# Fact-Finder Choice in Felony Courts

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*Scholarship in criminal adjudication is preoccupied with plea-bargaining and jury trials, but has largely ignored bench trials. Yet bench trials occur, and not just in misdemeanor cases. In some jurisdictions, they are a mainstay of felony adjudication. This Article offers the first systematic collection and reporting of bench trial prevalence in felony cases across the nation's largest jurisdictions, and the first qualitative study of the factors influencing jury trial waiver. It reveals bench trial prevalence to be highly variable across jurisdictions, including those within the same state. Qualitative study of five jurisdictions with varying bench trial prevalence shows what underlies that variability: ingrained institutional structures of fact-finder choice produced through the repeated interactions and interdependencies of the courthouse's community of professionals (judges, prosecutors, and defense attorneys). Though the jury trial right rests, in theory, with the defendant, these institutional structures shape the degree of defense agency in exercising it. This study illuminates the jury trial right's meaning on the ground, reveals the influential and under-noticed role of trial judges in a pivotal defense decision, and identifies questions for future research. More broadly, it offers a new*

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*vantage point for perennial inquiries in criminal law and procedure: what confers power in the criminal process, and how is power distributed?*

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## INTRODUCTION

Felony criminal adjudication is often told as a binary tale. On one side is the jury trial, idealized as a bulwark against state overreach and fundamental to fair process.[1] On the other is the guilty plea, lamented as an engine of mechanized criminal process[2] and outsized prosecutorial discretion.[3] The tale is a nationalized one, of jury trials everywhere giving way to guilty pleas and prosecutors amassing power.[4] But this binary misses an important aspect of the adjudicatory picture in some jurisdictions, one that complicates a single national narrative of prosecutorial dominance: the felony bench trial.

Bench trials – that is, a trial in which the judge is the sole fact-finder — are a surprisingly common mode of felony trial resolution in some jurisdictions, while they remain rare in others. Though definitive nationwide data on adjudication methods are unavailable, the most

[1] *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 82-110 (1998) (arguing the jury, as embodied in the Constitution's bill of rights, was the "dominant strategy" for limiting centralized state power); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48-64 (2003) (framing the jury's historical purpose as a check on government power and a guarantee of fair process).

[2] *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 1 (2012) ("The entire [criminal] process has morphed from a public morality play into a speedy plea-bargaining machine, hidden and insulated from the public."); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 42 (1979) ("[O]ur supposedly accusatory system has become more dependent on proving guilt from the defendant's own mouth than any European 'inquisitorial' system.").

[3] *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1048 (2006) ("[I]n the plea bargaining context[, t]he prosecutor acts with discretion that is almost unmatched anywhere in law."); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2569 (2004) (arguing that criminal law "define[s] a menu — a set of options law enforcers may exercise, or a list of threats prosecutors may use to induce the plea bargains they want. . . . The real law of crimes and sentences is the sum of those prosecutorial choices").

[4] *See* MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 1 (2005) ("The fact that at some point in the nineteenth century trials were replaced by guilty pleas in American state courts is well documented."(citing the copious literature on this point)). The literature on prosecutorial power is voluminous; see sources cited *supra* note 3, for seminal examples linking that power to the rise of plea bargaining.

recent statewide survey of criminal case resolutions estimated a third of all felony trials are bench trials.[5] That statistic, however, hides the marked heterogeneity of bench trials across jurisdictions. Among states that track and publish bench trial rates in felony cases,[6] there is wide variation both across states and within them. For instance, in Illinois, bench trials are more common than jury trials — but not in every county.[7] In Indiana, nearly half of all felony trials statewide are before a judge; but in some counties all trials are before judges, in others all are before juries, and many counties fall somewhere in between those extremes.[8] Oregon, where over a third of all felony trials are bench trials,

[5] *See* SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., U.S. DEP'T OF JUST., FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES, 25 tbl.4.1 (2006) (finding a total of six percent of felony cases went to trial in sampling across 300 counties in 2006, with four percent comprising jury trials and two percent comprising bench trials). For more on the limitations of this dataset, *see infra* Part I.B.

[6] The National Center For State Courts and the Conference of State Court Administrators reports data on bench trial rates in felony cases. *See* Sarah Gibson, B. Harris, N. Waters, K. Genthon, M. Hamilton, E. Bailey, M. Moffett & D. Robinson, *CPT STAT Criminal*, CT. STAT. PROJECT, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal (last updated June 5, 2023) [https://perma.cc/2HRU-36AU]. However, the NCSC itself does not verify this data. It is simply provided by local court administrators. *See* E-mail from Sarah Gibson, Data Scientist, Nat'l Ctr. for State Cts. ("NCSC"), (June 1, 2021) (on file with author). My own attempts at verification with state court administrative offices revealed outright inaccuracies or simply data that is unverifiable (for instance, the NCSC displays felony bench trial rates for a number of states that do not collect or report data on felony bench trials at all). Accordingly, here and throughout this paper when referencing state data, I rely only on data published and verified by a state's own court administrative office.

[7] ADMIN. OFF. OF THE ILL. CTS., ILLINOIS COURTS STATISTICAL SUMMARY 2019, at 78-80 (2019), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/9ce1588a-09e6-419e-93de-dcc585cf2e4a/2019_Statistical_Summary.pdf [https://perma.cc/VNF7-ZTDT] (showing 3,320 bench trials out of 4,015 total trials statewide in 2019 – an 83% bench trial rate – with many counties having more bench trials than jury trials, but some having more jury than bench trials). Throughout this paper I rely on data prior to 2020, before the COVID-19 pandemic caused enormous disruptions to adjudication. *See infra* note 75 and accompanying text.

[8] Indiana Trial Court Statistics by County 2019, IND. CTS., https://publicaccess.courts.in.gov/ICOR/ (last visited Aug. 17, 2023) [https://perma.cc/FD9R-7595] (showing felony bench trial rates averaging 47%, with rates ranging from 100% (Fulton) to 0% (Grant and others)).

exhibits similar variation across its counties.[9] And many states with low overall bench trial rates are home to jurisdictions in which bench trials are the norm rather than the exception.[10]

Why do felony bench trials predominate in some jurisdictions but not in others? What forces influence a defendant's choice of fact-finder? And how does a deeper understanding of those forces illuminate the uses and allocation of institutional power in the criminal process? These are among the questions probed in this Article, which offers the first mixed-methods empirical study on the prevalence, underlying dynamics, and institutional implications of fact-finder choice in felony cases.

The Article makes three contributions. First, gathering available data on bench trial prevalence from the most populous jurisdictions in every state and the twenty-five most populous jurisdictions in the United States, it offers a snapshot of enormous inter-jurisdiction variation in the use of bench trials in felony cases. A review of all jurisdictions in selected states that publish county-specific data, moreover, reveals wide intra-state variation in bench trial prevalence in many states. This data, gathered and compiled here for the first time, highlights the importance of attending to the local level in studies of criminal enforcement and adjudication. And it prompts the question: what lies behind such marked local variation in fact-finder choice?

Unraveling that mystery is the Article's second contribution. Through a qualitative study of five jurisdictions — two with high felony bench trial rates, two comparative jurisdictions with low felony bench trial rates, and one comparative jurisdiction with a mid-level bench trial rate — the Article offers a window into the adjudicative dynamics that shape defendants' choice of fact-finder. It reveals those dynamics as less products of external forces (state-level legal regimes, jury pool demographics, or court dockets) than internal ones. Interviews with

[9] OR. JUD. DEP'T, OREGON CASES TRIED ANALYSIS — MANNER OF DISPOSITION 2019 (2020), https://www.courts.oregon.gov/about/Documents/2019CasesTriedAnalysis-MannerofDisposition.pdf [https://perma.cc/GC4S-6MQK] [hereinafter OR. MANNER OF DISPOSITION] (showing a 37% bench trial rate statewide); OR. JUD. DEP'T, OREGON CASES TRIED ANALYSIS — TRIAL METRICS 2019 (2020), https://www.courts.oregon.gov/about/Documents/2019CasesTriedAnalysis-TrialMetrics.pdf [https://perma.cc/B2EF-VCCS] [hereinafter OR. TRIAL METRICS] (showing some districts with only jury trials, some with mostly bench trials, and a great many in between).

[10] These include California, New York, Florida, and Delaware. *See infra* note 78.

experienced defense attorneys in these five jurisdictions reveal a complex set of interactions between defense attorneys, judges, and prosecutors that, collectively, create *institutional structures* of fact-finder choice. That is to say: the structures of fact-finder choice in a given courthouse are deeply embedded, a product of "the enduring relations, inter-dependencies and norms" of the courthouse's community of professional repeat players.[11]

Assessing how those structures affect institutional power distribution is the Article's third contribution. Prior organizational studies of courts have shed light on the ways in which relationships between and incentives among prosecutors, defense counsel, and judges can produce different adjudicative outcomes even in systems operating under the same legal rules.[12] This Article builds and expands upon that work in two key respects. First, in focusing on fact-finder choice — a near-exclusive prerogative of the defense[13] — it exposes the ways in which relational

[11] Mona Lynch, Matt Barno & Marisa Omori, *Prosecutors, Court Communities, and Policy Change: The Impact of Internal DOJ Reforms on Federal Prosecutorial Practices*, 59 CRIMINOLOGY 480, 482 (2021) ("The courts-as-communities metaphor captures the enduring relations, interdependencies, and norms that develop among organizational actors in a given court, and marks the differences that exist between how different courts do business and produce outcomes, even under the same penal code."); *see also* JAMES EISENSTEIN, ROY B. FLEMMING & PETER F. NARDULLI, THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS 14-16, 53-54 (1988) (seminal study of nine jurisdictions in three states observing how interdependent working relations among court participants produced distinct courtroom practices even within jurisdictions operating under the same sets of formal legal rules); Jeffrey T. Ulmer, *Criminal Courts as Inhabited Institutions: Making Sense of Difference and Similarity in Sentencing*, 48 CRIME & JUST. 483, 491-92 (2019) (describing courts as "inhabited institutions," in which the interactions between judges, prosecutors and defense attorneys produce forms of "processual order" such as "going rates" with respect to sentencing or plea-bargaining practices).

[12] *See* sources cited *supra* note 11.

[13] The defendant's Sixth Amendment right to a jury trial in felony cases puts in defendants' hands the choice between a jury or a judge as fact-finder. Though most states qualify the defendant's right to a bench trial by requiring prosecutorial approval, judicial approval, or both, *see* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 6 CRIM. PROC. § 22.1(h) (6th ed. 2022), in no instance can a prosecutor or judge elect a bench trial without the defendant's assent. In this way, fact-finder selection is different from plea-bargaining or sentencing (frequent subjects of the courts-as-communities literature), both of which are necessarily produced through the decisions of multiple institutional actors. A plea bargain is, definitionally, a negotiation between prosecution and defense for an agreed-upon resolution; and a sentence is the result of

dynamics dominate even seemingly individualized aspects of the criminal process.[14] Second, it uncovers connections between relational dynamics and defense agency in fact-finder choice, revealing how certain relational structures enhance defense agency while others diminish it.[15]

In these respects, fact-finder selection and the processes that produce it offer a new vantage point to explore perennial inquiries of criminal law and procedure: What confers power in the criminal process, and how is power distributed? The conventional wisdom posits that prosecutors are the most powerful institutional actors in the criminal process.[16] This Article complicates that narrative. It shows that the choice of fact-finder — a key decision point in the adjudicative process — is dictated largely by the actions of courts (judges and judicial administrators), and defense attorneys' reactions to them. Though the five studied jurisdictions have distinctive approaches to fact-finder choice, teasing out the relational dynamics underlying them reveals a common theme. Fact-finder choice may technically reside principally (and in some jurisdictions exclusively) with defendants; but a jurisdiction's institutional structures of fact-finder choice — and the social processes that produce them — heavily shape how the choice is made.

Organizational sociologist Richard Scott has developed a helpful taxonomy of the three types of social processes, or "pillars," that produce and sustain institutions — and each emerges clearly in the five studied jurisdictions.[17] Two jurisdictions, one with high and the other

the prosecution's charging decisions, the legislature's (and in some jurisdictions a sentencing commission's) decreed sentencing range, and the judge's discretionary decision-making within that range.

[14] *See infra* Parts II, III.

[15] *Id.*

[16] *See, e.g.*, Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 677-78 (2016) ("No serious observer disputes that prosecutors . . . hold most of the power in the United States criminal justice system."); Eisha Jain, Proportionality and Other Misdemeanor Myths, 98 B.U. L. REV. 953, 960 (2018) ("[C]riminal law scholars frequently view prosecutors as the most powerful actors in the system."). *See generally* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019) (canvassing the copious literature asserting the claim and refuting it).

[17] W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS 55-86 (4th ed. 2014). Drawing on decades of work by organizational sociologists, Scott theorizes institutions

with moderate bench trial prevalence, are dominated by the *regulative* pillar, in which incentives and sanctions primarily mold behavior.[18] In those jurisdictions, court practices regarding case assignment, sentencing, and (in one of the jurisdictions) trial scheduling collectively incentivize defendants to opt for a bench trial in most lower-level felony cases.[19] Two other jurisdictions are shaped primarily by the *cultural-cognitive* pillar, in which shared beliefs and interpretations over time create a commonly-recognized social reality.[20] Although those jurisdictions have very different bench trial prevalence — one is the highest in the study and the other the lowest — they arrive at those disparate points largely due to ingrained perceptions and shared interpretations among the courthouse community as to how cases should be tried.[21] The fifth jurisdiction is dominated by the *normative* pillar, in which expectations of how institutional actors should behave impact how they do behave.[22] There, intense norms against judicial-litigant communication chill the sort of dialogic mechanisms that permit defense attorneys to assess bench trial risks and benefits, thus steering them towards juries.[23]

The pillars shaping and sustaining fact-finder choice carry important implications. One is for defense agency. Defendants appear to have greater agency in fact-finder choice in jurisdictions dominated by regulative forces than in those dominated by normative or cultural-cognitive forces, jury trial prevalence notwithstanding.[24] Somewhat counterintuitively, a defendant's power over fact-finder choice does not necessarily align with jury trial prevalence. The other key implication is for institutional power. Whether through case assignment procedures, sentencing practices, dialogue, or inscrutability, the actions or inactions

as products of three core social processes — what he calls "pillars" — with different institutions invariably leaning more heavily on one or another pillar, but all ultimately sharing these common bedrocks.

[18] *Id.* at 59-64.

[19] *See infra* Parts II.B.1, II.D, III.A.

[20] *See* SCOTT, *supra* note 17, at 66-70.

[21] *See infra* Parts II.B.2, C.2, III.A.

[22] *See* SCOTT, *supra* note 17, at 64-66.

[23] *See infra* Parts II.C.1, III.A.

[24] *See infra* Part III.A.

of judges and judicial administrators are crucial to sustaining the regulative, normative, and cultural-cognitive forces shaping defendants' choices.[25] Defense attorneys largely react, while prosecutors are bit players. Though the institutional structures of fact-finder choice are maintained and supported by all members of the courthouse community, judges are the structures' linchpins.

In this respect, the Article bridges two literatures, one on the socio-legal dimensions of criminal courts as institutions inhabited by a community of professionals[26] and the other on the under-noticed powers of trial courts to constrain other institutional actors in the criminal system.[27] The courts-as-communities framework has given us important insights into jurisdictional divergence in plea bargaining and sentencing, but remains mostly untapped in the study of bench trials. Likewise, the emerging literature on the systemic powers of felony trial courts has not considered bench trials.

Indeed, bench trials have received little scholarly attention in general, and almost none in the last several decades — even as they dominate

[25] *Id.*

[26] *See* Ulmer, *supra* note 11, at 491-96 (reviewing the literature).

[27] *See* Bellin, *supra* note 16, at 194-98 (highlighting the powers of trial courts in the criminal process); Andrew Manuel Crespo, *The Hidden Law of Plea-Bargaining*, 118 COLUM. L. REV. 1303, 1397-88 (2018) (revealing the ways in which procedural and evidentiary rules, both written and interpreted by courts, help expand prosecutors' plea-bargaining leverage); Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 326 (2016) (qualitative study exposing judges' active role in plea-bargaining across ten states); Jessica A. Roth, *The "New" District Court Activism in Criminal Justice Reform*, 74 N.Y.U. ANN. SURV. AM. L. 277, 283-317 (2019) (assessing trial judges' expanding role in critiquing fundamental aspects of the federal criminal justice system). This is a nascent and small literature, eclipsed by the far larger focus on prosecutors as the most powerful institutional actors in the criminal system. *See* Bellin, *supra* note 16, at 194-98 (reviewing the literature and refuting the claim). By contrast, scholars have for decades been uncovering how trial judges in civil cases use communication with and supervision over litigants to shape litigants' choices and ultimately affect case outcomes. *See, e.g.*, Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010) (reviewing three decades of literature on the managerial model of judging in civil cases); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003) (assessing the phenomenon in historical perspective); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 376 (1982) (describing and critiquing the phenomenon).

trial adjudication in some jurisdictions.[28] In the 1970s and early 1980s, scholars explored bench trials in relation to guilty pleas, probing the extent to which bench trials comprised a fully adversarial process or instead a "slow guilty plea."[29] Somewhat more recently, scholars have explored bench trials in relation to jury trials, examining differences in acquittal rates and theorizing reasons for them.[30] Other scholars have considered the sentencing outcomes of bench trials as compared to jury trials and guilty pleas.[31] But no scholarship has systematically analyzed the prevalence of bench trials in felony cases at the county level — the key jurisdictional level in criminal cases[32] — nor sought to qualitatively probe the reasons for jurisdictional heterogeneity in their use.[33]

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[28] *See supra* notes 5–10 and accompanying text.

[29] *See, e.g.*, JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977) (study of Baltimore); MARTIN A. LEVIN, URBAN POLITICS AND THE CRIMINAL COURTS (1977) (study of Pittsburgh); Lynn M. Mather, *Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles*, 8 LAW & SOC'Y REV. 187 (1973) (study of Los Angeles); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) (study of Philadelphia).

[30] *See, e.g.*, Martha A. Meyers, *Judges, Juries and the Decision to Convict*, 9 J. CRIM. JUST. 289, 291-94 (1981). *See generally* Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151 (2005) (analyzing acquittal rate differences between federal bench and jury trials); Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495 (2006) (postulating how asymmetric ambiguity aversion affects criminal process, and considering factors that might contribute to more predictable bench trial results relative to jury trials).

[31] Nancy J. King, David A. Soule, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 978-84 (2005) (in study of five states using sentencing guidelines, finding sentences after guilty plea lower than after trial, but less consistent sentencing differential as between bench and jury trials); Gary D. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY 289, 300 tbl.3 (1985) (finding sentences across state courts vary by mode of conviction, with guilty pleas generating the largest discount relative to jury trials and bench trials generating a lesser discount than guilty pleas).

[32] Though penal laws are enacted by state legislators, they are enforced by local police departments and prosecutors, and adjudicated before judges presiding over, and juries drawn from, the local jurisdiction.

