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Abstract

The topic of judicial involvement in plea negotiations is a controversial issue, with potential benefits (e.g., ensuring that the process is fairer) and risks (e.g., inducing an innocent defendant to plead guilty). Currently, 20 jurisdictions explicitly prohibit judicial involvement in plea negotiations, whereas eight permit some type of involvement. We surveyed state court judges about judicial involvement in plea bargaining (colloquy and negotiations) and their perceptions on judicial participation. We expected judges in states that prohibit judicial involvement in negotiations to have a more negative view of judicial participation compared with judges in states that permit involvement or those in states that have no explicit laws permitting or prohibiting it. Our sample consisted of 233 state court judges, in states that permit, prohibit, or make no mention in their state policies regarding judicial involvement in plea negotiations. Our survey addressed components of standard involvement (judges' expectations of the parties' responsibilities and judges' experiences with plea colloquies) and expanded involvement (judges' experiences with and perceptions of participation in plea negotiations). Judges in *permit* states were more likely to endorse the benefits of increased judicial participation in plea negotiations compared with judges in *no mention* and *prohibit* states. Conversely, judges in *prohibit* states were more likely to acknowledge the existence of risks of increased judicial participation in plea negotiations compared with judges in *no mention* and *permit* states. These data suggest policies and procedures are not only associated with judges' behavior in plea-bargaining but also their perceptions of this controversial practice.

Keywords: plea bargaining, guilty pleas, judges, judicial involvement, policy

Judicial Involvement in Plea-Bargaining

Plea bargains dominate criminal practice in U.S. state and federal court systems. That is, almost all convictions are the result of guilty pleas (Redlich et al., 2017); however, not all convictions by plea are the same. One controversial aspect of plea negotiations is the degree to which the judge is allowed to take part in the proceedings. At the time of this writing, federal courts, 18 states, and the District of Columbia explicitly prohibit judicial involvement in plea negotiations, and eight states allow the practice (four of those require the consent of both the state and defense). The remaining 24 states' statutes make no mention or discussion of whether judicial involvement is permitted in plea negotiations (Zottoli et al., 2019). Proponents of increased judicial participation assert that greater judicial scrutiny of and involvement in plea negotiations would facilitate a more transparent and fairer process (Rakoff, 2014; Turner, 2017, 2020). Opposition to judicial involvement centers around fears that greater judicial participation would be coercive and potentially infringe on defendants' rights to make a voluntary decision (Miller et al., 1978). What remains unclear, however, are judges' perceptions of and experiences with the plea bargain process, including their role and responsibilities. Such perceptions and experiences are key to gaining a more in-depth and nuanced understanding of the debate on judicial involvement in plea negotiations.

Before accepting a defendant's guilty plea, the judge advises the defendant of the charge(s), potential consequences of the guilty plea, and the rights the defendant will waive by pleading. During this process (known as the *plea colloquy*), the judge asks a series of questions to evaluate whether the defendant's plea is knowing, intelligent, and voluntary (requirements cemented in *Boykin v. Alabama*, 1969), and whether there is a factual basis of guilt. Because plea bargaining involves a waiver of constitutional rights (rights guaranteed by the Fifth, Sixth, and

Fourteenth Amendments of the U.S. Constitution), the judge's role during the plea colloquy is "of paramount importance" (Champion, 1987, p. 64). However, plea bargains are "negotiated behind closed doors and with no judicial oversight" (Rakoff, 2014, p. 1), which threatens assumptions of the judges' responsibilities in plea-bargaining. We examined judges' perceptions of standard and expected roles during the colloquy and plea negotiations in the U.S., as well as judges' attitudes towards greater judicial involvement. To do this, we surveyed U.S. state court judges and, when relevant, compared their responses by whether their state policy permits, prohibits, or does not mention judicial involvement in plea negotiations. We focused on two domains that fall under standard practice: judges' expectations of the parties' responsibilities, as well as their own involvement, and judges' experiences with the plea colloquy and indicators that judges rely on to determine if a plea is made knowingly, intelligently, and voluntarily; and one domain that falls under expanded judicial involvement: judges' experiences with and perceptions of participating in plea negotiations.

Below we describe the dichotomy between judges' standard practice in plea-bargaining and a more expanded role, direct judicial involvement in negotiations (a practice most states and the federal system prohibit or advise against). The standard role, which includes the responsibility of overseeing the plea colloquy, confirming the factual basis for the plea, and ensuring the constitutionality of the plea, has been codified in Rule 11 of the Federal Rules of Criminal Procedure, and supported by the American Bar Association's (ABA) guidelines for the judicial function (2018). Conversely, a more expanded role of judicial involvement in plea-bargaining goes beyond the standard practice and might allow judges to assist in the negotiation process; a minority of state statutes already allow for variations of this type of expansion.

The Standard Practice of Judges in Plea-bargaining

The standard role of judges in plea-bargaining is typically quite passive. Rule 11 of the Federal Rules of Criminal Procedure provides specific guidance on plea procedures, dictating that the federal judge *may not participate* in plea discussions, and generally limiting the federal judge's involvement to the colloquy itself (FRCP 11(c), 2020). Federal judges have a limited but important responsibility to assure that the plea meets certain requirements, but their involvement beyond what the rules allow (e.g., participating in negotiations) could render the guilty plea involuntary (*State of Louisiana v. Bouie*, 2002). The federal rules create clear guidance on judicial involvement in plea-bargaining that can be adopted and incorporated by individual states, though there is variation in state statutes (see Zottoli et al., 2019).

The ABA's guidelines for "pleas of guilty" leave the door open for narrow judicial involvement in plea-bargaining outside the colloquy, but provide little guidance on the substance of that involvement (2018). The ABA states that judges *should not* ordinarily participate in plea negotiations unless the parties request involvement; rather, a judge may review the proposed plea agreement and indicate if the court would accept the terms, and the likely sentence to be imposed if the plea were accepted (2018). Beyond that, the ABA's guidelines are largely similar to the Federal Rules of Criminal Procedure on judicial responsibilities in plea-bargaining. Furthermore, the ABA does not provide individual state-specific guidelines or rules as these can change rapidly and differ across the states (2018). For example, Colorado explicitly prohibits involvement in negotiations, stating, "a judge's participation in plea bargaining is fundamentally unfair" (*People v. Clark*, 1973). In contrast, other states leave room for some involvement: "Upon request by the defendant and with the agreement of the prosecutor, the trial judge may participate in plea discussions" (Illinois Sup. Ct. R. 402, 2020).

There are judicial responsibilities in pleas that are standard across federal and state courts. The judge must determine that the government has sufficient evidence to support a finding of probable cause (Brown, 2018), and therefore determine the factual basis for the plea (FRCP 11(b)(1), 2020). The criteria of what constitutes a "factual basis" differs. For example: sufficient evidence to determine the defendant likely committed the offense, an admission of guilt, prosecutor's summary of evidence or probable cause affidavit, and is likely dependent on the judge (Redlich, 2016) and the severity of the charges (Dezember et al., 2020). Under standard practice, judges are also tasked with the responsibility of ensuring the constitutionality of the plea (*Boykin v. Alabama*, 1969). Early observational research of plea hearings by Miller and colleagues (1978) suggests that judges confirm the constitutionality of the plea during the colloquy, albeit in a substantial portion of plea colloquies, the judge did not actually question the voluntariness of the plea (54.1%) or ask if the defendant understood their rights (34.9%) (see Redlich, 2016). Beyond Miller's study from over 40 years ago, little research has examined the nuances of plea colloquies across the state courts.

The judge is also responsible for confirming that the defendant understands the elements of the crime(s) they are pleading guilty to (*Henderson v. Morgan,* 1976; FRCP 11(b)(3), 2020). Many jurisdictions interpret this as requiring judges to inform defendants of the direct consequences of their guilty plea (e.g., any maximum or mandatory minimum penalty, forfeiture, restitution; FRCP 11(b)(1); Turner, 2017). More recently, this has been expanded to include a discussion of whether the court (namely judges and defense attorneys) should be required to notify clients of collateral consequences. The U.S. Supreme Court has affirmed that defendants must know if their acceptance of a guilty plea carries potential deportation or threats to their immigration status (*Padilla v. Kentucky*, 2010). This comports with the *Boykin* requirement that

that defendants' waiver of rights be done in a knowing, intelligent, and voluntary manner. Thus, historically, the standard practice of judges is to serve a more passive role in plea-bargaining, limited to the plea colloquy stage (Alschuler, 1976; Heumann, 1978). Despite the plea colloquy taking place in open court, surprisingly little systematic study of this oral exchange has been conducted. In part, the present study helps to fill this gap by obtaining judges' perceptions of what they see as their role in standard and expanded exchanges with defendants.

An Expanded Role of Judicial Involvement

Controversy exists regarding whether the standard practice should be expanded to allow for greater judicial scrutiny and involvement (Rakoff, 2014; Turner, 2006, 2020). Generally, suggestions for increased judicial involvement would allow the judge to go beyond overseeing the colloquy to a more direct and active role in plea negotiations. Currently, eight states allow for some degree of involvement in plea negotiations. Four states allow participation with specific rules and guidelines; judges can be involved with the consent of both the defense and the prosecution (Arizona, Massachusetts, and Oregon), once a tentative agreement has been made (i.e., the judge cannot initiate discussions; Illinois), the proceedings must be on the record (Massachusetts), or a judge other than the trial judge may participate (Oregon). The other four states allow for involvement in negotiations but do not list any specific rules (Hawai'i, Idaho, Maine, and North Carolina). In contrast, 18 states explicitly prohibit judicial involvement in plea negotiations; this is often a blanket prohibition (e.g., Colorado's policy mirrors the Federal Rules of Criminal Procedure 11(c)(1); Batra, 2015). The remaining 24 state policies make no mention of judicial involvement in plea negotiations (neither explicitly permitting nor prohibiting it).

Early research categorized expanded judicial involvement in plea negotiations into two unique typologies: implicit and explicit (Alschuler, 1976). In implicit involvement, judges play a

role but might not directly contribute information to the plea negotiations. Rather, the parties involved are aware of how the judge typically makes decisions and use that information to reach a resolution (Alschuler, 1976). For example, an attorney might know from past experience that a judge prefers parents to be involved in their child's case, so the attorney takes additional time to consult with parents (Fountain & Woolard, 2021). Attorneys might also know of comparable pleas for similar crimes, and tailor the plea terms accordingly prior to the plea hearing (rather than risk the judge rejecting the terms). Implicit judicial involvement in plea negotiations allows the judge to play an active role, although it is likely through indirect routes of persuasion rather than explicit contributions to the negotiations.

In explicit involvement, judges are actively involved in plea negotiations, commenting on the merits of the case and plea terms and sentences. Explicit participation could involve conferences in judicial chambers, and the judge can "temper" the positions of both sides and offer insight into what terms would be deemed acceptable by the court (Turner, 2006). As noted by one judge engaging in explicit participation, "835 cases were backlogged. [I] reduced the backlog to 299 cases by…setting up conferences at 5-minute intervals day and night for six days…[and] enforced attendance of the prosecutor and defense attorney under threat of an arrest warrant" (Miller et al., 1978, p. 252). This type of explicit involvement, described as a *moderator model* by Turner (2006), allows the judge to play a more active role, and moderate the negotiations between the defense and prosecution. It is perceived to be the most transparent and neutral model of judicial involvement. Explicit participation can also fall under the *information source* model, where judges make clear what terms would be acceptable by the court, even if they are not actively involved in negotiation discussions (Turner, 2006). The *information source* model differs from a *moderator model* in that judges cannot initiate plea discussions (the

defendant must request a judicial conference) and cannot make comments about potential sentences if convicted at trial (which might be seen as coercive). Importantly, under all these models, it is suggested that if plea negotiations fall apart, a judge other than the one who participated in negotiations should preside over trial.

