuss a negotiated settlement that day, and cases with defendants ready to plead guilty without a conference to the judges ready to take pleas and sentence immediately.<sup>111</sup> If the settlement conference successfully resolves a case, the settlement judge will generally take the plea and sentence the defendant that same day.<sup>112</sup> If the case is not resolved, it is set for trial and assigned a trial judge.<sup>113</sup> By delaying the assignment of the trial judge until after the settlement conference, these mechanisms avoid the statutory requirement to obtain written consent from both parties before the judge assigned to try the case can do anything in negotiations other than concur with a proposed disposition.<sup>114</sup> With this system, the vast majority of felony defendants—80 to 90%—plead guilty and are sentenced on this call date.<sup>115</sup>

Local rules authorizing early disposition for felonies appeared in some California counties as early as 1999.<sup>116</sup> Explained one prosecutor, on plea days, for each of the approximately fifty cases up, the parties “ask the judge to continue the case, or to settle the case, or will say, ‘We need

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111. *Id.* The presiding judge determines which case goes to which judge, but the parties can pick their own judge and contact the judge for a meeting before the thirty-five-day call if they prefer. *Id.* For a description of the system in one Oregon county, see generally LANE CTY. CIRCUIT COURT, PRELIMINARY REPORT ON ENHANCEMENTS TO CRIMINAL CASEFLOW MANAGEMENT (2006) (describing a 2006 pilot project on case management in which the county was one of six judicial districts to participate); see also OR. UNIF. TRIAL CT. R. 7.010 (outlining the early disposition process for Oregon circuit courts).

112. OR-D-1.

113. *Id.* In at least one county, parties cannot get a trial date unless they have first completed a settlement conference with a judge. See OR-D-2 (“Six or seven years ago the presiding judge decided to make this mandatory, the lawyers complained and griped, and as it turns out mandating settlement conferences was a good idea because some judges have skills that help cases settle that didn’t look like they would settle.”).

114. OR. REV. STAT. § 135.432 (2015); see also OR-J-3 (noting that before judicial settlement conferences were mandatory, the judges had to get waivers, but when mandatory conferences were adopted, trial judges were no longer assigned until much later in the process); OR-D-3 (“There would always be a different judge for trial.”). For more on the assignment of a different judge for trial, see *infra* note 354 and accompanying text.

115. See OR-J-1 (“So a huge bulk of cases settles on the day of that thirty-five-day call and the ones that don’t will go to trial.”); OR-D-2 (reporting that “[a]bout eighty to ninety percent [of] felonies are settled before thirty-five-day call, between the lawyers,” without the judge’s help, in order to get the case on the morning docket and avoid waiting for a settlement conference later). To assure that this is possible, court rules may require the defendant’s presence. See, e.g., OR. CIR. COURT, MULTNOMAH COUNTY, R. 7.055(10) (“All out-of-custody felony defendants shall appear on all Call dates, unless the Presiding Judge directs otherwise.”).

116. See CAL. SUPER. COURT, KINGS COUNTY, R. 520(A) (allowing the defendant to ask for an early-disposition hearing); CAL. SUPER. COURT, IMPERIAL COUNTY, R. 4.1.4 (requiring counsel to “be prepared to discuss the offer or other possible disposition with the Court” at the first pretrial conference, and mandating a second formal attempt at early disposition “following compliance by all parties with discovery rules”); see also EDWARD A. RUCKER & MARK E. OVERLAND, 1 CAL. CRIM. PRACTICE: MOTIONS, JURY INSTR. & SENT. § 14:4 (4th ed. 2016) (“Most courts, at the urging of the Judicial Council, have created ‘Early Disposition Courts.’”).

intervention.”<sup>117</sup> Clerks in other counties assign each case to a “home court” judge who meets with the parties shortly after arraignment to settle the case prior to preliminary hearing, before a trial judge is assigned, in a courtroom located at the jail.<sup>118</sup> In still other counties, lower grade felonies are referred to retired judges for settlement before preliminary hearing.<sup>119</sup>

Similar arrangements turned up in Maryland, Missouri, North Carolina, and Florida.<sup>120</sup> In addition to separating the judges who take pleas, some Maryland courts have created “preliminary disposition dockets,”<sup>121</sup> or “resolution conferences” staffed by retired judges whose sentencing practices are generally acceptable to both sides.<sup>122</sup> Some counties in Missouri have adopted “Early Disposition Dockets,”<sup>123</sup> while urban counties in North Carolina alternate an “Administrative Term” with a “Trial Term” to sort out

117. CA-P-3.

118. CA-J-3; *see also* CA-J-2 (“[I]f it can’t be resolved [in home court, it will be] shipped to a trial court judge. . . . The judges in the home court . . . , they get down to what a case is worth and how to value it.”). Elsewhere, low-level felonies are sent to the “master calendar,” where a case is either settled after the judge indicates the sentence that would be imposed if the defendant pleads guilty as charged, or assigned out to another judge for a preliminary hearing. CA-D-2.

119. *See* CA-D-4 (describing a settlement court at the pretrial facility where a retired judge oversees an early settlement process for “first-, second-, third-time offenders doing less serious things . . . . [T]he idea was you pair a reasonable defense attorney with a reasonable prosecutor and a reasonable, settlement-oriented judge, and try [to] get a case settled,” also noting settlement court is not for cases that would be strikes or are serious felonies).

120. Other judicial-participation states not in our study have also adopted early disposition practices. *See* ARIZ. R. CRIM. P. 17.4(a) (“[T]he court may, in its sole discretion, participate in settlement discussions by directing counsel . . . to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice.”); MASS. SUPER. COURT STANDING ORDER No. 2-86 (2009) (“At anytime within 45 days of the pre-trial conference, counsel may advance the case for an early disposition . . . .”); MASS. R. CRIM. P. 11(a) (“[T]he court shall order the prosecuting attorney and defense counsel to attend a pretrial conference on a date certain to consider such matters as will promote a fair and expeditious disposition of the case.”); N.M. 2D JUD. DIST. COURT R. LR2-400 (detailing the local process for assigning cases to case-management calendars); LOC. ADMIN. R. OF LUBBOCK COUNTY, TEX. 5.15 (outlining policy goals, including the establishment of “effective and fair procedure for the timely disposition of criminal cases”); LOC. R. CRIM. PROCEEDINGS, TARRANT COUNTY, TEX. 5.27 (“The last case setting before trial is the Status Conference (SC). Meaningful plea negotiations are encouraged.”).

121. MD-J-2.

122. MD-J-3; *see also* MD-P-1 (“That’s why we use retired judges. . . . They can hear what they want to hear, if the plea breaks down . . . they won’t be trying the case.”); MD-J-2 (describing how the court started “a criminal settlement docket” with “two judges with expertise” in settling cases sitting “at least a day a week” to “dispose of cases that were going to plead as early as possible,” noting that most courts “use retired judges for settlement conferences because if it doesn’t work out, another judge can try the case,” and relating that settlement conferences help avoid day-of-trial settlements: “That costs a lot; the jurors are already there.”).

123. *See* MO-J-4 (reporting that defendants for “EDD” are selected by a department of corrections employee who identifies those charged with low-level crimes, like “petty theft, tampering, anything victimless,” who can’t make bond). *But see* MO-D-4 (reporting that switching out judges from phase to phase was tried and abandoned in his jurisdiction, because there was more accountability, presumably for case disposition efficiency, when one judge had the case the entire time).

cases for settlement as early as possible.<sup>124</sup> And in Florida, various circuits have adopted formal early disposition tracks for felony cases by court rule.<sup>125</sup>

Tracking permits courts to allocate judicial resources efficiently and strategically, assigning to settlement duty those judges who are the most effective at helping parties reach agreement early. In one county in Michigan, for example, the judges assigned to handle arraignments on the less serious felonies are “the most lenient sentencers.”<sup>126</sup> Attorneys have “an incentive to deal in front of them” because waiting to negotiate at a later stage means that “you might get Darth Vader as your judge.”<sup>127</sup> An Oregon defense attorney reported that if the parties on the “call” date request “active assistance” from the presiding judge, the presiding judge would avoid assigning a judge for settlement who would be a “bump on a log” and assign instead a judge who would work to resolve the case.<sup>128</sup> Or the parties might ask for “a judge who would be bound” if they want assurance that the judge will agree to impose a stipulated sentence that is more lenient than usual.<sup>129</sup>

Granted, these tracking practices are not restricted to judicial-participation states.<sup>130</sup> But states that do institutionalize distinct tracks—with separate judges for settlement and for trial—can make judicial participation in negotiations easier and less risky. Tracking not only permits presiding judges to match each judge’s duties to that judge’s strengths, but it also reduces concerns that the judge who discusses settlement could retaliate later or improperly use information learned during the settlement process should negotiations fall through.

### C. Regulation of the Settlement Discussion and Its Consequences

In addition to mandatory meetings and case tracking, the increasingly institutionalized nature of judicial participation also finds expression in the

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124. NC-P-2; *see also* NC-J-2 (stating that “all but one or two” of the division’s judges preside over “Administrative Settings,” while a nearby urban jurisdiction assigns the Administrative Terms to “specialists” on account of the volume of cases).

125. *See* FLA. 20TH JUD. CIR. ADMIN. ORDER NO. 3.25 (2007) (adopting separate case tracks for “Expedited,” “Standard,” and “Complex” cases, with the presumptive track for a case “primarily based upon the lead charge in the charging document”); FLA. 9TH JUD. CIR. ADMIN. ORDER NO. 2009-05 (2009) (“The Criminal Intake Bureau of the Office of the State Attorney, shall screen and designate the cases that meet the criteria for the Special Felony Case Management Program. . . . The State Attorney shall prepare a guideline scoresheet for the case management conference.”).

126. MI-J-1.

127. *Id.* Similarly, we heard from California practitioners that early disposition courts are staffed with experienced judges who were “reasonable”—that is, willing to agree to lower sentences and not opposed to going below the prosecutor’s offer. CA-D-1; CA-D-4.

128. OR-D-2.

129. *Id.*

130. For a state-by-state guide to the use of DCM technology in state trial courts, *see State Court Organization*, NAT’L CTR. FOR ST. CTS., tbl.60a, [http://data.ncsc.org/QvAJAXZfc/](http://data.ncsc.org/QvAJAXZfc/.opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document%255CBM223)  
[opensoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&](http://data.ncsc.org/QvAJAXZfc/opensoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document%255CBM223)  
[bookmark=Document%255CBM223 \[https://perma.cc/7WX2-NNUQ\]](https://perma.cc/7WX2-NNUQ).

case law, statutes, and court rules, which spell out what can and cannot take place during these discussions with parties. Years of experience with the practice have provided lawmakers and courts with rich information about how to protect against abuses while maintaining the advantages that judges and parties seek. Statewide regulation signals statewide acceptance as well, unifying and disseminating a practice that would otherwise be restricted to a subset of counties.

1. *Authorized Scripts*.—Case law in several states now details what judges can and cannot say in their conversations with the parties. In 1993, the Supreme Court of Michigan, in *People v. Cobbs*,<sup>131</sup> held that a trial judge, upon the request of a party, may state on the record the sentence the court believes would be appropriate if the defendant was convicted as charged, based on the information then available to the court.<sup>132</sup> The defendant may then agree to plead guilty in reliance upon that sentence preview and has the right to withdraw the plea if the judge later decides the sentence must exceed the earlier valuation. The rules for “*Cobbs* evaluations” have been refined over the years,<sup>133</sup> codified into a state court rule,<sup>134</sup> and standardized with a form for judges to use.<sup>135</sup> Similarly, the Florida Supreme Court in 2000 interpreted its rules of criminal procedure to allow a trial judge to state on the record “the length of sentence which, on the basis of information then available to the judge, appears to be appropriate for the charged offense.”<sup>136</sup> In 2013, the California Supreme Court, in *People v. Clancey*,<sup>137</sup> instructed judges to wait until the parties negotiate a potential bargain, to consider

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131. 505 N.W.2d 208 (Mich. 1993) (per curiam).

132. *Id.* at 212.

133. *See* *People v. Williams*, 626 N.W.2d 899, 902 (Mich. 2001) (per curiam) (defining the procedure to be followed when the court determines that it cannot impose the sentence contemplated under a preliminary *Cobbs* evaluation).

134. *See* MICH. CT. R. CRIM. P. 6.310(B)(2)(b) (indicating that the defendant is entitled to withdraw his plea if “the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose”). The rule was amended in 2014 to require that the agreement be on the record or in writing, and to explain that a defendant’s misconduct that occurs between the time the plea is accepted and the defendant’s sentencing may result in a forfeiture of the defendant’s right to withdraw a plea. *Id.* at 6.302(C)(1), 6.310(B)(3).

135. *See* 2 MICH. JUDICIAL INST., CRIMINAL PROCEEDINGS BENCHBOOK app. at 14 (2016), <https://mjeducation.mi.gov/documents/benchbooks/20-crimv2/file> [https://perma.cc/Y6AZ-MTND] (containing a sample form). Individual judges have created their own forms, and defendants will sometimes use forms to request a *Cobbs* evaluation. MI-P-4.

136. *State v. Warner*, 762 So. 2d 507, 514 (Fla. 2000). Reports from the field were consistent. For example, as one prosecutor described chambers conferences on more serious cases: “The judge asks, ‘What is the holdup?’ Then we hash out the state’s position and the defense position. The judge will offer views on the predicted outcome at trial and the likely sentence based on the facts visible at that point.” FL-P-1.

137. 299 P.3d 131 (Cal. 2013).



whether there is sufficient information to make the sentencing decision, and to avoid any mention of a different sentence after trial.<sup>138</sup> The judges we interviewed knew what they could and could not say and welcomed the clear direction.<sup>139</sup>

2. *Prerequisites for Conference.*—Local regulations in some jurisdictions standardize preparation for and conduct of the conference with the judge, requiring the parties to make a good faith attempt to reach an agreement in advance,<sup>140</sup> prepare the guidelines scoring or other information for the judge to consider,<sup>141</sup> or provide discovery to the other party.<sup>142</sup> The rules may specify that a prosecutor with authority to negotiate must be present, or that the defendant must be standing by.<sup>143</sup> Courts without mandatory conferences often provide that the judge can only enter the negotiations at the invitation of one or both parties, or after the parties have

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138. *Id.* at 138–39. The court also noted that, when announcing an indicated sentence, the trial court should state that it represents the court’s best judgment, given the information then available about the appropriate punishment, regardless of whether guilt is established by plea or at trial. *Id.* at 139. Subsequent case law continues to refine the court’s instructions. *See* *People v. Gray*, No. F068375, 2015 WL 4396211, at \*6 (Cal. Ct. App. July 17, 2015) (holding that “a trial court has discretion under section 1018 [of the California Penal Code] to decide whether to permit a defendant to withdraw a plea entered in response to an indicated sentence when the court decides not to impose the indicated sentence”).

139. As one judge described it, “Under the *Clancey* case, you can indicate the sentence you would give, you are allowed to say, ‘Based on what I know about the case and the defendant now, this would be an appropriate sentence.’ *Clancey* says that . . . can’t be a pre-trial, post-trial comparison.” CA-J-1. The judge added that “*Clancey* is helpful in that it told judges you can’t make the sentence turn on when they plead guilty. The coercive part of judicial participation is telling the defendant he would get five years today if he pleads guilty, and ten years after that. Can’t do it that way.” *Id.*

140. *See, e.g.*, N.C. SUPER. COURT, MECKLENBURG COUNTY, CRIM. R. 7.4 (judicial involvement is “reserved for cases in which all independent efforts to agree on a plea arrangement have been exhausted without an agreement”).

141. *See infra* section III(B)(5) (discussing information provided to judges).

142. *See* OR. CIR. COURT, CROOK & JEFFERSON COUNTIES, R. 7.016 (requiring the prosecutor to submit, “in writing to the court, a detailed settlement offer” and the defense to submit “in writing a certificate that counsel has informed and discussed the offer with his or her client and the District Attorney”).

143. *See, e.g.*, OR-P-1 (explaining that by the time of the conference, the prosecutor must have made a plea offer to the defendant, and the defendant must be on hand, prepared to resolve the case).

reached a tentative agreement.<sup>144</sup> Some states now require that these discussions take place, or be placed, on the record.<sup>145</sup>

3. *Plea Withdrawal, Trial.*—States have also adopted specific rules regarding the defendant’s right to withdraw his plea if a judge who once indicated she would accept a certain sentence changes her mind.<sup>146</sup> A Michigan judge who concludes at sentencing that the sentence indicated earlier is too low must allow the defendant to withdraw the plea but may not indicate the new sentence.<sup>147</sup> Also common are rules governing when a judge

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144. *State v. McMahon*, 94 So. 3d 468, 474 (Fla. 2012) (quoting *State v. Warner*, 762 So. 2d 507, 513 (Fla. 2000)); *Lebron v. State*, 127 So. 3d 597, 606 (Fla. Dist. Ct. App. 2012) (quoting same); FL-J-1 (“Our rule is that the judge cannot initiate negotiations. He has to be invited in by a party. I can’t just say from the bench, ‘Can’t you work a deal? State, can’t you drop this part?’”). In Missouri, a court rule bars the court from participating in any plea negotiations but authorizes the court, after a plea agreement has been reached, to discuss the agreement with the attorneys and to suggest alternatives that would be acceptable. *Harris v. State*, 766 S.W.2d 460, 461 (Mo. Ct. App. 1989) (citing MO. R. CRIM. P. 24.02). In Maryland, too, parties can tender a proposed plea agreement to the judge for consideration. MD. R. 4–243(a)(1)(F); *see also* *Smith v. State*, 825 A.2d 1055, 1077 (Md. 2003) (holding that a trial judge should refrain from participating in plea negotiations until she receives an agreement for approval); *Barnes v. State*, 523 A.2d 635, 641 (Md. Ct. Spec. App. 1987) (holding that a trial court judge “exceeded the permissible bounds of judicial participation in plea bargaining contemplated by Rule 4–243” by “interject[ing] himself into the plea bargaining process as an active negotiator”). In Ohio, judges are “supposed to wait until the parties ask, but word gets around about which judges are open” to discussing potential plea agreements. OH-D-1.

145. *See State v. Poole*, 583 A.2d 265, 273 (Md. 1991) (encouraging lower courts to make a record of plea discussions and to grant party requests that an agreement be placed on the record). States not in our study have adopted similar regulations. *See* VT. R. CRIM. P. 11(e)(1) (“The court shall not participate in any such discussions, unless the proceedings are taken down by a court reporter or recording equipment.”); *see also supra* note 2 and accompanying text (discussing a recent Massachusetts rules amendment that allowed judicial involvement in plea negotiations provided that participation be at the request of one or both parties and that these discussions be recorded and made a part of the record).

146. In California, *Clancey* left this open, but intermediate courts have concluded there is no right to withdraw, as there would be if the judge’s indication was itself a promise or bargain. *People v. Gray*, No. F068375, 2015 WL 4396211, at \*6 (Cal. Ct. App. July 17, 2015). Examples of similar restraints appear in other judicial-participation states not in our study. *See, e.g.*, MASS. R. CRIM. P. 12 (detailing the process of making and withdrawing a plea agreement); *State v. Milinovich*, 887 P.2d 214, 217 (Mont. 1994) (outlining factors that a trial court may use to determine whether a defendant may withdraw a guilty plea).

