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What's the Matter with Kansas—and Utah?: Explaining Judicial Interventions in Plea Bargaining

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What prompts reform in criminal adjudication? Evidence is slim that a common cause is the persuasive force of carefully crafted policy arguments. Scholars know their proposals rarely are put into action, at least directly. Reform ideas developed in settings with closer ties to policymakers, such as committees under the auspices of bar associations, state courts, or professional organizations likewise frequently fail to persuade, even when proposed changes have clear track records of feasibility and success in other jurisdictions. The Virginia Supreme Court, for example, recently rejected suggestions for new criminal discovery rules from a committee of its own devising, largely (it seems) because state prosecutors predicted they would do more harm than good, even though comparable rules have been in place for years in many other states.¹ The rejection of indigent defense reforms by states and localities, despite the imprimatur of the American Bar Association and other prominent organizations, are too numerous to count.²

Still, some things change. Virginia could not manage it, but many other

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1. See generally Michael R. Doucette, *Virginia Prosecutors' Response to Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. ONLINE 415 (2016) (describing the Virginia discovery reform effort and prosecutors' opposition).

2. See Jon B. Gould, *Indigent defense — A Poor Measure of Justice*, 92 JUDICATURE 129, 130 (2009) (discussing how indigent defense reforms cost taxpayer money, and the local governments are unwilling to do this because the public face of indigent criminals is not sympathetic to the public at large).

states *have* adopted much broader pretrial disclosure rules.³ Guilty plea rates increased in the last quarter-century, despite having long surpassed trials as the means by which courts enter convictions. The rights defendants waive in plea agreements have changed, and a couple of rights—to competent counsel and awareness of consequences that follow from convictions—have modestly expanded.⁴ Now, thanks to Nancy King and Ronald Wright’s “Plea Bargain’s Quiet Revolution,”⁵ we learn of a change in a longstanding tradition of common law adjudication—the “passive judge” uninvolved in the party-dominated heart of modern adjudication, the plea negotiation process.

Granted, this is not a complete surprise. “Managerial judging” has been a feature of federal civil litigation for decades.⁶ Scattered reports of judges playing off-the-record roles in plea bargaining have appeared before.⁷ Judicial passivity has been a variable tradition; judges often took stronger hand over prosecutions in the nineteenth century.⁸ And some number of states in recent decades have authorized their judges to take a more active hand in facilitating settlements in criminal cases. That development prompted King and Wright’s broad investigation of whether judges are actually playing the role that the law allows but that law and tradition long restrained.

The breadth of judicial activism they document is an important development. In eight of the ten states they studied, many trial judges routinely play various active roles in plea negotiations.⁹ Effects seem significant. Judicial intervention often leads parties to reach plea agreements sooner, sometimes changes the terms of the plea agreement, and occasionally results in parties making an agreement they otherwise would not.¹⁰ In my view, the changes in professional norms and practices may be more notable. Judges lead the parties, especially prosecutors, to disclose more evidence earlier than they would do on their own. Judges contribute valuable new information to the parties’ negotiations. The much-feared practice of judges pressuring defendants to plead guilty rarely occurs; more often, judges

3. Sandra L. Edwards, *Discovery of the State’s Witnesses: State v. Walters*, 43 LA. L. REV. 1549, 1550 (1983).

4. *Lafler v. Cooper*, 132 S. Ct. 1376, 1390–91 (2012) (right to competent counsel during plea negotiations); *Missouri v. Frye*, 132 S. Ct. 1399, 1411 (2012) (same); *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (right to notice of immigration consequences of convictions).

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

6. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982).

7. See King & Wright, *supra* note 5, at 326 & n.3 (citing Albert Alschuler’s reports of “back room” discussions).

8. DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* 53–54 (2016) (describing roles of nineteenth century state court judges).

9. King & Wright, *supra* note 5, at 328.

10. King & Wright, *supra* note 5, at 363.

moderate prosecutors' demands and push outcomes in a more lenient direction. And everyone gets used to *judges*, as well as lawyers, having pretrial access to the evidence files. These are big changes from what rules traditionally permit, what parties have come to expect, and what judges claim about their limits of their role.

It is unclear how or when this change occurred. King and Wright infer only it seems much broader now than studies in the 1970s suggested, and that it probably picked up in the 1990s as courts adopted case management technology.¹¹ Caution is in order: the history of plea bargaining is the history of lawyers and judges innovating practices long before formal rules sanctioned them.¹² But King and Wright have theories for why this occurred, which builds on what their interviewees told them. The biggest factor is a familiar one: courts feel caseload pressure, so they seek more efficient ways to process cases more quickly. This quest got a push with case management software, which enables courts to easily measure and monitor judicial “productivity,” meaning mostly case processing times and the number of cases judges resolve in a given time period. But this is not the whole story. As George Fisher concluded in his landmark study of nineteenth century plea bargaining, lawyers and judges find ways to replace trials with negotiated pleas because it serves their interests.¹³ One interest is preventing caseload backlogs, but that is not a universal pressure nor their only interest. Reducing workloads, having certainty in outcomes, relieving burdens on witnesses and victims, keeping cases from trial that “should not be tried”—those drive plea bargaining too.