Benefits of Expanded Judicial Involvement

Expanded judicial participation in plea negotiations could have three important benefits: a) increasing the predictability of plea bargaining by informing attorneys of the possible outcomes of plea negotiations and trial (i.e., knowing the bargain that would be acceptable to the court and possible sentence if convicted at trial would allow for more certainty in decision-making); b) enhancing the accuracy and fairness of the plea; and c) introducing more transparency to the plea negotiations (Turner, 2006, 2020).

Predictability and Transparency. Expanded judicial involvement can increase the predictability and transparency in plea-bargaining by making the process "fairer, more truthful, and more legitimate" (Turner, 2020, p. 33). Judges could participate in negotiation discussions, which has been found to mitigate uncertainty by the parties (King & Wright, 2016). Furthermore, plea negotiations could occur in open court with everything on the record (i.e., "real-time transparency"), or the offers and agreements could be made available to others after negotiations have concluded ("retrospective transparency"; Turner, 2020). Judicial review of the plea agreement on the record "exposes plea bargains to analysis by a more neutral figure" and would increase the predictability of plea-bargaining, especially if the judge then reviews the plea process (Turner, 2020, p. 54). Some states (e.g., Arizona) already require such judicial review, presumably to increase transparency and fairness.

Accuracy and Fairness. The standard judicial supervision role at the plea colloquy is often mechanical; there is limited defendant participation, and the judge often defers the responsibility of providing information on the facts of the case to the defense and prosecution (Turner, 2020). During the colloquy, defendants often read "scripted responses" using words provided by their attorneys, and as long as "the defendant parrots the correct phrases, the judge is unlikely to scrutinize the pleas any further" (Appleman, 2010, p. 751). Under standard practice, the judge defers the responsibility of informing the defendant of the plea terms and of ensuring voluntariness to the defense attorney. Expanded judicial involvement during negotiations, or requiring judicial review of the plea agreement, would put judges in a better position to determine the validity of the plea and encourage fair and responsible negotiations and bargains (Turner, 2020).

Risks of Expanded Judicial Involvement

Expanded judicial involvement in plea negotiations does pose risks, such as potential coercion, or undermining the neutrality of the judge (Miller et al., 1978; Turner, 2017). The argument is that if judges are involved, it may give the defendant the impression they would not receive a fair trial, which may induce coerced and/or false guilty pleas and hinder the judge's ability to later objectively determine the voluntariness of the plea (Ryan & Alfini, 1979).

Potential Coercion. Whereas some have argued that increased judicial participation could protect innocent defendants from pleading guilty (Rakoff, 2014), it is also possible that their presence in the negotiations could induce a defendant to plead guilty where they otherwise would not have (Miller et al., 1978). For example, in *People v. Crumb* (2008), the defendant argued that the judge "impermissibly participated in plea discussions and in doing so pressured [them] into pleading guilty". The Colorado Court of Appeals rejected the claimant's argument,

but that rejection was later overturned by the Colorado Supreme Court, which found that the "trial judge stepped out of his role as a fair and impartial arbiter by making participatory comments" (*Crumb v. People of Colorado*, 2010). Similarly, a trial court judge's comments regarding reluctance to impose a death sentence during negotiations were ruled improper, rendering the guilty plea involuntary; the court reasoned that, "due to the force and majesty of the judiciary, a trial court's participation in the plea negotiation may skew the defendant's decision-making" (*McDaniel v. State of Georgia*, 1999). These decisions and research suggest that courts are cognizant of the weight of the judiciary and have concerns about the potential coercive effect of a judge's comments during negotiations. However, King and Wright (2016) interviewed judges, prosecutors, and defense attorneys about judicial involvement in plea negotiations, finding that defense attorneys believed the judge's presence benefited their clients and protected the defendant from coercion.

Objectivity/Neutrality of the Judge. Increased judicial participation in negotiations could also affect the neutrality (or perception of neutrality) of the judge (Turner, 2017). Rakoff (2014) acknowledges this risk (e.g., especially if no bargain is made), and references how, in civil cases, neutral magistrates other than presiding judge usually facilitate settlement conferences. This is similar to Oregon's statutes on judicial involvement, "Any other judge, at the request of both the prosecution and the defense, or at the direction of the presiding judge, may participate in plea discussions" (ORS 135.432). The issue of neutrality cuts both ways, as proponents argue participation in plea negotiations allows a neutral assessment of the party's positions and likely outcomes, and critics argue that participation undermines the neutrality of the judge (Turner, 2006).

Present Study

This study seeks to address two gaps in prior literature: (a) to address judges' perceptions of their standard role in the plea process (e.g., their responsibility to confirm the factual basis and ensure the constitutionality of the plea) and (b) to explore judges' perceptions of expanded judicial involvement (i.e., involvement in plea negotiations). Ultimately, we seek to understand judge's perceptions of and experiences participating in plea negotiations, a controversial issue that state statutes differ on.

To our knowledge, there is little research on either what judges actually do during plea colloquies or on their perceptions of their responsibilities during the plea colloquy (Dezember et al., 2020; Miller et al., 1978). Moreover, few studies have examined expanded judicial involvement in plea negotiations. Although past research on judicial involvement in negotiations provides a solid foundation (King & Wright, 2016; Turner, 2006), it is limited to an examination of jurisdictions that allow judicial involvement. The current research extends our understanding of judicial involvement in plea negotiations by surveying state court judges in jurisdictions that do and do not allow for involvement as well as those that make no mention of judicial involvement. We asked about judges' involvement in plea bargaining (colloquy and negotiations) and their perceptions of increased judicial participation in negotiations. Although we consider this to be an exploratory study, we expected that judges in states that have laws explicitly prohibiting involvement in negotiations would have a more negative view of judicial involvement and participation in plea negotiations compared with judges in states that explicitly permit involvement or judges in states where there are no explicit laws permitting or prohibiting it.

Methods

Recruitment & Participants

We recruited active and retired state court judges primarily through email solicitation requests sent out by the American Judges Association (AJA). The AJA listserv included roughly 1,200 judges (membership totaled 1,191 at the end of 2019).[1] An initial email solicitation and two follow-up requests were sent out by AJA in February and March 2020. Additionally, to increase our sample of states that explicitly permit or prohibit involvement in negotiations, emails were separately sent out by the first author to 167 Oregon, 14 North Dakota, and 17 Virginia state court judges whose email addresses were available. Similarly, an initial email solicitation and two follow-up requests were sent out in March and April 2020 to these 198 judges. Prior research on judicial involvement in negotiations has relied on in-depth interviews with judges in the U.S. who engage in the practice; for example, Turner (2006) conducted roughly 10 interviews, and King and Wright (2016) roughly 30 interviews. Because our study addressed the standard practice and expanded role of judges across jurisdictions that permit and prohibit involvement in negotiations, we chose to use a survey to gather a more diverse and larger sample of state judges.

In total, 302 judges clicked on the link to start the survey. 15 participants were automatically re-directed to the end of survey because they were not eligible based on inclusion criteria (i.e., they must be active or retired state court judges). Of the remaining 287 judges, 69 judges did not fully complete the survey: 54 judges completed less than 25% of the survey, six judges completed between 25% and 50% of the survey, and nine judges completed more than

[1] We do not know how many of these emails were returned or inaccurate. Importantly, AJA's membership also includes a small number of federal judges. Federal judges were not eligible per our recruitment flyer, and would have been excluded from participating based on inclusion criteria. Although, the American Judges Association is the largest independent, organization of judges in the U.S., membership totals 1,200 of the roughly 30,000 active state court judges in the United States.

50% of the survey, but did not finish. We excluded the 54 judges who completed less than 25% of the study (many of whom did not get past the Informed Consent document).

Our final sample consisted of 233 judges (93.5% completed the full survey, 6.5% completed partial sections). Judges who did and did not complete the study did not differ significantly by race, gender, geographical region, and years on the bench. Analyses were run with the full sample (n = 233) and those who "completed" the survey (n = 218) and the results generally stayed the same.

The final sample of 233 judges came from 33 states; 8.7% of the sample practiced in the South, 58.7% in the Midwest, 7.0% in the Northeast, and 25.7% in the West (geographical jurisdiction defined using Census criteria). As a note, a large percentage of our sample (41.3%) were judges from Michigan. We ran all analyses with Michigan judges excluded to examine whether their responses were driving the results reported; major differences did not emerge.[2]

Our final sample was 84.4% White, 5.0% Black or African American, 2.3% Hispanic or Latinx, 2.3% Biracial, 1.4% reported other racial/ethnic backgrounds, .9% Asian, and .5% Native Hawaiian (3.2% preferred not to answer). Two-thirds of our sample were male (67.0%), 30.3% female, and 2.8% preferred not to answer. Our racial and ethnic breakdown is consistent with a recent study of diversity in the state judiciary, which found that roughly 83% of state court judges are White (less than 20% are people of color), and roughly 34% are female (George & Yoon, n.d). Participants served an average of 13.07 years on the bench (SD = 8.94), ranging from less than 1 year to 38 years. Participants were asked to indicate their occupation prior to becoming a judge (select all that apply); 47.6% served as prosecutors, 27.0% as public defense/criminal defense, 39.5% private practice/generally represented defendants, 24.9%

[2] Analyses are available upon request.

private practice/generally represented plaintiffs, 6.4% were corporate counsel, and 22.3% reported they had other roles (such as real estate law, government attorney). Next, participants were asked to indicate the type of court they currently or previously served in (select all that apply); 82.8% in felony court, 82.4% in misdemeanor court, 63.6% traffic court, 52.8% family court, 44.2% juvenile/delinquency court, and 19.8% oversee "other" matters such as drug court or small claims. Thus, our sample consisted of generalist judges who had or are currently overseeing a wide range of cases.

As one of the components of this study was to examine differences in responses between judges practicing in states that permit judicial involvement in plea negotiations compared with those that do not, we created a variable coding whether the states' policies "permit", "prohibit" or make "no mention" of judicial involvement. These groups were categorized based on coding of state statutes, court rules, and case law on judicial involvement in plea negotiations conducted by Zottoli et al. (2019). The judges in our sample represented states that permit (21.7%), prohibit (13.0%), or make no mention and therefore neither explicitly permit or prohibit (65.2%) judicial involvement in plea negotiations.[3]

[3] Given that judges from Michigan represent a sizable portion of our sample, we examined the state's policy a bit further. Researchers have categorized Michigan differently, with varied interpretations of *People v. Cobbs* (1993), which recognized that judges may participate in "sentence discussions" where, "At the request of a party, and not on the judge's own initiative, a judge may state on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." Some researchers (e.g., King & Wright, 2016; Turner, 2006) find that such judicial involvement reaffirms "the practical impossibility of precluding all judicial involvement in the negotiation process" and makes Michigan akin to a permit state (*People v. Killebrew*, 1982, p. 282). Others find Michigan laws silent on the issue (Batra, 2015; Zottoli, et al., 2019), though perhaps discouraging judicial involvement (e.g., "the existing laws are silent on the issue of judicial participation, but nevertheless the courts have similarly discouraged, but not prohibited, judges from participating"; Batra, 2015, pp. 576-577). While we relied on the more recent Zottoli et al. (2019) categorization, we also analyzed these data with Michigan coded as a *permit* state. Those analyses are available in Supplemental Materials. In the supplemental analyses, we note when results diverged from the results reported in the main paper.