147. *See People v. Williams*, 626 N.W.2d 899, 902 (Mich. 2001) (“[W]hen the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process.”).

other than the settlement judge must preside at trial, should the defendant end up going to trial.<sup>148</sup>

Compliance with these various new rules is reportedly not perfect.<sup>149</sup> Nevertheless, the preplea judicial conferences described to us look very different than the clandestine sessions of decades past. They have matured from an entirely ad hoc, unregulated process of questionable propriety into an approved, increasingly uniform, and institutionalized procedure, complete with protections responsive to each state's experience.

#### D. Mediation Programs

One of the most surprising new policies we encountered was full-fledged mediation, practiced in two of our ten states: Oregon and Kansas. Motivated by fiscal concerns, and arising only in the past several years, this development has been entirely missed by legal scholars.

In Oregon, mediation in criminal cases was prompted by a federally supported program called Justice Reinvestment, known by the acronym "JRI."<sup>150</sup> Since 2014, Oregon has allocated funds to several participating counties based in part on the reduction in the number of defendants going to prison.<sup>151</sup> In one participating county, for example, a "Judicial Settlement Conference Standards of Excellence Task Force" has drafted four separate "Best Practice" guides for judicial settlement conferences: one each for judges, prosecutors, defense attorneys, and probation officers.<sup>152</sup> Each guide

148. See MD. R. 4-243(c)(5) (providing for a change of judge on motion of either the defendant or the state following a plea withdrawal); Addison v. State 990 A.2d 614, 623 (Md. Ct. Spec. App. 2010) (holding that Rule 4-243 "requires recusal only upon the objection or request of a party"); see also *infra* section III(B)(7) (discussing the judicial-coercion concern).

149. See FL-D-1 ("I can think of only one judge who gets involved only after an invitation from an attorney. Others aren't such sticklers about the invitation. They might propose a plea conference from time to time, although it is normal for the parties to make the proposal. There's a judge who . . . will put on the record anything that was concluded in conference. Others don't put everything on the record.").

150. OR-D-2. The JRI program helps states to reallocate criminal justice dollars in ways that reduce recidivism and incarceration rates. *What is JRI?*, BUREAU JUST. ASSISTANCE, [https://www.bja.gov/programs/justicereinvestment/what\\_is\\_jri.html](https://www.bja.gov/programs/justicereinvestment/what_is_jri.html) [https://perma.cc/W98G-BVTB].

151. See OR-J-1; OR-P-1 ("[T]hose counties with lower length of stays will essentially be rewarded by taking the money that would have gone to incarceration. Instead, a portion of that money will be returned to county to use for innovative programs to divert people from prisons. I call it, 'If you don't send people to prison we'll send you a quarter million bucks.'").

152. See generally STEPHEN K. BUSHONG ET AL., MULTNOMAH CTY. JUSTICE REINVESTMENT PROGRAM, BEST PRACTICES FOR JUDGES (2016) [hereinafter BEST PRACTICES FOR JUDGES] <https://multco.us/file/52352/download> [https://perma.cc/S4E4-FBL7]; STEPHEN K. BUSHONG ET AL., MULTNOMAH CTY. JUSTICE REINVESTMENT PROGRAM, BEST PRACTICES FOR DISTRICT ATTORNEYS (2016), <https://multco.us/file/52474/download> [https://perma.cc/BN86-9YSD]; STEPHEN K. BUSHONG ET AL., MULTNOMAH CTY. JUSTICE REINVESTMENT PROGRAM, BEST PRACTICES FOR DEFENSE ATTORNEYS (2016), <https://multco.us/file/52476/download> [https://perma.cc/76ZH-3QJZ]; STEPHEN K. BUSHONG ET AL., MULTNOMAH CTY. JUSTICE

contains detailed suggestions for questions and statements when communicating with different participants at different stages of the process and detailed checklists for each participant's preparation.<sup>153</sup>

In one county that embraced the program, probation officers now provide risk-and-needs assessments for each defendant charged with an eligible offense.<sup>154</sup> JRI-eligible cases include serious felony cases with presumptive prison terms, other than domestic violence, sexual assault, and homicide.<sup>155</sup> A judicial-settlement conference is mandatory within a certain period after arraignment for any JRI case.<sup>156</sup> The mediators in these JRI cases are a subset of the county's judges, selected by a committee with representation from both prosecution and defense.<sup>157</sup> Each judge devotes at least one afternoon a week to these conferences, which are held off the record, in the courtroom, "about forty-five days out" from first appearance.<sup>158</sup> At the conference, the judge might meet with the prosecution separately from meeting with defense counsel and the defendant.<sup>159</sup> Those separate meetings make it easier for the mediator to "unstick"<sup>160</sup> the parties from their initial negotiating positions by allowing them to "save face."<sup>161</sup> As one defense attorney observed in a county where the judges met with parties separately during settlement conferences, "Those harder discussions, when a judge is trying to move the DA's position, those take place without everybody in the room, so the prosecutor won't be disrespected by the judge in front of everybody."<sup>162</sup>

If a mandatory minimum sentence follows from an enhancement or charge, the conference would be about dropping that enhancement or

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REINVESTMENT PROGRAM, BEST PRACTICES FOR PROBATION OFFICERS (2016), <https://multco.us/file/52478/download> [<https://perma.cc/CRG5-4RGU>].

153. *E.g.*, BEST PRACTICES FOR JUDGES, *supra* note 152, at 3–4 (outlining preliminary steps to take at conference).

154. *See* OR-J-2.

155. *Id.*

156. *See id.* (describing the program and reporting that all presumptive-prison-sentence cases must go to settlement unless the defendant opts to go to trial, but that reportedly "[d]oes not happen very often"); OR-P-3 (describing a program "designed to look at resolving a case short of trial that allows us to have confidence in local public safety, in the form of probation that can also save state prison resources"); *see also* OR-D-4 (stating "I'm seeing more probation offers on cases that used to go to prison").

157. *See* OR-D-3 (noting that judges were selected "[b]ecause they have a good handle on sentencing options"); OR-J-2.

158. OR-J-2.

159. *Id.*

160. OR-D-2.

161. *Id.*

162. *Id.*; *see also* OR-J-2 (stating that often a defendant will stop insisting on trial once he "finds out that instead of presumptive prison the state would be on board with something less").

substituting a charge that would permit the desired disposition.<sup>163</sup> Prior to JRI, the prosecutor might have been willing to negotiate a nonincarceration sentence but could not be sure that the treatment, housing, or other support that the defendant needed to succeed was available.<sup>164</sup> With the new program, not only do judges and lawyers receive a report of the risks and needs of each defendant before settling on a negotiated resolution, but probation officers also attend settlement conferences, so that everyone has access to the latest information on the immediate availability of programming for a particular defendant.<sup>165</sup>

In addition to the JRI conferences and the shorter routine settlement conferences described earlier, some Oregon counties conduct special settlement conferences for the biggest, most expensive cases.<sup>166</sup> Both parties will approve a settlement judge, other than the one assigned to try the case—often a judge from another jurisdiction—particularly when the case is being prosecuted in a small county.<sup>167</sup> The judge will use “shuttle diplomacy,” meeting with one side then the next.<sup>168</sup> Victims and defendants, sometimes

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163. See OR-J-2 (noting that a second degree assault charge carrying a mandatory sentence of seventy months might “resolve as attempt, or . . . with a completely different crime, to get the sentence goal they’ve determined based on that particular case”).

164. OR-P-3 (“Say there is a charge for a burglar who is presumptive prison. But the reason he’s burglarizing, everybody agrees, is his heroin addiction. So a risk and needs assessment will reveal he needs high level inpatient treatment. Five years ago, me and [the defense] attorney would resolve this case, the judge will say, ‘[T]here’s my order: he gets treatment’—but when he gets to parole and probation, they might say, ‘[W]e don’t have a bed, so he will wait in line.’ And if there’s no bed, they’ve reoffended. So we now have a more informed judicial settlement conference. We have to know what will actually happen with this guy. Will the programs be there? We need to know that. So if we will use that, I need a high degree of certainty. It is increasing system awareness, informed awareness, helps us support one another”).

165. *Id.* (“We do the LSCMI for each of these. Eighty percent of those eligible for the JRI program score high or very high risk of recidivism. So I want judicial involvement, so that if we’re giving probation the judge is aware of how risky that is and how we need judicial support if there is a misstep. . . . We’ve added parole and probation to judicial settlement conferences, too, so we have all the information about resources and programs right there at the table.”).

166. See OR-P-1 (noting settlement conferences for “homicides and serious cases”—the “high-end cases where a lot of resources are going to be used”); OR-P-2 (noting success of settlement “in a number of big cases, murders, aggravated murder, child abuse cases, and other statutory theories of homicide”).

167. See OR-P-1 (explaining that “someone from the outside will have no personal relationship with the parties, [and is] not going to try the case or experience fallout from it, so they’ll presumably do a fair job of really trying to force the litigants to resolve the case,” reporting that smaller counties do this only “on an occasional basis”); OR-P-2.

168. See OR-P-1 (indicating that “sometimes this is a lengthy process”); OR-P-2 (“The judge is an intermediary, he or she shuttles back and forth. And in a victim case, meeting with DA in the morning, and we’d tell ’em where we’re at, reveal everything they know. Then might meet with the victim. Then later in the morning the judge would meet with the defendant and the defense attorney, maybe some of the defendant’s family, and get the two sides, and then shuttle back and forth trying to hammer out an acceptable deal.”).

even the defendant's family, participate, all trusting the judge not to pass along confidential information to the other side.<sup>169</sup>

In Kansas, a state where most of those interviewed reported little if any judicial participation in negotiations, a small number of counties have quietly started, without any rule or statutory change, to conduct mediation in criminal cases similar to the process described in Oregon.<sup>170</sup> Reportedly beginning in one county more than ten years ago, mediation is now practiced in at least two others for more serious or complex crimes as well as for cases with unpredictable sentences.<sup>171</sup> Counties that do not mediate cases may send some cases to judges in counties that will.<sup>172</sup> If one of the parties does not request mediation, the judge might do so;<sup>173</sup> although one party could refuse after the other party or the judge requests it, that "never" happens.<sup>174</sup> The judge assigned to try the case selects a mediator for the case, often another sitting or retired judge who has volunteered to take mediations.<sup>175</sup> The volunteers are often criminal court judges with experience in both prosecution and defense,<sup>176</sup> but the mediation judge can have no contact at all with the trial judge—before, during, or after the mediation.<sup>177</sup> The probation department prepares a preliminary presentence investigation report (PSI), and the mediation is conducted by meeting with one side, then the other, off the record: it might take less than an hour, or several short sessions over several days.<sup>178</sup> The judge, without revealing specific confidential information, might signal to the attorneys that there will be serious challenges for them at trial, and will propose a specific outcome for the parties to consider.<sup>179</sup> If the parties agree, and between 30% and 90% of the time they do, then the trial judge will implement the mediation result.<sup>180</sup> Estimates of

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169. OR-P-2 ("Everybody spills all the beans about strengths and weaknesses and the judge gets them to agree, often persuading the parties to genuinely appreciate a different perspective."). The discussions are not on the record, and nothing can be admitted or used later. *Id.*

170. *See* KS-J-1 (stating that mediation takes place in one or two Kansas counties); KS-D-2 (explaining that, while at least one county had recently started criminal-case mediation, the practice "is not established by formal rules of procedure").

171. *See* KS-D-2 (mentioning counties that use mediation); KS-D-3 (stating that felony mediation began in one county approximately ten years ago); KS-J-2 ("Mediation, in my mind, is designed for the trickier cases."); KS-P-2 (stating that cases involving more serious sentences or witnesses that might prove unreliable at trial are more likely to be sent to mediation).

172. *See* KS-J-3 ("[T]hose judges will send them to me for mediation.").

173. KS-J-2.

174. *See* KS-D-3 ("I've never had a refusal.").

175. KS-D-2.

176. *See* KS-J-3 (describing one judge's extensive criminal justice background); KS-P-2 (same).

177. *See* KS-D-2 ("The mediation rules are not written, but . . . that practice holds true.").

178. KS-D-2; KS-D-3; KS-J-2.

179. KS-D-2; KS-J-3.

180. *See* KS-D-3 ("The process is successful, produces an agreement, about a third of the time."); KS-J-3 ("As for success rates, mine is well over ninety percent. That's how often the parties

the proportion of felonies resolved with mediation in these Kansas counties ranged from 5% to 20%.<sup>181</sup>

*E. Placing Judges with Felony Sentencing Authority Before Bindover*

As a final example of the formalization of judicial involvement in settlements, courts in at least two states have modified the traditional division of authority between felony- and lower court judges precisely to encourage settlement of felonies before the preliminary hearing. Such changes would not be necessary in a state with a unified criminal bench, where the judges who preside over the earliest phases of a felony case are the same judges who impose the sentence. But in states where felony-court judges, not lower court judges, select the sentence, parties have little incentive to ask a lower court judge to weigh in on disposition.<sup>182</sup> Some counties in Michigan have encouraged earlier settlement conferences by authorizing their circuit judges to function as district judges so that they may talk to the parties about sentencing before the preliminary hearing.<sup>183</sup> In California, too, trial courts with more than three judges are required by court rule to adopt procedures to facilitate dispositions before the preliminary hearing, which may include “[t]he use of superior court judges as magistrates to conduct readiness conferences before the preliminary hearing and to assist, where not inconsistent with law, in the early disposition of cases.”<sup>184</sup>

The surprising array of formalized intervention techniques described above is one of our most important findings. In the 1970s, researchers thought a single judge’s decision to “announce from the bench that [he] will be available during a specific time to ‘pre-try’ cases,” was “institutionalizing judicial participation in plea bargaining.”<sup>185</sup> Scholars back then could not

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reach an agreement in mediation.”). None of those interviewed could remember a trial judge rejecting a mediated settlement.

181. KS-D-2 (estimating five percent); KS-P-2 (same); KS-J-3 (estimating ten to fifteen percent); KS-J-2 (estimating twenty percent).

182. See MI-J-2 (“*Cobbs* doesn’t come up in the district court; they can’t make representations about sentencing.”). In Missouri, judges reportedly do not get involved before preliminary hearing because they can’t take the plea; judicial involvement must await bindover. See MO-D-4.

183. See MI-J-1 (“[W]e have identified cases we send to one circuit court, designated as a district court judge—low-end cases that carry four to five years max . . . . [L]ast year, we probably got rid of . . . maybe twenty percent of felony caseload [that way].”). For a list of plans allowing for circuit and district judges to exercise one another’s jurisdiction, see generally MICHIGAN STATE COURT ADMINISTRATIVE OFFICE, CONCURRENT JURISDICTION PLANS (2011), <http://courts.mi.gov/Administration/SCAO/Resources/Documents/other/concurrentjurisdictionwithcj.pdf> [https://perma.cc/9QBW-Y2VF].

184. CAL. R. CT. 10.953; see EDWARD A. RUCKER & MARK E. OVERLAND, CALIFORNIA CRIMINAL PRACTICE: MOTIONS, JURY INSTRUCTIONS AND SENTENCING § 14:4 (4th ed.), Westlaw (database updated Oct. 2016) (“Superior court judges sit as magistrates to encourage the early disposition of cases. A defendant who pleads guilty or nolo contendere in these courts is sentenced before the judge taking the plea.”).

185. HEUMANN, *supra* note 44, at 147; see also *id.* at 198–99 n.25 (emphasizing that “[t]here are no administrative rules or directives about this process; it is simply something instituted by

imagine the level of institutional support and momentum for judicial participation that now exists in some of these state courts.<sup>186</sup> Even today, it remains almost invisible in legal scholarship.

### III. Why Judicial Participation Thrives

The institutionalization of the judge's role in plea negotiation is not accidental. In this Part, we explore the larger forces that are driving this trend. We divide these explanations into two sets. First, in subpart A, we address a pair of recent developments in state criminal justice that promote this portfolio of new judicial practices—the rise of criminal docket management and an explosion in information technology—and summarize what judges and lawyers told us about how these management tools have changed practices in their own courts. The second set of explanations, discussed in subpart B, includes a long list of other benefits from judicial involvement, beyond the efficient resolution of cases. The interviewees' comments challenge not only some of our hypotheses, but also some of the most common criticisms of judicial participation.

#### A. *Judges as Cost-Conscious Docket Managers*

The procedures outlined in Part II are part of a fundamental shift in the way that state courts process criminal cases, a shift toward more aggressive management of criminal caseload. Accelerating over only the past two or three decades, this shift has gone unnoticed in scholarly literature. Few scholars have noticed the transformation in the way state courts handle cases on the criminal side,<sup>187</sup> perhaps because it has been overshadowed by other attention-grabbing developments such as drug courts, sentencing reforms, mass incarceration, and the crisis in indigent defense.<sup>188</sup> In any event, the

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individual judges concerned about facilitating negotiations,” and noting judges' conflicting views about the propriety of this sort of involvement).

186. See, e.g., *id.* at 137 (predicting that, “though the judge may not necessarily participate in plea bargaining, the requirement that he sanction the deals suggests that over time he will have to come to grips (in a normative sense) with the notion of negotiated dispositions”).

187. Exceptions include Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 613–14 (2014) (discussing the processing of misdemeanors in New York City); Turner, *supra* note 50, at 203 (referencing managerial-judging models in a study of judicial bargaining in Florida, Connecticut, and Germany, citing Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004) and Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835 (2005) for Langer's observation of this phenomenon in Germany and at the International Criminal Tribunal for the former Yugoslavia). In an article published while our interviews were underway, one scholar speculated briefly that adopting the more “modern” model of managerial judging in the criminal context would allow for judicial participation—predicting, but apparently unaware of, the entrenched practices revealed for the first time by our study. Batra, *supra* note 24, at 571–72.

188. Federal courts are just now joining this movement in earnest on the civil side from top to bottom. See JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2015)



managerial ethos among judges in criminal cases has emerged right under our noses; alongside this managerial ethos, a controversial practice from an earlier generation—judicial participation in plea negotiations—has matured into an institution in its own right. Differentiated case-management structures, early disposition programs, and other policies designed to minimize delay and achieve quicker dispositions are now structural features of criminal courts in many states. Organizations such as the National Center for State Courts (NCSC) and the Conference of State Court Administrators (CSCA) offer training, tools, and resources to help state trial courts speed up criminal-case disposition.<sup>189</sup> Of the many factors contributing to these developments, two stand out: budget stresses, sometimes linked to increasing caseloads, and new capabilities in information technology.

*1. Time Is Money: Earlier Disposition and Budget Concerns.*—As state courts struggled with the budget stresses of the recent recession, case-management techniques that streamline disposition emerged as popular cost-cutting measures. The focus of these efforts has not been to convert more trials into guilty pleas but instead to help cases that are already headed for a guilty plea to get there *sooner*.

The push to shrink disposition time has been based, at least in part, on research confirming that slower cases cost more money. Earlier disposition reduces the number of conferences and hearings for each case, freeing up the time of attorneys, judges, court staff, and sheriff's personnel.<sup>190</sup> For example, one report noted two protracted cases in a mid-sized urban jurisdiction that included over seventy scheduled events apiece and estimated that those two cases alone may have cost the jurisdiction the full-time equivalent of an extra prosecutor or public defender.<sup>191</sup> A 2011 study from California concluded

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(noting the “crucial role of federal judges in engaging in early and effective case management”). See generally Bert I. Huang, *Trial by Preview*, 113 COLUM. L. REV. 1323 (2013) (discussing previews of the judge's assessment in civil cases).