[33] Segal & Stein, *supra* note 30, canvassed state-level data from the National Center for State Courts ("NCSC"), and did not distinguish between the use of bench trials in felony and misdemeanor cases (an important distinction given the absence of any jury trial right in most misdemeanor cases). Similarly, Thomas Frampton has surveyed inter-

The Article proceeds as follows. Part I offers a brief history of the felony bench trial in the United States and situates that history in conceptions of the jury trial right. It then provides an empirical snapshot of felony bench trial prevalence today in populous jurisdictions across the nation. It compiles available data from the most populous jurisdiction in every state and the District of Columbia and, to the extent not already covered by that sampling, from the twenty-five most populous jurisdictions in the United States. To assess intra-state variation, it compares county-by-county bench trial data in states that keep and publish it.

Part II comprises the qualitative portion of the study. It details findings from interviews of experienced defense attorneys in two jurisdictions with relatively high felony bench trial prevalence, two comparable jurisdictions where bench trials in felony cases are rare, and one comparable jurisdiction where felony bench trial prevalence falls somewhere in between.

Part III considers the study's implications. It argues that felony bench trial prevalence is, in part, a function of institutional structures built and sustained through the regulative, normative, and cultural-cognitive forces within a given courthouse community. It explores the relationship between rights, agency, and power in fact-finder choice. And it teases out trial judges' roles in creating and sustaining the structures shaping that relationship.

Before proceeding, it is worth clarifying what this Article does not do. First, it does not take a position on the normative value of bench versus jury trials. My focus here is on the process of fact-finder choice, not the outcomes of it (either in terms of verdict or sentence) or the theoretical

state variation in felony jury trial rates as measured against felony bench trial rates — also relying in part on NCSC data — focusing on differences in state laws and procedures that might explain such variation. *See* T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 188-98 (2012). But because the vast majority of criminal cases are prosecuted by county rather than state prosecutors, state-level data on bench trial rates (like that of plea, trial, and other outcome rates) is too generalized to draw any conclusions about jurisdiction-specific dynamics. And, as my research shows, there is wide intra-state variation in felony bench trial rates. On the problems with relying on bench trial data from the NCSC, see *supra* note 6.

benefits and costs of trial by jury versus by judge.[34] Second, this Article is not an origin story. To the contrary, it reveals a set of bounded jurisdictional worlds whose inhabitants operate within institutional structures so deeply ingrained they scarcely know how or why those structures came to be. These findings raise intriguing questions about whether or how particular jurisdictional conditions correlate with distinct institutional structures, as well as the relationship between bench trial prevalence and other features of the adjudicatory landscape. Future study will explore these questions.[35]

## I. THE PAST AND PRESENT OF FELONY BENCH TRIALS

### *A. A Brief History of Felony Bench Trials*

The right of defendants charged with a serious crime to trial by jury is well established in the United States. It was guaranteed in the Constitution, both in Article III[36] and the Sixth Amendment[37] (the latter made applicable to the states in 1968, when the Supreme Court deemed incorporated into the Fourteenth Amendment).[38] It was also enshrined in the constitution of each of the original thirteen states and by every subsequent state to join the Union.[39]

In 1888, the Supreme Court clarified that neither the Constitution's jury trial command in Article III, nor the Sixth Amendment jury trial

[34] For work that assesses sentence differentials between bench and jury trials, see sources cited at *supra* note 31. For work that assesses verdict differentials between bench and jury trials, see sources cited at *supra* note 30. For a discussion of the downsides of bench trials vis-à-vis jury trials rooted in theories of the jury trial right, see LAURA I. APPLEMAN, DEFENDING THE JURY: CRIME, COMMUNITY AND THE CONSTITUTION 159-71 (2015).

[35] For more on the next research questions this study raises, see *infra* pages 1260-61.

[36] U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .").

[37] U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

[38] *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[39] *See id.* at 153.

right, extends to so-called "petty" offenses.[40] Because petty offenses were commonly tried before judges at the Founding, they could not, the Court reasoned, have been what the framers meant in Article III's reference to "crime" or the Sixth Amendment's reference to "criminal prosecution."[41] States differed in their definition of a petty offense, and for a long while the Supreme Court declined to specify a bright-line definition for the federal Sixth Amendment right.[42] The ambiguity ceased in 1970 when, just two years after extending the Sixth Amendment jury trial right to the states, the Court held that the right attaches to the prosecution of any crime for which the maximum allowable penalty exceeds six months.[43]

Rights, of course, may be waived by those who hold them. For much of the nineteenth century, courts conceptualized the jury trial right (along with other criminal procedural rights) as a right of the public.[44] Through the nineteenth century, just a handful of states authorized felony jury trial waivers by statute,[45] and appellate courts for the most part declined to uphold jury trial waivers in felony cases.[46] Whether due

[40] *See* Callan v. Wilson, 127 U.S. 540, 557 (1888). This holding has since been affirmed multiple times. *See* Cheff v. Schnackenberg, 384 U.S. 373, 379 (1966) (citing cases).

[41] *See supra* note 40.

[42] For a view into the once muddled state of the law on the serious crime/petty offense boundary, see Case Comment, *The Petty Offense Category and Trial by Jury*, 40 YALE L.J. 1303, 1305-07 (1931).

[43] *See* Baldwin v. New York, 399 U.S. 66, 69 (1970).

[44] *See* Nancy K. King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 120 (1999) ("Although it seems natural for us today to talk about rights belonging to the defendant — his to do with what he will — the same understanding did not come naturally to early nineteenth-century judges," who viewed criminal procedure rights as "inalienable" and a "public good").

[45] *See* Susan C. Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 AM. J. LEGAL HIST. 123, 149-50, 152, 155 n.132 (1982) (identifying Maryland, Indiana, Connecticut, and Louisiana as states with statutes permitting jury trial waivers for felony cases). "Felony" has become a stand-in term for "serious" crime; legally, most states define it as either a crime punishable by imprisonment in a state prison or a crime carrying a penalty of at least one year. *See* Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 575 (2018).

[46] *See* King, *supra* note 44, at 125-26 ("The idea that the jury right could become the subject of an agreement between the prosecutor and the defendant was abhorrent to nineteenth-century judges." (citing notable cases of the time)); Towne, *supra* note 45, at 152 ("An examination of state supreme court cases dealing with jury waiver shows that

to legislative disinterest, judicial hostility, cultural aversion, or a mix of all three, bench trials for serious offenses were rare.[47]

But they would not remain so. By the 1920s, courts, legislators, and practitioners had begun warming to the idea of jury waivers in cases charging serious crimes. This was a period of rising crime, rising criminalization, and increasing (and increasingly professionalized) criminal enforcement,[48] and there was a widespread sense among the bench and bar that criminal procedure reforms were necessary to help routinize and speed up criminal adjudication.[49] The National Crime Commission's Committee on Civil Procedure and Judicial Administration included among its recommended criminal procedure

most of the state jurisdictions had deep philosophical antipathy toward the idea of allowing bench trial for felonies." (citing cases)). This was true as well for federal courts interpreting both the Sixth Amendment and Article III Section 2. *See* Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373, 394 (2012) ("For late-nineteenth and early-twentieth century jurists the Constitution's original meaning was clear. Common law tradition and Supreme Court precedent complemented Article III, Section 2's absolute text. They all pointed to the conclusion that in federal court a jury waiver followed by bench trial could not be one of the defendant's options. The trial of all serious crimes had to be by jury.").

[47] *See* Towne, *supra* note 45, at 123 (observing that by 1800, the bench trial practice for serious crimes that had developed in some colonies "was virtually extinct," and did not emerge among states a significant way until the twentieth century).

[48] *See generally* Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 NOTRE DAME L. REV. 691 (2016) (discussing how early twentieth century legislators increasingly turned to criminal law as a regulatory tool).

[49] *See* Esther Conner, *Crime Commissions and Criminal Procedure in the United States Since 1920*, 21 J. CRIM. L. & CRIMINOLOGY 129, 129 (1930) ("The high rate of crime in the United States has resulted in a country wide movement against crime. The most satisfactory organization formed is the crime commission or some variation from it, which has been either National, state or city in scope. Each has had the same purpose, that is to evolve some remedial measures and to arouse public interest."); S. Chesterfield Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 MICH. L. REV. 695, 695 (1927) ("The belief is common that the element of delay is one of the primary causes of the general disrespect attaching to the courts of criminal jurisdiction. It is said that an overzealousness in shielding the citizen against oppression and injustice has resulted in shifting to the background expedients designed to simplify and give momentum to the disposition of criminal cases.").

reforms the allowance of jury trial waivers in all but capital cases.[50] Legislatures increasingly proposed statutes permitting jury trial waiver in felony cases.[51] And courts increasingly viewed the jury trial right as a privilege of criminal defendants rather than a public interest.[52] In 1930, the Supreme Court placed its imprimatur on jury trial waiver, holding that the jury trial provisions in Article III Section 2 and the Sixth Amendment were "meant to confer a right upon the accused which he may forego at his election."[53]

And so it was that, by the third decade of the twentieth century, bench trials in felony cases had become an accepted practice, utilized to varying degrees across jurisdictions.[54] By mid-century, one study estimated bench trials as comprising approximately forty percent of

[50] *See* Am. Bar Ass'n, *Outline of Code of Criminal Procedure*, 12 A.B.A. J. 690, 693-94 (1926).

[51] Oppenheim, *supra* note 49, at 695 n.1 (citing proposed legislation in various states).

[52] *Id.* at 703 ("[T]here is a distinct tendency, especially in more recent years, to uphold waiver on the view that jury trial is a privilege. This is true in misdemeanors and felonies.") (collecting cases).

[53] Patton v. United States, 281 U.S. 276, 298 (1930) (noting that "the two provisions mean substantially the same thing"). Patton involved a challenge to a conviction by an 11-member jury, but because the Court had previously held in *Thomson v. Utah*, 170 U.S. 343 (1898), that the Constitution's jury trial provisions required a jury of twelve, the Court framed the issue before it as whether a defendant could waive trial by jury:

> It follows that we must reject *in limine* the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing . . . . [A] person charged with a crime punishable by imprisonment for a term of years may, consistently with the constitutional provisions already quoted, waive trial by a jury of twelve and consent to a trial by any lesser number, or by the court without a jury.

*Patton*, 281 U.S. at 290.

[54] *See* J. A. C. Grant, *Judicial Organization and Procedure: Felony Trials Without a Jury*, 25 AM. POL. SCI. REV. 980, 981-84 (1931) (cataloguing frequency of felony bench trials in some state courts and observing wide disparities between states and within them, with bench trials at or approaching the majority of tried cases in six states, remaining rare in two, and occupying a middle ground in two more).

felony trials across twenty-four states.[55] The bench trial was a recognized feature of the felony adjudicatory landscape, a viable alternative to the jury trial or guilty plea.

In the modern era of criminal enforcement, this development was unsurprising. Bench trials offered a means for defendants to contest guilt while placing a lesser burden on overtaxed judges, prosecutors, and defense counsel. A bench trial dispenses with the need to bring in a jury venire and select from among them (a process that can sometimes take days). And felony trial judges, well familiar with investigatory procedures and evidence collection, require less argument and explication by prosecutors to establish their case or defense attorneys to undermine it. Issues can be streamlined; testimony shortened; and evidence presented intermittently, in between the judge's other hearings and cases. For overburdened felony courts, bench trials were an appealing alternative to lengthy jury trials.

At the same time, bench trials raised concerns about harms to defendants and the adversarial process generally — concerns that persist. Do bench trials permit robust contestations of guilt?[56] Would they lead to the systemic displacement of jury trials?[57] Are defendants incentivized to request bench trials, and at what point does incentivization effectively deny the jury trial right?[58] These questions have framed the debate around bench trials as a contest between efficiency and fair process. But how does the defense — the institutional actor with ostensibly the greatest power in choosing the fact-finder — conceive of the options? And what do those conceptions reveal about the nature of procedural rights, choices, and power in the criminal process?

The balance of this Article unpacks these questions.

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[55] HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY 18 (1966) (estimating based on criminal justice statistics data of the U.S. Census Bureau, compiling criminal dispositions from 24 states and the District of Columbia for the year 1945).

[56] *See* sources cited *supra* note 29l; *see also* Appleman, *supra* note 34.

[57] *See* Appleman, *supra* note 34; Frampton, *supra* note 33.

[58] *See* King et al., *supra* note 31 (surveying the literature on the debate).

### *B. Felony Bench Trials Today: An Empirical Snapshot*

We know that felony bench trials grew in prevalence through the twentieth century.[59] But we do not know precisely how prevalent they became, nor how uniformly across individual jurisdictions. There was not then, nor is there now, a complete and systematic accounting of adjudicative outcomes in state courts. The poor visibility into bench trials persists today.

There are sporadic efforts to account for bench trial prevalence at the state level. The most well-known is the National Center for State Courts ("NCSC"); yet its data collection is entirely a function of which state court administrators in any given year choose to provide data, some of which has proven unreliable.[60] Even when reliable, moreover, state-level data is too generalized for uncovering dynamics of criminal adjudication, and particularly dynamics of trials. Though penal laws are enacted by state legislators, they are enforced by local police departments and prosecutors, and adjudicated before judges presiding over, and juries drawn from, the local jurisdiction. Without documentation of felony bench trial prevalence at the county level, we cannot ascertain relative prevalence and uniformity across the jurisdictional boundaries that matter most for criminal adjudication.

In the 1990s and early 2000s, the Bureau of Justice Statistics ("BJS") gathered county-level felony adjudication data (the data collection ended in 2006).[61] However, the data on bench trial prevalence in these

[59] *See supra* Part I.A.

[60] *See supra* note 6.

[61] The BJS maintains two county-level datasets on felony adjudication. One, the State Court Processing Statistics Program, tracked a weighted sample of state court felony cases filed in 40 of the nation's 75 most populous jurisdictions during the month of May in even numbered years between 1990 and 2006, and also in 2009. *See* U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., STATE COURT PROCESSING STATISTICS, 1990–2009: FELONY DEFENDANTS IN LARGE URBAN COUNTIES (2014), https://www.icpsr.umich.edu/web/ICPSR/studies/2038 [https://perma.cc/DU69-4PEY]. The other, the National Judicial Reporting Program, gathered felony sentencing data from a weighted sample of 300 counties of varying sizes in even years between 1986 and 2006. *See* Bureau of Just. Stat., *National Judicial Reporting Program Series*, NAT'L ARCHIVE OF CRIM. JUST. DATA, https://www.icpsr.umich.edu/web/NACJD/series/77 (last visited Aug. 17, 2023) [https://perma.cc/AS69-W3XP].

datasets is sporadic and appears unreliable.[62] In recent years, the NCSC began collecting selected county-level data on adjudicative outcomes.[63] Designed to study case processing efficiency in criminal trial courts, the collected data reveals felony bench and jury trial rates for seventy counties across nineteen states.[64] The NCSC dataset does not, however, give us a view into felony bench trial prevalence (or adjudicative outcomes more generally) across all states. And it omits most of the largest jurisdictions in the nation.[65]

[62] Most of the counties in the datasets lack data on bench trial prevalence. The National Judicial Reporting Program dataset, moreover, is categorically unreliable as a method of tracking bench trial prevalence because it tracks only cases in which defendants were convicted and sentenced, omitting adjudications resulting in acquittals. The State Court Processing Statistics Program ("SCPS") data has its own reliability issues. First, the data from one county in particular, Dade, raises concerns: it shows extremely high bench trial prevalence, even though the Dade defenders with whom I spoke — who have been practicing for decades — told me that bench trials have always been exceedingly rare there. More broadly, the SCPS collection methodology has been criticized. *See, e.g.*, John F. Pfaff, *Prosecutors Matter: A Response to Bellin's Review of* Locked In, 116 MICH. L. REV. 165, 171-72 (2018) ("The SCPS is a somewhat quirky dataset. It is, for example, the only BJS dataset I have encountered that comes with an explicit warning about not using parts of it in causal analyses. It also gathers data in a rather idiosyncratic way . . . by collecting information on cases filed on random days in May every other year and then tracking those cases for the next year or until resolution. My own experience with the dataset has made me cautious about how much to relay on it, and in informal conversations colleagues have expressed similar concerns.").

[63] For a description of the project, and links to the data collected, see *Effective Criminal Case Management Project*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-management-and-performance/caseflow-management/effective-criminal-case-management (last visited Aug. 17, 2023) [https://perma.cc/2CGF-GYLQ].

[64] The data is accessible at *Effective Criminal Case Management Interactive Dashboard*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-management-and-performance/caseflow-management/effective-criminal-case-management/effective-criminal-case-management-interactive-dashboard (last visited Aug. 17, 2023) [https://perma.cc/N2LV-KH6K].

[65] Of the 25 most populous jurisdictions in the United States, the NCSC dataset includes just eight, not all of which reported felony bench and jury trial prevalence. Missing populous counties include, among others, Los Angeles County, and several of California's other most populous counties; Miami-Dade County, Florida; Cook County, Illinois (Chicago); Denver County, Colorado; Wayne County, Michigan (Detroit), Dallas County and several of Texas' other most populous counties; Clark County, Nevada (Las Vegas); and Marion County, Indiana (Indianapolis). *Id.*

This Section seeks to fill the gap. It offers a view into felony bench trial prevalence today across the nation's most populous jurisdictions and compares prevalence on the county level within selected states. This undertaking reveals three key findings. First, many states and counties do not track bench and jury trial prevalence at all; second, among those that do, bench trial prevalence is highly variable across jurisdictions; and third, state-level data can disguise substantial variation across counties within a state. Subsection 1 describes the methodology used to collect and report the data and Subsection 2 discusses observations.

### 1. Methodology

There is no criminal justice system in the United States; there are, rather, over 3,000 systems spread across the fifty United States and the District of Columbia.[66] This creates two formidable hurdles to data collection. First is sheer size. Gathering case disposition data from over 3,000 jurisdictions is such an enormous task that no agency has yet undertaken it (the few "national" statistics available collect from a statistical sample of selected jurisdictions).[67] The second hurdle is standardization. Each system utilizes slightly different methodologies for data categorization and reporting, making it difficult to standardize jurisdictions' data for comparison purposes.

To deal with the size challenge, I used a sampling strategy guided by two key factors. First, the bulk of criminal cases in the United States are prosecuted and adjudicated in large population centers;[68] and second,

[66] Criminal justice systems in the United States are administered by counties or county-equivalents, of which there are 3,143 as of 2022. *See* Press Release, U.S. Census Bureau, Over Two-Thirds of the Nation's Counties had Natural Decrease in 2021 (Mar. 24, 2022), https://www.census.gov/newsroom/press-releases/2022/population-estimatescounties-decrease.html [https://perma.cc/B2FD-MZ38].

[67] Even this collection, by the BJS, ceased in 2009. *See supra* note 61 and accompanying text.