Below I add some context for parts of King and Wright's findings. First, I juxtapose their study to an earlier, woefully neglected plea bargaining study that covered much of the same ground. I then argue that two key procedural rules provide much of the explanation for why judges had not become active in the plea process in two of King and Wright's ten states that authorize activism; two critical rules explain what's the matter with Kansas and Utah—the rules are different there. There are also some reasons to suspect their state courts face less docket pressure. Finally, I emphasize how dramatic this change in pretrial practice is *conceptually* by highlighting the implications of what some judges are actually doing. King and Wright sell their findings a bit short, perhaps because they stayed close to the understandings of the

11. King & Wright, *supra* note 5, at 359.

12. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 111–24 (2004); JOHN BALDWIN & MICHAEL MCCONVILLE, NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY 18, 25–36 (C.M. Campbell & P.N.P. Wiles, eds. 1977). King and Wright argue their findings show a change from the judicial practice that Albert Alschuler found in his investigation of plea bargaining practices in several jurisdictions in the 1960s and 1970s, but the localities each studied are not the same. And we know King and Wright reveal the states, but not the localities, where they conducted interviews.

13. FISHER, *supra* note 12, at 111–24.

judges and lawyers they interviewed. They describe judges as more *managerial*; I argue they are also more *inquisitorial*. That is, their role has shifted toward that characteristic of European civil law systems, the dreaded nemesis of the common law adversarial trial.¹⁴ Understanding the transformation in these terms undermines widely accepted claims about criminal discovery practice.

I. A Tale of Two Plea Bargaining Studies

King and Wright interviewed nearly 100 judges and lawyers in a geographically diverse set of states: California, Florida, Kansas, Maryland, Michigan, Missouri, North Carolina, Ohio, Oregon, and Utah.¹⁵ They chose these states because they concluded the law in each had loosened from the traditional ban on any judicial role in plea negotiations—thus these are likely places to find judges taking such a role. (No state rules *require* this judicial involvement.) Plus, all have some form of sentencing guidelines which, they hypothesized, might be a good reason parties *don't need* judges involved in the settlement process—because the law already gives them some degree of certainty about the main thing judges do with guilty pleas: dictate the sentence.¹⁶

This was a huge amount of work by two leading scholars known for laborious data gathering, and it turned up a trove of valuable reports. But I have a quibble. This is not “the most comprehensive study of judicial participation in plea negotiations since the 1970s.”¹⁷ It is the most comprehensive since the 1980s. In that decade Peter Nardulli, Roy Flemming, and James Eisenstein completed a massive three-volume study of nine counties in three states that included 300 interviews of lawyers and judges along with a wealth of statistical data.¹⁸ Their work has been woefully underappreciated by legal scholars, perhaps because the authors were political scientists. King and Wright are among the relative few who have previously cited these studies.¹⁹

14. On the negative picture of the European “inquisitorial” procedure to U.S. judges, see generally David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009).

15. King & Wright, *supra* note 5, at 326 & n.6.

16. *Id.*

17. *Id.* at 337.

18. JAMES EISENSTEIN ET AL., *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* 15–20 (1988) (describing the study’s scope and methods); ROY B. FLEMMING ET AL., *THE CRAFT OF JUSTICE: POLITICS AND WORK IN COURT COMMUNITIES* 15–16 (1993) (same); PETER F. NARDULLI ET AL., *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* 24–25, 56 (1988) (same).

19. A search of the lead author and title of each of Eisenstein, Flemming, and Nardulli’s three volumes (e.g., “The Tenor of Justice” /p Nardulli) in Westlaw’s “Law Reviews and Journals” database on Feb. 18, 2017 returned 46 articles that cite *The Tenor of Justice*, 41 that cite *The Craft of Justice*, and 56 that cite *The Contours of Justice*. Approximately half those citations are in cross-disciplinary or political science journals, often in articles by scholars whose primary appointments are not on law faculties. Most citations are not in articles focused on plea bargaining. Seven citations

The Eisenstein–Flemming–Nardulli (EFN) study is striking in how its findings overlap with King and Wright’s. (The studies had one state in common—Michigan.) As did King and Wright, EFN found a variety of judicial behavior; some were active in docket management and plea bargaining, some were not. EFN analyzed the different ways by which judges “polic[e] guilty pleas” and found “four styles of intervention”: some judges were proactive and some reactive, and some intervened formally while others did so informally.²⁰ Both studies found some judges (whom EFN labeled formally proactive) who scheduled prosecutors and defense counsel for pretrial conferences in which the prospect of settlement was addressed; EFN’s informal judges met with counsel in chambers and off the record, and the proactive ones sometimes lobbied prosecutors to change policies. Both studies discovered judges who prodded prosecutors to disclose more of their evidence pretrial than they would on their own, and both found judges providing additional pretrial information to the parties from sources such as probation office or presentence reports. Both found judges who worked against harsh or inflexible prosecution charging decisions and guilty plea terms, although in somewhat different ways. EFN recount a judge who convinced a chief prosecutor to revise a rigid, overly severe charging policy;²¹ King and Wright recount judges who informally collude with assistant prosecutors to achieve outcomes that circumvent a rigid policy dictated by supervising prosecutors.