189. See, e.g., *Caseflow Management Resource Guide*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/Topics/Court-Management/Caseflow-Management/Resource-Guide.aspx> [<https://perma.cc/UP4H-FP8K>] (collecting caseflow-management resources); see also *ICM Fellows Papers*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/Education-and-Careers/ICM-Fellows/ICM-Fellows-Papers.aspx> [<https://perma.cc/7H3F-2JKE>] (compiling additional research regarding DCM in individual jurisdictions).

190. NAT'L CTR. FOR STATE COURTS, MODEL TIME STANDARDS FOR STATE TRIAL COURTS 35 (2011) [hereinafter MODEL TIME STANDARDS]; see BRIAN J. OSTROM & ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, EFFICIENCY, TIMELINESS, AND QUALITY: A NEW PERSPECTIVE FROM NINE STATE CRIMINAL TRIAL COURTS 104-06 (1999), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.173.4163&rep=rep1&type=pdf> [<https://perma.cc/H5SX-CZYQ>] (summarizing research on the relationship between local legal culture and efficient case disposition); DAVID C. STEELMAN & JONATHAN L. MEADOWS, NAT'L CTR. FOR STATE COURTS, TEN STEPS TO ACHIEVE MORE MEANINGFUL CRIMINAL PRETRIAL CONFERENCES IN THE NINTH JUDICIAL CIRCUIT OF FLORIDA, at ix–xi (2010) (illustrating time and personnel costs of nonmeaningful pretrial conferences and trial dates).

191. See MODEL TIME STANDARDS, *supra* note 193, at 43 (discussing this finding).

that “[i]f all California trial courts . . . were able to reduce by one the number of hearings required to dispose of their felony cases, the courts would realize cost efficiencies of over \$60 million dollars.”<sup>192</sup> Earlier pleas also reduce the cost of summoning, orienting, feeding, and paying potential jurors whose services are never needed, in courts where plea agreements are too often reached on the first day of trial.<sup>193</sup> And earlier pleas reduce the cost of jailing pretrial detainees who would be released upon entering their plea.<sup>194</sup>

Although the monetary savings<sup>195</sup> of earlier dispositions have been recognized since the late 1980s,<sup>196</sup> it wasn’t until the 1990s that criminal-case management moved out to the leading edge of policy change, prompting targeted federal funding for state courts to experiment with some of the early disposition programs mentioned above.<sup>197</sup> And it was the budget trimming required by the recession of 2008,<sup>198</sup> combined in some places with rising caseloads, that prompted even more court administrators seriously to consider adopting new case-management techniques in criminal cases.<sup>199</sup>

192. See GREACEN & MILLER, *supra* note 68, at 2.

193. See *infra* note 228.

194. MODEL TIME STANDARDS, *supra* note 193, at 43 (“A 2011 study to improve the efficiency of the trial court process concluded that early and continuous court control of criminal case progress would reduce the average monthly population of the jai[l] by almost 10% . . .”).

195. Monetary savings to the county and state are not the only benefits of earlier dispositions. Moving the time of disposition forward may reduce the toll that unnecessary pretrial detention takes on defendants and their families, the risks associated with transporting the defendant back and forth to court repeatedly, the frustration of jurors and witnesses who must show up and wait around, and the delay before a defendant receives treatment or a victim receives restitution.

196. See MICH. CASEFLOW MGMT., *supra* note 71, at 4 (“The National Center for State Courts and the Bureau of Justice Assistance of the U.S. Department of Justice initiated a Trial Court Performance Standards project in August 1987 to develop measurable performance standards for trial courts.”).

197. See HENDERSON ET AL., *supra* note 105, at 1 (studying the application of DCM to criminal-case processing at four demonstration sites).

198. See, e.g., OREGON JUDICIAL BRANCH, 2011–2014: A FOUR YEAR REPORT 15–17, <http://courts.oregon.gov/OJD/docs/OSCA/2011-2014OJDFourYearReportR.pdf> [<https://perma.cc/4TWY-8D9S>] (describing state budget cuts between 2008 and 2013 that forced layoffs, weeks of unpaid furlough days, pay freezes, and courthouse closures; and explaining how, as the budget crisis persisted, the Oregon Judicial Department “undertook an urgent effort to ‘do more with less’ . . . by ‘doing things differently’ in developing permanent OJD-wide efficiencies [and] innovations”); see also FLANGO & CLARKE, *supra* note 103, at 24–25 (“[T]he financial crisis provides an opportunity to examine court activities, define those that are most essential, streamline or even eliminate services that are not of the highest priority, and reengineer those court processes that remain.”).

199. One expert described the transformation this way:

[T]here have been two big changes in the past five to ten years. One is technology . . . The other is a change in culture, a shift in priorities that came about because of the recession. Courts have decided they need to be able to measure these things because they just can’t be at the mercy of the parties anymore. They need to know what is happening in order to budget for it, manage judicial resources.

See Interview with William Raftery, *supra* note 65; see also ROBERT C. BORUCHOWITZ ET AL., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 34–35 (2009) (describing early disposition

2. *Data and the New Performance Measures: Measuring Speed and Savings.*—Another catalyst for these new ways of managing criminal cases has been the revolution in information technology.<sup>200</sup> Before the 1990s, statistical information about caseload in state courts was very limited; what did exist was expensive to collect and evaluate.<sup>201</sup> Since then, a large number of state courts have launched new case-management information systems.<sup>202</sup> In just the last decade, many presiding judges and state-court administrators for the first time gained the power to track (and to publish) how long it takes criminal charges to move through the system.<sup>203</sup> Advances in court information systems have also allowed courts to calculate how much money they can save through more aggressive case-management techniques, making experimentation with judicial settlement practices less risky to attempt and more attractive to cost-conscious judges, legislators, and commissioners.<sup>204</sup>

Part of the “new notion” of court management of the criminal docket, as explained by William Raftery, an expert in court management and court technology at the NCSC, is the adoption of court-performance measures.<sup>205</sup> Lower criminal courts track and report how quickly they move criminal cases from charge to disposition or bindover, while felony courts detail how quickly they move cases from arraignment to plea or sentence.<sup>206</sup> In 2011,

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projects, created as a response to overwhelming caseloads, including the Allegheny County Early Disposition Project, which promotes “coordination between the courts and social service agencies to help clients get out of jail and resolve their cases earlier. . . . [W]ithin a week, as opposed to four or five months.”).

200. See NANCY LAVIGNE ET AL., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT 5 (2014) (attributing the new emphasis on justice-system innovation and “increased efforts to assess the impact and cost-effectiveness of criminal justice policies and practices” to “[a]dvances in information technology” that support data analysis and “infrastructure for data-driven decision-making.”).

201. See Interview with William Raftery, *supra* note 65.

202. See *id.*

203. See Interview with William Raftery, *supra* note 65, noting that:

[T]echnology . . . allows courts to track how badly they are wasting resources, to track how long cases are taking, etc. Particularly in the last decade, courts have for the first time become able to track this and there is greater willingness to do it. They can see the time these are taking and whether there are continuances.

204. See OR-J-1 (describing how the adoption of a thirty-five-day call case management “dramatically cut the number of jurors we had to summon, and generated more savings too”); Interview with William Raftery, *supra* note 65 (“Juror utilization alone is substantial savings. . . . In a state where prior to [case management] it was one continuance after another, it is a big savings, trial date certainty reports show this.”).

205. Interview with William Raftery, *supra* note 65; see also MODEL TIME STANDARDS, *supra* note 190, at 35 (“[T]ime standards can play an important role in achieving the purposes of courts in society.”).

206. Other popular measures include the number of trial postponements and the number of jurors summoned but not used. See, e.g., Memorandum from John A. Hohman, Jr., State Court Adm’r, Mich. State Court Admin. Office, to Judges (Apr. 3, 2014), <http://courts.mi.gov/administration/admin/op/performance/documents/pmstatus04-03-14.pdf> [<https://perma.cc/NFB6-2GW5>] (discussing implementation of these measures); see also GREACEN

the NCSC published model time standards for case disposition, approved by the Conference of State Court Administrators, the Conference of Chief Justices, the American Bar Association House of Delegates, and the National Association for Court Management.<sup>207</sup> At least thirty-nine states and the District of Columbia have adopted time-to-disposition standards for felony cases.<sup>208</sup> In the fall of 2015, the NCSC launched a new “Effective Criminal Case Management Project” that will “collect the most broadly based case-level data ever assembled on case processing of felony and misdemeanor cases,” and select “[e]ight courts that have demonstrated the ability to achieve timely criminal case processing . . . to document the specific best practices that underlie their success.”<sup>209</sup>

The new measures allow comparison of the relative speed of each court within a state, and, when judge-specific information is available, of each particular judge.<sup>210</sup> Some states provide the information from local courts only to those courts or their presiding judges to use as they see fit; others post it online for all to see.<sup>211</sup> “If an individual judge is going to be accountable to time performance standards, the burden [to move the case] is on the court,” Raftery noted.<sup>212</sup> “[T]he judge has the attitude toward the parties: ‘you’re not tanking my numbers.’”<sup>213</sup>

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& MILLER, *supra* note 68, at 7 (noting that the “study is the outgrowth of seven years of effort by the California judicial branch to improve criminal case processing in its 58 counties”).

207. MODEL TIME STANDARDS, *supra* note 190, at 3 (recommending the resolution of 75% of felonies within 90 days, 90% within 180 days, and 98% within 365 days).

208. *Id.* at 5. For a sampling of standards from the states in our study, see CAL. SUPER. COURT, ALPINE COUNTY, R. 6.1(B) (calling for 90% of felony preliminary examinations to be concluded within 30 days after arraignment, 98% within 45 days, and 100% within 90 days); 9TH JUD. CIR. FLA. ADMIN. ORDER NO. 2004-04-3 (2007) (adopting time standards and differential case management); MICH. CT. R. 8.110 (requiring chief judges to file quarterly reports including a list of felony cases with delays of more than 301 days between bindover and adjudication); N.C. SUPER. CT., CUMBERLAND COUNTY, R. 2 (establishing a case-tracking system); see also *Case Processing Time Standards*, NAT’L CTR. FOR ST. CTS., <http://www.ncsc.org/cpts> [<https://perma.cc/49U4-HK9C>] (collecting time standards by state); *Trial Court Performance Measures*, COURTOOLS, <http://www.courtools.org/Trial-Court-Performance-Measures.aspx> [<https://perma.cc/3EFJ-9F7K>] (recommending particular performance measures).

209. *Effective Criminal Case Management Project*, NAT’L CTR. FOR ST. CTS., <http://www.ncsc.org/services-and-experts/areas-of-expertise/casflow-and-workflow-management/effective-criminal-case-management.aspx> [<https://perma.cc/8M8Q-94H3>].

210. See MICH. CASEFLOW MGMT., *supra* note 71, at 30 (describing data uses); Hohman, *supra* note 206 (noting the schedule for publication of individual judge’s disposition rates).

211. See generally MICH. STATE COURT ADMIN. OFFICE, CIRCUIT CASE AGE RATES (2013), <http://courts.mi.gov/education/stats/performance-measures/Documents/Timeliness/caseagelargecircuit.pdf> [<https://perma.cc/6M6R-7QJ5>] (providing average disposition rates by case type).

212. Interview with William Raftery, *supra* note 65.

213. *Id.*; cf. Resnik, *supra* note 7, at 397–99 (noting the role of “[n]ew recordkeeping systems coupled with computer technology” in the rise of managerial judging in the civil system as a response to workload pressure and case backlogs).

3. *Reports from the Field Linking Judicial Negotiation to Management Goals.*—Some of the new approaches described in Part II do not require judicial participation in the negotiation process.<sup>214</sup> But in many of the states we examined, where the law does not prohibit judicial participation, this new, data-driven regulatory regime for the administration of criminal cases creates an environment that welcomes judicial involvement to help parties reach agreement faster. The overwhelming attention to efficiency sends a clear message to trial judges: Do what you can to resolve these cases earlier in the process. As the saying goes, “What gets measured, gets managed.” And experts on court management sometimes suggest that the best way to manage disposition time is for judges to get in there and settle criminal cases earlier.<sup>215</sup>

This shift to statistics-driven case management clearly made an impact in the states in our study. Nine of the ten states we examined had adopted time-to-disposition performance standards for felony cases.<sup>216</sup> The tenth, Utah, actively collects and publishes time-to-disposition information and conducts training for courts to improve their numbers.<sup>217</sup> The trial judges we interviewed knew their efficiency was being tracked.<sup>218</sup> Even though public access to these statistics, if any, is limited to court-level rather than judge-level data, interviewees stated that presiding judges use the individual judge numbers internally to encourage speedy disposition<sup>219</sup> and manage judicial

214. Indeed, although the NCSC recommends early conferences in every case to encourage early settlement, it recognizes that what judges do and say during those conferences is regulated by local law. See Interview with William Raftery, *supra* note 65 (“Our obligation is with court management. The court’s responsibility is to schedule the meeting and get those parties staring at each other; what they talk about is up to the law of the jurisdiction. Court management gets people in the room, then lets them do the law.”).

215. See SOLOMON, *supra* note 105, at 11 (“An early disposition climate is created by requiring counsel to meet with the client as soon as possible, creating a structured opportunity for serious negotiations between the lawyers directly responsible for the case and meaningful judicial participation in the process, where appropriate.”); see also DAVID C. STEELMAN ET AL., NAT’L CTR. FOR STATE COURTS, FELONY CASEFLOW MANAGEMENT IN BERNALILLO COUNTY, NEW MEXICO app. at 50–53 (2009).

216. Maryland’s counties are adopting CourTools individually. See, e.g., *Performance Measures (CourTools)*, MONTGOMERY COUNTY CIR. CT., <https://www.montgomerycountymd.gov/circuitCourt/Court/Publications/CourTools.html> [<https://perma.cc/ERU2-SU3L>] (explaining the measures).

217. *Time to Disposition: District Courts*, UTAH ST. CTS. (2016), <https://www.utcourts.gov/courtools/reports.asp?measure=disposition&court=dist&detail=all> [<https://perma.cc/BAQ6-SXSE>].

218. See MO-J-1 (“Historically our circuit had been way up at the top on these stats, but now we are falling behind. We are thinking about imposing time limits on associate judges.”); MI-J-1 (reporting that the court had been tracking the timing of pleas for the past seven or eight months as part of the budget process).

219. See MI-J-2 (reporting that the chief judge “would distribute all the judges’ numbers to all the judges”; asked if this operated as peer shaming, the judge answered, “Now, I didn’t say that. But it worked.”); FL-J-2 (“If there is a large number of cases over 180 days old—the standard

assignments.<sup>220</sup> “[T]he reports create this gentle pressure not to be the low boy,” explained one judge.<sup>221</sup> “Everyone sees the reports.”<sup>222</sup> Judges seemed proud when their court’s statistics were good compared to the rest of the state.<sup>223</sup> A number of the judges we interviewed specifically linked local judicial-involvement practices to encouragement from the state supreme court, court administrators, or the presiding judge to secure pleas earlier in the process. Said one judge, “We have numbers through the State Court Administrative Office that show the percentage of cases closed on time—there are deadlines established. The judges actively involved in the process have the best numbers.”<sup>224</sup>

Lawyers, too, perceived courts as driven by disposition speed and performance measures,<sup>225</sup> and some tied judicial-participation practices to this pressure. A California prosecutor explained that the court split up the pretrial department in hopes of earlier settlements after the county “got poor marks for how long cases were taking to resolve prior to prelim. . . . The push came from the court.”<sup>226</sup> Said an Oregon prosecutor, “The reason they use settlement judges is . . . because of how the performance measure is for the court. . . . Almost always it is the presiding judge of the county that says, ‘Let’s go to a settlement judge.’”<sup>227</sup>

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declared by the Florida Supreme Court—I would address that with the judge. I would just inquire, ‘What’s happening?’”).

220. See CA-J-2 (“[Y]ou have to do what the presiding judge says. Everyone goes along, or you’ll get shipped to some worse court where you don’t want to be.”). Another judge elaborated:

The judges can see who is efficient, who is keeping their heads above water. . . . [The Chief Judge wants] everyone to see what everyone else is doing, so they won’t complain about a workload that they only imagine. “Judge Smith, your numbers are growing. But I see that all of your colleagues are doing the same.” Versus, “Judge Smith, you alone are going up. So how can I help you speed up?”

FL-J-1.

221. FL-J-1.

222. *Id.*

223. CA-J-3 (“I had the highest resolution statistics. . . . [The spreadsheet] would have median resolution rate, then where you were up against that rate. . . . I didn’t live by the numbers, but I would look.”).

224. MI-J-3.

225. See CA-D-1 (“[T]hey’ll get pressure from the supervising judge—that their numbers are too high, have to get the lawyers to move more quickly. . . . If the numbers are too high, the judges don’t look good in front of their colleagues.”); FL-D-1 (“Case backlog numbers for all judges go out in a monthly report. It’s like a competition to see who has the lowest numbers. . . . If you’re backed up in your criminal docket, you might get moved elsewhere, someplace where fast dispositions are not so important.”); OR-D-1 (“In this county, the judges are interested in trying to reduce the trial rate. They are . . . always working on how we can reinvent our docket system: more smooth, fewer trials, fewer cases . . .”).

226. CA-P-3.

227. OR-P-1; see also FL-P-2 (“They are highly conscious of their numbers. They carry on friendly competitions with each other, and some judges are known for having the lowest numbers on their dockets. . . . Judges probably think of their own plea negotiations as a docket management technique.”).

Several interviewees also connected judicial participation to reduced juror costs<sup>228</sup> or to lowering the duration or expense of pretrial detention.<sup>229</sup> And in Oregon, where judicial settlement conferences are supported by grant funding, early anecdotal reports point to significant savings already.<sup>230</sup>

Not surprisingly given the range of disparate practices, interviewees varied in their perceptions of how effectively judicial participation improved efficiency. There were some who thought having the judge involved didn't make much of a difference in efficiency.<sup>231</sup> Several believed that having the judge's input helps settle cases that would otherwise go to trial.<sup>232</sup> But the majority of our interviewees doubted that judicial participation affected *how many* cases settled; instead, they were convinced that judicial participation facilitates *earlier* settlement.<sup>233</sup> An Oregon judge, for example, explained that an attempt to force parties to negotiate their cases earlier on their own, without the judge, failed to reduce the number of cases that were settling at the last minute, and that only by requiring the parties to present their positions to the judge in a settlement conference was the court able to get its trial docket under control.<sup>234</sup>

228. See MD-J-2 (noting juror costs); MI-J-1 (noting, “[W]e were spending a considerable amount of money to summon jurors, they were sitting and never being sent to courtroom. . . . [O]n any particular day thirty-five percent never get out of the assembly room,” and that permitting *Cobbs* evaluations moves the plea earlier, reducing this expense).

229. MI-J-2 (“[W]hat it did was move things forward, to shorten the pretrial confinement.”); see MO-J-4 (“We have a lot of cases and a small county jail, so those two issues drive the train. It forces the prosecutor to negotiate a resolution faster.”).

230. One attorney reported that the county prosecutor has said the program has saved “millions.” “I’m seeing more probation offers on cases that used to go to prison. . . . Some Measure 11 cases, it is making a difference.” OR-D-4; see also OR-J-2 (“We are seeing a lot of cases that before JRI would have been prison sentences.”).