[68] The BJS has observed that as of 2009 (the last year it gathered a nationally representative sample of criminal case processing statistics) the 75 largest counties in the United States accounted for nearly half of all serious crime prosecutions in the United States. *See State Court Processing Statistics* (*SCPS*) *and National Pretrial Reporting Program* (*NPRP*), BUREAU JUST. STAT., https://bjs.ojp.gov/data-collection/state-court-processing-statistics-scps#publications-0 (last visited Aug. 17, 2023) [https://perma.cc/GCR7-QN4W].

the court practices and processes utilized in felony prosecutions can be influenced by criminal laws (both substantive and procedural) enacted by state legislatures. I therefore chose to collect data from the twenty-five largest jurisdictions in the United States as well as the largest jurisdiction in every state (and the District of Columbia) — sixty-five jurisdictions in total.[69] Where I could standardize data I did, and where I could not, or where lack of standardization imperiled reliability, I discarded it. (Appendix A contains more details on data standardization.)

There is no uniform definition of "felony." Though most states define felonies as a crime carrying a certain punishment (typically, one year or more) or a sentence in a state prison, not all do.[70] I focused on "felonies" regardless of a given state's definition for two reasons. First, it is the most useful and efficient adjudicative demarcation for data collection: many jurisdictions segregate "felony" and "misdemeanor" cases into separate courts, rendering accountings of bench and jury trials in each court effective counts of felony and misdemeanor trials (even for jurisdictions that do not so label them). Second, a state's use of the "felony" label is some indication of the stakes of a given charge. The definition of felony in most states does not track the federal constitutional jury trial right, which attaches to any crime carrying a sentence of imprisonment of more than six months.[71] I was interested in learning about fact-finder choice not simply in the context of trial rights, but also in the context of stakes. However a state defines them, felonies are higher stakes than misdemeanors, even those misdemeanors that trigger jury trial rights.

As anyone who has endeavored to compile criminal case processing statistics knows, some jurisdictions (and states) keep more detailed case processing data than others. Data were gathered from publicly-available court statistical reports and, where not available, data were

[69] The most populous jurisdictions in the United States not also captured by the 50-state sampling were Queens and New York counties (in New York), Dallas, Tarrant, and Bexar counties (in Texas), Broward and Palm Beach counties (in Florida), and Riverside, Alameda, San Diego, Sacramento, Santa Clara, Orange, and San Bernardino (in California).

[70] *See* Ristroph, *supra* note 45.

[71] *See* Baldwin v. New York, 399 U.S. 66, 69 (1970); *supra* text accompanying note 43.

requested directly from the state judicial office or local county clerk's office (depending on the jurisdiction's data-collection practices).[72] Because data provided in response to a specific request were compiled outside the ordinary course of court data collection and reporting, I sent any specially-provided dataset to the county public defender's office for a "real-world" check.[73] Input from public defenders' offices was extremely useful; in at least two circumstances, discrepancies between data originally provided and the public defenders' assessment resulted in the courts catching data errors and rectifying them. In the end, I could not reconcile discrepancies (and therefore discarded data) from one jurisdiction.[74]

Finally, to assess felony bench trial patterns within states, I reviewed county-by-county felony bench trial data in the limited states that collect and publish it. All data collected in this study predate the

[72] In some jurisdictions, case processing data is collected and kept by the state administrative office of the courts, while in others the county manages its own data collection. States with sentencing commissions also keep and publish case disposition data, but in a number of instances sentencing commission data did not match data published by state courts' administrative offices. Inquiries with sentencing commissions revealed that sometimes not all trial courts, or not all judges within a trial court, consistently reported case dispositions to the commission. For consistency, and because state court administrative offices have direct oversight of trial courts' recordkeeping, I chose to rely on court rather than sentencing commission data.

[73] Public defenders' offices represent the largest number of criminal defendants in a given jurisdiction and are in conversation with the larger defense bar as well, giving them unique institutional awareness of the prevalence of bench trials in their jurisdiction. Prosecutors' offices will have similar institutional awareness, but because of the bureaucratic approvals required to speak with prosecutors in any given office, and because in many instances I was already reaching out to defense attorneys for the qualitative portion of the study, it was more expedient to check with public defenders as to their sense of the accuracy the bench trial data specifically provided to me.

[74] This jurisdiction was Shelby County, Tennessee; it reported a nearly 60% bench trial rate, whereas representatives from the public defender's office reported almost no bench trials by either their office or the private defense bar. ADMIN. OFF. OF THE CTS., TENNESSEE JUDICIAL INFORMATION SYSTEM REPORT, 1/1/2019-12/31/2019 (2020) (showing 35 bench trials and 32 jury trials) (on file with author); Notes of interview by Lauren Ouziel with Shelby County Public Defender's Office (Aug. 2, 2021) (on file with author).

COVID-19 pandemic and the severe disruptions it brought to criminal adjudication across the country.[75]

2. Findings

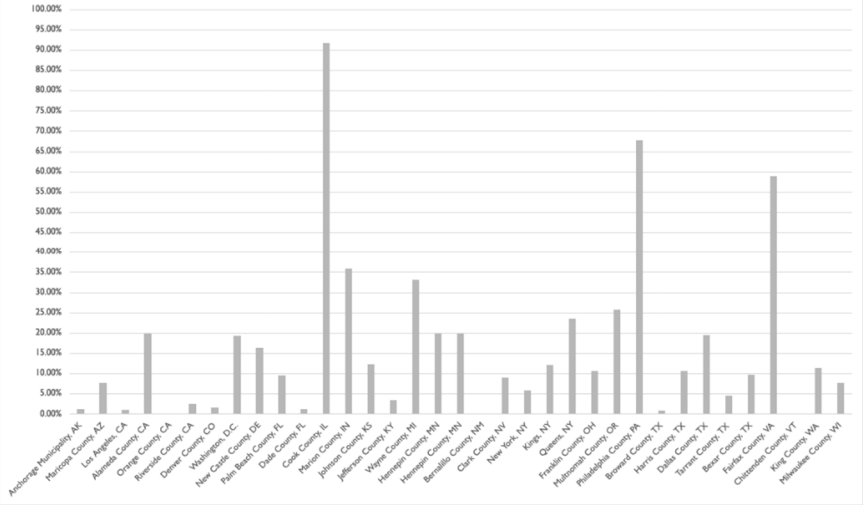
Of the sixty-five jurisdictions from which I sought data on felony bench trial prevalence, thirty-five jurisdictions had such data available. Of those, I discarded data obtained from one jurisdiction because it was determined to be unreliable.[76] This left thirty-four jurisdictions with usable data on felony bench trials. This in itself is a striking finding: a large number of jurisdictions (nearly half of those sampled) fail to track how felony cases are tried. Given the importance of fact-finder choice to the adjudicative process and the marked variation of bench trial prevalence within jurisdictions that do keep track, this failure is both notable and disappointing.

Of the jurisdictions that do track fact-finder choice, there was large variation in bench trial prevalence. That variation is visible in Graph 1, which reports felony bench trial prevalence as a percentage of all felony trials in each reporting jurisdiction. The mean prevalence rate across all reporting jurisdictions is sixteen percent, and the median is eleven percent. The standard deviation from the mean is twenty percentage points, indicating extremely high variability.

[75] On the criminal court disruptions caused by the pandemic, see Ed Spillane, *The End of Jury Trials: Covid-19 and the Courts: The Implications and Challenges of Holding Hearings Virtually and in Person During a Pandemic from a Judge's Perspective*, 18 OHIO STATE J. CRIM. L. 537, 537 (2021) ("[T]he ability to hold jury trials has almost completely grounded to a halt since March 2020.").

[76] *See supra* notes 72–74 and accompanying text.

Graph 1: Felony Bench Trials as a Percentage of Felony Trials




Of course, trials are rare; thus, while the rate of bench trials showed large divergence, it is important to keep in mind that the data reflects a small sample overall. Appendix B reports the raw numbers of felony resolutions, jury trials, and bench trials in each jurisdiction.

Are jurisdictions' bench trial rates representative of a general state trend, or do they diverge across counties within a given state? A review of the fourteen states that collect and publish felony bench and jury trial rates by county[77] reveals intra-state divergence in bench trial prevalence, though there is variation across states. For instance, more than half of states that publish felony bench and jury trial rates by county — California, Delaware, Florida, Indiana, Michigan, New York, Ohio, and Oregon — exhibit significant intra-state divergence in bench

[77] Unfortunately, most states do not systematically keep and publish a breakdown of felony bench and jury trial rates by county. As noted earlier, *see supra* notes 72–74 and accompanying text, data made available by states or counties pursuant to specific requests is not subject to the checks that attend data publication, and therefore without verification on a county-by-county level I am not comfortable relying on it. The states I identified that publish a county breakdown of felony bench and jury trial rates are California, Colorado, Delaware, Florida, Kansas, Illinois, Indiana, Michigan, Ohio, Oregon, New Mexico, New York, Vermont, and Wisconsin.

trial prevalence.[78] In Illinois (home to Cook County and its ninety-two percent bench trial rate), bench trials are the norm in many counties, but uncommon in some.[79] And the remaining states (Colorado, Kansas, New Mexico, Vermont, and Wisconsin) exhibit a consistently low bench trial rate across counties.[80] The NCSC dataset likewise shows intra-

[78] *See* JUD. COUNCIL OF CAL., 2019 COURT STATISTICS REPORT, 138-39 tbl.8a (2019), https://www.courts.ca.gov/documents/2019-Court-Statistics-Report.pdf [https://perma.cc/MGV8-Z9EN] (showing felony bench trial rates averaging 11%, with wide variation across counties — ranging from a 94% bench trial rate (Sonoma) to a 0% rate (Sacramento and others), with many counties exhibiting very high or very low bench trial prevalence and few in the middle); DEL. SUPER. CT., DISPOSITIONS (2019), https://courts.delaware.gov/aoc/AnnualReports/FY19/doc/SuperiorDispositionTypeTrialsAndNolleProsequis.pdf [https://perma.cc/VC87-FAJK] (showing Delaware's three counties have bench trial rates of 35%, 16% and 0%); *Trial Court Statistics Search*, FLA. CTS., http://trialstats.flcourts.org/(last visited Aug. 31, 2023) [https://perma.cc/KGY4-M9BY] (query of Circuit Criminal Courts data statewide and for all 67 counties in 2019 shows an 11% statewide bench trial rate, with less than a handful of counties having rates well above 50%, and the rest with rates well below); *Indiana Trial Court Statistics By County*, *supra* note 8 (showing felony bench trial rates averaging 47%, with rates ranging from 100% (Fulton) to 0% (Grant and others)); N.Y. CTS., NEW YORK STATE UNIFIED COURT SYSTEM 2019 ANNUAL REPORT 38-39 (2020), https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf, [https://perma.cc/JFE2-VR8F] (showing a statewide average felony bench trial rate of 16%, with rates ranging from 78% (Steuben) to 0% (Onondaga and others)); *State of Ohio Courts of Common Pleas, Dispositions*, OHIO DEP'T OF ADMIN. SERVS., https://analytics.das.ohio.gov/t/SCPUB/views/FormA-judge-state-PROD/Dispositions?iframeSizedToWindow=true&%3Aembed=y&%3AshowAppBanner=false&%3Adisplay_count=no&%3AshowVizHome=no (last visited Aug. 17, 2023) [https://perma.cc/N2PJ-P8BW] (showing a 28% statewide bench trial rate, with some relatively high bench trial-prevalence counties (Cuyahoga at 36%) and some quite low (Franklin at 10.6%); OR. MANNER OF DISPOSITION, *supra* note 9 (showing a 37% bench trial rate statewide); OR. TRIAL METRICS, *supra* note 9 (showing some districts with only jury trials, some with mostly bench trials, and a great many in between). Percentages, of course, mask raw numbers; all of the counties mentioned here have a relatively high raw number of trials overall relative to other counties in their states, making them useful indicators.

[79] *See* ADMIN. OFF. OF THE ILL. CTS., ILLINOIS COURTS , *supra* note 7 (showing a statewide bench trial rate of 83%, with counties such as Champaign and Lee exhibiting high rates (95% and 100%, respectively), counties such as Lake and Peoria exhibiting much lower bench trial rates (30% and 26%, respectively), and counties such as DuPage and Winnebago having a roughly even split between bench and jury trials).

[80] *See* COLO. CTS., COLORADO JUDICIAL BRANCH ANNUAL STATISTICAL REPORT 2019, at 26 tbl.16 (2019), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2019/FY2019AnnualReportFINAL.pdf

state heterogeneity in three states (Pennsylvania, Missouri, and New York) out of the four in which more than a handful of counties reported adjudicative data.[81] The degree of intra-state divergence observed in many states reporting county-level felony bench trial data indicates that state-level differences (in, for instance, penal laws, sentencing regimes, jury trial rights, jury size or pretrial procedures and discovery) do not adequately explain jurisdictional heterogeneity in felony bench trial prevalence.

Though I did not analyze smaller and mid-size data systematically from all states reporting it, a review of small and medium sized jurisdictions in these and other states indicates that felony bench trials can predominate over jury trials in jurisdictions of all sizes. How often

[https://perma.cc/V98C-9P5J]; KAN. CTS., ANNUAL REPORT OF THE COURTS OF KANSAS (2019), https://www.kscourts.org/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/19-T-OF-C-for-web.pdf [https://perma.cc/H6M3-SZ3Z]; N.M. JUDICIARY, STATISTICAL ADDENDUM TO THE 2019 ANNUAL REPORT 6-18 (2020), https://realfile3016b036-bbd3-4ec4-ba17-7539841f4d19.s3.amazonaws.com/79968cf9-5462-40fd-a32b-d338f4419f36?AWSAccessKeyId=AKIAIMZX6TNBAOLKC6MQ&Expires=1674858401&Signature=neQ81SLV1Gz44tiZfmxnM%2B9L%2FSI%3D&response-content-disposition=inline%3B%20filename%3D%222019%20Statistical_Addendum.pdf%22&response-content-type=application%2Fpdf [https://perma.cc/P2FM-QKXW]; VT. JUDICIARY, VERMONT 2019 ANNUAL STATISTICS REPORT APP. II (2020), https://www.vermontjudiciary.org/sites/default/files/documents/Appendix%20II.pdf [https://perma.cc/AD8G-6F5J]; WIS. CTS., WISCONSIN CIRCUIT COURT STATISTICS BY COUNTY (2019), https://www.wicourts.gov/publications/statistics/circuit/docs/felonycounty19.pdf [https://perma.cc/V3FZ-SQYV].

[81] The four states in the NCSC dataset reporting felony disposition data for more than a handful of counties are Pennsylvania, Missouri, Colorado, and New York. While Colorado shows a consistently low bench trial rate across its seven reporting counties, Pennsylvania and Missouri display heterogeneity. In Pennsylvania, bench trials well outnumber jury trials in Philadelphia and Allegheny counties, while jury trials vastly outnumber bench trials in Erie and Westmoreland, and the remaining reporting counties fall somewhere in between. In Missouri's seven reporting counties, bench trials outnumber jury trials in one, while in the remaining six jury trials predominate but to varying degrees. *See Effective Criminal Case Management Interactive Dashboard*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-management-and-performance/caseflow-management/effective-criminal-case-management/effective-criminal-case-management-interactive-dashboard (last visited Aug. 17, 2023) [https://perma.cc/4XF5-2BFA]. New York is among the states reporting bench and jury trial prevalence for each of its counties, and I discuss its wide variation in bench trial prevalence at *supra* note 78.

and why bench trials predominate in small and mid-sized jurisdictions are questions worthy of future study.

## II. GAINING DEEPER INSIGHT INTO VARIATION IN BENCH TRIAL PREVALENCE: A QUALITATIVE ASSESSMENT

### *A. Methodology*

To gain a deeper understanding of jurisdictional variation in felony bench trial prevalence, I interviewed twenty-nine experienced defense attorneys across five jurisdictions with varied bench trial rates.

I used purposive sampling for the jurisdictions studied. I first selected the two jurisdictions with the highest bench trial rates: Cook County (ninety-two percent of trials) and Philadelphia County (sixty-eight percent of trials). I then sought to identify comparable counties with low bench trial rates, controlling for certain key criteria shared by Philadelphia County and Cook County: mode of judicial selection (both Philadelphia and Cook elect trial court judges);[82] mode of sentencing (both Philadelphia and Cook have judge rather than jury sentencing);[83] and jury pool demographics (using the Center for Disease Control and Prevention's Social Vulnerability Index and its measures of socio-economic and minority status as rough proxies).[84] While the state's right

[82] In both Pennsylvania and Illinois, trial court judges are selected via partisan elections. *See Circuit Court*, ILL. CTS., https://www.illinoiscourts.gov/courts/circuit-court/ (last visited Aug. 17, 2023) [https://perma.cc/7K5Z-MKWE]; *How Judges Are Elected*, THE UNIFIED JUD. SYS. OF PA., https://www.pacourts.us/learn/how-judges-are-elected (last visited Aug. 17, 2023) [https://perma.cc/7NTC-MDDU].

[83] In 2019 six states in the nation utilized jury sentencing in some form: Texas, Virginia, Oklahoma, Kentucky, Missouri, and Arkansas. Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Legislative Structuring of Sentencing: The Allocation of Sentencing Authoring, in* 6 CRIMINAL PROCEDURE § 26.2(b) (4th ed., 2022). Although Virginia has since modified its jury sentencing provision, it still permits the practice upon the defendant's request. *Id.*

[84] *CDC/ATSR Social Vulnerability Index (SVI)*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, https://www.atsdr.cdc.gov/placeandhealth/svi/index.html (last visited Aug. 17, 2023) [https://perma.cc/W4GL-X5TL]. The Social Vulnerability Index ("SVI") is a measure of 15 U.S. Census variables across four themes: socio-economic status; minority status and language; household composition; and housing and transportation. *See* AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, CDC SVI 2018 DOCUMENTATION (2022), https://www.atsdr.cdc.gov/placeandhealth/svi/documentation/pdf/SVI2018Documentation_

to a jury trial might appear to be an important feature of fact-finder choice, it is one Cook and Philadelphia counties do not share: in Pennsylvania, the prosecution has a right to a jury trial while in Illinois, it does not.[85] I therefore opted to select both types of counties for comparison. Docket pressure, as measured by felony dispositions per judge, is another feature that might appear meaningful, given that bench trials are more expedient than jury trials. Yet it, too, differs between Philadelphia and Cook. At approximately 230 felony resolutions per assigned felony judge, Philadelphia appears to have about a third of the docket pressure of Cook, which has approximately 700 felony resolutions per assigned felony judge.[86] (The degree to which bench trial

01192022_1.pdf [https://perma.cc/V2CB-VSJK]. Each county's SVI is rated on a five-point scale (high; moderate-to-high; moderate; low-to-moderate; and low) and the index numbers reflect a county's status relative to all other counties. A county with an index of 95, for instance, means that 95% of counties have lower vulnerability on that index measure. *Id.* As of 2018 (the most recent year for which SVI data is available), Philadelphia has a high SVI (.92), with a socio-economic status index of .81 and a minority status and language index of .96. Cook has a moderate-to-high SVI (.68), with a socio-economic status index of .51 and a minority status and language index of .96. *See CDC/ATSR Social Vulnerability Index (SVI)*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, https://www.atsdr.cdc.gov/placeandhealth/svi/interactive_map.html (last visited Aug. 17, 2023) https://svi.cdc.gov/map.html[https://perma.cc/X5CX-CPC7] [hereinafter *Social Vulnerability Index Interactive Map*].