The differences in the two study’s findings are equally striking. King and Wright report a judge’s criticism of trial penalties as imposed only rarely by the “weak, lazy, feeble judge.”²² EFN’s study includes reports and some statistical evidence of judges imposing trial penalties.²³ While King and Wright found little evidence of judges unduly pressuring defendants and more often pushing prosecutors toward more moderate dispositions, EFN found more evidence (beyond trial penalties) that some judges tend to be perceived as pro-prosecution, and that some used their power over indigent defense appointments to influence defense counsel behavior.²⁴ Other contrasts bear more directly on the King and Wright’s central interest in the effects of rules authorizing a broader judicial role in the plea process and in changed court practices intended to increase disposition speeds. King and

are mine; five are by King or Wright.

20. FLEMMING ET AL., *supra* note 18, at 112–29.

21. *Id.* at 125–29.

22. King & Wright, *supra* note 5, at 386.

23. FLEMMING ET AL., *supra* note 18, at 114, 118–19 (interview reports); NARDULLI ET AL., *supra* note 18, at 244–45 257–59 (statistical evidence). In both studies, judges observe that trial sentences are sometimes more severe than a sentence on a guilty plea would have been because additional details justifying the sentence came out in trial evidence—a reason that should be distinguished from a trial penalty *per se*.

24. FLEMMING ET AL., *supra* note 18, at 114–19, 156.

Wright's judges mostly have clear authority to take certain kinds of roles in plea discussions, although some are restrained by tradition. But EFN's judges are inhibited by their lack of rule-based authority in the plea process; a couple had guilty pleas overturned when appellate courts ruled their involvement excessive. As a result, many are reluctant to give a clear indication of the sentence they are inclined to impose for a proposed guilty plea,²⁵ something King and Wright find judges now doing more often and openly. Additionally, King and Wright find many courts that have formalized pretrial conferences or mediation in criminal cases, so that judges who interact with parties in plea negotiations would not preside if the case goes to trial. In the courts EFN studied, there seems to be no such separation. Judges' pretrial interactions with parties seem to be in the cases on their assigned dockets, over which they would preside if the case goes to trial. Neither of these studies is designed to confirm the thesis that legal rules change lawyer and judge behavior. But these contrasts in their findings suggest that rules often do, even though both studies also include evidence to the contrary: some EFN judges are active in the plea process, while King and Wright's judges decline to use their authority to take a more active role. A closer look at key rules in these jurisdictions provides further reason to suspect that rules influence how likely judges will depart from the passive role tradition.

II. What's the Matter with Kansas and Utah?

King and Wright find a good bit of judicial activism in the plea process in eight of the ten states they studied, enough for them to conclude that “managerial judging” . . . has finally taken hold in criminal litigation” and “the judge’s participation in negotiations has matured into a standard managerial tool.”²⁶ The exceptions are Kansas, where they found reports of only a few judges modestly involved in a subset of felony cases, and in Utah, where they found almost none. Given that King and Wright studied only states that had sentencing guidelines and in which they concluded state law authorizes a judicial role in pleas, what accounts for these outliers? Two basic rules of criminal procedure seem the likeliest candidates.

A. *Differences among State Criminal Discovery Rules.*

In her seminal 1982 article “Managerial Judges,” which King and Wright use as a reference point, Judith Resnik observed that perhaps the most important precondition for this new judicial role was the 1938 reform of the Federal Rules of Civil Procedure.²⁷ Those rules created the first broad regime of pretrial discovery. They gave both parties opportunities and obligations to

25. *Id.* at 112–29.

26. King & Wright, *supra* note 5, at 326–27.

27. Resnik, *supra* note 6, at 378–79.

develop nearly all evidence in the pretrial stage instead of at trial.²⁸ In doing so, they gave *judges* a role in managing discovery schedules and disputes, as well as some pretrial access to the evidence.²⁹

Criminal discovery rules took a very different path. They remained minimal for much longer and still are not as broad as those for civil litigation. But over time, a majority of state criminal justice systems have adopted much greater disclosure obligations for both prosecutors and criminal defendants. In light of Resnik's thesis, one might expect criminal court judges to be more active, or managerial, at the pretrial stage in those states with broad criminal discovery rules, and more passive in those states that retain more limited rules. It turns out that, among the ten states King and Wright studied, Kansas and Utah have notably narrower discovery rules than all the rest.

In all eight states in which King and Wright found judges more actively involved in the plea process, disclosure rules require both parties to disclose their trial witnesses' names, addresses, and statements well before trial. Some require prosecutors to additionally disclose witnesses' criminal records and the names and information about all people known to have relevant information about the case, subpoenaed as witnesses or not. All require both parties to disclose information about expert trial witnesses; prosecutors must disclose results of forensic tests or medical exams. Defendants must participate in line ups and cooperate with fingerprints, DNA tests, voice exemplars, and the like.³⁰ Two of the eight states, Florida and Missouri, are among only five U.S. jurisdictions that allow parties to take pretrial witness depositions in criminal cases as a matter of course. Several give judges some additional authority to expand or oversee discovery in ways that could lead judges to be more active in this stage. Florida judges can dictate more party disclosures "as justice may require."³¹ Ohio judges can review prosecutors' decisions that certain evidence is not subject to disclosure.