231. See MI-P-5 (“You don’t need conferences to move pleas up from the first day of trial.”); see also MI-J-4 (stating *Cobbs* evaluations “slow down the process, because defendants wanting to talk to the judge are waiting longer to plead”).

232. See CA-P-1 (predicting that defendants would go to trial more often if they didn’t have any input from the judge, because “[t]he defendant doesn’t have a clue”); CA-P-3 (“Of the cases that settle, I would say twenty percent of those cases would not settle without judicial intervention.”); MI-D-4 (“Nothing was ever created that reduced the amount of trials better than *People v. Cobbs*. . . . The decrease in jury trial is exponential, and the reason is being able to do preliminary evaluations with the judge at the pretrial.”).

233. See CA-J-3 (answering whether cases would resolve without judicial involvement: “Not in as timely a fashion and maybe not as fair.”); MI-J-2 (“It increased the number of pleas, but dramatically affected the timing of the pleas. A lot of pleas happened on the first day of trial; with *Cobbs* that tends to not be the case. . . . [W]hat it did was move things forward . . . .”); MI-J-3 (noting that “[c]ases get resolved earlier in the process” with judicial intervention); see also MATTHEW KLEIMAN & CYNTHIA G. LEE, NAT’L CTR. FOR STATE COURTS, MICHIGAN JUDICIAL WORKLOAD ASSESSMENT: FINAL REPORT 14 (2011) (“Judges also cite . . . [*Cobbs*] agreements as time-savers in criminal cases.”).

234. “Before we had this process . . . we’d have [dozens of] cases on for trial, and we have all these people at call for all those cases . . . and the poor lawyers were having to prepare for trial, but they didn’t know if it would go.” OR-J-3. “We tried setting conferences without the judge, but they just didn’t do it. Or the DA would send somebody with no authority to negotiate the case.” *Id.*

Like judges, many prosecutors and defense attorneys also appreciated judicial input on sentences as a means of improving efficiency for their staffing.<sup>235</sup> The earlier in the process that routine cases settle, the more time staffers have for the most serious cases.<sup>236</sup> One Florida prosecutor explained: “Some prosecutors, especially drug prosecutors, love it when the judge resolves all of the possession cases through routine pleas to the bench: ‘Then I can spend all my time going after the bad guy traffickers and will put less work into the possession cases.’”<sup>237</sup> And in those counties using mediation, prosecutors also prized a judge’s ability to smooth the way to an agreement in serious cases that would otherwise be particularly time consuming to litigate.<sup>238</sup>

All of these comments leave a strong impression that the structured and formalized judicial involvement that these participants describe is part of a larger transformation in criminal-case management generally, encouraged by budget pressures and new court-statistics capabilities. And this change in the way state courts adjudicate criminal cases is likely here to stay: like race car drivers, once they experience greater speed, courts may never be satisfied with less.

*B. Beyond Efficiency: Other (Often Surprising) Reasons Participants Favored Judicial Involvement*

Judges, prosecutors, and defense attorneys did not always attribute judicial involvement to the judge’s desire to control caseflow, nor did they cite efficiency as its only advantage. In addition to speeding up the process, interviewees from all three groups reported that judicial involvement advanced their interests in other ways. This subpart collects these reports,

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235. See MI-P-4 (“I like em a lot . . . [I]t’s a no brainer for me. By the time I go down to the hearing, the defense lawyer had already submitted a form requesting *Cobbs*, had put in there the preliminary evaluation of guidelines. When the hearing date comes, I go down there and it’s all set.”); OR-D-1 (“[T]he DA doesn’t want to try the case either. Maybe the victim will mess up, or . . . he needs to indict ten other people instead of sitting in the trial for this guy.”).

236. See NC-P-1 (“[I]t’s good to know where things stand. At bottom, that’s what the judge’s involvement gives us. The judge’s input can lead to a more efficient use of judicial resources. It can prevent some wasted efforts by us to collect witnesses and victims at the courthouse.”); OR-D-2 (“[F]or every one that is settled earlier, my lawyers can invest their time on other cases and preparing the ones that actually do go to trial . . .”).

237. FL-P-2.

238. As one prosecutor explained,

You get to the truth and facts of a case, and you get through some of the emotional challenges . . . You are getting a judge who has no role in deciding pretrial motions or a stake in the trial, working through those issues that sometimes get in the way. . . . Having done this quite a while, seeing serious cases resolved in an appropriate fashion, in a way that satisfies everyone, other counties are taking notice.

OR-P-2. Further, “[i]t’s all about meeting the defendant as opposed to meeting the prosecutor. Sometimes it’s not even about the sentence, but about the discussion.” *Id.*



comparing each claimed advantage to our initial predictions and the conventional critique.

Section 1 addresses a theme we heard from many judges when we asked why they appreciate their opportunity to participate in negotiations. They told us that early involvement improves case outcomes because it provides the opportunity to suggest options for sentencing that the parties had not presented and to remedy clear errors by the attorneys.

Section 2 turns to a common observation from prosecutors, who find the judge's input strategically useful in managing their relationships with police, victims, and the public.

Section 3 addresses an observation that defense attorneys stressed, one of the two dominant drivers here other than efficiency: the expectation that getting the judge involved tends to produce a sentence more lenient than the deal offered by the prosecutor. Reports of the moderating influence of judicial participation on sentences were quite consistent across different courts and interviewees—a finding that is not surprising when one considers the participants' explanations.

Section 4 tackles the other explanation for the practice of judicial involvement that we heard over and over again: the desire of both parties for information about the likely sentence—a preview that only the judge can supply. We note in this part that our interviews appeared to refute our initial hypothesis that the added predictability provided by laws restricting sentencing discretion would reduce the parties' incentives to seek a preview of the likely sentence from the judge before agreeing to a deal. Rather, such laws merely shifted the parties' uncertainty to other aspects of sentencing, such as guideline scoring. When a state's sentencing restrictions included a provision insulating from review any deal with advance judicial approval, those restrictions may have increased the incentives for prosecutors to nail down the judge's views in advance.

The remaining sections suggest that three of the more common criticisms of judicial participation may have it backwards. In section 5, we relate how interviewees dismissed worries that judges would be reluctant to talk about the sentence before receiving a presentence report complete with guidelines facts and a victim's statement. They shrugged off concerns that judges lacked this information at the negotiation stage or that adding the judge to the negotiating mix would produce less informed sentences, inviting trouble should more complete information surface later. The processes our interviewees described suggested just the opposite: the judge's involvement created a higher likelihood that a victim's views would be considered in the sentence, as compared to a deal with a sentence recommendation hammered out between the parties alone before tendering a plea to the judge. And as for missing information from presentence reports, many related either that presentence reports had recently faded from use in guilty-plea cases generally, or that the judge had access to other, novel sources of information

at the negotiation stage that replicated the type of information typically found in such reports.

In section 6, we note that those who spoke with us showed little fear that the judge's participation in negotiations would force defendants to settle their cases before they received the information they needed. Rather, interviewees reported that prosecutors typically turned over discovery to the defendant well before such conferences took place, often at the urging of the judge. Moreover, the judge's involvement put the defense attorney in a position to hear the prosecution's answers to questions from the judge, questions that the prosecutor might never address in negotiations with defense counsel alone.

Finally, in section 7, we address the potential for a judge's involvement to influence a defendant's decision about pleading guilty. Despite the concern of a few that judicial involvement creates the risk of coercing the defendant into pleading guilty, this view was not widely shared. Most of the participants who spoke to us seemed unconcerned about a risk that judicial input into the negotiations added to the coercion defendants already face in plea bargaining. Instead, attorneys often prized judicial involvement for just the opposite reason: that it made the negotiation *less* coercive. As section 6 relates, interviewees suggested that by increasing the information available to a defendant and creating a sentencing option that is often more moderate than the prosecutor's offer, judicial participation can make an already coercive situation a little less so.

*1. Better (Not Just Faster) Outcomes.*—Judges reported that participating in discussions about potential sentences allowed them to educate prosecutors about why the sentence terms they had offered were excessive. In these conferences, said one, "I'll say that a lot, 'Why should the public have to pay to house him for three or four years when you and I know this guy is no danger?'"<sup>239</sup> Explained another, "We get some [state's] assistants that aren't too smart; they don't realize they won't get anything better."<sup>240</sup> The judge continued, "If I had to wait until the plea colloquy, I can't talk to them then. . . . I say to the state, 'You really think you are going to win this case?'"<sup>241</sup> Some considered their participation to be an essential source of impartial information for an assistant prosecutor who is bound by office policy and may have less experience: "The judge has the neutral role and is not an advocate for one side. . . . [S]omeone not beholden to the prosecutor's office or food chain politics, who is able to look at a case and provide some balance . . . ."<sup>242</sup>

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239. OR-J-1.

240. MD-J-1.

241. *Id.*

242. CA-J-3; *see also* OR-J-3 ("Sometimes it's the DA. [After hearing the offer in one case] I said, 'No way, . . . that's ridiculous.' So they get a little more reasonable after hearing that.").

Prosecutors with management responsibility also remarked that judicial participation in plea discussions is helpful when the attorneys involved are inexperienced or overzealous. Explained one:

As a manager, I am aware that lawyers on both sides fall in love with their cases. They become too committed. The defense attorney decides to right a terrible injustice; and from the prosecutor's side, the prosecutors can't see the holes in their cases. Lawyers are human beings, but the more passionate they are sometimes creates problems. A rational, reasonable, respectful person can come in and tell the prosecutor, "Let me tell you what the problems are with this case." [The judge] can tell your assistant, "Look, your victim has a drug problem—she won't come across that well. These are bizarre text messages she sent. Have you considered [a lesser charge]? Instead of a hundred months, just sixty . . . ?"<sup>243</sup>

The prosecutor continued, "Having someone outside who is respected, and here judges are respected by everyone, is giving the defendant, defense attorney, or prosecutor—giving them a reality check and—I appreciate that greatly."<sup>244</sup>

Judges also noted that their involvement can help to reach a more just resolution when they are concerned that inexperienced defense attorneys are going astray, against the best interests of their clients. Judges who conduct these discussions in a group setting reported that it allows the more experienced defense counsel to teach the rookie attorneys about law and strategy.<sup>245</sup> A number of judges also suggested that a defense attorney might occasionally need education from the judge, as when the attorney is out to prove a point at the expense of her client, has overlooked a problem, or has an unrealistic view of the case. Stated one judge, "[I]f there is an unreasonable defense practitioner who is looking to jam up the system, wanting to have as many cases set for trial or push things as far as they can to gum up the works, the judge is able to impact things then."<sup>246</sup> One judge recalled a colleague who was known to have said to defense attorneys: "Are you kidding? This deal is so good, if he doesn't take it I will!"<sup>247</sup> One prosecutor said he would ask a judge to participate only if an inexperienced defense attorney "is unrealistic in terms of how much time the case is worth. So I'll say, 'Why don't you ask the judge, and you'll see what I'm saying is

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243. OR-P-1.

244. OR-P-1; *see also* CA-P-3 ("There are a lot of DAs, less experienced, who might want input a bit because they are not as comfortable with the likely sentences.").

245. *See supra* notes 94–99 and accompanying text; *see also* MI-D-1 (reporting that "there will be private attorneys and other attorneys sitting around the table, and they hear all the cases," and that the younger attorneys do learn a lot by "watch[ing] and listen[ing] to the older attorneys").

246. CA-J-3.

247. MI-J-3.

accurate?”<sup>248</sup> A defense attorney remarked, “[As] advocates, we get tunnel vision. We are like little children; it is helpful to have a mediator-type figure to shed light on it.”<sup>249</sup>

Finally, several judges noted that, in talking with the parties, they would suggest dispositions or conditions of probation that neither party had thought about, but that they believed were appropriate for the particular case.<sup>250</sup> “Occasionally I’d see a situation where the parties are missing what the key issue is or not focusing on the appropriate conditions,” said one.<sup>251</sup> “So I’ll bring those up.”<sup>252</sup> Said a California judge:

We’re really talking about different options: how best to rehabilitate the defendant, how do we protect the public, what should we do to accommodate the particular defendant. We’re talking about a menu of options. When I sit down with them I really want a conversation about what kinds of options they are looking at, how best to resolve this case.<sup>253</sup>

2. *The Strategic Utility of Judicial Participation to Prosecutors.*—In past years, some prosecutors have voiced opposition to proposals to authorize

248. CA-P-3.

249. CA-D-4; *see also* OR-D-3 (“It’s one thing to read the dry police report; it’s another to watch the DA give a mini opening statement to the judge . . . . And often the Judge can help the parties come to agreement. I might have a blind spot, and the judge can point that out.”). These comments are consistent with law-and-economics analyses of settlement behavior: judicial participation would make settlement more likely if it helped the parties replace differing, irrational expectations of trial outcome with more rational, converging expectations. *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (presenting a model of litigation in which parties select for settlement and trial according to expected outcomes and associated costs); George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman’s Mistakes*, 14 J. LEGAL STUD. 215 (1985) (responding to criticism of the 1984 article). The judge can also help the parties overcome the psychological barrier known as “reactive devaluation.” *See* Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 26, 28 (Kenneth Arrow et al. eds., 1995) (“[Reactive devaluation] refers to the fact that the very offer of a particular proposal or concession—especially if the offer comes from an *adversary*—may diminish its apparent value or attractiveness in the eyes of the recipient.”); Bibas, *Outside the Shadow of Trial*, *supra* note 24, at 2532–34, 2542–43 (suggesting that more information about the probable sentence would de-bias bargaining, and that judicial oversight could help correct for agency costs of representation).

250. *See, e.g.*, OR-J-1 (“I might suggest there is a treatment program that would be beneficial”—also noting he would sometimes even volunteer to do the supervision, meeting with the defendant once a week, because the probation officers’ caseloads were too high to provide adequate supervision).

251. OR-J-2.

252. *Id.*; *see also* FL-D-1 (“The judge does more than react to party proposals. The judge, for instance, might talk about referral to Drug Court . . . . A lot of the discussion in the plea conference involves potential grounds for a departure.”).

253. CA-J-1. Also, “It is not a total one-way ratchet. Not at all. If judges refused to get involved, that should be a win for the prosecutor. But that is a narrow way to look at it.” *Id.*; *see also* OR-D-4 (“I like working the judge in because they can involve the DA and change the posture, from adversarial to, ‘Alright, let’s get behind this and get this done.’ It fosters a spirit of teamwork.”).

judicial participation;<sup>254</sup> several of the prosecutors we interviewed were not fans of it, either. We were somewhat surprised, then, to hear from many prosecutors that judicial participation held several advantages for them. Most even said they prefer it over a system in which judicial input was not available before the plea. We have already seen that prosecutors value judicial participation for its efficiency effects and that they appreciate how judges train and moderate assistants who are inexperienced or overzealous.<sup>255</sup> When judges can proffer a sentence, prosecutors said, in some cases it also helps them manage relationships with victims, police, press, and the public. One former prosecutor put it this way:

[I]t is unusual, but in politically sensitive cases—sex crimes, domestic violence cases—there are times when the DA has to take a really hard position politically, but maybe they have a weak case . . . . They’ll want to do what I call, “pass the poop.” They want the judge to offer on the deal, so, if the guy goes out and sexually assaults somebody else, the judge would have been the one who let him out early. . . . [Prosecutors] are elected. If the cops think the DA is going too lenient, the cops can go AWOL. . . . The media won’t know who the line deputy was. . . . It would be the *elected* district attorney who would get the flak if the police got mad.<sup>256</sup>

Another California prosecutor emphasized the utility of a judge’s indication of sentence when dealing with victims: “It is hard to tell someone that we couldn’t get any more time for you, or that something has to be punished as a misdemeanor, not a felony.”<sup>257</sup> He continued, “Victims call and voice their displeasure. You say, ‘I’m sorry this wasn’t our offer, it was the court’s offer. We encourage you to come to sentencing and let him know your views.’”<sup>258</sup> A Michigan prosecutor explained that some prosecutors might “actually [be] glad the judge does this—keeps the pleas moving—it allows the prosecutors to look like they are tough on crime.”<sup>259</sup>

Judges mentioned this dynamic as well. “The DA would look at me [and say], ‘You gotta help me out.’ So I’d say to the defense attorney, ‘Okay

254. *See supra* note 57.

255. *See supra* notes 235–38 and accompanying text.

256. CA-D-2; *see also* CA-D-1 (“[T]he judge takes the heat. The judge is [retired], it won’t affect his career.”).

257. CA-P-3.

258. *Id.*

259. MI-P-5. A Florida prosecutor also noted this tendency, finding it “disturbing.” FL-P-2. “Among prosecutors, the higher-ups say, ‘I don’t want the State’s Attorney depending on the judge to do something to avoid taking a difficult but correct stand.’” *Id.* Even in Utah, where judges reportedly did not participate as often, one prosecutor related, “Judicial signals allow the prosecutor to blame the judge for the bad news when dealing with the victim.” UT-P-1.

you plead the sheet, plead guilty to everything, and here's my promise."<sup>260</sup> "If the prosecutor says, 'I can't agree to a jail cap,' [then I know] they have victim issues," explained another judge.<sup>261</sup> This judge continued, "If it's a high-profile case, where press come in, oftentimes the prosecutor doesn't want to make a generous offer, even if all agree the case doesn't cry out for a long sentence. I would say, 'Don't worry, I'll do it. . . . [L]et the victim blame me.'"<sup>262</sup>

Assistant prosecutors had another reason to appreciate judicial input: it allowed them to avoid having to enforce a boss's rigid office policy in particular cases. "If I had an unreasonable boss that was gung ho on a case that was hopeless," explained one former assistant DA, "[and] my supervisor said I can't dump this, so I said, 'If the court does this I won't object, but I'm constrained.'"<sup>263</sup>

Judges and defense attorneys mentioned this as well. As one defense attorney described it, when the line prosecutor "doesn't want to get in trouble with the boss, but wouldn't mind if the outcome were lower than office policy allows. . . . [He'll] just signal to me, saying something like, 'Let's ask for a conference on this one.' Wink, wink."<sup>264</sup> A Florida judge agreed:

Sometimes the defense appreciates that the Assistant State's Attorney is in a pickle. The ASA knows that something lower is acceptable, but couldn't be seen by the boss to go with something less the current offer. The defense and prosecution are holding hands, so the State leaves no fingerprints on the case. . . . Some judges might say, "Eh, State, do you have any objection if the defendant pleads straight up and I sentence to X?" Sometimes the State says, "We have a big problem with that." Others say, "Judge, that would be a plea to the court." That's a wink and a nod, meaning, "Yes, go ahead. I just don't want to agree to that on the record." Using this technique, the prosecutor can pass the heat off to the judge for the victims and their

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260. CA-J-2; *see also* NC-J-2 ("At least fifty percent of the time, it is somewhat political. The elected DA doesn't want to say in open court that he agrees with the proposal, but doesn't really oppose it, either.").

261. MI-J-3.

262. *Id.* Indeed, this very rationale for authorizing judges to make a sentencing offer to a defendant was mentioned expressly by one of the justices in the *Cobbs* case itself:

A judge who chooses not to become involved has no political responsibility for a bargained sentence and that is a wholly appropriate position to take. Where, however, a judge is willing to assume that responsibility, I can think of no reason why that truth should not be communicated to the representatives of the people and the defendant.