A county's SVI is only a rough proxy, however, because the demographics of jury pools are a function not only of the demographics of the county population, but also the means by which states identify citizens to summon for jury duty. *See* Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 943-45 (2015) (discussing methods used in different states); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 356 (1999) (detailing features of summons process that result in under-representation of minorities in jury venires).

[85] Few states grant defendants the unfettered right to a bench trial; the vast majority qualify it by requiring prosecutorial approval, judicial approval, or both. *See* LaFave et al., *supra* note 83, at § 22.1(h).

[86] This measure is a very rough approximation. Because judicial assignments vary slightly by year and none of the studied jurisdictions publish past years' judicial assignments, I compared the number of judges in each jurisdiction currently assigned a felony criminal docket (using judicial assignment information on the courts' websites) to the number of felony dispositions in 2019. While not an exact metric, it is useful for purposes of comparing jurisdictions because the number of felony judges in a given courthouse and the number of felony dispositions are not typically metrics that change drastically from one year to the next. For Philadelphia County judicial assignments, see Judges of the Pa. Ct. of Common Pleas., *Judicial Telephone Directory*, PHILA.COURTS.US,

prevalence correlates with docket pressure, judicial selection, sentencing mode, and jury pool demographics — along with other metrics such as guilty plea and dismissal rates — are questions to be addressed in a future quantitative analysis of the gathered data.[87])

Based on the above-described criteria, I selected New York County (Manhattan) and Clark County (Las Vegas) as low-prevalence comparison districts — having felony bench trial rates of six and seven percent, respectively — and Marion County (Indianapolis) as a medium-prevalence comparison district, having a felony bench trial rate of thirty-six percent. In all three counties, trial court judges are primarily elected and sentencing is conducted exclusively by judges.[88]

https://www.courts.phila.gov/directory/cp/ (last visited Oct. 15, 2023) [https://perma.cc/9CR9-6APL]. For Cook County judicial assignments, see *Judges Information*, CIR. CT. OF COOK CNTY., https://www.cookcountycourt.org/ABOUT-THE-COURT/Judges-Information (last visited Oct. 15, 2023) [https://perma.cc/TUA5-W6RR]. Total felony resolutions for 2019 for each county in the study are reflected in Appendix B.

[87] *See infra* pages 1260-61.

[88] Trial court judges in Indiana have historically been selected by partisan election. *See How Judges Are Selected in Indiana*, IN. JUD. BRANCH, https://www.in.gov/courts/selection/ (last visited Aug. 17, 2023) [https://perma.cc/F889-ZC4F]. In 2017 the state adopted a judicial nominating commission for the selection of judges in Marion County, *see* IND. CODE § 33-33-49-13.1 (2017), but because elected judges serve six-year terms and those up for retention may continue to run for re-election, few trial judges in Marion County have been appointed thus far; in 2019, just two out of the twenty criminal division judges were appointed. *See Marion County, Indiana* (*Judicial*), BALLOTPEDIA, https://ballotpedia.org/Marion_County,_Indiana_(Judicial) (last visited Aug. 17, 2023) [https://perma.cc/QV6Z-4CNG] (listing each Marion County judge, their term dates and method of selection). In New York, judges compete in a general election after being nominated by their parties (there are no primaries), and interim vacancies are filled by appointment. *See Judicial Selection in New York*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_New_York (last visited Aug. 17, 2023) [https://perma.cc/UT5Q-FKTK]. In Nevada, trial court judges are selected by nonpartisan election. *See Judicial Selection in Nevada*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_Nevada#Nevada_District_Courts (last visited Aug. 17, 2023) [https://perma.cc/N2S4-PD2X].

Of course, the degree of actual contestation in state trial court elections is difficult to measure. Prior research attempting to do so indicates that while contestation varies across jurisdictions, it is overall low. *See* Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation in Trial Court Elections*, 94 JUDICATURE 208, 214-15 (2011) (canvassing prior empirical studies and presenting own study finding that less than 22% of trial court races in 29 states offered voters an actual choice between candidates at any electoral stage). Nelson's study did not include Illinois, Pennsylvania,

Prosecutors have a right to a jury trial in Nevada[89] and Indiana[90], but not in New York.[91] The three counties share similar levels of social vulnerability to Philadelphia and Cook, with nearly identical levels of vulnerability along the minority status measure.[92] At roughly 200 felony dispositions-per-judge, New York shares similar docket pressure to Philadelphia, while Clark and Marion, each with roughly 650 felony dispositions per judge, share similar docket pressure to Cook.[93]

I chose to interview defense attorneys because the defense ultimately decides whether to pursue a bench or jury trial.[94] While the actions of judges, as I learned, have enormous effects on defense decision-making, I was most interested in defense attorneys' perceptions of those actions. Ultimately, it is those perceptions that influence counsel's strategy,

or Indiana; it did include Nevada and New York, finding trial court elections in those states among the relatively more contested in the nation. *Id.*

[89] *See* NEV. REV. STAT. § 175.011 (2022).

[90] IND. CODE § 35-37-1-2 (2015).

[91] *See* N.Y. Crim. Proc. Law § 320.10 (2023).

[92] New York County has a moderate-to-high SVI (.55) with a socio-economic status index of .42 and a minority status and language index of .96. Clark County has a moderate-to-high SVI (.74) with a socio-economic status index of .55 and a minority status and language index of .96. Marion County has a high SVI (.79), with a socio-economic status index of .68 and a minority status and language index of .91. *See Social Vulnerability Index Interactive Map*, *supra* note 84. For the SVI and contributing index measures for Cook and Philadelphia counties, see *id.*

[93] For a cautionary note on this metric, see *supra* note 86. Note the metric is particularly inartful for Clark County, where judges have a mixed criminal and civil docket and therefore can devote only part of their time to the felony docket. Practically speaking, docket pressure in Clark almost certainly eclipses the other four studied counties. For data on judicial assignments in New York County, see Sup. Ct., Crim. Term, N.Y. Cnty., *Judicial Personnel*, NYCOURTS.GOV, https://ww2.nycourts.gov/courts/1jd/criminal/judicial.shtml (last visited Oct. 15, 2023) [https://perma.cc/ENK5-GRT8]; Clark County, see *Civil Courts*, EIGHTH JUD. DIST. CT. CLARK CNTY., NEV., http://www.clarkcountycourts.us/departments/judicial/civil-criminal-divison/ (last visited Oct. 15, 2023) [https://perma.cc/7MT5-V9WG]; Marion County, see *Directory of Courts & Clerks in Indiana*, IND. CTS., https://www.in.gov/courts/files/court-directory.pdf (last visited Oct. 15, 2023) [https://perma.cc/8GLJ-3B5K].

[94] Even in jurisdictions where prosecutors must agree, a prosecutor can never opt for a bench trial without defense assent. Moreover, as I learned in the course of my interviews with defense attorneys in jurisdictions where prosecutorial assent to a bench trial is required, it is typically forthcoming with limited exceptions (namely, prosecutions of police officers). *See infra* notes 129, 172–173 and accompanying text.

decision-making, and advice to their clients. And while the decision of whether to waive a jury trial rests with the defendant alone, the advice and experience of defense counsel heavily influence a defendant's choice: across jurisdictions and attorneys, clients' reliance on counsel's recommendation with respect to fact-finder choice was a consistent theme. Unlike their clients, moreover, defense attorneys have deep and ingrained institutional knowledge of the jurisdictions in which they practice.

Temple's Institutional Review Board approved the protocol for the qualitative portion of this study. Interviewees were identified and selected using a "snowball" approach with multiple "seeds" in each jurisdiction.[95] Initial introductions were sought and made via professional contacts and references. I sought a mix of public defenders and attorneys in private practice; many of the attorneys I spoke with in private practice had begun their careers in the public defender's office, giving them a comparative perspective. In total, the twenty-nine attorneys I interviewed had, among them collectively, over 600 years of criminal litigation experience and over 5,000 felony trials in the relevant jurisdictions.

Interviews were semi-structured and open-ended: I asked interviewees from each jurisdiction the same basic questions, but follow-up questions sometimes differed based on their responses. I asked all interviewees to limit our discussion to their pre-pandemic experiences (thus, before 2020). Almost all interviews were conducted over Zoom videoconference, with a small number conducted over telephone. The interviews were audio-recorded and then professionally transcribed for all but three interviews (for which I took contemporaneous notes). Interviews ranged from thirty minutes to over an hour, with most lasting about forty-five minutes.[96]

[95] Julian Kirchherr & Katrina Charles, *Enhancing the Sample Diversity of Snowball Samples: Recommendations from Research Project on Anti-dam Movements in Southeast Asia*, 13 PLOS ONE 1, 1, 4 (2018).

[96] I coded interviews by jurisdiction (P for Philadelphia County, C for Cook County, NY for New York County, LV for Clark County and M for Marion County) and a unique numerical identifier (beginning in 1 if the attorney was currently a public defender and 2 if the attorney was currently in private practice — though as noted, most private practitioners with whom I spoke had previously served as public defenders).

I interviewed a minimum of five attorneys in each jurisdiction. (In Philadelphia, because of the unique methods of formal case assignment, I also interviewed a court administrator to learn about the administrative functioning of the case assignment system.) I ceased interviews in a jurisdiction only once I felt I had a solid understanding of the jurisdictional dynamics influencing fact-finder choice and that information collected in interviews was becoming redundant. Perhaps unsurprisingly, that point came quite quickly — there were very few instances where defense attorneys offered conflicting information or insights.

Some caveats are in order. First, as this study reveals, jurisdictions vary greatly in how felony cases are handled and the process by which defense attorneys consider the choice of fact-finder. A wider sampling of jurisdictions, therefore, might reveal additional dynamics not observed here — though, as Part III demonstrates, common threads across the very different approaches in these five jurisdictions indicate some potentially universal themes. Second, for the reasons noted, this study is limited to the perceptions of defense attorneys. Future studies that seek to query judges and prosecutors will shed light on the perceptions of those institutional actors.

### *B. High-Prevalence Jurisdictions: Philadelphia and Cook County*

Bench trials make up the overwhelming majority of tried cases in both Philadelphia and Cook counties. The processes of fact-finder choice in these two jurisdictions, however, differ. In Philadelphia, a formalized method of courtroom assignment divides likely bench trials from likely jury trials, helping to create a presumption in favor of bench trials in lower-level felony cases. In Cook County, there is little in the way of formalities when it comes to fact-finder choice; instead, that choice occurs against a background of informal communication from judges as to their views of the strength of the charges.

1. Philadelphia

*a. The Case Assignment System*

Since at least the 1970s, Philadelphia has divided its felony courtrooms in two.[97] One group is comprised of "waiver rooms" (or "list rooms," as the court administrators refer to them), where judges preside over trials in which the defendant has waived the jury trial right.[98] The other consists of "majors rooms," where judges mostly preside over jury trials. [99]

Cases are tracked to one or the other as follows. After a felony case is charged and has survived an initial judicial determination of probable cause in the Municipal Court,[100] the defendant is arraigned and the case proceeds to the "SMART Room" in the Court of Common Pleas.[101] The primary function of the SMART Room judges is to check on the status of the case and discovery, determine if the case can be quickly disposed via guilty plea, and if not, then "spin" the case – that is, randomly assign it to a courtroom for any further motion practice and trial.[102] If the case has been tracked to the "waiver" or "list" rooms, it will be randomly assigned to one of the judges in the waiver program; if it has been tracked to the "majors" rooms, it will be randomly assigned to one of the judges in the majors program; and if it is a homicide, it will be randomly assigned to one of the homicide judges.[103]

[97] Notes of interview with Philadelphia court administrator (Sept. 13, 2021) [hereinafter P-CA Interview] (on file with author).

[98] *Id.*

[99] *Id.*

[100] Pennsylvania does not require a grand jury to determine the existence of probable cause for felony charges; in Philadelphia nearly all cases are initiated by complaint rather than grand jury indictment, *see* 234 PA. CODE §§ 502, 556 (2015), and proceed by way of preliminary hearing for the probable cause determination. *Id.* § 542.

[101] *See* P-CA Interview, *supra* note 97. SMART stands for "Strategic Management, Advanced review and consolidation, Readiness and Trial," a reference to the different processes available to the defendant at this stage: he or she may seek to consolidate their cases with an existing case; enter a plea of guilty; or proceed to trial. *Id.*

[102] *Id.*

[103] *Id.*

Court administrators are in charge of assigning each case to a track.[104] Any case that is classified as an F1 felony (the most serious felony classification under Pennsylvania law) is typically tracked as a majors case and assigned to a majors courtroom; homicides are assigned to a subset of judges that typically preside exclusively over homicide trials.[105] Most non-F1 felonies are assigned to a waiver room.[106] There are sometimes exceptions, though, and the process of case tracking is not publicly revealed.[107] However, defense attorneys experienced in the jurisdiction have a general sense of how a case will be tracked.[108]

A defendant assigned to a waiver room can demand a jury, but they will then be assigned to a majors room for their jury trial; waiver room judges do not handle jury trials.[109] A defendant assigned to a majors room can request a bench trial, and if the prosecution agrees (they almost always do),[110] the trial will be heard by the majors room judge to whom the case was originally assigned.[111]

For the most part, judges in the waiver rooms are newly elected judges, typically with three or fewer years of experience. As new judges

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[104] *Id.*

[105] *See id.*

[106] *Id.*

[107] *See* P-25 (Oct. 1, 2021) ("There is no document or any piece of paper, policy position, or anything that I've ever seen on the First Judicial District website or anywhere else that says, 'If it's this, it goes here. If it's this, it goes there.' . . . There are F1 aggravated assaults that go to the waiver room, and some that go to majors, and again, that's always a guess, like, 'Is that going to get slotted to a majors, or is that going to get slotted to a waiver room?'"); P-24 (July 20, 2021) ("I don't know who decides [how cases get assigned]. The great wizard behind the curtain decides. I don't know."); P-22 (June 1, 2021) ("There's no really good guideline. . . . No one ever knows. We just know that the defense doesn't get to decide.").

[108] *See* P-25 ("And you can accurately predict, because of how I practiced for 21 years in this court system, what cases would be slotted as a waiver, and what cases would go to majors. But if you were coming down from . . . [y]ou wouldn't otherwise be able to find that information."); P-24 ("If it has anything to do with a gun, that'll be a majors case, typically. Although, there are gun cases that will go potentially into a waiver room. If it's just a possession of a gun, that might go into a waiver room . . . [but] not always.").

[109] *See* P-23 (June 2, 2021); P-22.

[110] *See infra* note 129 and accompanying text.

[111] *See* P-23; P-22.

come in, they replace the relatively more experienced waiver room judges, who can choose to then become majors judges.[112]

*b. The Unwritten Rules of Case Tracking*

The case tracking system in Philadelphia creates a set of unwritten rules and practices regarding adjudication and sentencing. Defense attorneys uniformly described a system that both generates, and is sustained by, implicit expectations among litigants.

Foremost among those expectations is a sentencing discount for defendants opting for a bench trial — a key factor cited by defense attorneys in their fact-finder choice calculus. The discount is never expressly acknowledged in so many words, but uniformly understood. As one attorney described it:

> It's just something you just pay attention to over the years. And I don't think I've ever heard a judge say that when you're statusing a case or conferencing a case. I don't remember a judge ever coming out and saying, "Hey, listen. You're going to get a bigger sentence if you lose in a jury trial as opposed to a waiver trial or plead guilty." But it's a fact. It's a fact that if you [as a defense attorney] don't know that then you better start talking to people because it's a big play. It's important.[113]

Other attorneys described the unspoken bench trial discount as being couched in terms of acceptance of responsibility — even though a defendant who goes to trial is in fact contesting guilt.

> [S]ome judges are bold enough to say it, but then they just try and say it the constitutional way. What I mean by that is, a judge will say, "How much responsibility are you really taking if you had a whole jury here for a week," and stuff like that. They have to couch it under taking acceptance of responsibility, or else it is unconstitutional to tax someone for a jury [trial].[114]

[112] P-25; P-23.

[113] P-23.

[114] P-22.

Pennsylvania has sentencing guidelines, but of course those are not binding[115] and even within them, judges have discretion to sentence within the lower end of the range (reserved for mitigating factors), the middle (the "standard" range) and the higher end (reserved for aggravating factors).[116] Defense attorneys described a sliding sentencing scale between plea and trial: while a guilty plea might earn their client a sentence within the mitigated range based on the time and effort saved and the remorse shown, a bench trial would likely keep them in the standard range while a jury trial often subjects the client to a sentence within the aggravated range.[117]

Defense attorneys pointed to two reasons for the sentencing differential. One is the added time and effort required for a jury trial, costs that some judges believe should be accounted for at sentencing. As one attorney put it,

> [T]he sentencing guidelines tend to control . . . . Most judges start in the guideline range at some point. And then it's a question of what in that judge's mind is an aggravating factor? In some judges' minds, taking a case to a jury trial is just on their checklist of aggravating factors.[118]

[115] *See* United States v. Booker, 543 U.S. 220, 244-45 (2005) (invalidating mandatory federal sentencing guidelines under the Sixth Amendment, but permitting their use as advisory); Blakely v. Washington, 542 U.S. 296, 303 (2004) (invalidating mandatory state sentencing scheme akin to sentencing guidelines under the Sixth Amendment).

[116] *See Sentencing*, PA. COMM'N ON SENT'G, https://pcs.la.psu.edu/guidelines-statutes/sentencing/ (last visited Aug. 17, 2023) [https://perma.cc/R3A4-9HJT].

[117] P-25 ("[Y]ou do get a benefit for having given up your right to a jury trial. I mean, I think that is a factor to consider in sentencing. You can say to the court, 'My client waived his right to a jury trial.' And that is a factor for them to say a factor at mitigation. Just like it would be a factor if you plead guilty. It's kind of the same thing like that."); P-24 ("[Y]our mitigated range could be if . . . you plead guilty at the earliest possible . . . . Or you do have a trial, but you've waived your right to the jury trial, which is considerably less expensive to the government taxpayers, like you and me, if you do a bench trial, you could also then just get a standard range sentence. So, you're flat in the middle of the guidelines. If you have an aggravated sentence that, again, goes to what your record would be, how bad this case was, or you did a full jury trial, and it took two weeks and you didn't stipulate to a single thing, and you put the government to their test."); P-22 ("[Y]ou get a little discount for a bench trial. Like, you can say, 'Judge, this is a bench trial,' and they might start at the bottom of the standard range of the guidelines.").

[118] P-11 (May 7, 2021).