Only Kansas and Utah discovery rules contain virtually none of these provisions.³² Both are among the diminishing minority of states that continue to follow the model of the Federal Rules of Criminal Procedure and do not require parties to disclose even the names of their witnesses before trial.³³ Prosecutors must disclose defendants' own statements to the defense but not statements of their other witnesses (unless they fall under the constitutional

28. John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *YALE L.J.* 522, 542 (2012) (describing how modern discovery rules replaced the traditional function of trials as a device to produce evidence).

29. Resnik, *supra* note 6, at 391–92.

30. CAL. PENAL CODE §§ 1054.1–1054.10 (West 2016); FLA. R. CRIM. P. 3.200, 3.220; MD. R. 4–263; MICH. CT. R. 6.201–6.202; N.C. GEN. STAT. §§ 15A-901–15A-909 (2015); MO. R. CRIM. P. 25, 25.12; OHIO R. CRIM. P. 16; OR. REV. STAT. §§ 135.815–135.845 (2015).

31. FLA. R. CRIM. P. 3.220(f).

32. KAN. STAT. ANN. §§ 22-3211–3213, 22–3218 (West 2015); UTAH R. CRIM. P. 16.

33. *See* FED. R. CRIM. P. 16.

duty to disclose exculpatory evidence). Kansas requires prosecutors to disclose experts and exam results only if defendants request it.

If Resnik's conclusions about federal civil litigation extend to state criminal courts, these differences surely contribute to the passivity of Kansas and Utah judges in the plea bargaining process. They are likely to have much less to do in the discovery stage, and to have much less awareness of the parties' evidence before trial from settling disputes or setting schedules. And to join the most active of King and Wright's (and EFN's) judges, they would start at a disadvantage in coaxing parties to share evidence early in the process. The consistent correlation of discovery rule and judicial involvement in plea bargaining across these ten states strongly suggests Resnik's thesis has general applicability: broad discovery rules lay the groundwork for judges to actively interject themselves in the pretrial stages traditionally left to the parties. Broad rules may also make parties more likely to seek or accept a broader judicial role.

B. Rules on judicial intervention in plea bargaining

Another procedural rule reinforces this view that Kansas and Utah judges are outliers mostly because their state rules are different. This rule was also a central criterion for King and Wright's selection of their ten states: the rule (or rules, or case law) that define what judges can or cannot do in the plea process. These rules vary widely, even among King and Wright's ten states. Some state rules and statutes directly address the topic; elsewhere rules are silent but appellate decisions have looked favorably or unfavorably on various judicial interventions. Rishi Raj Batra recently published a fifty-state survey of these rules.³⁴ It turns out that even characterizing the law on this point can be tricky in some states; lawyers and trial judges must draw guidance from less-than-pellucid statutes and case law. Evidence of this difficulty is that Batra concluded that Kansas and Utah both *prohibit* judicial participation in plea bargaining. King and Wright disagreed and "read the law in those states to leave room for the practice."³⁵

Utah's Rule 11 says "[t]he judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney."³⁶ King and Wright nonetheless conclude that Utah permits a judicial role because an exception for proposed deals with stipulated sentences permits judges to "indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved."³⁷ This signals a basic distinction among state rules: some authorize judges to join the plea *negotiation* or

34. Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565 (2015) (fifty-state survey, also making normative recommendations).

35. King & Wright, *supra* note 5, at 335 n.54.

36. UTAH R. CRIM. P. 11(i)(1).

37. UTAH R. CRIM. P. 11(i)(1)–(2); King & Wright, *supra* note 5, at 335 n.54.

discussion stage; others bar that but allow judges to respond to the parties' completed agreement before the formal plea hearing. The equivalent statute in Kansas is silent on whether and how judges can be involved at either stage.³⁸ King and Wright correctly note that this statute "neither prohibits nor condones judicial participation."³⁹ But they conclude that Kansas law permits judicial participation based on two appellate decisions. One concluded that a judge's discussions with the defendant before his guilty plea did not violate federal due process because it was not unduly coercive, but the court endorsed "the wisdom of the federal rule" that bars judicial involvement and said the "better practice" was for judges to avoid plea discussions.⁴⁰ The other decision reversed a guilty plea conviction but found no error in the trial judge describing his apparent sentencing options at the plea hearing at which the parties presented a charge bargain with a sentence recommendation.⁴¹ Batra, on the other hand, reached the opposite conclusion based on a decision that affirmed a plea-based conviction but concluded the "clear, fair, and workable standard for trial judges" was that they "should not participate in the negotiation of the proposed terms of a plea agreement."⁴²

In my view, Utah and Kansas provide no basis for trial judges to think they are free to join the parties' plea *discussions*; Utah allows a judge to offer a response to one type of negotiated agreement before the plea hearing. Kansas judges have thin authority even for that. One should hardly expect to find judges in either state doing anything before parties reach agreement on their own. These constraints—especially combined with restrictive disclosure rules—likely explain why Utah and Kansas judges are outliers.