Online Survey

We surveyed judges on three domains: judicial expectation of the parties' responsibilities, including their own; judges' experiences with the plea colloquy and indicators judges rely on to determine if a plea is made knowingly, intelligently, and voluntarily; and judges' experiences with and perceptions of participating in plea negotiations. Below, we give examples of questions in each section; the study protocol is available in Supplemental Materials.

Judicial Expectation of Legal Parties' Responsibilities

Participants were first asked a series of questions regarding supervision and the parties' roles in plea bargaining (e.g., "During the plea colloquy, confirming the factual basis of the plea is _____ % the: [judge's responsibility, defense attorney's responsibility, prosecutors' responsibility]"). These questions were presented on a slider scale (0% - 100%), and did not have to equal 100%.

Judges' Experiences with the Plea Colloquy and Indicators of a Constitutionally Valid Plea

Judges were then asked questions regarding the plea colloquy (e.g., "What is the estimated average amount of time you spend on the plea colloquy with felony defendants?"), and about defendants' waiver of rights and indicators of a knowing, intelligent, and voluntary decision (e.g., "During the colloquy, how often do you find that defendants do not fully understand the rights they are waiving?"). Judges were asked how frequently they observe or engage in certain practices during the plea colloquy (e.g., "During the colloquy, how often do you discuss direct consequences with defendants who plead guilty?"). These questions were measured on Likert-type scales ranging from: *Never* (1), *Very Rarely* (2), *Rarely* (3), *Occasionally* (4), *Frequently* (5), to *Always* (6). From a checklist of seven different rights, judges were asked to indicate which rights defendants are not commonly aware of (e.g., "The right to

testify and present evidence"; "The right to compel the attendance of witnesses"), and had the option to write in "other rights" that defendants frequently are not aware of.

Judges' Experiences with and Perceptions of Participating in Plea Negotiations

Lastly, on the same 6-point Likert scale as above, we asked judges about their experiences participating in plea negotiations (e.g., "How often do you provide specific sentence recommendations in plea negotiations?"; "How often do you provide general sentence recommendations, such as the lower and upper range of a sentence, in plea negotiations?"). The last section asked judges about their perceptions of participating in plea negotiations (e.g., "Judges who are involved in plea negotiations should remove themselves from a subsequent plea colloquy.").

Possible Benefits. Based on past literature, we included questions assessing the potential benefits of judicial involvement in plea negotiations; we averaged 10 item scores to create a measure addressing perceptions of the benefits of judicial participation in plea negotiations (α = .945). Examples of items include: (a) "Increased judicial involvement in plea negotiations enhances the fairness of plea bargaining."; (b) "Judicial participation in plea negotiations increases the judge's ability to ensure the plea was accepted in a knowing, intelligent, and voluntary manner."; and (c) "Judicial involvement in plea negotiations ensures cases reach resolution more quickly (i.e., involvement facilitates earlier settlement)."

Possible Risks. Based on past literature, we also included questions assessing the potential risks of judicial involvement in plea negotiations; we averaged 4 item scores to create a measure addressing perceptions of the risks of judicial participation in plea negotiations (α = .891). Examples of items include: (a) "Judicial involvement in plea negotiations gives defendants the impression that they would not receive a fair trial if the negotiations are unsuccessful/fall

apart."; (b) "Judicial involvement in plea negotiations is coercive to defendants; a plea suggested by a judge cannot be voluntarily entered by the defendant."; and (c) "Judicial involvement in plea negotiations can induce innocent defendants to plead guilty."

Open-ended Questions

Judges were asked five open-ended questions about their involvement in the plea colloquy and perceptions of expanded involvement (e.g., "What indicators do you look for in determining that a defendant is prepared to make a voluntary, knowing, and intelligent decision?"). Approximately half (51%) of responses were coded by two independent coders. Agreement ranged from .71 – .90 (varied across the questions). Considering the high agreement, coding the remaining 49% of responses was split between two coders. Disagreements were resolved by a third independent coder or by consensus.

Sensitivity Check

We included multiple questions to check the impact of variation in state policy on judicial involvement. Responses to the first question, "Statutes, rules, or case law dictate my level of involvement in plea negotiations" varied significantly by state policy, F (2, 218) = 5.73, p = .004. Judges in *no mention* states were less likely to agree that state statutes, rules, or case law dictate their level of involvement (M = 3.92, SD = 1.71) than judges in *prohibit* states (M = 4.93, SD = 1.73; p = .024, d = -0.79) and *permit* states (M = 4.55, SD = 1.36; p = .031, d = -0.52). The difference between judges in *permit* and *prohibit* states was not significant, p = .605.

Judges' agreement with the statement, "The jurisdiction I serve in discourages judicial involvement in plea negotiations" also significantly varied by state policy, F (2, 218) = 14.77, p < .001. Judges in *prohibit* states were more likely to agree that their jurisdiction discourages involvement (M = 5.37, SD = 1.18) than judges in *permit* states (M = 3.36, SD = 1.78; p < .001,

d = 1.26) and *no mention* states (*M* = 3.52, SD = 1.76; $p < .001$, *d* = 1.10). The difference between *permits* and *no mention* was not significant, $p = .860$. Thus, judges appear to be aware of the policy in their jurisdiction, and report that it influences their involvement.

Procedures

The University of Maryland, Baltimore County Institutional Review Board approved all study materials and the collection of these data. The recruitment method consisted of email solicitations. The email invitations described the purpose of the study, eligibility criteria, noted that participation was voluntary and anonymous (no identifying information will be collected), and provided the Qualtrics survey link. Once participants were directed to Qualtrics, they first viewed the informed consent document. Participants then answered questions assessing plea decisions, waiver components, judicial involvement in plea negotiations, and demographic information. The median time to complete the survey was 18.56 minutes.

Results

Results are organized by judges' standard practice during the colloquy (i.e., overseeing the colloquy, responsibility to confirm the factual basis, and ensure a voluntary, knowing and intelligent plea) and expanded judicial participation (i.e., experiences with and perceptions of participating in plea negotiations). All results below represent judges' self-reported experiences and perceptions of judicial involvement. In each of the following sections, we examine correlations between judges' responses and state statutes (*permit*, *prohibit*, *no mention* in plea negotiations) where relevant and present the aggregate rate for the total sample.

Standard Practice of Judicial Involvement

Overseeing the Plea Colloquy

On average, participants estimated that 86.12% of their cases result in plea bargaining (*SD* = 14.30). Judges reported spending an average of 12.29 minutes on the plea colloquy with *felony* defendants (*SD* = 6.34, *min* = 3 min, *max* = 30 min) and 8.04 minutes with *misdemeanor* defendants (*SD* = 4.80, *min* = 1 min, *max* = 25 min). Of the sample, 67.8% (*n* = 158) said their jurisdiction uses a written tender of plea form (30.9% do not use a tender of plea form, *n* = 72). Judges were asked how frequently they observe or engage in certain practices during the plea colloquy on Likert-type scales ranging from *Never* (1) to *Always* (6). See Table 1 for frequencies for the total sample. The majority of judges *always* (69.7%) discuss direct consequences of the plea during colloquy, compared to just 32.0% who *always* discuss collateral consequences. Roughly half of the sample reported *frequently* (32.9%) or *occasionally* (19.8%) discussing collateral consequences during the colloquy.

Judicial Expectation of Legal Parties' Responsibilities During the Colloquy

Judges were asked whose responsibility it is during the plea colloquy to confirm the factual basis of the plea, ensure the defendant makes a knowing, intelligent, and voluntary decision to plead, and that they understand the rights they are waiving. They were provided with three slider scales for each question (judge, defense attorney, and prosecutor), and asked to indicate how responsible that legal actor is for that domain, using a percentage (e.g., it is 100% the judge's responsibility to…). Accordingly, the percentages for each question do not necessarily add up to 100%. For example, judges could have stated that it is equally the full, 100% responsibility of all three actors to ensure a factual basis. See Table 2 for percentages across these domains. Overwhelmingly, judges believed it was their responsibility to confirm the factual basis and validity of the plea during the colloquy compared to prosecutors and defense attorneys. Although judges note they are the most responsible for ensuring the validity of the

plea, the majority of judges believed there is shared responsibility across legal actors. About a quarter of judges believed that overseeing the constitutionality of the plea is exclusively their responsibility (100% the judge's responsibility, and 0% the defense and prosecutor's responsibilities); 51 judges (21.9%) reported it is exclusively their responsibility to ensure the factual basis, 68 judges (29.2%) reported it is exclusively their responsibility to ensure the defendant's decision is knowing and intelligent, 71 judges (30.5%) reported it is exclusively their responsibility to ensure the defendant's decision is voluntary, and 61 judges (26.2%) reported it is exclusively their responsibility to ensure the defendant understands the rights waived.

A smaller percentage of judges believed the responsibility is equally shared between legal actors (100% the responsibility of each legal actor); 40 judges (17.2%) reported it is equally everyone's responsibility to ensure the factual basis, 29 judges (12.4%) reported it is equally everyone's responsibility to ensure the defendant's decision is knowing and intelligent, 28 judges (12.0%) reported it is equally everyone's responsibility to ensure the defendant's decision is voluntary, and 22 judges (9.4%) reported it is equally everyone's responsibility to ensure the defendant understands the rights waived.

Ensuring a Constitutionally Valid Plea During Colloquy

Ensuring a Knowing, Intelligent and Voluntary Decision. In this sample, 46.6% of judges stated that defendants *occasionally* do not understand the rights they are waiving, the other half stated that defendants *very rarely* (25.1%) or *rarely* (26.0%) do not understand the rights they are waiving. Judges were given a list of seven rights and were asked to indicate whether each right was one that defendants may not be fully aware of and given the option of indicating "other rights" not listed. In order of frequency, judges reported that defendants are most commonly not fully aware of: (a) "The terms of any plea agreement provision waiving the

right to appeal" (35.2%, *n* = 82), (b) "Other rights" such as license suspension or loss of parental rights (21.0%, *n* = 49), (c) "The right to compel the attendance of witnesses" (20.2%, *n* = 47), (d) "The right to be protected from compelled self-incrimination" (16.7%, *n* = 39), (e) "The right to testify and present evidence" (9.4%, *n* = 22), (f) "The right at trial to confront and cross-examine adverse witnesses" (9.0%, *n* = 21), (g) "The right to a jury trial" (6.4%, *n* = 15), and (h), "The right to be represented by counsel—and if necessary, have the court appoint counsel" (6.0%, *n* = 14). Overall, there were only six judges who believed that defendants commonly do not understand all seven rights listed. In contrast, 47.2% (*n* = 110) of judges did not consider any of the seven rights listed to be commonly misunderstood by defendants.