Another attorney described the sentencing dynamic for jury trials versus bench trials more bluntly, using simulated dialogue to convey the judges' implicit message: "You have the constitutional right [to a jury trial], but the judge is like, 'You were a pain in the ass. And because you were a pain in the ass, I'm not going to cut you a break on sentencing, and I'm going to give you an aggravated rape sentence.'"[119]

The other reason for the sentencing differential derives from the case tracking process itself: because majors courtrooms involve more serious felonies than waiver courtrooms, judges presiding over jury trials are more accustomed to sentencing cases within higher sentencing guidelines ranges and thus to imposing higher sentences. And because all jury trials (even if initially assigned to a waiver room) are conducted by majors judges, that acculturation infects sentencing practices even in lower-level felony cases. As one defense attorney put it, majors judges are

> used to giving out much, much higher sentences, so you got to be careful what you do there. The waivers judges think it's a really big deal if you plead something out to a three-to-six [years]. They're like, "Oh my God, I gave a three-to-six the other day." The majors judge is like, "I usually give ten years on this case."[120]

This means that even an extremely favorable jury trial outcome short of an acquittal — such as a conviction on a lesser-included offense — may not ultimately result in a favorable sentencing outcome. As an attorney explained,

> you got to be careful, because you could win on a misdemeanor [*i.e.*, the jury acquits on the felony charges and convicts just on a lesser-included misdemeanor count] and you could get slammed, whereas in a non-jury room or waivers program,

[119] P-24. Both attorneys noted their descriptions are not the judges' explicit words, but rather their perception of the dynamic based on their experiences and the collective experience of others in the defense bar (a close-knit group that frequently shares insights and advice).

[120] P-22.

> they're used to less serious cases. They're used to giving out smaller sentences.[121]

Or, as another attorney summed up the dynamic, "when you're trying for either lesser charges or just to avoid severe penalty, then the bench trial seems to prevail."[122]

The sentencing differential is not the only pivotal yet unwritten practice of Philadelphia's dual-track system. Another is the assessment of reasonable doubt. Defense attorneys for the most part felt that, while Philadelphia juries tend to be quite favorable for defendants in assessing the evidence, judges — particularly in the waiver rooms — could be even more so:

> Sometimes you get a better trial with a fair waiver judge than you would with a jury because juries don't really understand the nuances of jury instructions and evidence and things like that. So, I've always been of a mindset if I can get a good, fair-minded waiver trial, win or lose, if I lose the case, hey, you know, I got a shot. And there are some judges like that in the majors program.[123]

This attorney also noted the particular advantages of bench trials when the client's best hope was guilt of a lesser-included offense, noting that "fair-minded judges . . . are much more comfortable making a legal decision as opposed to a complete acquittal on a factual issue, unless there's a justification [defense]."[124]

Others echoed the benefits of judicial assessments of reasonable doubt. Maintaining that, for criminal defendants, "[i]t doesn't get better than a Philadelphia jury," one attorney explained why they nevertheless preferred bench trials in most cases:

> I think we should try more [cases to] juries, especially drug cases because juries tend to expect a lot more from the police and police investigation. But culturally, that's not exactly where we're at, even with a good jury. Unless you had paperwork

[121] *Id.*

[122] P-11.

[123] P-23.

[124] *Id.*

> discrepancies, or unless you had positive defense evidence, as good as a Philadelphia jury is, they're probably still going to convict on a standard narcotics surveillance.[125]

This attorney summed up their calculus: "[O]verall, if the case is really good to fight, then it usually means that as long as you have a good trial forum, a fair trial forum, you can usually fight it in front of a judge."[126]

These unwritten sentencing and evidentiary expectations are not just products of the case-tracking system; they also sustain it. Attorneys observed that when waiver judges depart from settled expectations around sentencing and reasonable doubt, attorneys react accordingly and the system unravels. As one attorney described it, the waiver room "shuts down":

> [I]f a judge is really kind of heavy-handed in the waiver room as far as reasonable doubt and sentencing issues, the public defender's office will come in and say, "Every case is a jury demand." Because they want to shut that room down. So . . . the typical waiver judge in the waiver program needs to be balanced, keep both sides kind of happy, to keep the room going.[127]

The same dynamic can happen in reverse. Since gaining the right to demand a jury trial in 1998,[128] prosecutors in Philadelphia have rarely done so for cases assigned to waiver rooms.[129] Yet attorneys recalled prosecutors sometimes demanding jury trials as a matter of course

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[125] P-11.

[126] *Id.*

[127] P-23.

[128] *See* Commonwealth v. Tharp, 754 A.2d 1251, 1253 (Pa. 2000) (upholding as constitutional the 1998 amendment to Pennsylvania's Constitution that granted prosecutors the right to a jury trial in criminal cases).

[129] P-22 ("For 99.9% of cases, if it's being sent to [the waiver] program, [prosecutors will] agree to it."); P-23 ("I think there's kind of an unwritten rule that those kinds of cases [assigned to the waiver room] the District Attorney's office kind of agrees that they kind of can go into the waiver program. They're not going to demand juries on those kinds of cases," with the exception of prosecutions of police officers); P-24 (noting that prosecutors will typically decline a police officer defendant's request for a bench trial); P-11 ("For the most part, even before [District Attorney Larry] Krasner, the commonwealth jury demand, except for in particular categories . . . was generally rare. I'd say still, for the most part, it's up to the defendant and defense counsel.").

before a waiver judge who routinely acquits.[130] When rooms "shut down," however, case assignment processes are then leveraged to reestablish bench trial norms. Attorneys practicing for more than twenty years all recalled times in which, in response to rising jury trial demands in some waiver rooms, such cases began all to be referred to a single judge with a reputation as a harsh sentencer, or they might even be scheduled for trial that very day.[131] As a result, jury trial requests quickly ebbed and the system returned to one dominated by waiver trials.[132] One attorney referred to this dynamic as a three-dimensional "game of chess that gets played" between the defense bar, trial court judges, and supervising judges:

> So, let's assume the Defender's Office decides to shut it [down] . . . they're not doing any waivers or open pleas, and they'll only do something negotiated [meaning a plea agreement]. . . . Then

[130] P-23 ("I've seen over the years when cases get into a waiver court room sometimes a judge would be newly elected and get assigned and have a great deal of reasonable doubt and there'll be two weeks of acquittals and suppression motions granted and things like that. And then not so much with [District Attorney] Krasner's office but before that, I would see the DAs would just come in and say, 'Every case on the list is a jury demand.' To shut the room down."); P-22 ("[I]f [prosecutors] think the judge is too lenient, which for us is, God forbid, just has reasonable doubt, then they will demand a jury.").

[131] P-25.

[132] *Id.* ("When I first started practicing, and I was a young public defender, there it went to only one judge's room . . . who was a notoriously heavy sentencer. So, if you demanded a jury out of a waiver room, your case just got a date into his trial room, and then you went to trial there. And if you lost, your client was facing the maximum statutory sentences under the law. . . . So, at that point, clients would be disincentivized to demand their jury, because the possibility of what they're facing from a waiver room on a same conviction to a jury would be astronomical."); P-22 ("So if you're in a waiver room, in a non-jury room, and you say, 'I want a jury trial, that's my constitutional right,' they will spin it out to a majors judge. And the program used to threaten that it would be that day. So they would try to chill you from asking for a jury, because they would say, 'All right, you ready to pick?' Especially if you were a PD and you weren't allowed to pick [because] you weren't [assigned to] the jury unit that day, then your boss would get mad at you that you had this thing going on, and it'd be a potential nightmare. They used to find all different sorts of ways to kind of scare you into not asking for a jury."); P-24 (describing earlier practice in which, after a defendant in a waiver room requested a jury trial, his case would be assigned to a courtroom with "a ready jury waiting for them, theoretically, didn't always work so smoothly.").

> the supervising judge may set up a system where you have one or two heavy-handed majors judges to just do [jury trials from that waiver room]. And [they] say, "Hey, listen. Oh, okay. You want a jury trial? All right. You're going to go to. . ." — I won't use names, but — "You're going to go to so-and-so judge," who, if you lose at jury trial, you know, you're subject to a much heavier hit than you would have if you would have lost a case in the waiver program. I've seen that over the years.[133]

The case assignment system and its attendant unwritten rules in turn create a normative expectation of a bench trial in most cases — an expectation that extends to defendants themselves. While defense counsel uniformly felt most clients for the most part followed their advice, a number observed that the regularity of bench trials can color defendants' views. One attorney described a client refrain of "I heard I should take this [my case] to the judge,"[134] while another observed that the relative rarity of jury trials made their prospect more intimidating to many defendants:

> I definitely had that before where I'm like, "I think this should be a jury." They're like, "Oh, I think I want it to be . . . I don't want to sit for . . . ." I mean, people are intimidated by the concept of a jury trial. That seems like, "Wow, that's a big deal," right? "I've got to put fourteen in the box." That's what it looks like. I put fourteen in the box. And that can be very, very scary . . . .[135]

This attorney summed up the thinking of many clients over the years: "It feels less scary to go head up with a judge."[136]

### 2. Cook County

Cook County has the highest rate of bench trials of all sampled jurisdictions: nine in every ten trials are before a judge rather than a jury. Unlike Philadelphia, however, the default to bench trial is not a result of

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[133] P-23.

[134] P-11.

[135] P-25.

[136] *Id.*

a regimented system of judicial assignments. Cases are assigned randomly and the choice of fact-finder is typically made towards the very end of the adjudicative process, well after judicial assignment and following discovery and plea negotiations. Collectively, attorneys in Cook County described a system of informal practices and collective expectations that have produced, in a recurring phrase, a "culture of bench trials."[137]

A hallmark of that culture is judicial signaling of a bench trial's likely outcome. This communication often occurs during what attorneys variously described as the "402 conference" or the "issues conference." Under Illinois Supreme Court Rule 402(d), at the defendant's request and with the prosecutor's assent, the trial judge may participate in plea discussions, at the end of which "the judge may make a recommendation as to what an appropriate sentence would be."[138] While the rule contemplates plea agreements, the conferences — typically held in the judge's chambers, off the record — can sometimes launch discussions about a potential bench trial. As one attorney described it:

> [A 402 conference] is ostensibly to resolve with a plea. So you want to get a sense of what the Judge would do. And the Judge can say, if you plead him . . . if you plead to count one or whatever, my sentence will be ten years after hearing mitigation and aggravation, right, from both sides. But sometimes you learn a lot more in those conferences. They're off the record. And some Judges are more open and willing to cross lines a little bit to give us a sense of what they would do if you took a bench trial and decided you didn't want a plea. So . . . that would be [a] reason to take a bench trial for me, if I got that signal.[139]

Or, as another attorney bluntly summed up the dynamic, at a 402 conference the judge "could say, 'Well, if we go to a bench trial, I might find him only on this charge,' which is a pretty clear hint of okay, let's do a quick bench trial. He's going to give us what we're looking for."[140]

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[137] *See infra* notes 152–153 and accompanying text.

[138] ILCS. S. Ct. R. 402(d) (2023).

[139] C-22 (June 3, 2021).

[140] C-23 (June 4, 2021); *see also* C-12 (June 15, 2021) ("Sometimes the judge would say something [at the 402] sometimes on the record, sometimes off the record, that

Judges and defense attorneys find ways to communicate even without a 402 conference. Attorneys described scenarios in which the litigants agree to an off-the-record discussion with the judge without contemplating any plea agreement (and thus without the admonishments to the defendant that, by statute, must accompany a 402 conference).[141] These scenarios are sometimes referred to as an "issues conference":

> You go in the back, and there are two kinds of 402 conferences. There's a traditional 402 conference . . . . But there's another kind. We'll call them issues conferences, and there's no statute that discusses issues conferences. They're not even 402s. They're "Come back and discuss issues with the judge."[142]

At these "issues conferences," defense attorneys seek, and sometimes get, an informal signal from the judge on the likely outcome of a bench trial: "[T]he judge is saying, 'Fine, here's how I see it.' Nothing formal is undertaken, and no actual findings are made, but it's a 'how I see it.'".[143] As another attorney recounted:

> [I]ssues conferences . . . [are] not really quite frankly in the statute but you would go ask the judge and sort of work out the case in the back where in your mind, you might get sort of an indication from the judge that yes, the prosecutor's not going to

indicated that they thought maybe the top count wasn't appropriate and if we did a bench trial they would probably find the person guilty of a lesser included. Sometimes we even got very clear signals that it was going to be a "not guilty" at a bench trial, so we would choose to do a bench trial in that case.").

[141] *See* ILCS. S. CT. R. 402(d) (requiring judge to admonish defendant on the information the judge will hear as a result of the conference which he or she might not otherwise learn); C-15 (Aug. 4, 2021) ("When I say, 'Judge, I'd like a 402 conference,' the judge then immediately turns to my client and says, 'Do you understand what your attorney's asking for? Do you understand what a 402 conference is? I'm going to learn things about you in the back from your lawyer. I'm going to learn about your life, things that I wouldn't have known before this conference. I'm going to learn from the prosecutor about the facts of the case and any criminal history you have. I would not have known that unless this conference is happening. Do you agree with this 402 conference?' That's a formal 402 conference. When lawyers would ask for issues conference, none of that would happen.").

[142] C-13 (June 23, 2021).

[143] *Id.*

> reduce his charge but I don't really see the evidence here to support that charge. I do see the evidence on this count. So, then you take the bench trial.[144]

Beyond the back room, judges find other informal ways to communicate with defendants and their attorneys in ways that steer defendants to opt for bench trials. In response to a defendant's jury trial request, a judge might signal a potentially more favorable bench trial outcome.[145] Or he or she might signal the inconvenience imposed by the defendant's request:

> [A] lot of it comes out in just like the sheer exasperation that we see when people have, what seems like the audacity to make that [jury trial] request. . . : "Okay, I'm about to call to the jury room to send out a panel. All right, now they're saying they're going to need an hour and a half. Oh, there's someone on the panel who needs an interpreter. Do you *really*?" you know, "Should we set this for another day?" You know, "Are the panels about to come? Once the panel's in the hall, there's going to be no more negotiation." You know, just emphasizing the remarkable logistical hassle that is a jury trial. . . . [I]t's like, from the moment you make the request, everyone's like, "Oh, *really*? Do we have . . . do we even have . . . bailiff, *do we even* [*have*] *the notebooks?* [Sighing] I'll call and see if they've got a panel." It's sort of like, you know, they act like you've asked for . . . you feel like you've done something untoward.[146]

Judges have a great deal of discretion over the jury selection process, and some use it in ways that dissuade attorneys from seeking a jury trial

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[144] C-15.

[145] C-12 ("Other times there would just be this informal . . . [w]e'd say, 'Judge, we're ready for trial. We're demanding a jury,' and then there would be a break between the cases, and the judge would ask us informally about the trial, how many witnesses, how long it would take. Some of the judges would actually ask a little bit about the facts of the case and then, based on what they heard, they might give us some sort of hint."); C-14 (July 12, 2021) ("Somebody, you know, saying to me, well, if you're going to go ahead with a trial, wink-wink, you better not do a jury trial. No one's ever put that fine a point on it. But there certainly have been times where it feels like it's in the air.").

[146] C-14.

again with that judge — by, for instance, limiting the topics of voir dire, rushing the process through, or both.[147] "Under those circumstances," said one attorney, "[Y]ou might think, 'Well, if I don't have any real control over or really any knowledge of who the people on the jury are or who they will be, [my client] might be better off with a judge.' I think that's the consideration."[148]

Finally, sentencing practices can steer defendants towards choosing bench trials. Many attorneys perceive their clients will receive a higher sentence following conviction on a jury trial than a bench trial — what they referred to as the "jury trial tax"[149] — though the perception does not appear to have quite the same purchase in Cook as in Philadelphia. It was neither uniformly held (two of the seven attorneys with whom I spoke discounted it)[150] nor uniformly a key decision-making factor. As one attorney described their thinking:

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[147] *See id.* ("Judges in the Cook County system have a great deal of discretion in terms of how they conduct voir dire. And there is a great deal of variation from Judges who will basically not allow you to ask any questions at all, to Judges who seem to highlight certain inquiries over others. Some Judges will just rush you through voir dire in a way that really makes it difficult to thoughtfully exercise peremptories. So that's sort of a piece of the process, too."); C-11 (May 25, 2021) ("Many many years ago, the voir dire was meaningful. I mean, you could actually as a defense lawyer, ask some meaningful questions of the jury. The potential jurors now, the process is incredibly swift. Most juries are selected in less than a day, which I think is crazy. Which means that you can't really ask the jury many questions, jurors. So, you have in my view, you don't know as much about them as you would like and actually how they feel about what they're about to do.").

[148] C-11.

[149] C-11 ("[T]here's always a trial tax no matter what. . . . And then if you compound that by electing a jury, especially in a case where the judge feels you should have pled guilty, the defendant can receive an increased sentence. At least that's the feeling of the defense bar."); C-14 ("[T]here's also, frankly, just the trial tax. And that there is a much steeper price to be paid if you've put the court through the trouble of a jury trial."); C-15 ("If you take a bench trial, generally, you're saving yourself some time if you're convicted. We call it the jury tax.").

[150] *See* C-12 ("Sentencing doesn't come up much in my practice when deciding between bench and jury. Sometimes there's the belief that if there's a finding of 'guilty,' the judge will sentence more harshly on a jury because it's taken more of the judge's time and energy, but I haven't really encountered judges where that's the practice, so I don't concern myself with that."); C-23 (observing "not much" of a sentencing differential between bench and jury trials).

> [T]here's the jury tax issue, where the common assumption is that Judges will sentence you more harshly if you're convicted by a jury as opposed to by the Judge. I think that there's some validity to that. But I don't think that's a set-in-stone doctrine or theory. In other words, I wouldn't take a bench, I doubt I'd take a bench trial . . . for the principal reason that if my client were convicted that he would be sentenced less harshly.[151]

These practices — judicial signaling and defense attorney-judge communication, voir dire practices and, to a lesser (or more sporadic) degree, sentencing — help create a set of shared expectations among the courthouse participants that a trial will generally go before a judge rather than a jury. Those shared expectations, in turn, help perpetuate the practices that create them, producing what attorneys frequently described as a "culture" of bench trials.[152] One attorney who had previously practiced in a jurisdiction with few bench trials remarked on the role of culture in maintaining the mechanisms that encourage bench trials:

> In Cook County, in general, the culture is to engage in bench trials. That's it. . . . [W]hen I say it's part of the culture, it is ingrained. It's the 402 is part of the culture. The bench trial is part of the culture. It's a very different practice than other jurisdictions, where jury trials, they're like, sacrosanct. And I think, frankly, if I had walked into a courtroom in the last jurisdiction where I practiced, and tried to ask for bench trials,

[151] C-22. Still, a number of attorneys did view it as important. *See supra* note 149.