Compare how explicitly other states embrace judicial involvement in the plea negotiation stage. A North Carolina statute says the prosecution and defense may discuss the full range of plea-bargain options, and "[t]he trial judge may participate in the discussions."⁴³ An Oregon statute does the same with more elaboration. At the request of both parties, the judge who would preside over the trial may "participate in plea discussions" and may comment on the parties' proposed bargains.⁴⁴ Any *other* judge may also participate in plea discussions, either at the parties' request *or* "at the direction of the presiding judge."⁴⁵ By contrast, Missouri's rule explicitly bars a judicial role in the negotiation stage and expressly permits it afterwards: "The court shall not participate in any such discussions, but after a plea agreement has been

38. KAN. STAT. ANN. 22-3210 (West 2015).

39. King & Wright, *supra* note 5, at 335 n.54.

40. State v. McCray, 87 P.3d 369, 372 (Kan. Ct. App. 2004).

41. State v. Schow, 197 P.3d 825, 836–37 (Kan. 2008).

42. Batra, *supra* note 34, at 575 & n.69 (citing and quoting State v. Oliver, 186 P.3d 1220, 1226 (Kan. Ct. App. 2008)).

43. N.C. GEN. STAT. § 15A-1021(a) (2015).

44. OR. REV. STAT. § 135.432 (2015).

45. OR. REV. STAT. § 135.432(1).

reached, the court may discuss the agreement with the attorneys including any alternative that would be acceptable.”⁴⁶ Maryland’s key rule is more restrictive. It contains no prohibition like the Utah or Missouri rules, but it says only that “[i]f a plea *agreement has been reached . . .*, the defense counsel and the State’s Attorney shall advise the judge of the terms of the agreement *when the defendant pleads*. The judge may then accept or reject the plea”⁴⁷ Elsewhere, state rules are silent, and one is left to sort through local rules and case law.

In light of this variety of legal authority for judges to facilitate plea bargains, an interesting outcome of King and Wright’s study is not so much that Kansas and Utah judges rarely inject themselves into the mix, but that reports of actively involved judges are so widespread in the other eight states, where their engagement rests on widely differing authority. In Kansas and Utah, judges stay out where rules mostly forbid otherwise. In Oregon and North Carolina, judges take active roles where statutes clearly encourage them. The surprise is finding actively involved judges in states where the law is largely silent on the practice or the case law only weakly supports it. Rules, it seems, have some effect on judicial behavior, but other factors—perhaps docket pressures or professional self-interest—must be contributing to these changes in local criminal courts practices. That makes one wonder how much judicial involvement one would find in states that clearly forbid it, and in other states with rules that expressly authorize it, such as Arizona, Idaho, Massachusetts, and Vermont.⁴⁸

C. *State Imprisonment Rates.*

Beyond uncovering the breadth of judicial involvement in guilty pleas, a finding in King and Wright’s study that may be most notable is that, when judges influence the terms of a plea bargain, they mostly do so in the direction of leniency. To an unknown degree, judicial intervention produces some convictions and sentences that are less severe than prosecutors preferred. This undermines the concern that judges would pressure defendants, and it

46. MO. SUP. CT. R. 24.02(d). One might question that this is a distinction with little difference once the parties present *some* proposed disposition. After that point, the judge is free to discuss “any alternative.”

47. MD. R. 4–243(c) (emphasis added).

48. ARIZ. R. CRIM. P. 17.4(a) (“[T]he court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution”); IDAHO CRIM. R. 11(f)(1) (“The court may participate in any such discussions.”); MASS. R. CRIM. P. 11(a) (“[T]he court shall order the prosecuting attorney and defense counsel to attend a pretrial conference . . . [and] may require the conference to be held at court under the supervision of a judge or clerk-magistrate. . . . Among those issues to be discussed . . . are . . . [w]hether the case can be disposed of without a trial.”); VT. R. CRIM. P. 11(e)(1) (“[Parties] may engage in discussions with a view toward reaching [a plea bargain]. . . . The court shall not participate in any such discussions, unless the proceedings are taken down by a court reporter or recording equipment.”).

stands in some contrast to EFN's more mixed evidence on this point. That raises the question whether this effect of judicial involvement might be significant enough to show up in state imprisonment rates. One cannot infer that simply from a look at imprisonment rates over the last twenty years.⁴⁹ If anything, they suggest that judicial involvement takes hold in states regardless of what other policies drive imprisonment policies, which vary widely in these ten states even though all have some form of sentencing guidelines. And Kansas and Utah, where judges are least active, are again outliers.