*People v. Cobbs*, 505 N.W.2d 208, 214 (Mich. 1993) (per curiam) (Boyle, J., concurring).

263. CA-D-2.

264. FL-D-1; *see also* NC-P-3 ("Some places around the state have rules in the prosecutor's office about what you can offer or can't offer in certain types of cases. The judge could give the ADA a reason for departing from office policy.").

boss. They say to the boss and the victims, “I was holding out for five, but he got three.”<sup>265</sup>

A California defense attorney explained the consequences for a line prosecutor who acts against office policy without political cover from the judge: “Their bosses will make their life miserable. They’ll get ‘freeway therapy.’ . . . [T]hey’ll give you a job fifty miles from home.”<sup>266</sup>

3. *For the Defense: Better Sentences.*—In describing judicial participation and why they favor it, most interviewees told us that judicial input usually leads to sentences that are more lenient than the sentences defense attorneys would obtain for their clients if they had to deal with the prosecutor alone.<sup>267</sup> Said one attorney who practiced in a county where defendants attend the preplea conference, “[T]hey can be helpful to hear the defendant up close; the judge and the DA can size him up and see that he is not a monster.”<sup>268</sup> Said another, “If you do have a prosecutor who won’t deal, you still have an avenue to seek leniency for the client.”<sup>269</sup> And, we heard, when the prosecutor does offer a deal, the judge’s view of the appropriate sentence is often more lenient than the prosecutor’s offer.<sup>270</sup> The judge’s input offered a “face-saving” way for “gung ho” prosecutors to acknowledge

265. FL-J-1. A California judge similarly described when assistant prosecutors appreciate judicial participation:

Most often, when you would have a straight-jacket DA policy. . . . I’d have to read [the prosecutor to learn whether] this is an opposition on the record, or is it a pound-your-fist-this-is-an-outrage kind of opposition. . . . So I’d check to see the degree to which the prosecutor was offended you were doing this. Really a body language thing.

CA-J-3.

266. CA-D-1.

267. As to the exceptions, one defense attorney noted that a particular judge in his jurisdiction was “notorious for giving us a worse deal than what we negotiated . . . . [But] with other judges we do better than what we’re going to get out of the prosecutor.” MO-D-1; *see also* NC-D-1 (“At times [when parties ask for input], the judge says, ‘I don’t mind that, but you’ll have to add this.’ For instance, a judge might allow a split sentence, but will add confinement on the date of the collision every year for a certain number of years.”); OR-J-3 (“I probably concur with the DA more often than the defense.”); UT-P-1 (“Heavier judicial involvement brings in all the outliers. Our higher charges are being brought down. Defense’s generous proposals are rejected and the judge reinforces that. Overall, the judge makes party expectations more realistic.”).

268. OR-D-4 (“I’m hoping the judge will help me push the DA to be more reasonable. Some judges will, some won’t.”).

269. MI-D-1; *see also* OR-D-3 (“Or sometimes the DA is being stubborn or unreasonable. It is very powerful for that judge to say to the DA, ‘You are being unrealistic about your chances here.’”).

270. *See* FL-D-1 (“Of the cases that go to conference, I would say that about half end up more favorable to defense than they would have if the prosecutor and I just negotiated on our own. In the other half of the cases, there is simply no movement from the prosecutor’s offer.”); MI-D-2 (“If the prosecutor is offering something the defendant doesn’t feel is enough, then he can get the judge and the judge can narrow the exposure.”); UT-D-2 (“In these, maybe a third or half the time, the judge makes some little comment about really going to trial—‘Can’t you come up with something?’ These comments are mostly meant for the prosecutor.”).

weaknesses in their case: “[T]hey [hear] the judge say the same words that the defense lawyer was telling them about the problems with the case.”<sup>271</sup> Another said, “The judge backs them down, and the prosecutor will then bow to reality.”<sup>272</sup> In sum, defense attorneys agreed that judicial participation systematically helped their clients to receive lower sentences, not just in a few unusual cases.<sup>273</sup> Judges acknowledged that they regularly try to persuade the prosecutors to take a more lenient stance.<sup>274</sup>

It is easy to see why a judge might put more pressure on the prosecutor than the defense attorney in these discussions. The prosecutor generally has the authority to accede to a particular sentence arrangement on the spot, while the defense attorney may have to first consult the client.<sup>275</sup> Also, some prosecutors believe they have more to lose by irritating the judge than private defense attorneys do. Asked for his reaction to the suggestion that the judge’s involvement might seem coercive to a defendant, one prosecutor laughed, and said:

All the pressure [is] on the *prosecutor* to give them a better deal! . . . The lawyer that the judge can pressure is the lawyer that has to appear before the judge every day. Dozens of ways a judge can make a prosecutor’s life difficult. Do you want to tick off the judge? No, no matter what there is always something. Think about discretionary evidence rulings. There are a lot of ways you can pay for being obstinate. If there is a public defender the same rationale could apply there.<sup>276</sup>

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271. OH-D-1 (adding, “I involve the judge for prosecutor management”); *see also* OR-D-2 (mentioning that judges can help with “intransigent” or “stubborn” DAs, and that if judges did not participate, “[i]t would mean more clients went to prison for longer periods of time”).

272. FL-D-1 (adding, “The judge never takes the sentence or the charges in the case higher than the prosecutor’s negotiating position”).

273. *E.g.*, MD-D-2 (“Never happens that it works to the disadvantage of the client. Has not ever been anything other than what is good for the client.”); *see also* CA-D-4 (“Perhaps the judges in our county have overextended themselves to participate and give indicateds because our prosecutor has been so unreasonable.”). Prosecutors generally shared this view. *See, e.g.*, CA-P-2 (remarking that judges “probably lean more on the prosecutor,” but “it depended on the judge”); CA-P-3 (“The judge will typically go with or undercut my offer.”); NC-P-1 (“Sometimes we change our recommendation after we hear the judge’s view about the evidence. Or sometimes our recommended sentence changes after we hear the judge’s reaction to a possible open plea situation.”); OH-P-1 (“I could live with less involvement, maybe. . . . If I were answering this question from the defense side, I would probably see it differently.”).

274. *See* FL-J-1 (“Usually the defense asks. The defense attorney goes shopping to the judge to undercut the state. I will do this sometimes in my courtroom, and have had good luck with it.”); MD-J-1 (“The State’s Attorney’s office is my problem.”); MI-J-1 (“I can see why a prosecutor might think, ‘The judge is really leaning on me.’ The judge . . . may say, ‘Your facts are bad, you won’t get that from a jury.’ Or the judge may say, ‘You’ll be pushing for serious time, but I’m not seeing it.’”).

275. *See* MD-D-3 (“For me, the decision maker is the defendant; I have to go back to the client. . . . If the judge waits for you to go to the client, they have to wait. . . . But the prosecutor can make the decision right there.”).

276. MI-P-5.



4. *Increased Certainty for All.*—The most important thing, many interviewees told us, was that hearing from the judge on the sentence provided certainty—for defendants, victims, and attorneys.

a. *The Need for Certainty Despite the Predictability of Sentencing Limits.*—Despite guidelines, mandatory minimums, appellate review, and other restrictions on a judge’s sentencing discretion in the states we examined, a judge’s indication of sentence before the plea provides certainty that defendants continue to crave. We began this project with the hypothesis that structured judicial discretion in sentencing should give parties more certainty about sentence and thus reduce their incentive to seek judicial input. We also doubted that judicial participation would thrive in states where sentences were based on various sentencing facts ordinarily developed as part of the presentence investigation long after negotiations were complete. We selected our states accordingly, choosing states that have adopted restrictions on judicial sentencing in the form of guidelines or other structured-sentencing laws. We learned that judicial involvement in plea negotiations was alive and well even in states with binding sentencing guidelines, in part because judges retained considerable discretion.<sup>277</sup>

The various constraints on judicial discretion in these states did not satisfy the parties’ appetite for a more certain sentence. For example, at the time we conducted the interviews, Michigan’s sentencing guidelines were binding, but judges could depart for substantial and compelling reasons,<sup>278</sup> “straddle cells” permitted either incarceration or probation, and ranges were very broad for serious crimes.<sup>279</sup> In California, where for many felonies the judge can only choose among a mitigated, middle, or aggravated term of years, defendants wanted to know which the judge would choose, how much of the term they would spend in prison,<sup>280</sup> whether the judge would “strike a strike,” and whether a “wobbler” would be a felony or misdemeanor.<sup>281</sup> In

277. See, e.g., OH-P-2 (“Guidelines didn’t change their involvement. Not at all.”).

278. Some reported that an agreement with the judge trumps the guidelines. See MI-D-1 (explaining that the parties score the guidelines before the conference, and the agreement “eliminates the dispute at sentencing; if it comes back higher at sentencing, plea bargain controls”).

279. See MI-J-1 (“Straddle cell sentencing cases—where guidelines allow the judge to give probation, jail, or prison—those cases in particular, defendants want to find out with what the sentence will be with a *Cobbs* evaluation: If I plea, what am I going to get?”). The same is true for Ohio sentencing guidelines. See OH-P-1 (“As far as felonies, the parties want feedback from the judge more often on mid-range to high-level felonies. In those cases, the judge has more discretion under the guidelines.”).

280. See CA-D-1 (“The sentencing range is three terms, so they can say, ‘I can find this to be very aggravating’—that is a sign.”).

281. California judges have the authority to “strike a strike,” that is, to ignore an earlier felony conviction for purposes of a current habitual-felon sentence. *People v. Superior Court (Romero)*, 917 P.2d 628, 629–30 (Cal. 1996); *People v. Williams*, 948 P.2d 429, 435 (Cal. 1998); see CA-D-1 (“There are some [enhancements] they can strike. . . . [I]f your client has five priors, could get up to fifteen years of enhancement, but judge can say, ‘If you admit all those, I’ll give him one or

Florida, too, many ranges were broad, and judges could depart.<sup>282</sup> And interviewees from several states mentioned that parties wanted to know if the judge would impose consecutive or concurrent sentences for multiple counts.<sup>283</sup>

In Oregon and Maryland, the guidelines predicted even less. Oregon interviewees reported that they would agree on a sentence and then manipulate the state's binding guidelines by stipulating to whatever criminal history, grid blocks, sentencing facts, and departures would produce the sentence they wanted—and that the judge would willingly go along.<sup>284</sup> In Maryland the law includes a convenient fiction: once the judge is on board with a stipulated sentence and agrees to a “binding” plea, that sentence automatically complies with the guidelines.<sup>285</sup>

Sentencing guidelines in these states clearly do not sate the parties' appetites for greater certainty about what sentence the judge will impose.

*b. The Certainty that Judicial Input Brings.*—For the parties, the judge's advance views on sentencing provided welcome assurance that, if they proposed a sentence, the judge would probably accept their proposal.<sup>286</sup> The

two.”). The California Code also gives the sentencing judge authority to treat certain crimes as either a felony or a misdemeanor—the crime “wobbles” between the two statuses. *See* CA-J-3 (“For predictability, for the defendant there is still quite a range—say probation to six years—want to know sooner rather than later.”); CA-P-3 (noting that sentencing uncertainty includes whether a strike will be struck and whether a charge will be a misdemeanor or felony).

282. *See* FL-J-1 (noting that cases produce requests for judicial input where “judges have a wide range of discretion”). Some Florida judges reportedly defied the need to justify departures from the guidelines. *See* FL-P-1 (“In [one county], if you pointed out to the judge that there was no statutory basis for a contemplated downward departure, they would stop. But here, because of the volume, the judges don't care.”).

283. *E.g.*, CA-D-4 (“Our laws are so open-ended. Your client could get up to three years in prison, . . . there could be consecutive-sentencing possibility . . .”).

284. *See* OR-D-2 (“Guidelines don't ever get in the way of settling the case. So in that sense they don't matter. I have always said to the DA, ‘If we can agree on a number, I can figure out a way to get us there.’ . . . [There are] enough ways to wiggle around them.”); OR-D-3 (“We pick the correct sentence and engineer backwards.”).

285. MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, 2014 ANNUAL REPORT 39 (2014); *see also* MD-D-3 (“Q: Did the Guidelines bring more certainty, make it less necessary to use [binding pleas with judicial involvement]? A: No, to the contrary, the Commission said any binding plea would be a guidelines plea. The judge doesn't have to justify going outside the guidelines.”). Even though fewer than half of all Maryland cases in 2014 that departed from guidelines included a reason for the departure, about half of those that did include a reason listed, “the parties reached a plea agreement that called for a reduced sentence.” MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, *supra*, at 44–47. Asked whether such manipulation of their state's sentencing guidelines raised concerns about consistent sentencing, interviewees in both states responded, essentially, “Why should it, if both parties agree?” *E.g.*, MD-J-2 (“There is a recognition that if every single case went to trial, we couldn't handle it. . . . Judges realize that binding to a plea is sometimes helpful to get a case resolved.”); OR-J-3 (“It doesn't bother me, because if the defense and the prosecution are ok with it, it is ok with me.”).

286. *See* CA-P-3 (“The judge isn't making a promise, but in the . . . years I've done this, I've never seen a judge change his mind.”); FL-D-1 (“There are times when the judge rejects the plea offer that the parties propose at the guilty plea hearing. But I don't remember that ever happening

sentence preview was especially important, said a North Carolina attorney, in “serious, victim” cases, which “all attract media attention.”<sup>287</sup> In those cases, “if I’m dealing with an open plea, I’m not doing my job. A charge bargain without a sentence recommendation is just way too much leeway to allow the judge, even with structured sentencing.”<sup>288</sup> Summed up by a Maryland attorney, it is “a big deal to be able to tell a client with confidence that a certain disposition will follow from a guilty plea.”<sup>289</sup> California attorneys echoed that, when a defendant was considering pleading guilty as charged (“eating the sheet”) instead of taking the prosecutor’s offer, knowing what sentence the judge would impose was crucial.<sup>290</sup> “It would be like standing there naked,” said one; “pleading guilty without an indicated is crazy.”<sup>291</sup> “You don’t *need* it, but it is sure nice to have. Like a tightrope walker, I like the net.”<sup>292</sup>

Judges agreed: increased certainty about the sentence is the key advantage of judicial involvement before the plea for defendants. Explained one Michigan judge, pleading guilty without knowing what the sentence will be is “a white-knuckle ride.”<sup>293</sup> Another said that, decades ago, when Michigan law prohibited discussing a potential sentence or deal with the judge during a pretrial conference, the “[j]udges did it anyway.”<sup>294</sup> He told this story to illustrate:

There was another judge, . . . during the winter, [the] window between his chambers and the hallway would steam up. After pretrial

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if the parties went through a plea conference.”); UT-D-3 (“[T]he defense wants a commitment that you won’t send him to jail.”).

287. NC-D-1.

288. *Id.*; see also OH-J-1 (“Even under sentencing guidelines, discretionary sentences still happen. Parties find judicial guidance less valuable where the rules restrict more. But the guidance still helps them and they still ask.”).

289. MD-D-3.

290. See CA-P-1 (noting that judicial participation is more likely “[i]n cases where the judge has more discretion—nonviolent, non-serious offenses”). A Michigan attorney described this uncertainty:

I tell my client, “You have three choices: you can fight, or we can approach the prosecutor to see if we can reduce the charge or counts, or we can go to the judge and look at what you are looking at in terms of sentence.” And the clients want to go to the judge. They don’t care about the crime; they care about the sentence—Call it Murder 2 so long as I know I’m getting probation. . . . It’s like the devil you know.

MI-D-4.

291. CA-D-4.

292. *Id.*

293. MI-J-3; see also *id.* (“Defendant is always better off having certainty.”); OH-J-2 (“The defense counsel motive is to move the scary unknown parts of a bargain into more certainty.”); cf. Bibas, *From the Ground Up*, *supra* note 24, at 1075 (“At bottom, what defendants really need is an informed forecast of the expected conviction and sentence (including collateral consequences), how they compare to those received by other defendants, and the risks and benefits of holding out or walking away.”).

294. MI-J-2.

conferences with the lawyers, they'd walk out, and he'd write with his finger on the steamy window, "5–10." Then they would know what it would be.<sup>295</sup>

Knowing the probable outcome of a potential plea reduces uncertainty for prosecutors, as well as for victims and defendants.<sup>296</sup> When the prosecutor wants a sentence or plea bargain that would look unusual to the judge, speaking with the judge in advance of the plea can reduce the risk that the judge will balk. Said one, "[I]t is usually the prosecutor who wants to check with the judge [because the prosecutor] is the one who would be questioned by the judge about the deal in open court."<sup>297</sup> One prosecutor from North Carolina called this reason for requesting input from the judge the "heads-up plan," to "prevent the judge from rejecting the plea agreement."<sup>298</sup> The judge's agreement to be bound by the parties' proposed sentence in Maryland also carried assurance that the sentence would not be subject to later modification without the agreement of the prosecution.<sup>299</sup>

In sum, restrictions on judicial sentencing discretion did not dissuade parties from seeking sentencing information from the judge before settling on a deal. Instead, judicial input in these jurisdictions was valued for the certainty it provided about those aspects of punishment that the law left to the judge's discretion. And where the judge's approval offered a way around sentencing restrictions or postsentence review, judicial participation became even more attractive.

5. *Filling Gaps in Information for the Judge.*—Critics have been skeptical about whether judges should talk about the sentence before receiving a presentence report, complete with guidelines facts and a victim's statement, concerned that sentences estimated under such conditions would be inaccurate or require adjustment later.<sup>300</sup> Our interviewees described a

295. *Id.*

296. See NC-P-1 ("It prevents unhappy surprises for the victims.").

297. MO-P-1.

298. NC-P-1 (noting that this is "the most common scenario that involves the judge in plea negotiations"); see also FL-P-3 ("[J]udges appreciate hearing ahead of time about something that doesn't follow a typical pattern."); OH-D-3 ("We know if there is a potential problem with a deal because of its unusual terms, and for those cases we will approach the judge."). A Maryland judge noted that, in the rare case where the judge would reject a negotiated sentence as too low, a preplea session permits the judge to tell defense counsel what sentence the judge would consider. MD-J-2.

299. See MD-J-2 ("If it is a binding plea, it cannot be modified later if the state doesn't agree."); MD-P-1 ("[I]f it is an agreed-upon sentence, and the judge has bound himself, the judge will say, 'This cannot be modified unless state agrees to the modification.'"); MD-P-2.

300. See, e.g., Minutes, Advisory Comm. on Criminal Rules, *supra* note 1, at 5–6; UT-D-2 (recounting that one county's experiment with an Early Case Resolution Court was abandoned because "judges felt like they needed more information before they could impose a proper sentence, but in the ECR they had little or no information about the defendant or the crime").

very different picture: judges with as much or more information during negotiations as they would have if the parties had settled on their own.