[152] *See, e.g.*, C-11 ("I think that both with the public and private bar and with the judges, there is sort of a culture of encouraging bench trials. . . . [I]t's the culture in Cook in that respect in terms of managing the court calls, how the courts operate. Sort of a closed community of lawyers and judges and prosecutors who are used to doing things in a certain way."); C-15 ("This is the culture. The judges [who previously practiced in the criminal courts] came from that culture . . ."); C-12 ("I think everybody . . . and I'm sure the defense side, too — it's almost an unconscious thing where everybody is sort of adapting to the system in making sure that we get something close to the 80/20 split [meaning 80% bench trials and 20% jury trials]. . . . [I]t's usually unspoken. Everybody is just sort of playing the role without breaking the fourth wall and admitting what's really going on.").

> I might have been placed on probation at the Public Defender's Office. . . . [B]ut here that's not the practice.[153]

### *C. Low-Prevalence Jurisdictions: New York and Clark Counties*

The two low-prevalence counties I studied — New York County (Manhattan) and Clark County (Las Vegas) — had no structures in place encouraging bench trials. Yet there were different reasons for this absence. In New York, there is a strong norm disfavoring judicial signaling about the strength of a case or the likelihood of a certain outcome. Clark, in contrast, had a long history of trial judges' involvement in plea discussions that was only recently discontinued. Yet that practice did not encourage bench trials, largely because of defense attorneys' ingrained distrust of judges as arbiters. That distrust pervades Clark attorneys' assessments and calculations, such that they rarely even consider bench trials.

#### 1. New York County

Manhattan[154] has one of the lowest bench trial rates in the nation, at six percent. A pervasive theme among all the Manhattan attorneys with whom I spoke was risk: to a person, they viewed a bench trial as extremely risky, and therefore an option to be exercised in rare and unique circumstances (such as a prosecution against a police officer).[155] A variety of factors contribute to this perception of heightened risk,[156]

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[153] C-13.

[154] New York County is one of five counties in New York City, each of which is also a separately named borough. To avoid confusion with New York City, I refer to New York County throughout using its borough name, Manhattan.

[155] *See, e.g.*, N-12 (July 28, 2021) ("[T]he biggest issue [in deciding on a bench trial] is that it's not good for your client. Nobody thinks it's good for your client. In almost every circumstance, and maybe except when defending a police officer, it's not good for your client, and so you shouldn't do it."); N-22 (Aug. 17, 2021) (noting they would consider a bench trial rarely, only if their client was "exceptionally not likable" or a police officer, or if the defense was exceedingly technical).

[156] These include attorneys' general sense that judges are more predisposed to the prosecution, *see, e.g.*, N-12 ("judges are overwhelmingly former prosecutors, and they view the evidence that way"), that their awareness of inadmissible evidence biases them against the defendant, *see, e.g.*, *id.* ("You would be waiving a jury in front of a judge who you've had plea negotiations with, who has seen all of your client's record, has decided

but foremost among them is a strong desire on the part of defense attorneys for judicial communication about the strength of the case, coupled with an equally strong norm against such communication.

Attorneys perceived judicial signaling as exceedingly important to fact-finder choice. As one senior public defender explained: "I tell young lawyers all the time when they ask me, should I go bench trial, I'm like, well, like, what is the Judge signaling to you?"[157] This attorney continued:

> [W]hat we see in our office when it comes to felony bench trials in Manhattan, is [the] scenario where it's a legal issue and we get the sense, either explicitly or implicitly, that the Judge agrees with us .... [I]f the Judge is disagreeing with you vehemently when you're raising this issue, then probably not a good idea. If the Judge is signaling that he's very receptive to the idea or sometimes they maybe even say, I think he's right, like, flat out say it, then that's a different circumstance. . . . And so you really just got to get a sense of where the Judge is when you [are considering a bench trial]."[158]

In Manhattan, though, this sort of insight into judges' intentions is rare — few attorneys experienced it personally or had heard of others

what evidence is admissible and what's not, and then is supposed to ignore what they said was inadmissible . . . and humans just actually can't do that"); and that as a general matter, twelve laypersons are better than a single judge, *see, e.g.*, N-23 (Aug. 13, 2021) ("You're better off trying a case to 12 people, and all you need is one. . . than to take a chance with a judge.").

[157] N-13 (Aug. 26, 2021).

[158] *Id.*; *see also, e.g.*, N-22 ("I say this to my clients all the time when we're talking about [whether to do a bench trial] . . . I think it was Mark Twain who said that a trial without a jury is like a root canal without Novocaine. So my analysis basically is, if I get a message from the Judge, and I'm not talking about a phone call off the record, I'm talking about in open Court, if I get a signal or a message from the Judge in open Court, in front of all the parties, that there is likely to be an acquittal if I go bench, or if the Judge is likely to convict the client of something much less than the top count, and we'll wind up with a better sentence than if we even took a plea, then I, number one, I will seriously consider it, number two, I have to also ask myself if I trust the Judge. Because there are a lot of Judges who may send the signal, but then they do something else. So that's basically my analysis.").

experiencing it; those who had could count the times on one hand.[159] Its uncommonness was even more pronounced in comparison to the other New York City boroughs in which private attorneys also litigated.[160] More often "in Manhattan, the judges keep his or her cards a little closer to the vest," as one such attorney explained:

> They don't tend to signal quite as obviously, whereas in the outer boroughs, they are not so worried about, I don't want to call it, backlash, but maybe criticism. . . . [I]n Manhattan, for whatever reason, I think the respect maybe or the concern that the District Attorney's Office will out them, as we might say, there's more of a concern in Manhattan. Things are, let's say, done more by the book, I guess.[161]

Attorneys attributed the absence of signaling in Manhattan to an implicit understanding among judges, prosecutors, and defense attorneys that any judicial musings on evidential strength or likely sentencing is *verboten*. As one attorney put it, "If [a judge] was overt enough that it was obvious what they were saying to you and did that, you would be shocked, and I think everybody would hear about it, and the judge['s] . . . integrity would be seriously called into question, and it's just not a thing that happens."[162] Another attorney with decades of experience litigating in Manhattan could recall just a single time when a

[159] *See* N-11 (July 13, 2021) (noting that judicial communication about potential bench trial outcomes is "*very* unusual," and that they have never seen it in over 30 years of practicing in Manhattan); N-12 (has "never experienced" judicial signaling in any felony case in Manhattan, "it's just not a thing that happens"); N-13 (estimating "a handful" of defender's office cases each year in which a judge has indicated agreement with the defense position and the defender's office accordingly seeks a bench trial); N-22 ("In Manhattan, signaling is very, very rare."); N-23 (estimating less than one out of a hundred felony cases in Manhattan in which they might receive some sort of signal from the judge to take a bench trial).

[160] Each of New York City's five boroughs is its own jurisdiction; as a result, many private defense attorneys' practice spans multiple jurisdictions.

[161] N-23; *see also* N-22 ("In Manhattan, signaling is very, very rare. In other boroughs it's different. In Manhattan, it's very, very rare."). The inter-borough differences in judicial signaling, however, are at the margins. One attorney estimated a signaling rate of just one or two cases per 100 in Brooklyn, and a rate of less than one per 100 in Manhattan. N-23.

[162] N-12.

judge gave a defense attorney "a wink and a nod," and as a result the judge "got in trouble" with an overseer.[163] Another attorney with a long memory traced the aversion to judicial signaling back to Robert Morgenthau, Manhattan's influential reigning district attorney from 1975 to 2009, who would not stand for judges communicating their views on cases to either party.[164]

Outside of overt signaling about case outcomes, Manhattan attorneys seem to have no other means of assessing a bench trial's likely benefits. Unlike in Philadelphia and Cook counties, in Manhattan there appears to be no widely-perceived sentencing benefit for having a bench trial instead of a jury trial.[165] And no other mechanisms — such as judicial assignments (as in Philadelphia) or voir dire process (as in Cook) — might steer defense counsel towards bench trials.

Judicial signaling, then, is the whole game. It is perceived by Manhattan defense attorneys as both exceedingly important to fact-finder choice *and* exceedingly rare — making its relative absence a key factor in Manhattan's low bench trial rate. As one attorney reflected on their experience with bench trials:

> The most recent times that I've [counseled the client to demand a bench trial] I regret having done it, because the outcome was not what I thought it should be, or even what I predicted the judge might decide. So, I was very bad at predicting the outcome . . . I would not do it again, certainly not in New York County, not in Manhattan, unless, like we're saying, I got that really strong signal from a judge. . . . [W]ithout a signal, I would be very, very unlikely to do another bench trial."[166]

[163] N-11 (the attorney could not recall whether the particular overseer was the Appellate Division's Committee on Character and Fitness or the appellate panel to which the case had been assigned on appeal).

[164] N-22.

[165] N-22 (observing no sentencing benefit for a bench trial over a jury trial, but a sentencing benefit for a guilty plea); N-12 ("I think a trial tax is a trial tax, and if you make the judge do a bunch of work, whether there's a jury sitting there or not . . . they don't really care.").

[166] N-23.

2. Clark County

Clark County, Nevada, has a relatively low bench trial rate of nine percent. As with Manhattan attorneys, Clark County attorneys perceive bench trials as riskier than jury trials. Pervading that perception is a deep concern about judicial predilection, and a widely shared view that a group of laypersons is a far more preferable factual arbiter than a judge.

Almost to a person, the attorneys with whom I spoke believe judges are oriented towards the prosecution's viewpoint — a feature they attribute to a mix of judges' prior experience (until the most recent election, many were former prosecutors),[167] electoral incentives,[168] and habituation to the trial process and criminal enforcement generally.[169] In contrast, attorneys perceive juries as more defendant friendly.[170]

[167] LV-11 (Feb. 4, 2022) (noting that until the 2020 election cycle, the "bench [was] extremely prosecution oriented"); LV-23 (Mar. 17, 2022) (Until the 2020 election, "I would say of our 35ish departments, 25 were state or federal prosecutors, maybe more. As a defense attorney working here for so long, I don't want to put my case and the decision in the hands of a former prosecutor . . . [N]obody would want to trust their criminal defense case to those given judges."); LV-12 (Feb. 8, 2022) ("Whether it was by virtue of just a move for diversity or whatever else, we had seven or eight people elected from the Clark County public defender's office to the bench this last go around, which is a huge, huge turn of events.").

[168] *E.g.*, LV-12 ("Look, the easiest path to re-election is not falling too far outside the norm, right. . . . I think honestly, it's a lot easier to be too hard on crime and get re-elected than it is to be too soft. That's part of what drives the thought process away from allowing a judge to decide."); LV-21 (Feb. 8, 2022) ("One of the reasons I don't prefer a bench trial to a jury trial, or don't even think along the lines of bench trial, is what do I want? Do I want a dozen people with common sense? Especially if I'm going to do a focus group or two before. Or do I want a guy that's got to run for reelection and is concerned about being in the newspaper or on TV for having ruled my way? It's a pretty easy choice.").

[169] *E.g.*, LV-23 ("[I]f you can argue a case or muddle up a case or confuse a case or just make a mess of a case, you have a slugger's chance with a jury. With a judge, much more difficult."); LV-22 (Feb. 10, 2022) ("I think, generally speaking, a judge is . . . on the bench day in and day out. They know how to weed through evidence in my opinion. And so I think that's why you go to a jury. I mean, [a jury is] not as sophisticated . . . . You can appeal to a jury, I think, emotionally more than you can to a judge because the judge is on the bench day in and day out.").

[170] *See, e.g.*, LV-12 ("Do I think I have a better chance with a judge or a jury? My general impression is that I have a better chance with a jury than I do with a judge, that

These perceptions of judges vs. juries for the most part are based on intuition rather than comparative experience, since few attorneys have had bench trials at all. Yet the perceptions are so deeply ingrained that defense attorneys rarely even consider a bench trial. As one attorney summed up the common view, "I trust juries more than I trust judges. I can't even tell you the last time I contemplated a bench trial in state court."[171]

Prosecutors in Nevada have the right to a jury trial but, as in Philadelphia, this seemed to have little to no effect on bench trial prevalence.[172] To the contrary, attorneys perceived that the prosecution would likely prefer a bench trial in most cases.[173] None of the attorneys with whom I spoke had ever had the experience of seeking a bench trial and being denied one by the prosecution.

As in Manhattan, defense attorneys in Clark did not perceive any sort of sentencing tax for a jury trial as opposed to a bench trial. Some even recalled some cases in which they perceived a sentencing benefit from opting for a trial over a guilty plea, but noted this benefit would likely only come from a jury trial rather than a bench trial. As one such attorney explained:

> [T]here's a trial tax [versus a guilty plea], but the opposite is true too if it's particularly empathetic but to show a judge that it's not run of the mill may take some time. It may take a couple days of presenting things. The only way I get that much time is to do it in front of a jury, where they have to give you the time as opposed to a bench trial where they're going to be up my backside to move quickly.[174]

they are going to be more empathetic."); LV-21 ("I trust juries more than I trust judges.").

[171] LV-21.

[172] *See supra* note 129 and accompanying text.

[173] *E.g.*, LV-23 ("I think they [prosecutors] would go for it [a bench trial] more times than not.").

[174] LV-12; *see also* LV-11 (observing a trial tax in most cases, but noting that sometimes, if after hearing the evidence at trial the judge believes the prosecution's plea offer — which must be put on the record before a trial — was not good enough, the judge might sentence more leniently); LV-21 (recalling some cases in which a jury trial was

Until it was ended by the Nevada Supreme Court in 2006,[175] Clark County had a history of judicial signaling to litigants in felony cases. Attorneys practicing in Clark County before 2006 recalled off-the-record discussions in chambers in which judges would exert pressure on both sides to come to an agreement.[176] Yet these discussions never veered into discussions of a potential bench trial; neither the judge nor the defense attorneys seemed even to consider a bench trial as a potential avenue.[177] This "back room" practice had echoes of Cook County — yet in Clark, it generated guilty pleas rather than bench trials.

Following the demise of these back-room plea negotiations, in June 2019 the Nevada Supreme Court adopted Rule 252, allowing for settlement conferences in criminal cases under the auspices of a judge *other than* the judge assigned to adjudicate the case, with strict prohibitions on communications between the trial and settlement judges.[178] The Clark County defense attorneys with whom I spoke were

chosen solely as a sentencing mitigation measure because "to allow the facts to develop often allows a person listening to it to say, 'Mmm, I understand.'").

[175] *See* Cripps v. State, 122 Nev. 764, 766 (2006) (prohibiting any judicial involvement in plea discussions with sole exception that judge may indicate on-the-record their inclination to follow parties' sentencing recommendation, overruling *Standley v. Warden*, 115 Nev. 333 (1999)).

[176] *See* LV-11 (noting that "in [the] old days," judges used to bring the parties "back to chambers to try to work out a resolution"); LV-23 ("There would be bench conferences, and the judge would take it upon him- or herself to say, 'Hey, why are we going off to trial on this?' It's just conversational . . . at the bench or in chambers. . . . The judge would never go on the record in my cases, and I think this is fair to say for most, to pressure either side to deal a case. But in chambers, sure."); LV-12 ("Years ago, it used to be common for the judges to bring people into chambers and try to resolve cases. Happened all the time. They would pressure people. I've actually had judges say directly to me in chambers, 'You know . . . if you go to trial, you're going to get a trial tax.' My response is generally, 'You're not going to punish him for having a stupid attorney, I hope, judge.' We would have these kind of back-and-forth arm twisting.").

[177] *See* LV-23 ("I've never heard of a judge even really suggesting it [a bench trial]. . . . It's really not done.").

[178] Order Amending Rules 250 and 252, Nevada Supreme Court Administrative Docket 491, exhibit B (June 7, 2019) (codified as NEV. ST. SUP. CT. R. 252 (2020)), https://nvcourts.gov/__data/assets/pdf_file/0017/22913/adkt_0491_order_amending_scr_250_and_252.pdf [https://perma.cc/92YZ-764D]. If the plea agreement contains a sentencing stipulation and the trial judge ultimately does not follow it, a defendant may withdraw his plea. *Id.*

all extremely pleased with the settlement conference system, viewing it as helpful to achieving the best possible outcome for their clients.[179] With this system in place, most saw even less of a reason to incur the risk of a trial, let alone a riskier (from their point of view) bench trial. As one attorney candidly described the process:

> I hate to say this but . . . as low as our trial rate is, there are certain cases that should go to trial. There's certain cases that shouldn't. The vast majority shouldn't. . . . The vast majority, there's been an investigation done. Most of the time, the state's got a pretty good case. . . . [A] lot of us liked the way that it worked [pre-2006]. Not the arm-twisting. . . . But outside the arm-twisting, there is a value to have a neutral party come in and say, "Prosecutor, you're a little high on this and defendant, you need to think about this because there is a risk involved just like your attorney said." You put those things together and it just made sense to go back to the old settlement conferences.[180]

Whatever the processes available, then — be it the off-the-record discussions with the trial judge that occurred before 2006, the recently-established settlement conferences with a third party, or the period in between when neither option was available — defense attorneys in Clark County rarely, if ever, contemplated bench trials. Their perceptions of judges and juries seem impervious to shifts in pre-trial processes and procedures.

### *D. A Medium-Prevalence Jurisdiction: Marion County*

Marion County, Indiana, encompasses the city of Indianapolis and surrounding areas. In 2019 approximately thirty-six percent of trials

[179] *See, e.g.*, LV-22 ("I think the settlement conferences are great because it is that type of conversation. Like, 'I'm not a jury. So what's your problems? What are your strengths? What are your weaknesses in your case? And why aren't we resolving this? Why are we spending so many thousands of dollars to go to trial when you guys both kind of know where this is going to be in the end?' So I think it's a good thing. So now it's a combination of there's not a lot of behind the scenes, off-the-record stuff, but we have the option to do a settlement conference and some judges are really good at it."); LV-21 (finding the new settlement conferences "helpful").

[180] LV-12.

were bench trials. Marion appears to utilize a case-tracking mechanism similar to Philadelphia's, albeit without a waiver presumption. In 2019, the lowest-level felony cases (known as a "Level 6" under Indiana's felony classification[181]) along with certain misdemeanors were assigned to certain courtrooms, while higher-level felony cases ("Level 5" and above) were assigned to different courtrooms.[182] (Since 2021, the division between Level 6 and higher level felony cases remains, with some reorganization among the Level 6 courtrooms.[183]) A large majority of Marion County's felony bench trials (sixty-five percent) take place in the lower-level felony subdivision; the bench trial rate in that division is sixty percent, whereas it is just twenty percent in the higher-level felony subdivision.[184]

Why is there such a large disparity in felony bench trial prevalence between the two types of felony courts? In interviews with defense attorneys, two pervasive themes emerged. First, strategy: attorneys in the lower-level felony courts often use bench trials as a tactic to dissuade prosecutors from tracking down reluctant witnesses. Second, signaling: the communications defense attorneys receive from both prosecutors and judges can sometimes push them towards counseling clients to opt for a bench trial.

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[181] *See* IND. CODE ANN. § 35-50-2-7 (2023).

[182] *See* M-14 (Oct. 12, 2021); M-13 (Oct. 6, 2021); M-12 (Sept. 24, 2021) (describing pre-2021 system, in which certain judges were assigned only domestic violence cases charged either as level 6 felonies or misdemeanors; others were assigned level 6 drug felonies; others were assigned other level 6 felonies; and the remaining judges were assigned "major felonies," *i.e.*, all felonies level 5 and above).