A twenty-year snapshot suggests these states provide a great cross-sample of state imprisonment practices. Half of King and Wright's states in 1994 had imprisonment rates higher than the state average; the other half were lower.⁵⁰ In 2014, four still had above-average rates.⁵¹ In terms of trends, six of these ten states followed the national trend and substantially increased their imprisonment rates from 1994 to 2014. Two others had rates in 2014 that were only slightly above their 1994 rates; they held nearly steady. Two states—California and Maryland—*lowered* their rates of imprisonment over this period (after initially increasing them). In doing so they shifted relative positions from above to below the national average.⁵² Judges are active in the plea process both in states that had above-average imprisonment rates throughout these two decades (Florida, Michigan, Ohio) and in those with below-average rates (North Carolina, Oregon). They are active in states whose rates trended upward (Florida, Ohio, Oregon) and in those that trended downward (California, Maryland). A multi-variate analysis might suggest otherwise, but it seems that whatever moderating effect judges have on plea bargains is likely too small to move aggregate imprisonment figures. Still, King and Wright's findings support the inference that judges who facilitate

49. A twenty-year time frame roughly captures the period in which the changes in judicial behavior that King and Wright find likely occurred. They contrast their study with 1970s studies of plea bargaining that found some judges involved "in secret," and they note that "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," and "[s]ince then, a large number of state courts . . . launched new case-management information systems." King & Wright, *supra* note 5, at 359. Moreover, Oregon and North Carolina, the two states that adopted the most explicit rules authorizing judges to join plea discussions, did so in 1997. See N.C. GEN. STAT. § 15A-1021(a) (2015), *amended by* 1997 N.C. Laws Sess. Law 1997-80 § 2, effective Dec. 1, 1997; OR. REV. STAT. § 135.432(1)(b) (2015) (enacted by 1997 Or. Laws, ch. 313, § 4).

50. JODI M. BROWN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994, at 69 tbl.5.4 (1996).

51. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014, at 8 tbl.6 (2015).

52. *Id.* In California, the decline was mostly or wholly attributable to court-ordered reductions in prison populations, although California and Maryland had very similar imprisonment rates throughout this period. See E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 12–13 tbls.10 & 11 (2014) (discussing California prison policies and population changes over several years). During this same period, only Missouri shifted from below to above the national average. See CARSON, *supra* note 51, at 8 tbl.6.

guilty pleas abide by a judicial version of the Hippocratic Oath: they likely do no harm.

State Imprisonment Rates by Year
(Number of Prisoners per 100,000 US Residents)⁵³

State	1994	2014
California	398	349
Florida	406	513
Kansas	248	322
Maryland	412	346
Michigan	427	437
Missouri	338	526
North Carolina	334	358
Ohio	375	444
Oregon	222	378
Utah	168	237
State average	349	412

Notice Utah and Kansas stand out. In 2014, they had the two lowest rates of imprisonment. Utah's was also the lowest twenty years earlier, when Kansas had the third-lowest. (Oregon was second-lowest in 1994 but rose to fourth-highest by 2014.) Their *rates of increase* over this period were roughly average. It is hard to see any link between this data and the passivity of Utah and Kansas judges. Low imprisonment rates could be linked to courts that have less burdened dockets and so face less pressure to speed up case processing.⁵⁴ But reports of overburdened courts are less common in rural jurisdictions,⁵⁵ and Kansas and Utah are the most rural of these states. They

53. BROWN, *supra* note 50, at 69 tbl.5.4; CARSON, *supra* note 51, at 8 tbl.6.

54. Kansas, Utah, and Oregon had the lowest reported rates of non-negligent homicide in 2014. See *Crime in the United States 2014: Table 5*, FBI: UNIFORM CRIME REPORTING (2014), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-5> [<https://perma.cc/5XKH-6WCT>].

55. King and Wright found pressure to speed up adjudication was greater in urban court systems. King & Wright, *supra* note 5, at 389 & n.369. This observation contrasts with findings that prosecution policies in rural localities may burden local courts relatively more than in urban jurisdictions. Josh Keller & Adam Pearce, *This Small Indiana County Sends More People to Prison than San Francisco and Durham, N.C., Combined. Why?*, N.Y. TIMES (Sept. 2, 2016), http://www.nytimes.com/2016/09/02/upshot/new-geography-of-prisons.html?_r=0 [<https://perma.cc/3R6Q-YQQY>] (reporting on harsher prosecution policies and prison sentences in rural than urban districts, with data showing that “[p]rison admissions in counties with fewer than 100,000 people have risen even as crime has fallen”).

have the lowest population densities⁵⁶ and the fewest and smallest metropolitan areas.⁵⁷ Perhaps for those reasons, Kansas and Utah judges are also outliers—despite case processing technology in the pressure they face to speed up dispositions. Thus they have less incentive to circumvent restrictive state rules and take more active roles in facilitating pleas.

III. The Rise of the American Inquisitorial Judge

King and Wright recognize that their findings reveal judges abandoning the strictures of the common law “passive” judge whose job is to let the parties dominate: frame the issues, develop the evidence, and, if they choose, craft a settlement for the court’s approval. Criminal procedure rules in federal courts and many states still dictate the passive role by excluding judges from plea negotiations. All U.S. jurisdictions do so in other ways, such as by barring judicial review of prosecutorial charging decisions. When rules grant them more power, such as authority to dismiss charges “in the interest of justice” or to call expert witnesses the parties did not select,⁵⁸ judges rarely exercise it.