In two open-ended questions, we asked judges what they expect defense attorneys to have done to help prepare the defendant to make a voluntary, knowing, and intelligent decision, and then what indicators they use to ensure the defendant's decision meets that standard. Multiple codes could have applied to responses. From these responses (*n* = 216), judges most frequently referenced expecting defense attorneys to have explained, discussed, and reviewed the defendant's rights to trial and appeal (46.30%, *n* = 100), explained the agreed or potential sentence and penalties (39.81%, *n* = 86), and reviewed and discussed the (tender of) plea form and/or plea colloquy (32.87%, *n* = 71). See Table 3 for an overview of codes, frequency, and excerpts. Judges then determine the constitutionality of the plea (*n* = 210), based on: their own behavior (e.g., asking questions of the defendant or reviewing rights), non-verbal indicators (e.g., eye contact), and verbal indicators of the defendant (e.g., content of defendant's questions). Judges most frequently mentioned basing their determination on the defendant's answers to questions (39.52%, *n* = 83), non-verbal cues or body language exhibited by the defendant

(39.05%, *n* = 82), and that the judge asks the defendant various questions (through judicial inquiry) (24.76%, *n* = 52). See Table 4 for an overview of codes, frequency, and examples.

Confirming the Factual Basis. Under standard practices, judges are responsible for confirming the factual basis of the plea; in two open-ended questions, we asked judges how they determine whether the guilty plea rests on a factual basis, and what legal standard they follow in making that determination. Multiple codes could have applied to responses. Of judges who responded (*n* = 203), roughly half (51.7%, *n* = 105) stated that they use information from the defendant to determine the guilty plea rests on an accurate factual basis. For example:

> I have the defendant answer this question 'what did you do that you should not have done'. Then we work from there.

> I require the defendant to tell me expressly the facts that causes him or her to believe he or she is guilty of the offense. If the defendant's statement is not clear I will ask questions. However, if the defendant doesn't clearly give me a factual basis for the conviction, I will not accept the plea.

A smaller, but still sizable, proportion of judges stated that they use information from the prosecutor (28.5%, *n* = 58) or defense attorney (24.6%, *n* = 50) to confirm the factual basis. For example:

> The defense attorney and prosecutor typically agree to a written recitation of the facts. I read them out loud to the defendant and ask him or her if they are admitting such facts are true.

Additionally, 28.5% (*n* = 58) look to the complaint and case materials (i.e., facts of the case) or whether the statutory elements or elements of the crime are present (23.6%, *n* = 48).

In terms of the legal standard that judges use to determine a factual basis, of those judges who responded (*n* = 187), the majority of judges fell into two camps: relying on the "beyond a reasonable doubt" standard (40.11%, *n* = 75) or relying on "factual basis/elements of the crime/evidence" (51.34%, *n* = 96). For example:

> More likely than not that the defendant is telling the truth about the factual basis for the plea, so preponderance of the evidence.
>
> I have to be satisfied beyond a reasonable doubt that they are guilty of the charge they are pleading to or a more serious charge in certain plea agreements where they are pleading to a lesser.

A small minority of judges indicated they ensure "defendant understanding, and that the plea is knowing, intelligent, and voluntary" (10.16%, $n = 19$) or that they rely on jury instructions/court rules (4.28%, $n = 8$).

Expanded Role of Judicial Participation

Judicial Experiences in Plea Negotiations

Using a 6-point Likert-type ranging from (*Never* = 1 to *Always* = 6), judges were asked how frequently they engage in various practices during plea negotiations such as making general or specific sentencing recommendations, and suggesting the parties consider bargaining or taking the case to trial. See Table 1 for frequencies for the total sample. The vast majority of judges report not involving themselves in plea negotiations: 34.1% of judges *always*, and 48.2% *frequently* have no involvement in plea negotiations. A large percentage of judges *never* provide specific (41.6%) or general (39.8%) sentencing recommendations during plea negotiations. Judges are more likely to involve themselves by suggesting a plea instead of trial (35.8% *occasionally* or more frequently) than by suggesting a trial instead of a plea (14.6% *occasionally* or more frequently).

Next, we ran one-way ANOVAs with state policy on judicial involvement in plea negotiations as the IV and responses to the below statements as our DVs. See Table 5 for total sample means and univariate analyses. A clear pattern emerged between states that *prohibit* involvement and those that *permit* or make *no mention*. Judges from states that *prohibit* involvement were significantly less likely than judges from *permit* and *no mention* states to

provide general sentence recommendations (such as lower and upper range of sentences), and facilitate discussions by making suggestions about considering plea negotiations instead of trial. *Prohibit* judges were also less likely to inject themselves in the discussion by suggesting parties consider trial rather than plea negotiations. Judges from *prohibit* states were more likely to report that they have no involvement in plea negotiations compared with *permit* and *no mention* states. The differences between *no mention* and *permit* states were not significant, demonstrating that judicial involvement in *permit* and *no mention* states is similar, but both significantly differ from *prohibit* states. Lastly, judges' provision of specific sentence recommendations did not vary by state policy.

Judicial Perceptions of Participating in Plea Negotiations

To explore judges' perceptions of judicial involvement in plea negotiations and their views of expanded participation, we asked judges a general, open-ended question "how should judges be involved in plea negotiations, if at all". See Table 6 for an overview of codes, frequency, and examples. Multiple codes could have applied to responses. Of those who responded (n = 147), judges typically fell into a few camps: that judges should not be involved at all (29.93%; n = 44), that their involvement should be limited (25.85%, n = 38), with caveats to involvement such as only at the request of both parties (10.88%; n = 16), or only include discussions with the attorneys, not the defendant (6.80%; n = 10). For example, one judge described that judicial involvement in plea negotiations should be limited such that judges should never initiate discussions:

> Parties cannot agree on 1-2 terms but have agreed on other essential terms for the plea. Judge can give parties a sense where the judge is leaning on the remaining issue(s). Judge must never initiate the plea discussion.

Others believed that judicial involvement in plea negotiations was acceptable with the caveat that it only occurs at the request of both parties:

> Only participate when requested by both sides and not usually with clients present. If clients present, on the record.

Participants were also asked a number of Likert-type questions assessing their attitudes towards judicial involvement and participation in plea negotiations. We ran a series of ANOVAs to compare perceptions of judicial participation in plea negotiations by state policy. See Table 7 for total sample means and univariate comparisons. Judges from *prohibit* states were more likely to agree that judges involved in plea negotiations should remove themselves from the subsequent colloquy than judges from both *permit* and *no mention* states (the difference between *permit* and *no mention* was not significant). Judges from both *permit* and *prohibit* states were significantly more likely to agree that judges involved in plea negotiations should remove themselves from a subsequent trial, should the defendant reject the plea compared with judges from *no mention* states (the difference between *permit* and *prohibit* was not significant). There were no significant differences across state policy on perceptions that all plea negotiations should be on the record or that defendants' statements at plea negotiations should not be used later.

Possible Benefits of Participation. To examine overall trends, we ran a one-way ANOVA with state policy as the IV and the scale representing possible benefits of judicial involvement as the DV. The effect of state policy was significant, F (2, 209) = 8.12, $p < .001$. Judges in *permit* states were more likely to endorse the benefits of increased judicial participation in plea negotiations ($M = 3.94$, $SD = 1.16$) compared with judges in *no mention* states ($M = 3.36$, $SD = 1.12$; $p = .009$, $d = 0.51$) and *prohibit* states ($M = 2.86$, $SD = 1.05$; $p < .001$, $d = 0.96$). The difference between *prohibit* and *no mention* states was not significant, $p = .111$.

Because the individual items tap into unique concepts, we present some of the key differences here. See Table 7 for univariate comparisons. Judges from *permit* states were significantly more likely to believe that judicial participation allows a neutral party to assess the terms of the plea and case facts and enhances the fairness of plea bargaining than judges from *no* mention states, and both *permit* and *no mention* state judges were significantly more likely to endorse than *prohibit* judges. Additionally, *permit* state judges were more likely than judges from both *prohibit* and *no mention* states to agree that judicial participation increases the judge's ability to ensure the plea is made in a knowing, intelligent, and voluntary manner, introduces more openness and transparency into the negotiation process, and ensures that cases reach a resolution more quickly and the process is fairer. Differences between *prohibit* and *no mention* states were not significant.

Judges from *prohibit* states were less likely than both *no mention* and *permit* states to agree that judicial participation strengthens the process by increasing the predictability of possible outcomes (both potential plea bargains and post-conviction sentences). The difference between *permit* and *no mention* was not significant. Further, judges from *prohibit* states were significantly less likely than judges from *permit* states to agree that judicial involvement increases the accuracy of plea bargaining. All other differences were not significant.

There were no significant differences across state policy on perceptions that judicial involvement acts as a check on prosecutorial power or that judicial participation reduces the rate of innocent defendants pleading guilty. Although differences by state policy were not always consistent, the overall trend suggests that judges from *permit* states are more likely to endorse the benefits of judicial participation in plea negotiations; specifically, they indicated higher

agreement on eight out of 10 possible benefits. Judges from *no mention* states trend closer to those in *permit* states, with judges from *prohibit* states more skeptical of the potential benefits.

Possible Risks of Participation. We first ran an ANOVA with state policy as the IV and the scale representing possible risks of judicial involvement as the DV to examine trends in the data. The effect of state policy was significant, F (2, 215) = 18.39, $p < .001$. Judges in *prohibit* states were more likely to endorse the risks of increased judicial participation in plea negotiations (M = 4.49, SD = 1.11) compared with judges in *no mention* states (M = 3.34, SD = 1.31; $p < .001$, d = 0.90) and *permit* states (M = 2.67, SD = 1.03; $p < .001$, d = 1.72). The difference between *permit* and *no mention* states was also significant, $p = .002$.

On the individual items, all three groups differed significantly. See Table 7 for univariate comparisons. Judges from *prohibit* states were significantly more likely to agree that judicial involvement gives defendants the impression they would not receive a fair trial if negotiations are unsuccessful, hinders the judge's ability to objectively determine voluntariness, is coercive to defendants, and can induce innocent defendants to plead guilty compared with judges from *no mention* and *permit* states (both *prohibit* and *no mention* judges had significantly higher agreement ratings than *permit* judges). These trends suggest judges from *prohibit* states were more likely to endorse the risks of judicial participation in plea negotiations; specifically, they indicated higher agreement on four out of four possible risks. Judges from *no mention* states were significantly less likely to endorse the risks than judges from *prohibit* states, but both were more concerned than judges from *permit* states.

Discussion

In this study, we took an exploratory approach to understanding judicial involvement in plea bargaining by surveying state court judges. Little prior research has examined the judge's

role in plea negotiations (King & Wright, 2016; Miller et al., 1978; Turner, 2006), and to our knowledge, no work has compared states that prohibit versus those that permit involvement in negotiations (or those whose state statutes make no mention of it). Below, we present the major findings:

1. Although judges overwhelmingly believe it is their responsibility to ensure the constitutionality of the plea, most perceive this responsibility is not theirs alone, but rather shared/diffused across other participants.
2. State policy on judicial involvement is associated with reported behavior during plea negotiations.
3. Judges have differing views on expanded judicial involvement. State policy is strongly related to judges' perceptions of judicial involvement in plea negotiations.