[183] *See* MARION SUPER. CT., MARION COUNTY LOCAL COURT RULES LR49-CR2.2 & LR-CR2.3-101, https://www.in.gov/courts/files/marion-local-rules.pdf (last visited Aug. 17, 2023) [https://perma.cc/22EC-3SL9] (describing the assignment of cases to the different felony subdivisions). The post-2021 system eliminated specialized domestic violence and drug courts within the lower-level felony subdivision, and now assigns any level-6 felony or misdemeanor to any of the courtrooms in that subdivision. *See* M-13.

[184] *See Indiana Trial Court Statistics By County, Marion County 2019*, IND. CTS., https://publicaccess.courts.in.gov/ICOR/ (last visited Aug. 17, 2023) [https://perma.cc/VR5P-EC6Z] (showing 63% of all felony bench trials are for cases in which the most serious charge is a Level 6 felony).

1. Bench Trials as a Strategy

When attorneys defending lower-level felony charges know from their clients or suspect from pre-trial discovery[185] that a key witness is unlikely to appear for trial, they will often elect a bench trial.[186] Attorneys explained that a bench trial puts less pressure on prosecutors to ensure witnesses' appearance because prosecutors are simply more willing to lose before a judge than a jury.[187] As one attorney described the defense calculus:

> Especially in, like, Level 6 felonies . . . it's a very common defense attorney thinking that if you set this for jury, well, now flags are raised for the prosecutor and . . . it's going to be now their number one priority. They're going talk to their supervisors, they're going to hassle their witnesses. Whereas if it's a bench trial, they have fifteen [cases] set a week and it's not on their radar. And so they're much less likely to really, really work to get witnesses to show up. And so when we're thinking

[185] Indiana allows witness depositions in criminal cases. *See* IND. R. CRIM. PROC. 21 (1997); IND. R. TRIAL PROC. 32 (2020). For the most part, attorneys felt that depositions had large effects on the decision to plead guilty and more marginal effects on the choice of fact-finder. *See, e.g.*, M-15 (Nov. 5, 2021) (depositions do "not really" affect choice of fact-finder); M-14 (depositions almost never affect choice of fact-finder, unless a deposition were to reveal "a legal reason why . . . [a] case should be a not guilty"); M-12 (depositions do not affect the choice of fact finder "all that much," noting that on the margins, impeaching witnesses with prior deposition testimony is probably more effective with a jury than a judge and therefore depositions might facilitate more jury trials); M-13 (depositions facilitate plea bargaining when witnesses appear and might facilitate advice to waive to a bench trial if witness does not appear, but depends heavily on the nature of defense and importance of witness).

[186] *See* M-14 ("[A] lot of times the person will say, the client will say she's not going to come. You will look at the criminal history, she's never come before. And you can waive it to bench because you know that she's not going to show up."); M-13 ("With domestic violence cases, a lot of the calculations that you're considering is, is this person going to show up? And so, those cases generally wave to bench trial.").

[187] *See* M-14 (A bench trial "will put less pressure on the prosecutor to go out and find them [witnesses]"); M-11 (Sept. 3, 2021) ("[I]f the witnesses are really squirrelly, not cooperative, if it's a jury trial, the state's going to put in a lot more effort to going out and finding them and bringing them to court in the back of a police cruiser if they have to.").

> witnesses are kind of on the fence about whether they're going to show up or not, we're more likely to set it for a bench trial.[188]

In some cases, prosecutors who fear witness non-appearance but are not certain enough of it to dismiss their case may even encourage defense attorneys to waive a jury trial as a means of hedging an anticipated trial loss. As one defense attorney described:

> Sometimes if you have a good relationship with a prosecutor, they won't come out and tell you, "My alleged victim is uncooperative," but they might say, "You might want to consider waiving to bench." And if it's someone that you trust, you kind of know that's the lingo of, "I can't find my witness." . . . They're not as worried about getting a not guilty from a judge rather than going through a whole day trial, working everything up only for twelve people of the community to say, "Really? You brought me in for this? [The victim] is not even here. Why am I here?"[189]

2. Judicial Signaling

Defense attorneys also reported electing bench trials in response to signals from the trial judge that doing so would be beneficial. In rare instances, the signals may be overt, as one attorney described:

> If you've had a lot of pre-trial motions and the judge has really gotten [a] pretty good sense of what the case is about, the judge may say, "Have the parties considered waiving this? I think we can get this done." Or they will give [a] "Ms. [], have you talked to your client about waiving[?]" [W]hich is kind of a, "Hint, hint. Ms. [], I'm probably going to rule in your favor, but I can't say that." That doesn't happen often, but you kind of . . . [m]ost of us are generally in one court, predominantly, so you know your judge.[190]

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[188] M-21 (Oct. 29, 2021).

[189] M-11.

[190] *Id.*

Another attorney even recalled some judges "directly saying that the penalty is going to be stiffer or inferring it if you go to a jury trial."[191]

More often, though, signaling is indirect. Case scheduling is one example: by setting a jury trial date far into the future and a more immediate bench trial date, judges send a strong signal to detained defendants who are facing a relatively low risk of additional incarceration beyond their sentencing date.[192] As one attorney explained recalling their years of practice in the lower-level felony courts:

> Some of the judges, they're only signaling. Honestly, they did it by the speed at which they'd set a bench trial versus the jury trial. That's a well-known fact. When you had an in custody [client], that was the first question that client always asked you. That was one way that they [judges] tried to get you to waive to the bench. . . . The courts would set a bench trial in three or four weeks. They'd set a jury trial all the way up to your seventy-day speedy [trial] request. Bench trial, three or four weeks or you can wait for nine or ten weeks to have your jury trial. Most of the time, anyway, if they're convicted, they're probably going to get probation. If they were going to go to do any amount of prison time, they would get out of [pre-trial detention at] the Marion County jail, which was not a great place to be, and they would mostly prefer to go to DOC [the Department of Corrections, where defendants would be sent post-conviction]. It was a better facility.[193]

The delay differential between bench and jury trials is so significant a consideration in these lower-level felony cases that it factors into how some attorneys advise their clients on the bench vs. jury choice. As one attorney lamented, for detained defendants — most of whom simply

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[191] M-12.

[192] Level 6 felonies carry a penalty of 6 months to 3 years, but many defendants may be eligible to be sentenced as a Class A misdemeanor, *see* IND. CODE § 35-50-2-7 (2019), and defendants convicted of Level 6 felonies end up serving only half their sentence term, *see* IND. CODE §§ 35-50-6-3.1, 35-50-6-4 (2023).

[193] M-12; *see also* M-21 ("I can remember one judge a couple times that would say, 'Hey, we can always . . . [y]ou're welcome to waive to bench if you want to get this done sooner,' and it was really more of a like, 'Oh, I understand you're in a hurry to get to jury, and I can get this done sooner at a bench trial . . . .'").

cannot afford to pay the cash bond — the time differential is "impacting. . . . Even if I am to tell somebody, I feel obligated to say, 'I think this is a better case for a jury. But if you want to waive, you're going to get a faster trial.'"[194]

Judges also send signals through sentencing. As in the other jurisdictions with high bench-trial prevalence, attorneys in Marion's lower-level courts feel there is sometimes a sentencing discount for electing a bench over a jury trial. As one attorney explained:

> It's very judge specific. In probably the majority of the [lower-level] felony courts it's a thing. It's an unsaid thing, it's an unspoken thing because exercising your right to a jury can't be held against you, but there is a sense that, "If I waive, I'm not going to get as tough a sentence" in a lot of courts.[195]

This attorney differentiated the major felony courts, where "unspoken, there's a trial tax but not a jury trial tax. So, you're going to get probably close to the same sentence either way."[196] Another attorney described their sentencing calculus in the lower-level felony courts similarly:

> If it's like a drop-dead loser, I often find it's better to do a bench trial because if the client's insisted on a trial and won't take a plea, I generally find that bench trials are better because they're quicker . . . . The sentencing goes easier, sometimes you can beat the plea [offer sentence]. I've, in my experience often . . . if you're only taking two hours out of a judge's day instead of eight to twelve — they're much more likely to just sort of slap your client on the wrist and let him go.[197]

Judicial signaling occurs in even less tangible ways. One attorney described an unspoken predisposition towards bench trials in the lower-level felony courts:

> Even if it [the bench trial preference] isn't spoken, it's certainly felt in every court that you're in. You get this whole *jury trial*.

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[194] M-14.

[195] M-11.

[196] *Id.*

[197] M-15 (adding that this was the situation with "the vast majority" of judges).

> Honestly, they act like doing their job is a big deal if they have to sit there for a day doing a jury or whatever. At this level are just one-day juries. You definitely get a sense from a lot of judges that they sweat over this whole jury calendar and having to do juries, and having to find a courtroom, and having to find someone else to do the other calendar. I can't think off the top of my head the types of things that are said that make you understand that they prefer bench trials but I'm going to guess an attorney in this county would tell you that every judge they deal with prefers bench trials. Even the good ones. Even the ones that I would prefer a bench trial with don't want to do juries.[198]

Or as another attorney summed up their assessment of the dynamic in Marion's lower-level felony courts: "Judges really encourage bench trials in those kind of courts."[199]

Judicial signaling, however, is not universal. One attorney did not recall it occurring in any courtrooms in which they practiced.[200] Because public defenders in Marion County are assigned to a single courtroom for lengthy periods, individual defenders' experience depends heavily on their particular courtroom assignments. Attorneys with a range of experience before many different judges — both private attorneys and defenders who had been assigned to multiple different judges in the lower-level felony courts over the course of their career — had experienced judicial signaling at some point, indicating it to be somewhat common even though not universal.

## III. IMPLICATIONS

Part I of this Article demonstrated large heterogeneity in felony bench trial prevalence across jurisdictions, including large heterogeneity within many states. In light of intra-state disparities, this variation is not well explained by state-level legal regimes. Nor, given the significant variance in bench trial prevalence across the five jurisdictions studied in Part II, is it likely well explained by seemingly important county-level

[198] M-12.

[199] M-21.

[200] *See* M-13.

factors those jurisdictions all shared — namely jury pool demographics and docket pressure.

Part II revealed an important insight into the puzzle of felony bench trial heterogeneity: namely, that understanding it requires we look to the internal dynamics among criminal trial courts' repeat-players. As Part III will elaborate, these dynamics collectively build and sustain institutional structures of fact-finder choice. Part A discusses how those structures sustain themselves, analyzing them through a framework from organizational sociology of the three foundational pillars of institutions. Part B considers how these structures impact power allocation across institutional actors (defense, prosecutor, and trial judge), and contemplates lessons for the jury trial right more generally.

### *A. The Three Pillars of Fact-Finder Choice*

As Part II revealed, fact-finder choice is less a choice than an ingrained institutional structure, much like those of plea bargaining or sentencing.[201] Heterogeneity in bench trial prevalence across the five studied jurisdictions reflects differences in those institutional structures. In each jurisdiction, we see the institutional structure of fact-finder choice arising and sustaining itself through one or more institutional "pillars" — the "central building blocks of institutional structures, providing the elastic fibers that guide behavior and resist change."[202] Decades of work in organizational sociology has identified, in sociologist Richard Scott's clarifying framing, those three institutional pillars as *regulative*, *normative*, and *cultural-cognitive*, concepts further defined in the following discussion.

In Philadelphia and Marion County, fact-finder choice is a function primarily of the regulative pillar: top-down rules, rewards, and sanctions

[201] *See* Ulmer, *supra* note 11, at 490-92 (reviewing the literature on how court communities develop "distinctive processual orders" with respect to sentencing and plea bargaining, borrowing from Anselm Strauss' description of "processual order" as how "local organizational adaptations produce, maintain, and transform norms and practices"); *see also* ANSELM STRAUSS, CONTINUAL PERMUTATIONS OF ACTION 254-58 (1993) (describing "processual ordering" as encompassing the "creative or constructive aspects" of negotiated interactions that produce social orders within organizations).

[202] SCOTT, *supra* note 17, at 57.

that generate behaviors through instrumental motivations.[203] In Philadelphia the case assignment system mandates sorting most felony cases to presumptive bench trials, enforced through rewards (a bench trial sentencing discount) and potential sanctions (a jury trial sentencing tax).[204] Marion's system similarly dispenses bench trial rewards in the form of diminished prosecutorial efforts to court reluctant witnesses, earlier trial dates (critical for defendants detained pre-trial on charges carrying relatively low likely prison terms), and occasionally, sentencing discounts.[205]

In Manhattan, it is normative forces that principally forge and sustain fact-finder choice: shared expectations among judges, prosecutors, and defense attorneys as to how things should or should not be done.[206] Primary among them is the expectation that trial judges should not signal — on or off the record — their inclinations about the strength of the prosecution's case, the likelihood of conviction on a given charge or the appropriate sentence.[207] There is also a shared sense among the defense bar that a bench trial is far too risky without such a signal from the trial judge.[208] This combination of expectations — that judges should not show their hand and that bench trials are too risky unless they do — creates a structure in which judges typically keep their inclinations to themselves, and defense counsel almost never counsel a client to seek a bench trial.

Finally, in Cook County and Clark County, fact-finder choice is mostly a function of cultural-cognitive influences — that is, a social reality constructed through a shared set of beliefs about bench and jury trials which, over time, has ingrained an acceptance of one or the other form of trial as "the way we do these things."[209] Cook defense attorneys

[203] *Id.* at 59-64.

[204] *See supra* Part II.B.1.

[205] *See supra* Part II.D.

[206] *See* SCOTT, *supra* note 17, at 64-66.

[207] *See supra* notes 161–162 and accompanying text.

[208] *See supra* notes 154–159 and accompanying text.

[209] SCOTT, *supra* note 17, at 68 (noting that in the cultural-cognitive pillar, "compliance occurs in many circumstances because other types of behavior are inconceivable; routines are followed because they are taken for granted as 'the way we do these things'").

do not so much *choose* bench trials; they *assume* them. The institution of fact-finder choice in Cook is effectively a culture of bench trials, one built through decades of judicial signaling to litigants of likely trial outcomes and sentences, and other forms of judicial communications that impart a strong preference for bench trials over jury trials.[210] The culture is so well-entrenched that requesting a jury trial is considered almost aberrant.[211] The same sort of acculturation occurs in reverse in Clark, where distrust of judges as fact-finders is so ingrained that defense counsel generally do not even consider bench trials as an option, let alone recommend them to their clients.[212]

While each institution has a dominant pillar, each draws on one or more of the other pillars, too. And the pillars reinforce each other.[213] If the degree of bench trial prevalence (whether high or low) is mostly a product of rules and prohibitions, it persists out of shared normative expectations and cultural cognition. If it exists as a culture or a set of norms, the culture and norms are enforced through some degree of sanctions and rewards. The mutually-reinforcing pillars strengthen the institutional structure such that, when asked to evaluate that structure, nearly every attorney I spoke with in each of the five jurisdictions landed somewhere between ambivalence to strongly favoring it — even as they might take issue with certain of the regulative, normative, or cultural-cognitive aspects that support it.

Philadelphia attorneys, for instance, complained amply about the jury trial tax. But when asked whether they were satisfied overall with the existing structure of fact-finder choice, they tended to see it as the only conceivable approach for a high-volume jurisdiction — even though Philadelphia's high bench trial rate is, in fact, a relative outlier among all the high-volume jurisdictions in this study.[214] And for the most part, they

[210] *See supra* notes 137–140 and accompanying text.

[211] *See supra* notes 147–148 and accompanying text.

[212] *See supra* notes 171–173 and accompanying text.

[213] SCOTT, *supra* note 17, at 70-71 ("In stable social systems, we observe practices that persist and are reinforced because they are taken for granted, normatively endorsed, and backed by authorized powers. When the pillars are aligned, the strength of their combined forces can be formidable.").

[214] *See* P-25 ("The reality is, if we didn't do bench trials, the system would grind to a halt. It would just not function."); P-23 ("I think [the bench trial-heavy system is] a great thing. I think if you didn't have it, the backlog would be far greater than it is now."); P-

found the existing structure normatively desirable, or at least preferable to the alternatives (that is, more jury trials or more guilty pleas).[215] The system in Philadelphia may function primarily through top-down rules (courtroom assignments and sentencing differentials). Still, it has become part of the normative expectations of the litigants and the culture of the courthouse — so much so that defendants themselves sometimes ask their lawyers to request a bench trial even if the lawyer doesn't recommend it.[216]

Cook attorneys complained about the courthouse's cultural aversion to jury trials, yet appreciated the efficiency, risk-reduction, and sentencing benefits that attended bench trials.[217] They recognized their

24 ("We just have so many cases in Philly that we have to have a system. We can't do all juries all the time. We can't. . . . We have to have a system that allows for efficient, fair justice. And if we did it all by jury, we would never get anything done. We can't get it done that way.").

[215] *See* P-23 ("I think it's great. Over the years, we've had some great judges hear waiver trials, whether in the waiver program or majors judges or in the homicide program. We still do. I mean, we still have some really, really good judges who are balanced, fair-minded. That's all you can ask for in these cases, and again most of these cases are not that complicated. The very small percentage of cases are complicated. So, you can move these cases through and get good results. You get a nice result."); P-22 ("I think that when there's a good pick of judges and they understand what sufficiency means, and that you can't just believe all cops, I think [having more bench trials] is a great thing. I think it's a really good thing for people. I think the system would be so ridiculously jammed up, I think it's lovely to take care of a drug case to a not-guilty in 45 minutes instead of three days. . . . I think it's a great way of taking care of a lot of things, and in the process, taking care of a lot of clients, not having things hang over their head for a year. I think you'll get a really small sentence if you lose in a non-jury room than if you lose in a majors room, so I think there's a lot of good to it. The problem is that we elect judges in Pennsylvania, and it's a freaking disgrace. When it's not a disgrace, it works out really well, and we have a ton of things a year, and when it doesn't work out so well . . . then it goes a little bit worse."); P-24 ("I don't know [if a bench-trial heavy system is] better or worse. . . . I like juries for a variety of reasons because I think that you're able to really present a full picture. And for the right case, that is the right way to do things. That being said, in front of the right judge, from an efficiency standpoint, there's real value to judges that have the ability to have real reasonable doubt and don't see individual people as just chattel, sort of the machinery coming through and just trying to get through a list.").

[216] *See supra* note 134 and accompanying text.

[217] *See* C-12 ("I'm not sure what I think about [the system] because the other players in the system, the judge and the prosecutors, because they're incentivized to not let the system collapse, we get some benefit from it, too. If it were strictly us being stepped on

own roles in perpetuating the institutional structure, acknowledging that it continued, in no small part, out of instrumentalism. For each of the players in the system — defense attorneys, prosecutors, and judges — the system of bench trials holds important benefits.