The managerial judging Resnik identified in federal civil cases never developed in criminal litigation. Instead, we got the rise of what could be called managerial prosecution.⁵⁹ Judges also lost sentencing power in reforms beginning in the 1970s, and the law of plea bargaining that evolved in the same decade created no meaningful role for judges.⁶⁰ Aside from drug courts and other problem-solving courts, through which judges gained some

56. Based on 2010 as well as 2015 U.S. Census data, Kansas ranked fortieth in population density, and Utah rank forty-first. The other eight states studied are in the top twenty on this measure except Missouri (27th) and Oregon (39th). See *Population Density (Most Recent) by State*, STATEMASTER, http://www.statemaster.com/graph/peo_pop_den-people-population-density [https://perma.cc/H7KY-2AUE] (based on U.S. Census data). On 2010 Census data, Kansas has only one city with a population above 250,000. Utah has none; it has only four cities above 100,000 population. See *Race and Hispanic or Latino: 2010 Census Redistricting Data*, U.S. CENSUS BUREAU: AM. FACT FINDER, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_PL_GCTPL1.ST13&prodType=table [https://perma.cc/29XQ-V9KV] (data obtained by selecting the state under the “Geography” dropdown menu).

57. See *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More*, U.S. CENSUS BUREAU: AM. FACT FINDER, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [https://perma.cc/D5CE-TG5E]. Reported violent crime rates are consistently higher in metropolitan statistical areas than in nonmetropolitan areas. *Crime in the United States 2014*, *supra* note 54.

58. See FED. R. EVID. 706 (“The court may appoint any expert that the parties agree on and any of its own choosing.”); Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 641 (2015) (noting at least twelve states authorize judges to dismiss criminal charges in the interest of justice).

59. Cf. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2120–23 (1998) (describing the dominance of prosecutors in criminal justice administration).

60. For an overview of the development of plea bargaining law, see BROWN, *supra* note 8, at 91–117.

managerial capacity, the biggest exception is probably the rules and policies in some states that encouraged judicial participations in facilitating plea bargains.

As King and Wright's interviewees describe it, some state judges are best described as *managerial*, but for the most active, a better characterization would be a label they would less eagerly embrace—*inquisitorial* judging.⁶¹ Judges in the inquisitorially-rooted systems are much more active in questioning—sometimes even calling trial witnesses—than common law judges are. We see none of that in this study. But at the pretrial stage, these U.S. judges have moved closer to their inquisitorial counterparts. The biggest marker is judicial access to evidence. To varying degrees, judges persuade or order parties to disclose evidence to each other and to the court. Some judges “requir[e] the parties to present their positions to the judge.”⁶² (Details on precisely what this means are a bit thin, given that the source is interviewees' descriptions of meetings rather than observations of meetings.) Judges often can generate information independently about defendants, and sometimes victims as well—usually compiled by probation staff. This shared body of information creates something that looks very much like a central instrument of inquisitorial adjudication—the evidence dossier shared by judges and both parties' lawyers.⁶³

The evidentiary file undermines a key characteristic of traditional adversarial process—the judge's lack of knowledge about the facts of the case before trial. Ignorance justifies judicial passivity; judges can do little if they know little about the case. But many active judges (with the aid of broader disclosure laws) now cajole or compel parties to create something close to a common evidence record. That enables judges to assess the strength or weakness of the parties' cases and to offer their view about the appropriate judgment and sentence on the available evidence. Judges who assign parties to mediation, mandate pretrial party conferences, and schedule cases on a fast docket toward quick disposition are managerial. Judges who also facilitate early, full evidence disclosure, add more information themselves, and suggest disposition terms rather than reacting to the parties' suggestions, are doing something more, even if efficiency is their primary motivation. Some are guiding parties toward a resolution that the judge thinks is the right one. That kind of activism is close to the inquisitorial style.⁶⁴ In sum, it seems that you

61. See King & Wright, *supra* note 5, at 326.

62. *Id.* at 363.

63. See *id.* at 376–80.

64. One aspect of this shift toward an active judicial role in some states reveals the continuing power of the common law model of party-dominated litigation: the *parties* have a large hand in selecting the judges who take an active role in their cases. In Oregon, “[t]he mediators in . . . JRI cases are a subset of the county's judges, selected by a committee with representation from both prosecution and defense.” *Id.* at 352. In Oregon counties that use “special settlement conferences” for big cases, “[b]oth parties will approve a settlement judge.” *Id.* at 353.

can convince American judges and lawyers to abandon tradition and embrace a more inquisitorial model, as long it serves their interests, improves disposition times, and nobody calls it that.