The Standard Practice of Judicial Supervision

The Plea Colloquy and Diffusion of Responsibility

Judges overwhelmingly believed it their responsibility to ensure the defendant makes a knowing, intelligent, and voluntary decision, and understands the rights they are waiving (in accord with *Boykin v. Alabama*, 1969), but less than one-third (20-30%) perceived this role as exclusively their responsibility. Rather, the majority of judges stated that there is some level of shared responsibility among the legal actors. Depending on the element in question, 9-17% of judges in our sample believed themselves, the prosecutor, and the defense attorney to *each* be fully (100%) responsible for ensuring a valid plea decision. More common, however, was a perceived diffusion of responsibility, which may account for why plea colloquies tend to be short, routine affairs (see Turner, 2020). In this sample, judges reported spending an average of 12 minutes on the plea colloquy with *felony* defendants and eight minutes with *misdemeanor*

defendants, which is quite similar to the lengths Dezember and colleagues (2021) report in a study documenting actual plea hearings. However, the minimum reported time spent with misdemeanor defendants was one minute and only three minutes for felony defendants. Given the brief and routine nature of the plea colloquy, it might be unreasonable to expect that judges who typically know little about the underlying facts of the case and who follow a boilerplate waiver of rights, are able to fully determine and establish the validity of the plea. Nonetheless, this is precisely what is expected of them.

Confirming the Constitutionality of the Plea and a Factual Basis

Judges reported looking to indicators from defendants that they are prepared to make a knowing, intelligent, and voluntary waiver. In particular, the most frequently mentioned indicators judges rely on were: (a) non-verbal cues and body language exhibited by the defendant (e.g., eye rolling, appearing confused, hesitation), and (b) verbal answers to the questions posed by the Court (e.g., "can [the defendant] establish a factual basis"). Considering defendants' verbal answers, 69.5% of judges perceived that defendants are frequently or always speaking in their own words during the plea colloquy, rather than using phrases and terms likely given to them by their attorney. Still, only about 12% of judges said they look to the defendant's ability to answer questions without looking to their attorney (e.g., "independent of attorney 'nudging' or encouragement") as an indicator of a knowing, intelligent, and voluntary plea. This could be because defendants are saying the "correct phrases" (as supposed by Appleman, 2010, p. 751), which in turn, reduces the likelihood of further judicial inquiry.

Moreover, given research indicating that some defendants are unlikely to have made a knowing and intelligent (and voluntary) plea decision (see Redlich, 2016; Redlich & Summers, 2012), our findings suggest that judges may overestimate defendants' comprehension. Slightly

more than half of judges believed that defendants (very) rarely do not understand the rights they are waiving; the remainder believed that occasionally defendants do not understand. And when supplied with a list of specific rights, there were only six judges (2.6%) who believed that defendants commonly do not understand all the rights listed. Perhaps this is unsurprising—if judges believed that defendants generally did not understand the rights they are waiving or are not making a knowing and intelligent plea decision, they would essentially be acknowledging that the standard colloquy is inadequate.

Similar to Miller and colleagues' (1978) observational research of plea hearings, we saw variation regarding what constitutes an accurate factual basis. Half of the judges (45.1%) in this sample stated that they use information from the defendant to confirm the factual basis; a smaller percentage than the "three-fourths" of Miller et al.'s (1978) judges who confirmed the factual basis by asking the defendant if he "committed the offense to which he pled" (p. 282). Roughly, the other half of judges in our sample look to the defense attorney (21.5%) or prosecutor (24.9%) to establish factual basis. Interestingly, judges also varied in their responses regarding the legal standard of proof used in determining the factual basis of the plea; about half rely on proof beyond a reasonable doubt, and the other half rely on proof of a factual basis (e.g., evidence, elements of the crime). This disagreement regarding the appropriate legal standard for conviction by plea exemplifies the lack of regulation in plea-bargaining compared to trials. The lack of clear rules of criminal procedure regarding the standard of proof for accepting a factual basis threatens the constitutionality of pleas (especially in considering Alford pleas where factual basis of guilt is key to a valid plea). Future research should probe further to examine both the source of differences regarding applicable legal criteria for establishing a factual basis, and also possible implications of relying on different standards.

Expanded Participation in Plea Negotiations

Our results suggest state policy is strongly associated with judges' willingness to get involved—implicitly or explicitly—in plea negotiations. In this sample, generally, judges did not actively participate in plea negotiations; however, judges from *no mention* and *permit* states were more likely to be involved than judges from *prohibit* states. Additionally, a majority of judges commented that they could assist with limited functions or in a limited capacity (e.g., suggest possible sentences or step-in only at the request of both parties). One judge made a clear distinction between being "available to assist" with plea bargaining, and "interfering" with plea-bargaining, demonstrating that individual judges set their own boundaries for involvement in negotiations. A sizable sample of judges commented that they could serve as an objective mediator, ensuring fairness and justice and equality across defendants, and working with defendants to ensure their understanding of the plea process. Judges remaining objective may be especially necessary for vulnerable populations such as juveniles or individuals with mental illness and intellectual disabilities as the risk of paternalism is high. Considering that individuals involved with the justice system are significantly more likely to have mental health diagnoses and concerns than the general U.S. population (BJS, 2017), future research should examine this more closely.

Scholars have suggested that increased judicial participation has potential benefits and risks (Rakoff, 2014; Ryan & Alfini, 1979; Turner, 2006, 2017). In our sample, a trend emerged wherein judges from *prohibit* states had the strictest view on the ethics surrounding judicial involvement in plea negotiations, were less likely to endorse benefits of increased judicial involvement, and instead were more likely to agree with concerns about judicial involvement than judges from *no mention* and *permit* states. Judges from *permit* states were most likely to

agree that increased judicial involvement in plea negotiations enhances the accuracy of plea bargaining, ensures the process is fairer, and increases the judges' ability to ensure the plea is made knowingly, intelligently, and voluntarily. Adhering to the *Boykin* requirements has been noted as judges' primary concern but, as also noted above, their more standard role in plea bargaining does not necessarily afford them the ability to carefully scrutinize the plea terms, bargaining, and defendants' waiver decision-making, to the extent that expanded involvement does (Turner, 2020).

Turner has argued that judicial involvement in negotiations is likely to address a general lack of transparency in plea bargaining, including concerns surrounding coercion or "backroom" bargaining (2006). In our sample, judges from *permit* states were more likely to agree that judicial involvement introduces more openness and transparency into the negotiation process. Despite this, regardless of state policy, judges on average "somewhat disagreed" that all plea negotiations should be on the record. From interviews conducted by King and Wright (2016), judges noted special circumstances that they believe should be kept off the record, for example: Privacy concerns surrounding mental health conditions, if the defendant is cooperating on another case, or complex evidentiary issues (2016, p. 342). From our data, there appears to be a disconnect between some judges' support for expanded transparency and resistance to putting all plea negotiations on the record. Future research should examine the circumstances that judge believe warrant including or withholding negotiations on the record.

Judge Rakoff has argued that sentencing guidelines have "[provided] prosecutors with weapons to bludgeon defendants into effectively coerced plea bargains", and that increased judicial involvement may reduce false guilty pleas (2014, p. 3). However, judges in our sample, regardless of state policy, were generally neutral (in between "*Somewhat Disagree*" and

"*Somewhat Agree*") that judicial involvement in plea negotiations serves as check on prosecutorial power and somewhat disagreed that increased judicial participation could reduce false guilty pleas. Furthermore, judges from *prohibit* states perceived involvement might induce an innocent defendant to plead. It is worth noting that Judge Rakoff's recommendations go well beyond the level of involvement allowed in current state policies (e.g., the ability to question attorneys about evidence during negotiations). Judges may not see their current level of involvement as sufficient to protect innocent defendants. Although our data do not directly speak to Rakoff's expanded recommendations, we encourage future research to do so.

Connection Between Policy, Attitudes, and Behavior

Much of the present study focused on judicial perceptions (attitudes) about involvement in negotiations, and to a smaller extent judges' behavior under the standard role of judicial supervision during the colloquy and experiences with involvement in negotiations. Judicial behavior can, to an extent, be explained by attitudes (Gibson, 1983). But the relationship between attitudes and decisions is often mediated by situational context of behavior (Gibson, 1978). Judges hold individual attitudes on judicial involvement (i.e., what they prefer to do), but their behavior may be constricted by role orientations (i.e., what they should do) given the state's policy on involvement. This might help to explain the relationship between attitudes regarding judicial involvement and behavior in this study; that is, for an attitude to influence behavior that behavior must be within the range of acceptable actions (Gibson, 1978).

However, it is also possible that individual judges' behavior might vary and contravene state policy if their role orientations are not in congruence with the state's policy (this might be especially likely in jurisdictions with differing institutional norms or organizational cultures). For example, in our sample, 27.6% of judges from *prohibit* states report having some involvement in

plea negotiations, and approximately one-third have provided specific or general sentencing recommendations during negotiations (30.8% - 37.9%). And as one judge from a *prohibit* state commented, "If both sides ask the judge what range of sentencing might be appropriate if [a] defendant were to plead guilty (and actually be guilty), then giving a general range would be acceptable…" Additionally, when judicial involvement is not mentioned in state policy, judges might gain more autonomy in their decision-making process. As one judge from a *no mention* state commented, "The judge has NO IDEA what the facts are - and should not be involved with negotiating anything."

Furthermore, we found that judges who have involved themselves in plea negotiations while on the bench (even when their state prohibits such involvement) were more likely to have positive attitudes towards involvement than those who have not participated. It is possible that their experiences (i.e., behavior) have influenced their attitudes towards involvement (Gibson, 1983). In theory, judges in *permit* and *no mention* states may have more experience participating than judges from *prohibit* states, and therefore are more likely to base their attitudes on actual experiences, whereas judges from *prohibit* states may be more likely to base their attitudes on a matter of principle or what they believe they ought not to do (based on role orientations).

Implications for Research, Policy and Practice

Future research should examine the bi-directional relationship between attitudes and behavior; an examination could evaluate how local rules shape organization culture (e.g., "that is how we've always done it, so it must be good/correct"), as well as the circumstances that judges believe warrant involvement in negotiations, particularly in states where it is prohibited.