Some critics of judicial participation argue that it can cut victims out of the sentencing process.<sup>301</sup> The sidelining of victims is one of the oldest complaints about plea bargaining generally.<sup>302</sup> Yet, if prosecutors lack the time or resources to consult with victims before making a deal directly with the defense attorney, it is not clear that adding the judge's input to negotiations would aggravate that problem. Rather, as interviewees told us, because judges at these conferences often ask the prosecutor for the victim's views, the judge's involvement can push prosecutors to try harder to obtain victim input before settling a case.<sup>303</sup> Although there were some interviewees, particularly those from California, who did report that victims typically were not consulted before conferences,<sup>304</sup> most said that prosecutors regularly solicited victim views before meetings with the judge about settlement.<sup>305</sup>

In addition, all but a few interviewees<sup>306</sup> treated the absence of presentence reports at the discussion of sentence with the judge as no big deal. We gathered that the sentencing information the judge received at a settlement conference was as good as, and sometimes even better than, what the judge would see in guilty-plea cases without speaking with the parties before the plea. Many interviewees reported they seldom used presentence reports regardless of whether the judge was involved. In several states

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301. See Statement of Timothy Baughman, *supra* note 57 (“[Y]ou may have an impact statement coming in later and you may have a victim standing up at the lectern speaking, but the judge has already told the defendant what sentence he’s getting.”).

302. See generally Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea Bargaining and Beyond*, 117 W. VA. L. REV. 97 (2014) (assessing the victims’ rights agenda in three recent United States Supreme Court opinions); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987) (arguing that victims have a right to participate in the plea-bargain stage of the prosecution).

303. See FL-P-1 (“[T]he prosecutor has met with victim very early, so the victim information is not just based on a sworn statement. The judges know this. They’re very interested in hearing from us whether the victim is cooperative.”); MD-J-2 (“Often these [conferences] are during the regular criminal docket. I will always ask if the victim is aware of the plea agreement if the victim is not there.”); OH-D-3 (stating that, “[n]ine out of ten times—or more—the victim already knows about the offer” by the time the parties speak to the judge).

304. See CA-J-3 (stating that prosecutors rarely talk to the victim before making an offer, but that “there’s a better chance they have spoken” if it is a more serious case). Defense attorneys had strategies for dealing with the possibility that victim input later, at sentencing, could derail a settlement. For example, one reported that, if he was worried about the victim’s input at sentencing, he’d agree “to the high part of the guidelines. Many judges will explain on the record [at sentencing], ‘I have to stay within the guidelines.’” MI-D-1.

305. See MO-P-3 (reporting that they’ve “always talked to the victim by that point”); see also MI-D-4 (“This office is great—maybe too great—at contacting victims.”).

306. See MI-P-3 (“[Judges will] say, ‘I don’t know anything about this case. I don’t know the facts, I don’t know the guy. You people know much more about it than I do.’ They don’t want to weigh in.”); OR-J-1 (describing the settlement judge “making decisions totally on what the lawyers say,” and stating that “[t]he fact that we don’t have a PSR is a real problem for the system”).

presentence reports seem to be vanishing from routine use. A decade or more ago, as one Oregon attorney told us, probation office staff in his county routinely prepared presentence reports for most cases resolved by plea, but funding for the preparation of presentence reports has now been drastically reduced and probation office resources shifted to supervision and pretrial.<sup>307</sup> For example, despite the heralded embrace of risk-needs assessments at sentencing in California,<sup>308</sup> judges in some counties obtained full presentence reports in very few cases, making do with information about custody credits, criminal history, and whatever other information the attorneys supplied.<sup>309</sup> Judges don't often order presentence reports in some counties in Oregon,<sup>310</sup> Maryland,<sup>311</sup> or Florida<sup>312</sup> either, and use them in only about half or fewer of felony cases in Missouri.<sup>313</sup> Without presentence reports at the conference, judges relied on the parties for information.<sup>314</sup> Criminal history was always available from either the prosecutor or an online resource,<sup>315</sup> and defense attorneys presented employment, health, and other information about their

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307. See OR-D-4 (“We used to have [more] people in the probation office writing PSIs, now we have one half-time person,”—and noting JRI grant now funds risk-needs assessments in program-eligible cases only).

308. See Petersilia et al., *supra* note 73, at 35 (detailing California’s evidence-based presentencing programs, designed to target interventions to offenders at greater risk of recidivism as well those with “criminogenic” needs that might lead to criminal conduct).

309. See CA-J-3 (“[S]ince the probation office budget was slashed . . . we would waive any referral to the probation department. . . . So basically, [at sentencing] I’m fat, dumb, and happy; I don’t know anything more than what I learned in the chambers discussion.”).

310. Oregon interviewees reported that the state’s mandatory minimum laws have displaced the guidelines in affected cases, making presentence reports useless, and that there are no resources to prepare them. See OR-D-2 (reporting that, after the legislature passed a mandatory sentencing scheme in 1995, presentence reports stopped: “I haven’t seen a PSI since.”).

311. See MD-D-2 (“Q: What would the judge have later that he doesn’t have at the conference? A: That’s just it—nothing.”); MD-J-1 (stating that he will request PSR only for low-level cases where the defendant will be released—“[y]ounger defendants with no record, . . . cases where I am concerned whether or not a person who is homeless will carry through”—and that it “doesn’t happen very often that I want to see presentence to back up what the parties tell me”); MD-J-3 (noting that a presentence report “takes a while to get, and it’s expensive. Parole and probation figured out it’s about \$750 of time and materials to get each one. So we don’t generally get presentence reports. Only in a murder case, real serious stuff, we’ll do that.”).

312. See FL-D-1 (“The PSI report is not done routinely, not even in time for sentencing.”).

313. Missouri judges routinely dispense with presentence reports (or “Sentencing Assessment Reports”), unless the defendant pleads “open” or “blind” (that is, without a recommendation or agreement on sentence) or is convicted by a jury. See MO-D-2 (reporting that “most pleas never have a SAR”); MO-J-1 (“Our statistics on SAR show they are used in about 55% of the felonies.”).

314. See FL-P-2 (“If the judge is going to undercut me, the judge will give me a chance to talk him out of it. He’ll ask, ‘How serious was the injury? Do you have the photographs?’”); NC-D-2 (“The judge has nothing. He might have looked at the clerk’s file. That file contains the indictment, witness subpoenas . . . . The judge offers feedback based just on a quick view of the clerk’s file and whatever the attorneys say in chambers about the case.”).

315. See MD-J-2 (“We always get the criminal history of the defendant from the prosecutor.”). Online resources are available in Missouri and California. See MO-D-2 (“Casenet is open to anyone . . . .”); CA-J-1 (“[O]n criminal history, this is a huge state, our data base about their offenses is pretty good.”).

clients.<sup>316</sup> Parties calculated guidelines scores and grids for the judge using simple forms or online tools.<sup>317</sup>

Interviewees also reported that, even when a presentence report was prepared between a settlement conference and sentencing, it was unusual to encounter information that differed from what the judge knew at settlement.<sup>318</sup> Occasionally there would be a missed prior conviction, or a new victim's statement, but this happened rarely and, when it did, it rarely affected the judge's earlier view of the appropriate sentence.<sup>319</sup> Even in those highly unusual cases, we were told, in which a judge encountered a new fact at sentencing that compelled a higher sentence, it was quite uncommon for a defendant to withdraw from a bargain.<sup>320</sup>

Some responses suggested that, judges may receive *more* information about the case in a settlement conference than they could if a stipulated deal was simply presented to them for an up-or-down decision at a plea hearing. At the conference, we were told, the judge can explore options and issues with the attorneys.<sup>321</sup> When counsel appear at a plea hearing with a stipulated disposition in hand, however, a judge may be less inclined to have these exploratory conversations.

In addition, a few of those we interviewed reported another source of information that surprised us: judges at the settlement stage had access to evidence-based risk reports, sometimes called "bail reviews," prepared in connection with the pretrial release decision.<sup>322</sup> These reports, like presentence reports, provide information about a defendant's employment,

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316. See NC-D-1 ("Basically, you describe for the judge in this conference everything you would give him at sentencing. . . . I'll jump back to anything that I can find in my mitigation notebook, anything that relates to a topic that the judge mentioned."); OH-D-1 ("[Defense] might provide the judge with proof of counseling or treatment."). In at least one county, the defense attorneys did extensive investigation preparing for the settlement, for example, setting up psychological evaluations in all sex offense cases. OR-D-4.

317. See FL-D-2 ("All of the calculations for a single defendant appear on one sheet unless there's a lot of criminal history."); OR-D-3 ("One of the first questions the judge will ask is, 'What's his grid?"). Maryland has an online tool called "MAGS" that calculates guidelines scores automatically. See *Maryland Automated Guidelines System*, MD. ST. COMM'N ON CRIM. SENT'G POL'Y, <http://www.msccsp.org/MAGS/> [<https://perma.cc/MNB2-56KL>].

318. See CA-J-1 ("Can't think of any cases where the criminal history I received earlier turned out to be incomplete."); CA-P-3 ("The biggest surprise at sentencing is if someone picks up a new case or they don't show up to court. Those are changed circumstances. It is very, very rare for a disposition to be overturned because of anything else.").

319. See CA-D-4 (noting that "the info has to be really bad" for the judge to withdraw an indicated sentence; estimating that this occurs in "maybe one percent" of cases, and "[u]sually it's the prior record that upsets the apple cart" after "they do the background and all the aliases come in"); MI-P-1 ("The prosecutor will say, 'Judge, we see that the guidelines came in a year higher, but we'll overlook that and stick with the *Cobbs* [evaluation].").

320. See MI-J-1 ("I try very hard with *Cobbs*, that I know as much as I can so that I can follow through with it. Doesn't serve your reputation with defense bar if you don't.").

321. See *supra* notes 79–83, 94–99.

322. OR-P-3; CA-D-2.

educational, and family situation.<sup>323</sup> Judges in some courts also included probation staff in the conferences, consulted the probation officer before the conference, or were able to access for settlement discussions real-time information on the availability of treatment programs and jail beds, information the parties would not see if they were negotiating a sentence on their own.<sup>324</sup>

With alternative sources of information providing the same information as a traditional presentence report, if not better, at an earlier stage, it is no wonder that so many of our interviewees shrugged off the absence of presentence reports at settlement.

*6. Accommodating Early Discovery for the Defense.*—Another criticism leveled against any early plea negotiations—not limited to negotiations that involve judicial input—is that defendants are compelled to consider offers before they have had time to investigate the case or receive discovery materials. A few attorneys in two states complained about this,<sup>325</sup> but we found little of this concern in the other states included in our study. Instead, in these states, the practice of judicial involvement may actually prompt prosecutors to reveal more to defense counsel, and to reveal it earlier. Defendants generally receive the discovery they need in time, well before a

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323. See OR-J-1 (describing plans for expanding a system of pretrial, risk-based investigations, available to judges for use in evaluating sentences—“Judges would have access to that early on, so they will know more about the case and the defendant”—and noting that “that system is beginning to be accepted”); OR-P-3 (reporting that judges have access at settlement to bail reviews that “include some important release consideration factors . . . gathered by the court’s staff”; these are available “[o]nline, hard copies in the court file—both parties will have a file. . . . You have info on criminal history, [failures to appear], mental health issues, residence, drugs,” but this prosecutor cautioned that, “in a settlement conference, judges must be careful in consulting these risk tools which are created for a different context”); cf. OH-J-1 (describing one judge who “looks at police reports, witness statements, the defendant’s prior record, [and] the defendant’s conduct on bond”). Judicial access at settlement conference to risk-and-needs assessments originally created for setting bail was reported as well in California and Missouri. See CA-D-2 (commenting that they will get a probation report “for bail, at the time of arraignment”); MO-J-1 (describing the risk-assessment report and score available to the judge from first appearance on in some courts).

324. See MI-P-4 (reporting that the judge, after granting a written request for a sentence evaluation, “meets with probation, comes up with his own range, then meets on the record” with the parties); see also Pennypacker & Thompson, *supra* note 73, at 1025 (noting the presence of probation officers at settlement conferences); NAT’L CTR. FOR ST. CTS., *supra* note 130, at tbl.53(b), <http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM193> [https://perma.cc/7Q7S-EJRQ] (listing jurisdictions with real-time electronic exchange of information between courts and jails). By far the most informed settlement discussions reported to us were those supported by grant funding in Oregon, where full risk-and-needs assessment reports were prepared with the aim of exploring nonincarceration options. See OR-D-4 (stating that risk assessments are received by “secure email,” and that the report “does give you some of what you need for mitigation, life history about trauma, to show—not just a criminal—he has needs that can be addressed”).

325. See MI-D-1 (explaining that sometimes they don’t have “full discovery” needed before status conference); OR-D-3 (noting that in some JRI cases it has been a challenge to complete the defense investigation—particularly securing psychological tests—before the settlement conference deadline).



settlement conference,<sup>326</sup> or can request early discovery if a client wishes to settle before a preliminary hearing.<sup>327</sup> Some interviewees reported that the settlement conference itself serves as a discovery device for the defense because prosecutors had to relate some information to the judge that they may not have disclosed in negotiations with defense counsel alone.<sup>328</sup> Just as judicial involvement in bargaining may, depending on the practice, generate more information for the judge than the judge would have in a case without judicial involvement, it could also generate more information for defense counsel.

*7. Informing Clients Who Won't Believe Their Lawyers.*—In addition to the information benefits of judicial participation noted above, defense attorneys also perceived judicial participation as particularly helpful when clients are stubborn or do not listen to their advice. We heard this from practitioners in places where judges sometimes talked directly with defendants, as they do in some counties in Oregon, Kansas, and California.<sup>329</sup> The same point came from practitioners in other states where judges met only with the attorneys, and defense counsel relayed to clients what the judge had said.<sup>330</sup>

In states where judges sometimes speak directly to defendants, defense attorneys viewed enlisting the judge as a strategic option to help a client obtain a better sentence than he would get if he held out. “It helps to have someone else, someone in the robe, explaining the facts of life,” stated one

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326. See, e.g., MD-P-1 (“Discovery is done before you talk about pleas. How can you ethically discuss a plea if you don’t have discovery?”); MI-D-4. In California and Oregon, the prosecutor provides discovery at arraignment or soon afterward. See CA-P-1 (“Defense will get the police report, and any supplement reports, and a printout of the client’s criminal history [at arraignment.]”); OR-J-1 (stating that discovery is provided at arraignment in eighty percent of cases, otherwise within three to four days after); OR-J-3 (noting that discovery is required well in advance of the Early Resolution Conference); see also FLA. 20TH JUD. CIR., *supra* note 125 (“Initial discovery . . . shall be provided at arraignment or at the earliest time possible . . . in order to permit the State and the Defendant sufficient time, in advance of the case management conference, to evaluate the case and meaningfully participate in the [conference.]”).

327. MO-P-1.

328. Federal Judge Thomas Lambros claimed more than forty years ago that “[j]udicial participation in plea discussions inevitably causes the prosecutor to open his file and to freely discuss the strength of his case,” providing information to the defense that would not be discoverable. See Lambros, *supra* note 23, at 515. Based on the reports from our interviewees, it appears that he was right about that. See OR-D-3 (“In my experience, that process is helpful. I always learn something. It’s one thing to read the dry police report; it’s another to watch the DA give a mini opening statement to the judge—gives it that personal spin. It’s always informative.”).

329. See, e.g., CA-D-4; KS-D-2; OR-D-2; OR-D-4.

330. See MD-P-1 (“It gave the defense attorney something to go out to his client and say, ‘Look, I talked to the judge . . . [he is] saying this is a serious case and that you are looking at serious jail time.’”).

Oregon defense attorney.<sup>331</sup> As one California attorney explained, the client may treat the judge as more authoritative and therefore more believable:

[B]ecause I'm appointed they call us "public pretenders." They don't think we're real lawyers. They don't trust what I'm saying. They want to hear it from the judge. . . . So I'll go back—judges are very good at this—and I'll say, "Judge, the client wants to hear from you," and the judge will give 'em a real rundown: "This is why it is serious—have you considered the victim?" . . . [T]here are some clients who are so used to getting away, particularly abusers. They are bullies; they are used to strong-arming their way. They need someone stronger than they are to boom down on them with a strong voice. . . . They used to stuff people like me in lockers. I'm saving them from themselves.<sup>332</sup>

One female attorney said that she uses mediation with the judge (an older white male) to great effect with older male clients who have "a problem with me."<sup>333</sup> When the judge tells the client "that the offer [is] excellent," the client is more likely to accept this advice from somebody who is "more authoritative by his lights."<sup>334</sup>

Prosecutors and judges also mentioned this. A California judge explained how, upon the request of a defense attorney, he reviews the DA's offer with the defendant and then comments along these lines:

I'm not here to choose for you—it is entirely your decision and it doesn't matter to me—but at the same time, to the extent your lawyer is saying that is a good offer and to give it some thought, I would echo that's probably right. But it's your call.<sup>335</sup>

One North Carolina prosecutor estimated that the judge's advice to "hardheaded" defendants, delivered in open court, makes a difference: "Maybe twenty percent of time the defendant will accept the deal after

331. OR-D-2; *see also* OR-D-4 ("Another reason people have settlement conferences is to browbeat—or help—their clients. You have someone who is a difficult client, very criminal and antisocial, doesn't trust you. [I say,] 'So you don't believe me? You can hear it from the judge.' That is a very common practice.").

332. CA-D-4; *see also* UT-D-2 (noting how, for defendants, judicial input about a sentence "confirms that they're going to go to prison and the defense lawyer has been giving them good advice").

333. KS-D-2.

334. *Id.*

335. CA-J-3. An Oregon prosecutor, recalling his work as a defense attorney, also mentioned that a settlement judge can be helpful when the defendant is saying, "[W]ell, my friend in Cell Block D told me he thinks he can get a better deal." OR-P-1. Alternatively, he explained, a settlement judge is also helpful with:

a client who is a pedophile, looking at 120 years in prison, and he doesn't want to tell his mommy, so he says he's innocent. He needs someone other than the defense attorney to say it clearly, [so the settlement judge will] come in a room and say, "Son, you're screwed. If you don't do this you're looking at thirty-eight years in prison."

*Id.*

hearing from the judge, even though the defendant had rejected the same advice earlier from defense counsel.”<sup>336</sup>

These conversations between the judge and the defendant raise the specter of coercion. Indeed, one of the perennial risks of judicial involvement in negotiations is the prospect that the judge might create too much pressure to plead guilty for defendants who believe they are innocent or would rather go to trial.<sup>337</sup> We pursued this topic with our interviewees. Several defense attorneys, judges, and even prosecutors acknowledged some risk that a judge might cross the line while speaking with a defendant. But they also believed that standard limits on the judge’s involvement kept that risk low, and that the benefits to the defense far outweighed that risk.<sup>338</sup> In their view, judicial involvement made an already coercive situation a little less so. Like the other self-serving claims about defendant perceptions we report here, our interviewees’ assertions deserve testing that this study cannot provide. Yet the consistency with which participants held this view was striking.

First, interviewees in jurisdictions where judges met only with the attorneys were puzzled by the idea that judicial participation could be coercive when the judge did not speak directly to the defendant, and the defendant heard only from her own lawyer. All interviewees from Michigan and Maryland—and most of those we contacted from Missouri, North Carolina, Ohio, Florida, and California—reported that judges did not speak directly to the defendants in these conferences: defendants heard what the judge said in conference only from their own lawyers. In these courts, the judge adds no additional incentive to plea and only confirms for the defendant that the defense attorney’s assessment of the choice provided by the

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336. NC-P-1 (adding, “[T]here are plenty of other cases where everyone in the courtroom shakes their head, thinking to themselves, ‘Does this guy understand what he just turned down?’”); *see also* FL-P-2 (“The defense attorney sets a plea conference with expectations that the prosecutor will give a little speech about the strength of the case, and then the judge will describe the legal minimum and maximum sentences based on the current charges. . . . The defendant hears the bad news from the court and from the state, in equal amounts.”).