Conclusion

King and Wright identify all the likely reasons for the notable change in judicial behavior that they uncovered. They emphasize the most familiar one, which their interviewees also stress: the eternal pressure on courts to be more efficient.⁶⁵ Reforms that serve the state's interests in more efficient, less costly criminal process nearly always succeed; those that do not usually don't. Compare the poor record of jurisdictions adhering to maximum-caseload standards for prosecutors and indigent defense attorneys, urged by influential groups like the American Bar Association,⁶⁶ with the time-to-disposition standards for courts pushed by the National Center for State Courts. The latter are now adopted in thirty-nine states.⁶⁷ Reasons for the difference are not hard to infer. Caseload standards for attorneys *cost* states money. Speedy disposition standards *save* them money.⁶⁸

One way to view the new judicial activism in plea bargaining uncovered by King and Wright is that it was the only innovation left to speed up state criminal process. American criminal procedure has exhausted every *other* strategy for encouraging pleas over trials and achieving plea-based convictions as quickly as possible. Nothing constrains prosecutors' use of charging discretion and fixed sentences to pressure defendants to plead guilty; no evidence disclosure is required before pleas; defendants can bargain away nearly procedural entitlement; plea colloquies are minimal.⁶⁹

65. For decades judges and lawyers have viewed criminal dockets as putting enormous pressure on courts, requiring them to do all they can to find ways to resolve more cases faster. *See, e.g.*, *Corbitt v. New Jersey*, 439 U.S. 212, 219–20 n.9 (1978) (citing *Ludwig v. Massachusetts*, 427 U.S. 618, 627–28 n.4 (1976)) (explaining that bargaining is the most important means of achieving “the interest of the State in efficient criminal procedure”); *Santobello v. New York*, 404 U.S. 257, 260–61 (1971) (plea bargaining “is an essential component of the administration of justice . . . [that] leads to prompt and largely final disposition of most criminal cases”); Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 123 (1928).

66. *See generally* Dottie Carmichael et al., PUB. POLICY RESEARCH INST., GUIDELINES FOR INDIGENT DEFENSE CASELOADS (2015), http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/ls_sclaid_summit_04_texas_study_full_report.authcheckdam.pdf [<https://perma.cc/4244-UJJQ>] (describing caseload standards by several state and national organizations in report to Texas Indigent Defense Commission mandated by the Texas Legislature); AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004) (describing caseload standards and jurisdictions that fail to abide by them).

67. *See* King & Wright, *supra* note 5, at 357, 360.

68. At least, they save money *per case*; whether faster case processing reduces *aggregate* adjudication costs, or instead induces higher caseloads, is uncertain. *See* BROWN, *supra* note 8, at 147–73.

69. FED. R. CRIM. P. 11 (requirements at guilty plea hearings); *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (approving waiver of constitutionally required disclosure); *Bordenkircher v. Hayes*,

Judges have virtually no constitutional authority to supervise plea negotiation tactics, process or terms.⁷⁰ All this has allowed state and federal courts to reach guilty plea rates of 96 to 99 percent.⁷¹ Having groups of defendants plead guilty *en masse* in a single hearing was ruled off limits.⁷² What else could courts do? Judicial intervention in party settlement efforts may be the only thing left. But that probably underestimates the ingenuity of judges and lawyers. Don't be shocked when defendants start pleading guilty on smartphone apps from jail cells and police cars.

But King and Wright's findings are more surprising, because they point to other causes besides docket pressure and efficiency measures. Some are familiar interests of judges and lawyers, such as gaining certainty in outcomes. But in contrast to EFN's findings, King and Wright find many reports that judges' involvement in the plea process allows them to correct party errors and otherwise produce "better"—usually meaning less harsh—outcomes than the parties could on their own.⁷³ If this sentiment spreads among U.S. judges, it could be transformative. Judges could be a significant force for fairer, more moderate dispositions. And *real* American criminal procedure—plea negotiations, not trials—could shift somewhat from the prosecutor's office to the courtroom and, through quasi-inquisitorial judging, gain some of adversarialism's best features—rival parties scrutinizing each other's evidence under judicial supervision. In sum, the scope of judicial involvement in the plea process is King and Wright's biggest finding. The effects of much of that involvement is their most heartening.

434 U.S. 357, 365 (1978) (no limit on prosecutor discretion to create vast differences in guilty-plea and post-trial sentences); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 74–76 (2015).

70. See BROWN, *supra* note 8, at 91–118. Nor do they have much statutory basis for such a role, beyond the role authorized in the statute rules that King and Wright investigated, where judicial power is more persuasive than authoritative.

71. In 2007 to 2011, guilty plea rates in federal court increased from 95.8 to 96.9 percent of all convictions. U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2011/sourcebook-2011> [https://perma.cc/V8K2-AA86]. Guilty plea rates within each of the twelve federal circuits showed little variation, ranging from 93.6 to 98.3 percent in 2011. *Id.* at tbl.10 [https://perma.cc/4DD2-PQRK]. In Virginia, the jury trials account for about one percent of felony convictions. See VA. CRIMINAL SENTENCING COMM'N, 2014 ANNUAL REPORT 33 (2014), <http://www.vscs.virginia.gov/2014AnnualReport.pdf> [https://perma.cc/FXF3-GSKL] (90 percent of felony sentences in circuit courts followed guilty pleas, 9 percent followed bench trials, and 1.2 percent followed jury trials).

72. *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1139 (9th Cir. 2013) (disapproving "Operation Streamline").

73. King & Wright, *supra* note 5, at 394–95.