Additionally, research could compare states that allow some type of communication regarding sentence/disposition prior to the colloquy (e.g., in Michigan, at the request of one

party, the judge may state the length of the sentence appropriate for the offense) with those who explicitly prohibit involvement (similar to the federal courts), or compare states that place limits on the type and timing of involvement. This research should consider implicit involvement and other methods through which judges shape plea-bargaining outcomes. Implicit involvement might be harder to observe than explicit, but nonetheless, may shape how prosecutors and defense attorneys negotiate pleas; for example, some judges develop their own "plea policies" in that they will refuse a "plea agreement that reduces a felony charge to a misdemeanor" (Donnelly, 2020, p. 428). Additionally, state statutes, case law and rules (such as those we used to operationalize state policy here), refer to a narrow form of judicial involvement (i.e., during negotiations), and might oversimplify practices; future research should examine how judges influence dismissals, nolle pros, diversion and sentencing decisions, which all speak to their involvement in criminal cases more broadly. Individual characteristics of the judge may also influence their willingness to get involved in certain circumstances (i.e., "plea policies"); future research should examine if individual characteristics (in addition to characteristics of the case and jurisdiction) affect judges' philosophies, such as: adversarial experience, race/ethnicity, gender, years of experience, if judges are elected in that state (and if elections are partisan).[4]

Regarding policy implications, Bibas (2001) has argued that the current rules give prosecutors immense power, without much opportunity for judges to "check them." Because of this, policies should balance the power in plea-bargaining between judges and prosecutors (Bibas, 2001). These data suggest that some judges are open to policies that allow for expanded judicial involvement, especially if it comes with caveats and protections for defendants (e.g.,

[4] In exploratory analyses not reported here, we examined the effect of judges' gender, years of experience, and election method (non-elected, partisan, non-partisan) on willingness to participate in plea negotiations. There were no significant effects. Future research should examine these variables in a more systematic manner (e.g., oversampling from states that do not elect judges).

only at the request of both parties, and that any judge involved in plea negotiations must remove themselves from a subsequent trial). Some states' policies already dictate this level of protection (e.g., Oregon). Others who allow for involvement (or make no mention) should codify these rules if they are generally agreed as important for ensuring the fairness of the practice.

Our data also suggest the need for expanded judicial education on plea negotiation and colloquy. Beyond differences related to state policy, judges differed on whose responsibility it is to ensure that the defendant is making a knowing, intelligent, and voluntary decision, and understands the rights waived (as required in *Boykin v. Alabama*, 1969), as well as which legal standard to use in determining the factual basis of the plea. Half of the judges in this sample rely on the "beyond a reasonable doubt" standard, while the other half rely on the facts and evidence; this lack of consistency in what legal standard is appropriate to determine the factual basis of the plea represents a clear example for policy to address. Educational programming for state judges could address these important elements and also offer a forum for discussion among judges whose state policies on plea negotiation differ. We encourage organizations such as the National Center for State Courts and the National Judicial College to evaluate the need for such programming.

Limitations

This study contributes to our understanding of judicial involvement in plea negotiations, a topic with sparse research background. Despite its contributions, this study has limitations. We acknowledge the uncertainty in responses owing to the smaller sample size (though approximately 8 to 23 times larger than previous studies on the topic) as well as the potential for response bias. Participation was voluntary, and we offered no incentives for participation, and therefore our sample of state judges can be considered non-representative.

We may have attracted judges who have strong attitudes and opinions about the topic of judicial involvement in plea-bargaining; judges who opted not to participate might have responded differently. And, although our sample consists of state court judges from 33 states, 41.3% of our final sample was from Michigan. This was a convenience sample, therefore, our final sample results in an over-representation of judges from states that *permit* and make *no mention*, and under-representation of judges from states that *prohibit*. Thus, it is possible that these data do not capture nuances and variation from judges in *prohibit* states (smaller sample) to the same extent that those were captured from *permit* and *no mention* judges (larger samples).

Finally, the non-causal nature of our data precludes us from determining whether attitudes are shaped by policies, or if policies shape attitudes. It is also possible that judges are cautious survey respondents and feel compelled to respond in line with state policies (i.e., demand characteristics). Our data do provide some indication that the latter possibility is not solely driving the direction of the results, as we found evidence that judges behavior does not perfectly align with their states' policies (*i.e.*, prohibit judges involving themselves in negotiations). Future research should further interrogate this relationship between judicial perceptions, behaviors, and state policy.

Conclusions

Little is known regarding judges' standard role in plea-bargaining (i.e., supervising the plea colloquy), and expanding their involvement (e.g., assisting in plea negotiations). Moreover, there are conflicting views about the beneficial effect of increased judicial involvement in plea negotiations (Rakoff, 2014; Turner, 2017). Overall, this research suggests that judges believe overseeing the constitutionality of the plea is a shared role, which may result in spending minimal time supervising the plea colloquy and not frequently involving themselves in plea

negotiations. Further, state statutes and rules regarding judicial involvement in plea negotiations are related to both judicial perceptions and behavior. Generally, judges from states that *prohibit* involvement are less likely to inject themselves into the plea process than judges from states that *permit* or make *no mention*. They are also generally more likely to be skeptical of the benefits of increased judicial involvement (e.g., strengthens the process by increasing predictability of outcomes) and to endorse risks (e.g., increased involvement can induce innocent defendants into pleading guilty) than judges from *permit* and *no mention* states. Although more information is needed to better understand judicial involvement in plea negotiations, such as how it differs based on jurisdictions, and its effect on defendant decision-making, our results shed much needed light on this controversial issue.

References

Alschuler, A. (1976). The trial judge's role in plea bargaining, part I. *Columbia Law Review*, *76*, 1059. https://pdfs.semanticscholar.org/d684/a5a7c6d7e555f12106eb2f942faf83565660.pdf

American Bar Association (2018). ABA criminal justice standards: Pleas of guilty, 3rd ed. https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk/

Appleman, L. I. (2010). The Plea Jury. *Indiana Law Journal*, 85(3). https://www.repository.law.indiana.edu/ilj/vol85/iss3/1

Batra, R. (2015). Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective. *Ohio State Law Journal*, *76*(3). https://ssrn.com/abstract=2619433

Bibas, S. (2001). Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas. Faculty Scholarship at Penn Law, 934. https://scholarship.law.upenn.edu/faculty_scholarship/934

Boykin v. Alabama, 395 U.S. 238 (1969)

Brown, D. (2018). The Judicial Role in Criminal Charging and Plea Bargaining. *Hofstra Law Review*, *46*(1), 63-85. https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2990&context=hlr

Bureau of Justice Statistics (2017). BJS finds inmates have higher rates of serious psychological distress than the U.S. general population. https://www.bjs.gov/content/pub/press/imhprpji1112pr.cfm

Champion, D. J. (1987). Guilty plea hearings and judicial supervision: Some differences between federal and state judges regarding Rule 11 and a defendant's right to due process. *American Journal of Criminal Justice*, *12*(1), 62-81. https://doi.org/10.1007/BF02887539

Crumb v. People of Colorado, No. 08SC884 (2010)

Dezember, A., Luna, S., Woestehoff, S. A., Stoltz, M., Manley, M., Quas, J. A., & Redlich, A. D. (2020). Plea Validity in Circuit Court: Judicial Colloquies in Misdemeanor vs. Felony Charges.

Donnelly, M. (2020). Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process. https://moritzlaw.osu.edu/osjcl/2020/06/11/truth-or-consequences-making-the-case-for-transparency-and-reform-in-the-plea-negotiation-process/

Federal Rules of Criminal Procedure (2020). Rule 11: Pleas. Retrieved from https://www.federalrulesofcriminalprocedure.org/table-of-contents/

Fountain, E. & Woolard, J. (*in press*) Negotiating with parents: Attorney practices in the juvenile plea bargain process. *Law and Human Behavior*. https://doi.org/10.1037/lhb0000439

George, T. E. & Yoon, A. H. (n.d.). The gavel gap: Who sits in judgment on state courts? https://gavelgap.org/

Gibson, J. L. (1983). From simplicity to complexity: The development of theory in the study of judicial behavior. *Political Behavior*, *5* (1), 7–49. https://doi.org/10.1007/BF00989985

Gibson, J. (1978). Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model. *American Political Science Review*, *72* (3), 911-924. doi:10.2307/1955111

Henderson v. Morgan, 426 U.S. 637 (1976)

Heumann, M. (1978). *Plea bargaining: The experiences of prosecutors, judges, and defense attorneys.* Chicago, IL: The University of Chicago Press.

Illinois Sup. Ct. R. 402 (2020)

King, N. J. & Wright, R. F. (2016). The invisible revolution in plea bargaining: Managerial judging and judicial participation in negotiations. *Texas Law Review*, *95,* 325-397. http://texaslawreview.org/wp-content/uploads/2017/01/King-Wright.pdf

McDaniel v. State of Georgia, 522 S.E.2d 648 (1999)

Miller, H. S., McDonald, W. F., & Cramer, J. A. (1978). Plea bargaining in the United States. https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=40484

ORS 135.432. Judicial involvement in plea discussions. https://www.oregonlaws.org/ors/135.432

People v. Cobbs, 443 Mich. 276 (1993).

People v. Clark, 515 P.2d 1242 (1973)

People v. Crumb, 203 P.3d 587 (2008)

People v Killebrew, 416 Mich 189; 330 NW2d 834 (1982)

Padilla v. Kentucky, 559 U.S. 356 (2010)

Rakoff, J.S. (2014). Why innocent people plead guilty. *The New York Review of Books.* https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/

Redlich, A. D. (2016). The validity of pleading guilty. In M. K. Miller and B. Bornstein (Eds.), Advances in psychology and law (pp. 1-27). Springer International Publishing.

Redlich, A.D., Bibas, S., Edkins, V. A., & Madon, S. (2017). The psychology of defendant plea decision making. *American Psychologist*, *72*, 339-352. http://dx.doi.org/10.1037/a0040436

Redlich, A. D. & Summers, A. (2012). Voluntary, knowing, and intelligent pleas: Understanding plea inquiries. *Psychology, Public Policy, and Law*, *18*, 626-643.

Ryan, J. P. & Alfini, J. T. (1979). Trial judges' participation in plea bargaining: An Empirical Perspective. *Law & Society Review*, *13*(2), 479-507. https://www.jstor.org/stable/3053265

State of Louisiana v. Bouie, 817 So.2d 48 (2002)

Turner, J. I. (2006). Judicial Participation in Plea Negotiations: A Comparative View. *The American Journal of Comparative Law*, *54*(1), 199-267. https://www.jstor.org/stable/20454489

Turner, J. I. (2017). Plea bargaining. SMU Dedman School of Law Legal Studies Research Paper No. 348. Available at SSRN: https://ssrn.com/abstract=2930521

Turner, J. I. (2020). Transparency in Plea Bargaining. *Notre Dame Law Review*, *96*(1). https://ssrn.com/abstract=3545536

Zottoli, T. M., Daftary-Kapur, T., Edkins, V. A., Redlich, A. D., King, C. M., Dervan, L. E., Tahan, E. (2019). State of the States: A survey of statutory law, regulations and court rules pertaining to guilty pleas across the United States. *Behavioral Sciences & the Law*, *37*, 388– 434. https://doi.org/10.1002/bsl.2413

Table 1. Frequency of Experiences During the Plea Colloquy and Negotiations

Measure	Never	Very Rarely	Rarely	Occasionally	Frequently	Always
Judicial Experiences in Plea Colloquy						
Defendants do not understand rights they are waiving	2.7% (6)	25.1% (56)	26.0% (58)	42.6% (95)	3.1% (7)	0.4% (1)
Defendant is speaking in own words, rather than phrases given to them by defense attorney	0.4% (1)	3.6% (8)	4.5% (10)	22.0% (49)	57.4% (128)	12.1% (27)
Discuss direct consequences of the plea	0.9% (2)	0.5% (1)	3.6% (8)	7.2% (16)	18.1% (40)	69.7% (154)
Discuss collateral consequences of the plea	2.3% (5)	3.6% (8)	9.5% (21)	19.8% (44)	32.9% (73)	32.0% (71)
Judicial Experiences in Plea Negotiations						
Provide specific sentence rec	41.6% (94)	16.8% (38)	8.0% (18)	20.8% (47)	9.7% (22)	3.1% (7)
Provide general sentence rec	39.8% (90)	17.3% (39)	8.4% (19)	18.1% (41)	12.4% (28)	4.0% (9)
Suggest attys consider plea instead of trial	37.2% (84)	16.8% (38)	10.2% (23)	19.9% (45)	13.7% (31)	2.2% (5)
Suggest attys consider trial instead of plea	52.7% (119)	17.3% (39)	15.5% (35)	11.5% (26)	2.7% (6)	0.4% (1)
Frequency of no involvement in plea negotiations	1.8% (4)	3.1% (7)	1.3% (3)	11.5% (26)	48.2% (109)	34.1% (77)

Note. Percentage, (*n*).