337. *See, e.g.*, Hiser, *supra* note 23, at 213 (acknowledging the potential problems with judicial participation in the plea bargaining process); Hughes, *supra* note 23, at 760 (arguing that the practice of judicial participation in the plea bargaining process “is so fraught with danger that it should be generally abandoned”).

338. *See* MI-J-2 (noting that the risk of coercing defendant to plead when he’d rather not “[m]ay be true in some cases. In most cases, though, the defendant sees it as a real advantage to know what the sentence is going to be. . . . You have to be aware of that [risk], and can’t do it as a pressure [thing] when dealing with the defendant.”). But as noted in Part IV, some defense attorneys in Utah and Kansas praised judges for staying out of negotiations. *See, e.g.*, UT-D-1 (“Most judges are very good about staying away from that sort of thing.”); KS-D-1 (“[J]udicial involvement . . . [is] just never done and I hope it stays that way.”).

prosecutor was accurate.<sup>339</sup> “So, as far as pressure goes, the only pressure is from the defendant’s lawyer . . . .”<sup>340</sup>

Another safeguard mentioned frequently was that judges did not participate in plea discussions until defense counsel confirmed that the client was interested in exploring a plea and requested judicial participation, or until the parties had already reached a tentative agreement.<sup>341</sup> Judicial consultation, most reported, only happened when the parties wanted to make sure that the judge would accept the deal that the parties had discussed, or when the defendant wanted a better deal than what the prosecutor had offered.<sup>342</sup>

Even where settlement conferences were reportedly mandatory, a defendant could opt out if he was intent on going to trial.<sup>343</sup> Judges, for their part, told us that they had no time to get involved if the defendant had not already decided to plead guilty. “I don’t have *time* to work on you,” said one.<sup>344</sup> “I’ve got too many cases. [I]t’s like Lucy and Ethyl in there; we *have* to keep it moving, to preserve resources to be able to fully litigate the cases that need to be fully litigated.”<sup>345</sup> Some noted that some judges would try to

339. See MI-D-1:

I have no problem with [the judge’s involvement], because I’ve told my client the exact same thing. The history of public defenders is that we are not trusted by many clients, and sometimes our clients don’t think we are truthful. And when they hear it again from the bench, by the person in the black robe, many times they’ll say, ‘Hmm, that’s what my lawyer said.’ They’ll think it over. . . . But if the judge says, ‘You better take this plea; you’re stupid not to take it’—that’s something else. We don’t get that. Never seen it happen.

340. MI-J-3; see also CA-D-2 (“Your client isn’t there, so that doesn’t happen.”).

341. See MD-P-2 (noting that the judge “wouldn’t bother with it” if the defendant had not already agreed to plead guilty). In many states, court rule or case law forbids judges from participating without a request from the parties or a tentative agreement. See *supra* note 140.

342. See MI-D-2 (“Normally you are not asking for *Cobb*s unless the defense is thinking about pleading.”); CA-P-1 (“A majority of them are situations in which defense are not happy with the prosecution’s offer. They are interested in what better deal they may be able to get from the prosecutor or the judge.”).

343. See, e.g., OR-D-4 (“Q: What if your client insists on innocence, do you go to settlement anyway? A: You can opt out if you want to go to trial.”).

344. CA-J-3.

345. *Id.* The judge continued:

If they are not ready to have any meaningful discussion I would not force it. . . . I’m not going to lose sleep if attorneys say that there is no way the case can get resolved—either because so many counts, because so much past history, because they are filing an amendment. Or the defense says this case is a go—there is a legitimate suppression motion, or we think we can get the confession thrown out, or the guy’s exposure is just too big. If that happens, I’m not going to spend a lot of time asking, ‘Why is that?’ . . . The defendant may have those concerns [about coercion], but all the benefits inure to the accused by having a resolution system. You are ultimately harming the accused by not having judges have a chance to weigh in.

*Id.*; see also OR-D-2 (“[I]f we’re firm that we’re going to trial . . . the court may not want to waste its time trying to make settlement happen. . . . [I]f the judge thinks the attorneys are rookies . . . the

get the parties to settle even when the defendant had not asked for it, but these attorneys did not perceive this as a problem.<sup>346</sup>

As we noted earlier, states such as Michigan and California have barred judges from contrasting the sentence likely upon plea with the usual trial sentence, reasoning that this is one potentially coercive aspect of judicial participation that judges must strictly avoid.<sup>347</sup> A few interviewees from other states, however, mentioned that judges do tell defense counsel what sentence is likely if the defendant chooses not to plead and is instead sentenced after trial.<sup>348</sup> Some also observed that this contrasting information was now inevitable, even without judicial participation in negotiations. The United States Supreme Court in *Missouri v. Frye*<sup>349</sup> and *Lafler v. Cooper*<sup>350</sup> recommended that attorneys and judges create a record to show that a defendant considered and rejected an offer to settle the case.<sup>351</sup> Both where judicial participation in settlement is allowed as well as where it is not, judges and prosecutors frequently elicit—on the record at a hearing before trial—proof that the defendant learned of the offer, what that offer was, and that the defendant turned it down knowing the sentence range he would face if convicted at trial.<sup>352</sup> If judges who do not participate in negotiations are

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judge might take a stab at it anyway; if he respects the lawyers, the judge will say, ‘Okay,’ and move on.”).

346. See FL-P-2 (“Some judges do talk about the possible coercion. That’s one of their leading justifications for staying out of it, never negotiating. Other judges who do get involved still worry aloud about this. But I don’t think it’s a real problem. The vast majority of the time, the judge is offering something better than the state.”); NC-D-3 (“Q: Do you worry about the coercive effect on your client when a judge gets into the negotiating mix? A: No, that’s your job as a defense attorney. . . . [T]he statute allows me just to say no to the plea deal.”).

347. See *supra* section II(C)(1).

348. See *supra* note 136 and accompanying text; see also NC-P-1:

In the conference in chambers, the judge said to the defense attorney, ‘I just want you to know that if the jury finds your client guilty, this will be the sentence I plan to impose, assuming no surprises in the proof at trial or the further evidence you might present to me at sentencing.’ The judge indicated a sentence that was higher than the sentence that would have resulted from our proposed plea deal. This case went ahead to trial. But it was a comfort during the prep and the trial itself to know what the judge would do at sentencing after a guilty verdict. It was a confidence boost to know that our offer was not out of line.

349. 132 S. Ct. 1399 (2012).

350. 132 S. Ct. 1376 (2012).

351. *Frye*, 132 S. Ct. at 1408–09; *Lafler*, 132 S. Ct. at 1390.

352. See FL-J-1 (“That exchange on the record takes away a later [FLA. R. CRIM. P.] 3.850 argument regarding ineffective assistance of counsel. That colloquy in the court just before trial sometimes sparks a discussion between the parties and it settles at the last minute.”); MD-P-2 (describing a plea-rejection hearing as an opportunity for the judge to read the plea offer into the record and to ensure the defendant understands the offer and the consequences of rejecting it); see also *Noland v. State*, 413 S.W.3d 684, 686 (Mo. Ct. App. 2013) (quoting a trial-court record of a plea-rejection hearing); *State v. Jabbaar*, 991 N.E.2d 290, 295 (Ohio Ct. App. 2013) (“[I]t is important for a record to be established that a defendant is aware of a plea deal if one is presented to the defendant—something that may necessarily involve the participation of the trial judge by

already ensuring on the record before trial that the defendant understands the higher sentence he is risking by declining the prosecutor's formal plea offer, it is difficult to see why permitting a judge to give the defendant earlier notice of the likely trial sentence adds to the coercive effect of a prosecutor's plea offer.

One Florida judge recognized the risk that a defendant might claim vindictiveness after receiving a trial sentence higher than an earlier, rejected offer, but dismissed the concern: "If you get more bad facts at trial, that could justify a higher sentence. . . . Only the weak, lazy, feeble judge will hammer anybody who goes to trial. That is an immature and inappropriate way to handle your docket. And it's ineffective. Those judges don't clear their dockets any quicker."<sup>353</sup>

Other interviewees made additional points about why the risk of a vindictive sentence was not a concern. First, as noted in Part II, many of these courts already separate the judges who participate in settlements from the judges presiding at trial; even in places that did not designate a new trial judge automatically, several interviewees noted that, if a case ended up at trial, defendants were entitled to a judge other than the settlement judge.<sup>354</sup> Second, one judge viewed judicial involvement as raising no more incentive for retaliation than otherwise exists, where the judge is never involved in negotiations.<sup>355</sup>

A few interviewees noted that some judges would occasionally cross the line and try to pressure defendants to accept a plea resolution. One defense attorney explained that one former judge would say, "Make sure your client knows that, if you lose, your client is going to jail. Admitting responsibility weighs heavily for me."<sup>356</sup> In those exceptional cases when judges pressed a defendant to accept a deal that the defense attorney did not believe was in the client's best interest, attorneys treated it as their responsibility to protect their clients. The attorneys felt that they were up to the task. One Oregon defense attorney explained that if the judge is too heavy-handed, he intercedes:

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placing the plea deal on the record."); McConkie, *supra* note 24, at 74–75 (referring to such a hearing as a "no-plea colloquy").

353. FL-J-1; *see also* CA-J-1 (commenting on having the settlement judge as a trial judge: "Don't think it is a big issue; trial is so much more detailed").

354. *E.g.*, OR-J-2 (reporting that if no settlement is reached it is "never" the same judge for trial); MO-P-3 (noting that, in the "rare" case that a judge rejects a plea as too low, the defendant may ask for another judge for trial). For more on the benefits of requiring a different judge for trial if settlement talks fall through, see Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1292–93, 1326–27 (2005) (recommending "divided decision making" in order to avoid the inadvertent influence of inadmissible information on a judge who both participates at settlement and presides at trial); Batra, *supra* note 24, at 588–89 (recommending the same, and noting, in addition to evidentiary concerns, that the defendant may be improperly "incentivized to follow the instructions of the judge" at settlement knowing that the same judge is to preside at trial).

355. MI-J-1.

356. NC-D-2.

I pipe in and say, “We’ve already talked about this.” I’d say, “He’s been clear, that’s not acceptable to him.” . . . [I]t wouldn’t take any more than that to get the judge to back off. . . . I have never seen a client get beat up into taking a deal that the defense lawyer didn’t agree with the judge was the best resolution of the case.<sup>357</sup>

Everywhere, we heard a common refrain, that judicial settlement conferences provided *better* options for defendants, not worse.<sup>358</sup> It was not coercive, as one attorney explained, when a defendant pleads guilty to obtain a judge’s certain, indicated sentence to avoid the risk of a much longer sentence post-trial under a higher guideline range.<sup>359</sup> These stories suggest that defense attorneys, as well as prosecutors and judges themselves, regard the risk of coercion as negligible in context. In jurisdictions where the judge typically provides a better offer than the prosecutor does, they believe that the judge’s participation, on balance, assists, and does not coerce, the defendant. If they are right about that—and judicial participation really does provide a more lenient sentence, along with the extra benefits of greater certainty and potentially more information, more effective sentencing options, and a safeguard for inexperienced attorneys—then the image of overbearing judges threatening defendants to plead guilty—or else—seems to be overblown and outdated.

Overall, the new and varied forms of judicial participation in negotiation that judges and lawyers described to us looked quite unlike the landscape that Alschuler’s subjects painted decades ago. Based on reports from the field, efficiency remains a key motivator, but there is much more going on here than courtroom actors responding to the need for speed.

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357. OR-D-2.

358. Discussing the contrast, a Florida prosecutor related one way that judges, without ever participating in negotiations, would pressure defendants to settle:

Judges who are tougher at sentencing after trial are far more likely to get pleas to the bench. And everyone knows what they do at sentencing. The judges will intentionally set their sentencing hearings after a guilty verdict at trial for the first day of the next session. Defendants are sitting there still trying to decide whether to accept an offer. Then they’ll see a guy who just lost a trial sentenced to twenty years. The next two guys whose cases are called start asking with real interest about that five-year deal that the prosecutor mentioned.

FL-P-2.

359. MI-D-4, describing a murder case:

Even though his attorney was browbeating him, trying to get him to go to trial, there was also a risk of conviction with much, much higher guidelines. He knew the judge would stay within the guidelines [if he pleaded guilty to manslaughter]. That wasn’t coercive. He could have said, “I’m not guilty,” yet he took the plea knowing that, “I’m probably going to get seven to eight as opposed to dying in prison.”

*See also* CA-J-1 (“The concern about coercion is really academic, since this is a way for a defendant to get a better offer than the prosecutor is offering. It is not a disadvantage for defendants.”).

#### IV. When and Why Judges Choose Not to Get Involved

The many reported upsides of judicial participation naturally raise a question: “If this is so great, why isn’t everyone doing it?” State criminal justice is notorious for inertia as well as independence, and, in jurisdictions that have prohibited the practice for decades, change would be an uphill battle.<sup>360</sup> But the law in all ten of the states we examined already allows judges to indicate before the entry of the plea whether a proposed sentence would be acceptable.<sup>361</sup> And even though this involvement appears to carry several benefits in other states where it is commonplace, we found that judges rarely get involved in Kansas and Utah.<sup>362</sup> Even in the states where judicial participation is routine,<sup>363</sup> interviewees reported that some judges flatly refuse to participate,<sup>364</sup> or participate only in certain categories of cases, such as “when you wanted to sell something that was beyond the norm, unusual, and you didn’t think [the judge] was going to go for it.”<sup>365</sup> Although our study was not designed to produce information about the frequency of judicial involvement, our conversations often touched on this. Estimates of the percentage of felony cases that included a discussion with the judge about the sentence were all over the map, ranging from less than 10% to 100%.<sup>366</sup>

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360. There are many analogous areas in criminal practice where legal authorization is a precondition to the development of more refined choices. For example, innocence claims have evolved in some places, and haven’t even been recognized in others. *E.g.*, Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, in EXAMINING WRONGFUL CONVICTIONS 217, 228 (Allison D. Redlich et al. eds., 2014). The same is true for the choice between direct filing, grand jury, and preliminary hearing. *See* 1, 4 LAFAVE, ISRAEL, KING & KERR, *supra* note 56 §§ 1.3(b), 14.2(d), 15.1(c).

361. *See supra* section III(B)(4).

362. *See* KS-D-1 (“I did that once years ago. But it is rare. It is just not done.”); UT-D-1 (“Judges are virtually never involved in plea negotiations.”).

363. *See, e.g.*, CA-J-2 (noting that judicial participation was “the culture of the court”); MD-D-3 (reporting that judges are “used routinely” in plea negotiations); MI-D-4 (“The vast majority of cases are *Cobbs*.”).

364. *See* MD-D-3 (“In some counties, judges won’t bind themselves.”); MI-J-1 (“A few will refuse [to use *Cobbs*]. . . . They believe it is inappropriate for a judge to get actively engaged in that kind of activity.”); NC-P-1 (reporting that conferences where the defense is seeking a better offer happen frequently with one judge, who “kind of befriends the defense bar,” but that, “[i]n other counties in our district, it doesn’t happen often because defense attorneys know it won’t do any good and therefore don’t even ask”).

365. MO-D-1 (explaining that this was “the only time you’d go back into the judge’s office before the plea” in his county, but that, in other counties, the attorneys checked with the judge in every case); *see also* CA-D-2 (estimating that 40%–50% of cases settle before the preliminary hearing with no help from the judge, and asserting that “court offers” are only viable where the district attorney wants a high sentence on a low-level felony).

366. *See* MD. STATE COMM’N ON CRIMINAL SENTENCING POLICY, *supra* note 285, at 34, 39, 58 (reporting that, in 2014, 38% of cases were resolved by agreement in which the judge, prosecutor, and defense attorney agreed to sentencing terms before the hearing); CA-J-1 (noting one county where parties attempt to discuss settlement with the judge in every case); MO-J-3 (reporting that the judge makes a suggestion regarding settlement terms in 5%–10% of cases); OR-D-1 (estimating that about half of all cases are resolved at Early Case Resolution); UT-D-1 (suggesting that judges get involved in less than 10% of cases).



In this Part, we examine why some judges stayed away from plea negotiations. When we asked about this, several themes appeared over and over, in addition to the unsurprising mention of the judge's individual personality or philosophy.<sup>367</sup> First, we heard that judges in rural jurisdictions with smaller benches and caseloads are less involved than judges in busier urban courts. Second, we were told that newer judges or those who are more politically vulnerable tend to be less eager to wade into plea negotiations. Third, several interviewees explained that a judge's involvement with the parties' negotiations in a criminal case would violate the traditional practices and roles of trial judges.

Our interviewees reported that structured or routine participation of judges was more common in urban jurisdictions than in smaller jurisdictions.<sup>368</sup> Some based this observation on their own legal practice in different counties, while others drew this conclusion based on conversations with peers from other counties. Data was not available to test this hypothesis, but it makes sense for several reasons. Less volume, suggested some, means less pressure to speed up case disposition.<sup>369</sup> In that setting, judges who enjoy trials can allow more of them to happen without paying too great a price.<sup>370</sup> A smaller bench also means that attorneys know more about what any given judge will do, reducing their need for the added certainty that judicial previews offer.<sup>371</sup> Prosecutors' offices in larger jurisdictions are also more likely to keep tighter controls on line prosecutors, making judicial

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367. See FL-J-1 ("It does happen. It greatly depends on each judge's style, philosophy, and comfort level with the parties who come before them."); MD-D-3 ("Maybe the egos of the judges; who knows."). Only two interviewees noted that concerns about the potential coercion of the defendant might motivate judges to avoid getting involved. See FL-P-2 ("Some judges do talk about the possible coercion. That's one of their leading justifications for staying out of it, never negotiating. Other judges who do get involved still worry aloud about this."); NC-J-3 ("Some judges will say to a defendant, 'Look, if you plead guilty now, this is what the sentence would be.' I think this is too much like trying to strong-arm a plea. I stay away from statements like that.").

368. See FL-D-3 (explaining that, in the city where the attorney practices, "those days of informal meetings are over," but that "[i]t still happens out in the countryside"); OH-D-1 ("Especially in smaller counties, judges will not discuss negotiations at all. They won't discuss sentences at all. I have other judges in more urban counties that will be completely involved in the process.").

369. FL-D-1 ("[Smaller counties] have less volume. That means fewer departures and less judicial involvement through plea conferences."); OH-J-1 ("[I]t is more likely in urban districts for judges to get involved with the plea negotiations. They have more of a docket management need."); OR-D-4 ("It's unusual in a lot of the courts. We adopted here them [sic] as a way to dispose of cases prior to trial. Big docket here.").

370. See OH-J-1 ("One reason for my position of non-involvement is, I like trials. So if I get involved, I'm betting against myself.").