Table 2. Judges' Perceptions of Legal Actors' Responsibilities during Plea Colloquy: Means and (Standard Deviations)

Judge	Defense Attorney	Prosecutor
During the plea colloquy, confirming the *factual basis of the plea* is _____ % the role of the:		
83.09% (28.34)	37.91% (41.13)	44.01% (42.18)
…Ensuring the defendant makes a *knowing and intelligent decision* is _____ % the role of the:		
91.40% (20.50)	49.66% (44.29)	25.74% (37.24)
…Ensuring the defendant makes a *voluntary decision* is _____ % the role of the:		
91.62% (19.38)	50.87% (44.83)	23.94% (36.69)
…Ensuring the defendant *understands the rights they waive* by accepting a guilty plea is _____ % the role of the:		
92.35% (18.21)	53.75% (44.20)	21.61% (34.75)

Note. Judge were provided with three slider scales for each question (judge, defense attorney, and prosecutor), and asked to indicate how responsible that legal actor is for that domain, using a percentage (e.g., it is 100% the judge's responsibility to…). Accordingly, the percentages for each question do not necessarily add up to 100%.

Table 3. Expectations about Defense Attorney Preparation: Categories, Percentage Referenced, and Example Responses

Category- *Definition*	Percentage (n)	Examples
Discuss Case Factors		
Factual basis/elements of the crime	27.78% (60)	"Discuss their options. If agreeing to plea, tell them they will have to give a *factual basis that fits the crime* and that the judge will ask if the plea is knowing, voluntary and accurate."
Case strengths/weaknesses; Reviewing possible defenses	25.00% (54)	"Meet with his client. Make sure the defendant understands the charges, the law that applies to the case and the defendant's rights**.** *Make sure the defendant understands his options and the strengths and weaknesses of the case against him.*"
References review of evidence or discovery	17.13% (37)	"Consult privately with client/*review all discovery* and discuss with client/consult relative to possible sentencing outcomes."
Review charges	13.43% (29)	"*The defense attorney should have thoroughly gone over the charges, any lesser included charges,* gone over all possible defenses, clearly educated the defendant as to his/her rights, made sure that the defendant read the entire plea petition and understands it."
Discuss Options and Consequences		
Explain agreed/potential sentence/penalties	39.81% (86)	"Explain offer, *explain potential sentence with maximums and any mandatory minimums, explain any other consequences of pleading* i.e., immigration, licensing, housing, etc. Make sure they are doing it of their own will and that they will establish a factual basis. Explain any defenses they may be waiving by pleading."
Review choices/options (for plea vs trial	25.93% (56)	"*Explore every option in the case.* Thoroughly review the file, determine if motions to suppress should be filed, and if so, pursue a hearing. Knowingly determine if a defense can be successfully presented and communicate this to the accused. *Make sure the accused knows all options*, the potential sentences and the strength of the prosecution and the viability of a successful defense. *Ensure that the accused is completely apprised of all outcomes and makes a knowing choice about pleading or going to trial."*
Review plea agreement/offer	24.54% (53)	"*Go over written plea agreement and make sure the defendant understands all provisions.*"

Collateral consequences (e.g., immigration)	9.72% (21)	"Reviewed with his/her client the elements of the offense that the prosecution must prove in order to obtain a conviction; *detailed the direct and indirect consequences of a conviction, including immigration and potential deportation issues that may obtain*; and thoroughly examined the client's reasons for entering such plea to ensure voluntariness."
Discuss Process and Plea Colloquy		
Explain/discuss/review rights to trial and appeal	46.30% (100)	"Review plea petition with defendant, *explain rights waived by entering plea to defendant and answer any questions defendant has about rights that are waived* and consequences of entering a plea."
Review/discuss (tender of) plea form or plea colloquy	32.87% (71)	"Met with the client. *Reviewed the plea form. Had the client read and sign the plea form. Told the client the questions that the judge will ask in the courtroom.* Answered any questions that the client has, and ensured that there are no issues so that the matter can properly proceed to a hearing."
Knowing, intelligent, and/or voluntary- ensures understanding and client intention to plead	16.20% (35)	"Make sure the defendant understands what he will be pleading guilty to and that the defendant is in fact guilty of the crime. Review the [advice] of rights form and explain the trial rights that are being waived. Advise the defendant of the possible consequences of the plea. *Make sure the plea is not the result of any threats or promises*." "I expect the defense attorney has gone over the trial information, the discovery, the rights he or she is giving up, any defenses the client may have, and *received a relatively firm commitment he or she wishes to plead guilty*."
Review court processes/practices (*e.g.*, understands how trial will work)	14.35% (31)	"Explain the defendant's rights, including trial. Explain the charge. Discuss all the evidence or lack of evidence. Discuss possible defenses and likelihood of success at trial. Discuss sentencing guidelines. Discuss the ramifications of a guilty verdict. Thoroughly explain the plea offer and all sentencing ramifications involved with it. Explain all appeal rights available for a jury conviction or a plea. *Explain the plea process and what questions will be asked by the judge and what the defendant needs to say.* Explain the plea is under oath - so the defendant needs to be truthful."

Note. Responses corresponding to the question- "Prior to the plea hearing, what do you expect the defense attorney to have done to prepare the client to make a voluntary, knowing, and intelligent decision? Bolded text represents main themes. Multiple codes could have applied to responses.

Table 4. Indicators of a Knowing, Intelligent, and Voluntary Plea: Categories, Percentage Referenced, and Example Responses

Category- *Definition*	Percentage (n)	Examples
Judicial Behavior		
Judicial inquiry/Asks questions (*e.g.,* about charges, sentence)	24.76% (52)	"*I ask* if the defendant understands the charges and the agreed and potential sentences. *I ask* both the defendant and counsel about whether the defendant understands the trial and appeal rights he is giving up. *I ask* whether the defendant is sick or under the influence of drugs, alcohol, or medications. And *I ask* if anyone has promised anything else or threatened anything to convince the defendant to enter this plea."
Review rights waived (*e.g.,* trial rights, appeal) with client	20.48% (43)	"*[Defendant's] ability to articulate an understanding of the waiver and his/her rights to trial and having witnesses and evidence presented."*
Checks factual basis of plea	14.29% (30)	"Any signs of confusion or lack of full understanding; any expression or sign of reluctance to enter plea; *any difficulty accepting the factual basis for the plea including defendant's own description of the events of the offense.*"
Checks for individual characteristics that influence defendant's decision-making (*e.g.,* age, mental health, education and reading ability)	13.81% (29)	"*Age; language barriers; educational levels; mental health history*." "Their mannerisms, demeanor, answers appropriate to questions asked, knowledge of the rights they are waiving, *whether they have experience with the criminal justice system, level of education, language, ability to read and write etc.*"
Nonverbal or Behavior Cues by the Defendant		
Nonverbal cues/Body language	39.05% (82)	"*Non-verbal signs from the defendant- eye contact with me, signs of impatience or distress which interfere with his ability to focus or understand, body language.* Also signs of good communication between the lawyer and client, or the lack thereof. When actually talking to the defendant about the plea, *appropriate eye contact and body language*, as well as his responses, are very important."
Assess defendant reluctance and dis(satisfaction)	22.86% (48)	"*Any doubt or question* regarding the recitation of the factual basis: or stating they are pleading guilty upon the recommendation of counsel though denying they did anything wrong or saying "I guess..." when asked if they are pleading guilty."

		"What the defendant says and to a degree the body language. I frequently ask, "*Would you recommend your lawyer to a friend" rather than or in addition to are you satisfied with the representation?*"
Does not appear under the influence	9.52% (20)	"Age, familiarity with the court system, prior record, ability understand questions and articulate their understanding; *do they appear with it or affected by a mental or physical health issue, drugs or alcohol, etc*."
Based on interaction with defense attorney	9.52% (20)	"*Sometimes it is clear lawyer is relaying the nuts and bolts of a plea in the non-confidential setting of the courtroom immediately prior to the plea*. Client appears confused during the plea, *frequently whispering to the attorney* and/or making facial expressions that alert me that he or she is not prepared and doesn't fully understand. The attorney has not gone through factual basis inquiry with client and client can't articulate the elements."
Ensure defendant has spoken with counsel	5.71% (12)	"Level of education, ability of defendant to respond appropriately to questions, *number and quality of time spent with his lawyer.* Long length of time in pretrial incarceration can be a red flag."
Verbal Cues by the Defendant		
Based on defendant's answers to questions	39.52% (83)	"More art than science—who the attorneys are, *how defendant answers all questions, if defendant responses reflect lack of understanding or free choice (my attorney says I have to take this deal)!...*"
Defendant answers questions on their own without looking to attorney for answers /Can articulate understanding	13.33% (28)	"Eye contact, *answers independent of attorney "nudging" or encouragement*, clear decision making shown through decisiveness." "*Independent answers to the questions asked while the attorney remains quiet*."
Verbal cues	10.00% (21)	"*Verbal indication*, body language, *content of questions*, if any, overall judgment of level of comfort/understanding."
Defendant asks questions	5.24% (11)	"Hesitation by defendant. [Defendant's] reluctance to respond to the question "are you pleading guilty because you are guilty." *Questions by the defendant signaling defendant is unclear as to rights and options."*

Note. Responses corresponding to the question- "What indicators do you look for in determining that a defendant is prepared to make a voluntary, knowing, and intelligent decision?" Bolded text represents main themes. Multiple codes could have applied to responses.

Table 5. Judicial Experiences in Plea Negotiations (Practices)

		Mean (SD) SE [95% CI]			Univariate effect of state policy		
Measure	Total Sample	Prohibits	Permits	No Mention	*F*	*df*	*P*
Provide specific sentence rec	2.50 (1.57)	2.14 (1.77) 0.33 [1.47, 2.81]	2.83 (1.51) 0.22 [2.40, 3.27]	2.45 (1.54) 0.13 [2.19, 2.70]	1.95	(2, 222)	.145
Provide general sentence rec	2.58 (1.62)	$1.86\ (1.55)_{ab}$† 0.29 [1.27, 2.45]	$2.77\ (1.67)_{a}$ 0.24 [2.29, 3.25]	$2.64\ (1.59)_{b}$† 0.13 [2.38, 2.90]	3.36	(2, 222)	.037
Suggest attys consider plea instead of trial	2.63 (1.57)	$1.59\ (1.02)_{ab}$ 0.19 [1.20, 1.97]	$2.98\ (1.70)_{a}$ 0.25 [2.49, 3.47]	$2.70\ (1.53)_{b}$ 0.13 [2.45, 2.95]	8.30	(2, 222)	.000
Suggest attys consider trial instead of plea	1.96 (1.21)	$1.45\ (0.99)_{ab}$ 0.18 [1.07, 1.82]	$2.08\ (1.15)_{a}$ 0.17 [1.75, 2.42]	$1.99\ (1.23)_{b}$ 0.10 [1.79, 2.19]	3.01	(2, 222)	.052
Frequency of no involvement in plea negotiations	5.04 (1.04)	$5.66\ (0.67)_{ab}$ 0.12 [5.40, 5.91]	$4.63\ (1.32)_{a}$ 0.19 [4.24, 5.01]	$5.04\ (0.94)_{b}$ 0.08 [4.89, 5.19]	9.55	(2, 222)	.000

Note. Scales ranges from "Never" (1), "Very Rarely" (2), "Rarely" (3), "Occasionally" (4), "Frequently" (5), to "Always" (6). Total sample represents means for entire sample. Total sample mean not included in univariate analyses. Means in a row sharing subscripts are significantly different from each other at $p < .05$. †Marginal significance ($p \leq .06$).

Table 6. Perceptions of How Judges Should be Involved in Plea Negotiations: Categories, Percentage Referenced, and Example Responses

Category- *Definition*	Percentage (n)	Examples
Against Judicial Involvement		
Not involved	29.93% (44)	"*I have never been involved and wouldn't be comfortable.* There are so many factors in any individual case which I am not aware of. Judges could have an unintentional coercive effect." "*Judges should not be involved in plea negotiations.* Judges are only somewhat held to the conditions of pleas and getting involved would make the judge an advocate rather than a neutral trier of fact. It is one thing to ask "Is this going to go to trial or settle?" It's another to actively participate in what should be between counsels and the Defendant. It's a matter of perception of fairness which is critical for the judiciary to maintain." "*I don't think a judge should be involved in the negotiations at all*. Each player (judge, defense attorney, prosecutor, defendant) has a specific role to play in criminal proceedings. I believe that blurring those lines creates more problems than the ones they are seeking to solve."
Discuss Options and Consequences		
Suggesting possible sentences (general or specific)	19.73% (29)	"Determining where negotiations stand and whether judicial involvement might be helpful. Discussion of pertinent agreed upon facts in *making a non-binding prediction with regard to sentence.*"
Review/Advise on plea bargains submitted by parties	12.24% (18)	"Usually when because of unique facts the parties have tentatively agreed on a plea agreement but are not sure if the judge will approve it. *The attorneys can give the court an off the record description of the reasons for a plea agreement that seems substantially different from what would normally be the case in that jurisdiction."*
Limited Involvement		
Limited involvement only (not specific; *e.g.,* caveats to involvement)	25.85% (38)	"My philosophy is simple. *It is that judges should be AVAILABLE to assist with plea bargaining when requested.* They should not however, INTERFERE with plea bargaining."

Only at the request of both parties	10.88% (16)	"When parties are [at] loggerheads, judge should offer to mediate but not require it. *If parties jointly request judicial assistance, judge should agree but stay neutral.* Otherwise, absent express or implied request, judge should stay out of the negotiations."
Only discussions with attorneys (not defendant)	6.80% (10)	"*Judges should be involved only if both counsel or defense counsel request involvement.* Judges should not participate if only the prosecutor requests. Judges should never give advisory opinions, including predicting their thoughts on sentencing, in a plea negotiation. Judges should take care to consult with counsel for both sides --- together -- to avoid making statements about matters in dispute."
Ensure Fairness and Justice		
Act as objective mediator (*e.g.,* if attorneys are deadlocked)	16.33% (24)	"It depends on the judge. Some judges view their role as to force an agreement down the defendant's throat. *I view it as an opportunity to force the state to honestly look at their case and as an opportunity to force defendant and defense attorney to communicate, and an opportunity for the court to require both sides to truly evaluate the strengths and weaknesses of the case…*" "*If the attorneys are at loggerheads and struggling to find common ground judges may be able to see another path to resolution they haven't thought about.* I've seen this somewhat frequently. They get blinders on and egos get in the way of resolutions."
To ensure equality across defendants (*e.g.,* consistent treatment, free from racial biases)	6.80% (10)	"Judicial discretion should be had when a *plea is put forth that is too lenient or too harsh.* The judge should send it back to the prosecutor for clarification or have the reason for the plea stated on the record."
Working with defendant (*e.g.,* increase their understanding)	4.76% (7)	"*To explain the choices the defendant has and the rights he/she gives up by pleading guilty* and that the defendant will have to admit to have committed the crime."

Note. Responses corresponding to the question- "What are ways in which judges should be involved in plea negotiations, if at all?" Bolded text represents main themes. Multiple codes could have applied to responses.

Table 7. Judicial Perceptions of Participating in Plea Negotiations

		Mean (SD) SE [C95% CI]			Univariate effect of state policy		
Measure	Total Sample	Prohibits	Permits	No Mention	*F*	*df*	*p*
Judges involved in negotiations should remove themselves from colloquy	3.31 (1.70)	4.64 (1.68)$_{ab}$ .32 [3.99, 5.30]	3.20 (1.64)$_{a}$ .24 [2.71, 3.68]	3.08 (1.59)$_{b}$ .13 [2.81, 3.34]	11.12	(2, 215)	.000
Judges involved must remove themselves from subsequent trial if def reject plea	3.70 (1.83)	5.07 (1.51)$_{a}$ .29 [4.48, 5.66]	4.68 (1.75)$_{b}$ .26 [4.17, 5.19]	3.09 (1.62)$_{ab}$ .14 [2.82, 3.36]	28.39	(2, 218)	.000
Defendants' statements at plea negotiations should not be used later	5.36 (1.03)	5.59 (0.57) .11 [5.37, 5.82]	5.55 (1.10) .16 [5.23, 5.88]	5.25 (1.07) .09 [5.07, 5.42]	2.39	(2, 215)	.094
All plea negotiations should be on record	2.96 (1.64)	3.07 (1.84) .35 [2.35, 3.80]	2.62 (1.55) .23 [2.16, 3.07]	3.03 (1.61) .13 [2.76, 3.29]	1.22	(2, 217)	.296
Benefits of Involvement							
Allows neutral party to assess terms of plea and case facts	3.56 (1.57)	2.70 (1.41)$_{ab}$ 0.27 [2.15, 3.26]	4.43 (1.36)$_{ac}$ 0.20 [4.03, 4.83]	3.45 (1.54)$_{bc}$ 0.13 [3.20, 3.71]	12.78	(2, 217)	.000
Enhances fairness of plea bargaining	3.30 (1.51)	2.48 (1.28)$_{ab}$† 0.25 [1.97, 2.99]	4.11 (1.45)$_{ac}$ 0.21 [3.68, 4.54]	3.19 (1.47)$_{b}$†$_{c}$ 0.12 [2.95, 3.43]	12.02	(2, 216)	.000
Enhances accuracy of plea bargaining	3.44 (1.48)	2.85 (1.51)$_{a}$ 0.29 [2.25, 3.45]	3.89 (1.37)$_{a}$ 0.20 [3.48, 4.30]	3.42 (1.48) 0.12 [3.17, 3.66]	4.33	(2, 215)	.014
Strengthens the process by increasing predictability of outcomes	3.71 (1.45)	2.96 (1.51)$_{ab}$ 0.29 [2.37, 3.56]	4.09 (1.35)$_{a}$ 0.20 [3.69, 4.49]	3.73 (1.43)$_{b}$ 0.12 [3.49, 3.96]	5.38	(2, 216)	.005
Increases judge's ability to ensure plea knowing, intelligent, and voluntary	3.52 (1.47)	3.04 (1.51)$_{a}$ .29 [2.44, 3.63]	4.17 (1.40)$_{ab}$ .21 [3.76, 4.58]	3.38 (1.42)$_{b}$ .12 [3.15, 3.62]	7.04	(2, 216)	.001
Ensures cases reach resolution more quickly	3.82 (1.33)	3.27 (1.46)$_{a}$ .29	4.34 (1.17)$_{ab}$ .17	3.73 (1.31)$_{b}$ .11	6.43	(2, 214)	.002

		[2.68, 3.86]	[4.00, 4.68]	[3.52, 3.95]			
Introduce more openness and transparency into negotiation process	3.21 (1.38)	2.70 (1.30)$_{a}$ .25 [2.19, 3.22]	3.72 (1.38)$_{ab}$ .20 [3.31, 4.13]	3.13 (1.36)$_{b}$ .11 [2.91, 3.36]	5.34	(2, 216)	.005
Ensures the plea bargaining process is fairer	3.32 (1.36)	2.79 (1.32)$_{a}$ .25 [2.28, 3.30]	3.98 (1.29)$_{ab}$ .19 [3.59, 4.36]	3.20 (1.32)$_{b}$ .11 [2.98, 3.42]	8.73	(2, 217)	.000
Judicial participation reduces the rate of innocent defendants falsely pleading guilty	3.06 (1.28)	2.77 (1.21) .24 [2.28, 3.26]	3.29 (1.31) .20 [2.90, 3.68]	3.03 (1.29) .11 [2.82, 3.24]	1.42	(2, 214)	.244
Involvement acts as a check on prosecutorial power	3.51 (1.31)	3.23 (1.45) .29 [2.64, 3.82]	3.83 (1.36) .20 [3.42, 4.23]	3.46 (1.26) .11 [3.25, 3.67]	2.07	(2, 215)	.129
Risks of Involvement							
Gives defendants the impression would not receive fair trial if negotiations are unsuccessful	3.64 (1.57)	4.68 (1.16)$_{ab}$ .22 [4.23, 5.13]	2.89 (1.55)$_{ac}$ .23 [2.44, 3.35]	3.67 (1.54)$_{bc}$ .13 [3.42, 3.93]	12.56	(2, 218)	.000
Hinders judge's ability to objectively determine voluntariness	3.13 (1.56)	4.29 (1.54)$_{ab}$ .29 [3.69, 4.88]	2.50 (1.26)$_{ac}$ .19 [2.13, 2.87]	3.10 (1.53)$_{bc}$ .13 [2.85, 3.36]	12.73	(2, 217)	.000
Involvement is coercive to defendants; plea suggested by judge cannot be voluntarily entered by defendant	3.24 (1.56)	4.46 (1.26)$_{ab}$ .24 [3.98, 4.95]	2.57 (1.26)$_{ac}$ .18 [2.20, 2.95]	3.22 (1.57)$_{bc}$ .13 [2.96, 3.47]	14.42	(2, 218)	.000
Involvement can induce innocent def to plead guilty	3.42 (1.42)	4.48 (1.19)$_{ab}$ .23 [4.01, 4.95]	2.85 (1.16)$_{ac}$ .17 [2.51, 3.19]	3.38 (1.43)$_{bc}$ .12 [3.15, 3.62]	12.54	(2, 216)	.000

Note. Scales ranges from "Strongly Disagree" (1), "Disagree" (2), "Somewhat Disagree" (3), "Somewhat Agree" (4), "Agree" (5), to "Strongly Agree" (6). Total sample represents means for entire sample. Total sample mean not included in univariate analyses. Means in a row sharing subscripts are significantly different from each other at $p < .05$. †Marginal significance ($p \leq .06$).