371. See CA-J-1 ("[T]hey don't know me [here yet], so it seems that I am having to give more indications here. There has to be a level of trust between the lawyers and between the lawyers and the judge before they know what sentences you'll be giving."); MO-J-3 ("We know so many [of the defendants]. Their parents were here . . . . It's a very local area."); UT-P-1 ("In rural Utah . . . the prosecutors and judges know each other so well that they don't even have to hear any explicit hints about acceptable outcomes.").

involvement a welcome escape hatch, that may not be needed in smaller jurisdictions, for assistant prosecutors seeking to avoid a rigid office policy.<sup>372</sup>

There are further practical reasons explaining why judges in rural counties participate less than their urban counterparts. Where a single judge is shared between counties, it may be more difficult to find a time to meet with the judge simply because the judge isn't in the building very often.<sup>373</sup> And it is more difficult to assign settlement conferences to judges other than those trying the cases in smaller communities, or to find a capable retired judge nearby who is willing to conduct settlement conferences.<sup>374</sup> An Oregon judge offered another explanation: larger counties are more likely than smaller counties to have multiple judges who are really good at settlement conferences and have more opportunity to refine those skills.<sup>375</sup>

Many interviewees saw a connection between judicial involvement in plea negotiations and the fact that judges must campaign for re-election. They told us that the judges who were most politically vulnerable—especially newer judges or those who faced an election campaign in the near future—tended to remain on the sidelines during plea negotiations.<sup>376</sup> According to one Florida prosecutor, “[J]udges differ in how secure they are in themselves, how willing they are to rock the boat.”<sup>377</sup> Judges who are “newer to the bench and less sure of themselves” defer more to the parties.<sup>378</sup> Judges who merely endorse deals that the parties crafted for themselves can avoid political blowback if the sentence later proves unpopular.<sup>379</sup> It requires

372. See OH-D-2 (“[I]n larger districts, the judge helps the line prosecutor move his boss off of the original offer to something more favorable for the defendant.”).

373. See MO-D-1 (noting that a judge may devote one day a month to all felony arraignments, pleas, probation violations, and motions, so that any conversation would have to take place on one of those days, and that, in “five or six counties, there are only two judges, . . . [so] the likelihood the judge will be in county is low—hard to catch them”).

374. See OR-D-2 (noting that judicial participation works in larger counties where “trial judges are not assigned until the morning of trial”).

375. OR-J-3 (“In large counties there are more judges, who have more time to spend on these. And in some counties they have judges that are really skilled at this, they like to get in there and work out resolutions. It is a matter of preference and skill.”).

376. See OH-D-2 (“Over the years, judicial involvement has diminished due to heavier media coverage of criminal proceedings and public disapproval of any reductions in charges or proposed penalties. . . . So, they will lean on the prosecutor only when they believe the media will not notice.”).

377. FL-P-1.

378. *Id.* (“The judges who are closer in time to their election date are also more vulnerable to this.”); see also OH-P-2 (“Newer judges tend to look to us as prosecutors for a lot of guidance.”); UT-D-2 (explaining that newer judges want “that separation . . . between themselves and the lawyers; they want to stand apart”).

379. See MI-J-1 (“That is not a particularly courageous position—you are supposed to make tough calls—having as a judicial philosophy the notion that, if something goes wrong, I’ll say, ‘The prosecutor and defendant said it was okay.’”). A Maryland judge explained that some judges refuse to accept a plea that includes a binding sentence agreement, for similar reasons:

a secure judge to take responsibility for a punishment different from what the parties worked out on their own.

The interviewees disagreed, however, about which party benefits most from an insecure or vulnerable judge. Some worried that vulnerable judges would tilt toward the prosecution.<sup>380</sup> In an effort to appear tough on crime for election purposes, the judge might defer even to excessive proposals from the prosecution.<sup>381</sup> Some prosecutors, on the other hand, worried that apprehension about elections pushed judges in the direction of the defense because judges depend on political contributions from prominent defense attorneys.<sup>382</sup>

Many interviewees also mentioned that older judges are more likely to participate than younger judges.<sup>383</sup> More experienced judges may feel less politically vulnerable, or they may simply be more confident, sure that they know better than the parties what the appropriate sentence should be. As one Florida prosecutor put it, older judges “don’t want some pipsqueak prosecutor telling them about justice.”<sup>384</sup>

In two of the states we examined, Utah and Kansas, judges by and large stay out of the action, even though procedural rules and appellate opinions in

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[T]hey have strict sentencing philosophy and don’t want their discretion fettered in any way. . . . They don’t want to be perceived as anything other than tough on crime. Judges do have to run for election. We’ve had nasty contested elections. . . . [T]hey may not want to take the chance of something not making a good sound bite.

MD-J-3.

380. See MI-J-2 (“I think there is a pro prosecution bias on the part of state criminal judges, in part because of elections. It is a combination of factors: that they are elected; and that many came up through prosecutorial ranks; and the third factor is that there is, not exactly a burn out, but an attitude that comes about when ninety-eight percent are going to plead guilty to something. This attitude that everybody is guilty.”).

381. Judges mentioned this as a risk but then denied that a judge’s choice to defer, or not, to stipulated sentences actually influenced elections. See, e.g., *id.* (“Almost never comes up at election. But most judges don’t understand that.”); FL-J-1 (“Hopefully most of us have the courage to impose the proper sentence without regard to popularity. I’ve never seen a judge voted out of office because the judge was perceived as too weak or too strong. . . . The elections are never focused around sentencing habits.”).

382. See FL-P-1 (“Some are willing to do what’s right regardless of the guidelines. Others will cater to the private defense bar because the defense attorneys are so important to their election campaigns. In that situation, the judge won’t push back so much on defense ideas.”). This prosecutor reported that sometimes a judge will grant a motion to suppress filed by a campaign contributor, even knowing it will be reversed later, and tell the prosecutor to “go back to your people and make a better offer.” *Id.* But these concerns were atypical among our interviewees.

383. See FL-D-1 (“The experienced judges are more confident about what will produce trouble on appeal, and they want to resolve more cases without a trial. The newer judges don’t want the conferences in chambers as often.”); NC-P-2 (“A lot of our judges in our division are newer, with less than fifteen years on the bench. The older judges have the self-assurance it takes to be more active. They have a firmer idea about the proper outcomes for different categories of cases.”).

384. FL-P-1. It could also be that judges put more emphasis on docket control the longer they stay on the bench, and conclude that they can control their dockets best by stepping into the negotiations with the parties. FL-D-1.

those states allow some level of involvement in negotiations.<sup>385</sup> Judges in these states respect a strong, reportedly statewide norm against judicial negotiation and are willing only to send subtle signals that the parties should try harder to settle a case that is heading for trial.<sup>386</sup> Interviewees invoked traditional ideas of the judicial role in an adversarial system.<sup>387</sup> A Utah prosecutor explained the statewide practice in terms of classic judicial independence: “We don’t want to make a practice of involving the court in the negotiation process. That really changes the way the judge does business. We prefer the judiciary to be more independent, passively to receive recommendations and then to make their own call.”<sup>388</sup> As with the other views reported here, we cannot know if this viewpoint produces, or is produced by, a jurisdiction’s norms.

#### V. How Judicial Involvement Can Contribute to Healthier Criminal Justice

We turn now to the lessons this project holds for policy. The methodology requires caution in drawing conclusions. Our sample of interviewees, while larger than any study since Alschuler’s, was too small to show the frequency or variety of practices in each of these states, and says nothing about what happens in other states. The observations we did collect may be skewed by self-interest and cognitive biases.<sup>389</sup> Quantitative analyses refuting or confirming interviewees’ claims, based on court data, would be useful. Our interviewees’ claims about the perceptions of defendants, victims, and the voting public also deserve further study. In the meantime, assuming that those themes we heard most consistently are true, we offer several tentative, educated guesses about the potential effects of judicial involvement in plea negotiations.

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385. See *supra* note 54. For a discussion of the exceptional use of mediation in a few Kansas counties, see *supra* subpart II(D).

386. See UT-D-2 (“With older, more experienced judges, they might drop hints at the close of the preliminary hearing. They’ll say something like, ‘That was a close call. I’m not sure this will survive a jury trial.’ In other words: ‘Prosecutor, your case is shit.’”).

387. Sometimes they made the point in conclusory terms. See KS-D-1 (“It’s just not proper.”); UT-D-1 (“That’s just not what judges should do.”). For a discussion of the historical and comparative background to this claim about traditional judicial reluctance to regulate plea negotiations, see generally Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225 (2016) (analyzing the history of plea bargaining in the United States and critiquing common rationales of minimal judicial involvement in the process).

388. UT-P-1. This concern surfaced in a few other states as well. For example, as one Oregon attorney described the reasoning of judges who do not participate in settlement conferences: “They don’t think it is appropriate, I guess. . . . Some judges don’t think it’s his role. He’d rather say, ‘Just have a trial if you can’t settle.’” OR-D-4. This attorney went on to describe one particularly unenthusiastic judge: “One is very by the book: doesn’t come down from the bench, doesn’t tell the DA what to do, feels ethically restricted, figures he’s not a party so he shouldn’t be involved.” *Id.*

389. See *supra* note 62 and accompanying text.

A. *Faster, Cheaper Dispositions*

First, judicial participation accelerates pleas, shifting deals away from the eve of trial to earlier in the process. By reducing uncertainty for both sides and forcing lawyers to evaluate their cases sooner so as to prepare for presentations to the judge, judicial involvement helps defendants decide earlier in the process whether or not to plead guilty without an agreement and helps parties reach agreements earlier than they would without the judge's input.<sup>390</sup> And when the parties have settled on an unusually low sentence, the opportunity to answer the judge's questions in advance helps prevent delays.<sup>391</sup> Quicker pleas can carry significant savings from the more efficient use of courtrooms, judges, jurors, and court and corrections staff.<sup>392</sup> Savings can extend to more efficient use of staff and resources in prosecutor and public defender offices and shorter preconviction stays in jail.<sup>393</sup> Together, these savings could far exceed the cost of building a settlement talk with the judge into existing pretrial proceedings.

Of course, faster and cheaper processing of cases does not necessarily make a criminal justice system better. It could make case outcomes significantly worse. As the Framers recognized, time-consuming procedures—and adversarial trials in particular—protect defendants and carry independent benefits for the public, jurors, victims, and other participants.<sup>394</sup> Today, only a small percentage of defendants exercise their right to trial, in face of the powerful incentives to admit guilt created by the combination of delay, limits on pretrial release, prosecutors' charging practices, judicial-sentencing practices, and legislative punishment choices.<sup>395</sup> If new judicial involvement in negotiations diminishes the trial rate even further, then in our view the innovation is not justified by any monetary benefits.<sup>396</sup> And if the savings from a faster system simply

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390. See *supra* notes 66, 233–34 and accompanying text.

391. See *supra* notes 284–86 and accompanying text.

392. See *supra* section III(A)(1).

393. See *supra* notes 190–91, 194 and accompanying text.

394. See THE FEDERALIST No. 83, at 498 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; . . . the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.”).

395. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84, 102, 125 (2005) (stating that the federal acquittal rate fell to one percent in 2002, marking the lowest level since the inception of the federal criminal justice system; blaming the decrease in part on prosecution-friendly sentencing and trial practices, pretrial detention, and delay).

396. See, e.g., BIBAS, *supra* note 51, at 115 (“The machinery’s relentless efficiency undermines the criminal law’s broader moral goals. Efficient case processing and crime reduction are important goods, but not the only ones that matter. . . . Quantity automatically trumps quality, without much discussion or thought about the appropriate tradeoff between the two.”); ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 2, 113 (2009) (lamenting that “[t]he institution of the trial seems to be disappearing in one context after another” and explaining the trial’s function of “soften[ing]”

facilitate an even greater volume of prosecutions, that would not be an accomplishment worth celebrating.<sup>397</sup> Our findings suggest, however, that more cost-effective case disposition could actually contribute to the quality of case outcomes, at least where the process amplifies the judge's input. Under certain conditions, the judge's input ends up moderating, not exacerbating, several troubling aspects of early plea bargaining.<sup>398</sup>

*B. Innovative and More Lenient Dispositions*

When judges are invited to help resolve a criminal case, they sometimes propose alternative ideas for sentencing that the parties had overlooked, ideas that the parties welcome as better resolutions.<sup>399</sup> Even when judges merely indicate the likely sentence, they tend to provide a counterweight to the prosecutor's sentencing offer.<sup>400</sup> In a case where the judge can assure the defendant that a guilty plea as charged, if the facts don't change, would probably produce a sentence lower than the prosecutor's offer, judges are able to defuse prosecutors' threats about sentence.<sup>401</sup> Additionally, by pointing out evidentiary weaknesses, pushing back on draconian applications of rigid prosecutorial policy, and moderating inexperienced or overzealous assistants, judges can exert downward pressure on negotiated sentences, persuading prosecutors to accept more lenient sentence terms.<sup>402</sup> Hypothetically, judges could school the defense in similar ways, pitching a deal even less favorable than the prosecutor's, but generally they don't. The prosecutor's initial offer appears to mark an upper bound.<sup>403</sup> Participation also allows judges to correct misunderstandings of sentencing law that in a negotiation between the parties alone could have gone unnoticed.<sup>404</sup>

This judicial counterweight is a healthy antidote to the metastasis of prosecutor influence. While others have made this particular assertion

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rigid or harsh laws and serving as a place where "a citizen can effectively tell his own story publicly in a forum of power"); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 302 (2011) (arguing that the high rate of plea bargaining is decreasing transparency in case outcomes and creating a one-sided bargaining dynamic in favor of the prosecutor, thus further disadvantaging indigent defendants).

397. See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 200 (2014) (raising the concern that increased efficiency in case processing "makes it less costly for legislatures to create new offenses, and more tempting to choose criminal enforcement over other public policy strategies to address social problems or regulatory agendas").

398. See *supra* section III(B)(1).

399. See *supra* notes 250–53 and accompanying text.

400. See *supra* note 272.

401. See *supra* note 80.

402. See *supra* notes 234, 250–53, and accompanying text; section III(B)(3).

403. See *supra* note 272 and accompanying text.

404. See *supra* note 99 and accompanying text.

before,<sup>405</sup> the interviews reported here provide new information about exactly how, when, and why today's state judges choose to do this, and the surprising reasons why many prosecutors don't mind.

C. *Promoting Acceptance of Dispositions and Advocates*

The judge's participation also appears to help attorneys retain the confidence of clients, victims, and other constituencies. Without judicial participation, outsiders to the courtroom often assume that the attorneys pick the punishment in a negotiated case, and that the judge simply agrees to go along.<sup>406</sup> Defendants hold their own attorneys responsible for failing to negotiate better offers; victims and others blame the prosecutor for not insisting upon more severe punishment. With judicial involvement before the deal is done, the story can change. The attorneys can maintain that it was the judge who suggested or approved the sentence—that it was the judge's sentence, not theirs.<sup>407</sup> When judicial participation involves mediation, it can help defendants, victims, and observers to see the outcome, more accurately, as the product of a consensus.<sup>408</sup>

The judge's participation potentially reduces the second-guessing of attorneys in other ways. Without it, a defendant hears only his lawyer's own prediction of what the judge might do; if that prediction doesn't pan out, it is only natural to conclude that his lawyer was either dishonest or incompetent. Judicial participation certifies the lawyer's claims for the defendant and reduces the number of cases in which counsel's sentence predictions miss the mark.<sup>409</sup> Finally, advance information from the judge can prevent an unpleasant surprise, moderating the disappointment or anger that criminal dispositions can generate and making them easier to accept as legitimate.<sup>410</sup>

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405. See Bibas, *From the Ground Up*, *supra* note 24, at 1069 (noting previous proposals to allow judicial involvement in plea bargaining as a counterbalance to prosecutorial power); Rakoff, *supra* note 58 (advancing a similar proposal).

406. Cf. *Freeman v. United States*, 564 U.S. 522, 535–36 (2011) (Sotomayor, J., concurring) (arguing in her controlling concurrence that it is the parties' agreement, and not the guidelines, that is the basis for the sentence in a plea under Rule 11(c)(1)(C)).

407. See *supra* notes 331–35 and accompanying text.

408. Although the felony mediations described by our interviewees were not adopted as part of the restorative-justice movement, but instead to save resources and reduce recidivism, the involvement of victims and defendants may nevertheless produce some of the benefits restorative-justice proponents claim. See generally BIBAS, *supra* note 51, at 94–96, 151 (rejecting retributive criminal justice theory; praising mediations between offender and victim as a means to reconcile offender, victim, and state); Clynton Namuo, *Victim Offender Mediation: When Divergent Paths and Destroyed Lives Come Together for Healing*, 32 GA. ST. U. L. REV. 577, 578, 588 (2016) (describing the successes of statutory mediation programs in Texas and Tennessee); Lawrence W. Sherman & Heather Strang, *Restorative Justice as Evidence-Based Sentencing*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 215, 215–16 (Joan Petersilia & Kevin R. Reitz eds., 2012) (espousing the benefits of a reconciliatory approach to criminal justice, including reduced rates of recidivism and lowered costs to society).

409. See *supra* notes 336, 339 and accompanying text.

410. See *supra* note 335 and accompanying text.

#### D. *Better Informed Participants*

Any early negotiated plea, with or without the participation of the judge in negotiations, shifts the need for sentencing information about the offense and offender to an earlier point in the process. But adding judges to early negotiations may actually lead to more informed sentences, not less. The states we examined have adopted various ways to shorten the wait to receive discovery from the prosecution or the information that would otherwise appear in the report of a presentence investigation.<sup>411</sup> Some judges refuse to participate, for example, until the defendant has received discovery, and in several states the defendant routinely receives discovery before talking with the judge.<sup>412</sup>

Judicial participation can increase, rather than decrease, the amount of information available to the defense at the negotiation stage for another reason as well: at or before these discussions, a judge may be more willing or able to demand and receive more information from the government than a defense attorney could negotiating alone.<sup>413</sup> More information about sentencing, too, may be available to negotiators when judges participate, as compared to deals made with no judicial input. Judges in many counties brought to the table more information about sentencing options than the parties possessed.<sup>414</sup>

#### Conclusion

As courts turn in earnest to the project of regulating plea negotiations, the debate over the appropriate role of the judge in negotiations is intensifying. Federal and state judges who wonder how best to involve their colleagues in the negotiation process labor in the dark about what actually happens in the courtrooms of other judges. Using the words of nearly one hundred judges and attorneys across ten states, this Article sheds some light on a varied set of new practices that look quite unlike the judicial role as commonly imagined.

The breadth of innovation in just these ten states is mind-boggling: grant-funded problem-solving sessions complete with risk assessments and real-time information on treatment options; multicase conferences where other lawyers chime in; special settlement courts set up at the jail; settlement dockets using retired judges; full-blown mediation with families of victims and defendants; felony-court judges serving as lower court judges; and more. Whether the discussion with the judge takes place in a “home court,” at a docket “call,” in “early case resolution” or “early disposition docket,” or at

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411. *See supra* sections III(B)(5)–(6).

412. *See supra* section III(B)(6).

413. *See supra* note 328 and accompanying text.

414. *See supra* subsection III(B)(4)(b).



an “administrative term,” these courts have built the judge’s discussion with the parties into the very framework of the court system. Varied approaches have grown from ad hoc experimentation into system-wide best practices.

Severe budget pressures combined with new data about case processing and its costs have pushed many state trial courts in just the past ten years to abandon their traditional, passive approach to managing criminal cases. Judicial participation in plea negotiations is riding that wave. As practiced in the states we examined, it is fulfilling many other goals of judges, defendants, and prosecutors at the same time. This qualitative study of judicial participation in criminal-case settlement in ten states reveals, in unprecedented detail, just why the carefully tailored involvement of judges in plea negotiations has the potential to contribute far more than increased efficiency to contemporary criminal justice.