Manhattan and Clark attorneys lamented the inability to get useful signals from trial judges as to likely conviction and sentencing outcomes but embraced a culture that prizes laypersons as ultimate arbiters, believing it produces more favorable outcomes for defendants.[218] And

by the other parties, we would put our foot down, and we would let this disaster of every case being a jury trial happen."); C-13 ("I do have a bias towards the jury trial in general. . . . [But] despite my bias, I can see the benefit. It is a little bit terrifying to go to trial and try to talk to 12 people about putting aside some evidence and understanding that if you lose, you're likely, I mean, at least at the level I practice, they may be facing probably close to life in prison, if not life in prison, or to take a plea, a blind plea. . . . [W]here there is the system of a little bit of pressure, pressure that's coming in from the judge, some ability to take trials more quickly because they're bench trials, [I wonder] whether the outcomes for the clients might end up slightly better, I don't know . . . ."); C-15 ("There should be more jury trials, absolutely but it should always be the choice of the client after informed knowledgeable advice with their lawyer. There should be somehow a way to keep check on judges. I don't know how you do it, though. The judge is always the sentencer. So, how do we do that? Do we make the jurors the ones who sentence your client also? That would stop the jury tax if we took it out of the hands of the judge but I don't know if that would be better . . ."); C-23 ("I think it's just the system and the way it works it's a lot easier, because, again, you know the facts. Every lawyer knows the facts of what they have and can and can't do. They know the judge[], what he's going to do or not do.").

[218] *E.g.*, N-23 (noting that even in New York City boroughs where signaling was more common, "it's just generally accepted practice that you're better off trying a case to 12 people, and all you need is one . . . than to take a chance with a judge."); N-13 ("I think, clearly, jury trials [are better]. . . . I've been very successful in front of jury trials. My office, we have an acquittal rate somewhere around, you know, 50% straight acquittal. If you include convictions to lesser counts or cases where we're basically admitting to a misdemeanor but arguing for the acquittal of the felony, I think we can get it up to about 65%. You know, I think it's an adversarial system. . . . [F]or the most part, you know, juries are a good . . . are the best way for our clients and the best chance that they have to be acquitted."); N-12 ("Generally, [waiving a jury] it's not helpful, particularly because you would be waiving a jury in front of a judge who you've had plea negotiations with, who has seen all of your client's record, has decided what evidence is admissible and what's not, and then is supposed to ignore what they said was inadmissible [after they] made rulings about what they can consider and what they can't, and humans just actually can't do that."); N-11 (noting they would be "worried about [an] ineffective assistance claim" if they counseled their client to waive a jury for a bench trial); LV-21 ("I trust

while some Marion attorneys grumbled about a jury trial tax and a bail structure that incentivizes speed over all else in lower-level felony cases, others appreciated the benefits bench trials offered for defendants, or else simply could not contemplate an alternative.[219]

In all, then, across five jurisdictions with very different institutional structures of fact-finder choice, attorneys nevertheless shared a common sense. Most perceived their courthouse's structure of fact-finder choice to be instrumentally beneficial, normatively desirable, and presumptively immutable. In each jurisdiction, the institutional structures of fact-finder choice are deeply entrenched.

### *B. Fact-Finder Choice and the Jury Trial Right*

The foregoing account offers a different lens through which to understand the Sixth Amendment's jury trial right. That right is both contingent and contextual. How it operates is a function of the institutional structures within a given courthouse community — the regulative, normative, and cultural-cognitive forces that collectively create and establish how fact-finder choice unfolds on the ground.

In one sense, this should not be surprising. Extensive qualitative work has documented how the interactions within the courthouse's community of professionals collectively create and sustain the criminal process and its outcomes. But that work has largely focused on charging, plea bargaining, and sentencing.[220] In these areas, prosecutors exercise

juries more than I trust judges."); LV-12 ("Do I think I have a better chance with a judge or a jury? My general impression is that I have a better chance with a jury than I do with a judge, that they are going to be more empathetic."); LV-22 ("You can appeal to a jury, I think, emotionally more than you can to a judge because the judge is on the bench day in and day out. . . . They [judges] know how to weed through evidence in my opinion. And so I think that's why you go to a jury."); LV-23 ("if you can argue a case or muddle up a case or confuse a case or just make a mess of a case, you have a slugger's chance with a jury. With a judge, much more difficult.").

[219] As one attorney said when asked if they were satisfied with the existing structures of fact-finder choice and the relative prevalence of bench and jury trials: "That's like that David Foster Wallace joke, two fishes are swimming. And an old fish swims by and says, 'How's the water?' and the young fish looks at the other young fish and goes, 'What the hell's water?'" M-15.

[220] *See, e.g.*, EISENSTEIN ET AL., *supra* note 11 (plea bargaining and sentencing); Jo Dixon, *The Organizational Context of Criminal Sentencing*, 100 AM. J. SOCIO. 1157 (1995)

considerable power, dictating the charges to which a defendant must answer and thus setting the parameters of a possible sentence.[221] Not so with fact-finder choice, where it is defendants who seemingly hold the reins of power. Even when the prosecution has a jury trial right (as it does in most jurisdictions), it cannot waive it without the defendant's assent.[222]

And so, in another sense, the account offered here should surprise. How can a right theoretically controlled by defendants vary so much in its implementation across jurisdictions? And what does this tell us about how the jury trial right is actualized in trial courts? This Section considers these questions.

### 1. Institutional Structures, Defendant Choice, and the Jury Trial Right

Theoretically, every felony defendant can opt for a jury or a bench trial. In actuality, that choice is heavily influenced and constrained by the institutional structures of the courthouse in which a defendant finds themself. Depending on those structures, the choice of factfinder may be a pivotal consideration or hardly a choice at all.

Jurisdictions whose institutional structures are rooted primarily in norms and culture seem to lean more toward the latter. In Cook County, the culture of bench trials is so entrenched that defense attorneys almost never counsel their clients to opt for a jury trial, making fact-finder selection less a choice than a presumption. Likewise, in Manhattan and in Clark County, norms against judicial signaling (in the former) and a culture that prizes lay arbiters (in the latter) result in an overwhelming defense attorney preference for jury trials — such that bench trials are rarely even considered, let alone advised.

(plea bargaining and sentencing); Lynch et al., *supra* note 11 (charging, plea bargaining and sentencing); Jeffrey Ulmer & John H. Kramer, *Court Communities under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity*, 34 CRIMINOLOGY 383 (1996) (sentencing).

[221] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-23 (2001).

[222] And, as recounted in Part II, defense attorneys in jurisdictions in which prosecutors have a right to a jury trial rarely experienced prosecutorial refusals to accede to a defendant's bench trial request.

Meanwhile, in jurisdictions with primarily regulative fact-finder selection structures, defense attorneys seem to consider fact-finder selection more strategically, advising bench trials in some cases and jury trials in others. In both Philadelphia and Marion, a formal, court-imposed judicial assignment system operates in tandem with informal carrots and sticks. In Philadelphia (and to some extent Marion),[223] defense counsel perceive sentencing benefits to bench trials;[224] and in Marion, defense counsel perceive a strategic benefit to bench trials in cases where defendants are detained on charges carrying low likely penalties, or where prosecution witnesses' appearance is in doubt.[225] These regulative features collectively push defense attorneys to counsel clients in favor of bench trials in most lower-level felony cases while opting for jury trials in certain lower-level cases and most higher-level ones — making fact-finder choice a key part of trial strategy. The choice of fact-finder is rarely assumed; it is made.

This dynamic is counterintuitive. From one perspective, the jurisdictions with extremely high and extremely low bench trial prevalence would seem to share little in common regarding the jury trial right: the culture of fact-finder selection in Cook County is anathema to that in Clark, and vice-versa. But in another sense, these jurisdictions share a deference to culture as a key force in fact-finder selection. That shared deference translates into a diminished sense of choice among defense counsel across these jurisdictions.

This phenomenon offers an important insight into the relationship between choice, rights, and power. The jury trial right might appear at its zenith where jury trials predominate over bench trials. But can we consider a right robust when defendants have little genuine agency over its exercise (or waiver)? In turn, genuine agency in fact-finder selection appears to confer a degree of power in felony adjudication. In jurisdictions where the choice of fact-finder is not pre-ordained, defense counsel use it to their clients' benefit — as a strategy; a source of leverage; an adversarial tactic. In a system where defendants and their

[223] *See supra* notes 195–197 and accompanying text.

[224] *See supra* notes 113–122 and accompanying text.

[225] *See supra* Part II.D.1.

lawyers often have very little to work with, these benefits can be meaningful.

2. The Role of Judges in Fact-Finder Choice

The courts-as-communities framework gives us a relational view into the criminal process, emphasizing the interactions between judges, prosecutors, and defense attorneys. In so doing, it also reveals the sometimes-hidden influences of certain institutional actors in criminal processes. Prior work in this vein has, for instance, uncovered the ways in which different prosecutorial norms around charging and sentencing guideline interpretation across jurisdictions lead to different judicially imposed sentences in otherwise similar cases.[226]

So, too, with fact-finder choice. While the choice of fact-finder rests primarily with defendants, defense attorneys across all five jurisdictions revealed how judges' actions influenced their decision-making, whether purposely or inadvertently. Sometimes actions are not the work of individual judges but rather the judicial administration — as in Philadelphia and Marion counties, where court administrators use the powers of case and judicial assignments to steer lower-level felony cases to a set group of judges (and, in Philadelphia, to encourage bench trial selection in lower-level felony cases). Sometimes judicial actions are so widespread they become accepted processes — as in Philadelphia, where defense attorneys uniformly perceived (and expected) a sentencing discount for bench trials, or in Cook, where defense attorneys expected, and sometimes even actively sought, judicial signaling about the likely outcome if a bench trial were chosen. Sometimes judicial actions are sporadic and inconsistent — as in Cook and Marion, where only some

[226] *See, e.g.*, John H. Kramer & Jeffrey T. Ulmer, *Downward Departures for Serious Violent Offenders: Local Court "Corrections" to Pennsylvania's Sentencing Guidelines*, 40 CRIMINOLOGY 897, 921-22 (2002) (mixed-methods study finding departures from sentencing guidelines used to align differences between guidelines range and local jurisdiction's "going rate" based on "local actors' definitions of offender blameworthiness and dangerousness" ); Mona Lynch, *Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court*, 35 JUST. Q. 1309, 1332-33 (2018) (mixed-methods study finding distinct "processual orders" across federal districts influenced the exercise of federal charging discretion, and observing "the centrality of local, structural conditions to case generation").

judges were perceived as offering any sentencing benefit for bench trials, and only in some cases. Sometimes actions constitute desistance — as in Manhattan and (since 2006) Clark, where judges take care to avoid communicating with defense attorneys on how they view the evidence or what they believe the appropriate sentence to be.

Defense attorneys may make the ultimate call of how to advise their client (and their clients make the ultimate call of a bench or jury trial). Still, they do so in a context that is heavily shaped by court administrators, judicial practices generally, and the specific judge presiding over the case. Above all, defense attorneys were keenly attuned to the few leverage points in their jurisdiction where they might exact some benefit for their clients. If existing leverage points were to close, or new ones to open, the defense bar could be counted on to notice.

This is not to say that judges alone can change the institutional structures of fact-finder choice in a given jurisdiction. To the contrary, as this Article shows, the regulative, normative, and cultural-cognitive forces in each jurisdiction are deeply embedded, rendering alternative approaches difficult to envision and, for the most part, undesired.[227] It is simply to point out that while fact-finder choice is a defense prerogative, its exercise is heavily contingent and contextual. And the actions and choices of trial judges are much of what makes it so.

## CONCLUSION AND NEXT QUESTIONS

Little is known about bench trials in felony cases, and almost nothing about the defense choice to utilize them. This Article offers the first attempt to document felony bench trial prevalence at the county level — the key jurisdictional level in criminal cases — and uncover some dynamics underlying it.

A county-level focus uncovers wide divergence in the use of bench trials in felony cases, both across large jurisdictions in the United States, and across jurisdictions of all sizes within states. Interviews with attorneys in five of those large jurisdictions reveal an important insight into the processes of fact-finder selection: it is largely a function of the interactions, expectations, and established practices among defense

[227] *See supra* Part II.A.

attorneys, judges, and prosecutors — features that can vary widely by courthouse. These features over time produce institutional structures of fact-finder selection, and they do so in different ways. In some, the structures of fact-finder selection are largely a function of top-down rules that serve to encourage bench trials; in others, they are a function mostly of established norms; and in yet others they reflect long-term acculturation to a way of doing things.

These different mechanisms, in turn, confer differing degrees of defense agency, and power, in fact-finder selection. In jurisdictions where top-down rules pervade, fact-finder selection is an intentioned choice — a part of defense strategy, much like the decision to testify or present a particular theory of why a defendant is not guilty. In jurisdictions where fact-finder selection is a product more of norms and culture, fact-finder selection is less a choice than a presumption, overcome only by exceptional circumstances in a given case.

Finally, this study reveals the role of judges in actualizing a right held by defendants. Across jurisdictions of different institutional types (regulative, normative, or cultural-cognitive), how trial courts approach their relationships with defense counsel and their practices concerning case assignment, processing, and sentencing heavily influences a defendant's choice of fact-finder. Even in jurisdictions where defendants exercise exclusive control over the ultimate choice of fact-finder, they choose within a particular set of institutional structures. These structures shape and guide the defendant's choice.

This study has also generated questions for future research. First, what creates the conditions in which a given set of regulative, normative, or cultural-cognitive forces take root? The five jurisdictions studied here share similar metrics presumed influential to fact-finder choice, namely, docket pressure, jury pool demographics, and mode of judicial selection; and yet there are wide variations in how each jurisdiction has responded and adapted to those conditions in the context of fact-finder selection. Looking at the broader universe of large jurisdictions that keep data on bench trial rates, do any of these factors (or others) predict bench trial prevalence?

Second are questions about the relationship between bench trial prevalence and other features of a jurisdiction's adjudicative landscape. For instance: do bench trials influence, or are they influenced by, the

prevalence of guilty pleas, dismissals, or trials overall? And what insights does this give us into the potential value, or alternatively costs, of bench trials as an alternative to jury trials and guilty pleas? Future work will explore these questions.

APPENDIX A: DATA STANDARDIZATION

**Relevant units counted.** Most jurisdictions count dispositions by defendant, but a few count by case or, more rarely, by charge. I utilized data from jurisdictions counting by defendant or case, but did not utilize data from jurisdictions counting by charge because such accounting would vastly skew the results (given that most criminal cases usually involve multiple charges arising out of a single incident). Jurisdictions that count by defendant will overstate the number of dispositions relative to jurisdictions that count by case, as many criminal cases have multiple defendants. However, because I am comparing the *rate* of bench trials across jurisdictions — measured as bench trials as a percentage of total trials — what is most important is intra-jurisdictional consistency in the measurement of trials. If a jurisdiction counts by defendant rather than by case, then bench, jury and total trials will be overstated relative to bench, jury and total trials of a jurisdiction that counts by case — making bench trial rates in these jurisdictions amenable to comparison, even if the underlying raw numbers are not.

**Trials vs. guilty pleas.** Some jurisdictions count as "trials" cases that end in a plea mid-trial, while others count those dispositions as guilty pleas. Again, because I am comparing the rate of bench trials (as measured relative to total trials), what is most important is intra-jurisdictional standardization in the method of counting of "trials." A jurisdiction that counts as "trials" tried cases that end in guilty pleas does so for both bench and jury trials, ensuring the numerator and denominator move in tandem. Moreover, among the districts that reported specifically on the number of trials ending in guilty pleas, relatively few criminal cases fell within that category. For these reasons, I used the trial numbers reported by each jurisdiction without concern for how they counted trials that ended in guilty pleas.

**Two-tier courts.** In some jurisdictions, a defendant has an initial trial before a judge before permitting a jury trial as a de novo appeal. In these jurisdictions, I did not include bench trials utilized in the first-tier courts within my bench trial counts.

**Bench trials vs. trials on stipulated facts.** Sometimes a defendant wishing to preserve appellate rights on a pre-trial issue (for instance, a ruling on a motion to suppress) will seek a trial on stipulated facts before a judge. This sort of "bench trial" is effectively a guilty plea. There

is no way to know how many bench trials so qualify. However, the dynamics of such trials make them rare. A defendant would have to plead without an agreement in almost all situations (since prosecutors would almost never agree to a plea that allows a defendant to retain otherwise waived appellate rights); and without an agreement, there is little incentive for a defendant to simply go through the motions of a trial rather than genuinely try the case and thereby secure a chance at an acquittal or conviction on a lesser charge. The qualitative portion of the study confirmed this to be the case: every defense attorney with whom I spoke had either no or almost no experience with pro forma bench trials, nor were they aware of others having experience with it.

APPENDIX B: TOTAL FELONY RESOLUTIONS, BENCH TRIALS AND JURY TRIALS IN 34 COUNTIES IN 2019

| County and State | Total Resolutions | Total Trials | Bench Trials | Jury Trials | Bench Trial Rate |
|---|---|---|---|---|---|
| Anchorage AK | 1,037 | 79 | 1 | 78 | 1.3% |
| Maricopa AZ | 28,321 | 314 | 24 | 290 | 7.6% |
| Alameda CA | 6,142 | 66 | 13 | 53 | 19.7% |
| Los Angeles CA | 38,081 | 1,156 | 19 | 1,137 | 1.6% |
| Orange CA | 10,215 | 236 | 0 | 236 | 0% |
| Riverside CA | 11,986 | 404 | 10 | 394 | 2.5% |
| Denver CO | 7,510 | 134 | 2 | 132 | 1.5% |
| Washington, D.C. | 3,354 | 208 | 40 | 168 | 19% |
| New Castle DE | 2,340 | 110 | 18 | 92 | 16.4% |
| Broward FL | 10,208 | 140 | 1 | 139 | 0.7% |
| Dade FL | 19,115 | 447 | 5 | 442 | 1.1% |
| Palm Beach FL | 7,818 | 127 | 12 | 115 | 9.5% |
| Cook IL | 23,581 | 2,697 | 2,474 | 223 | 91.7% |
| Marion IN | 13,076 | 372 | 133 | 239 | 35.8% |
| Johnson KS | 2,329 | 49 | 6 | 43 | 12.2% |
| Jefferson KY | 5,472 | 59 | 2 | 57 | 3.4% |
| Wayne MI | 10,926 | 555 | 183 | 372 | 33% |
| Hennepin MN | 34,749 | 1,268 | 251 | 1,017 | 19.8% |

| | | | | | |
|---|---|---|---|---|---|
| Bernalillo NM | 7,293 | 98 | 0 | 98 | 0% |
| Clark NV | 10,433 | 102 | 9 | 93 | 8.8% |
| New York NY | 6,343 | 294 | 17 | 277 | 5.8% |
| Kings NY | 4,833 | 150 | 18 | 132 | 12% |
| Queens NY | 2,965 | 141 | 33 | 108 | 23.4% |
| Franklin OH | 8,716 | 94 | 10 | 84 | 10.6% |
| Multnomah OR | 3,204 | 164 | 42 | 122 | 25.6% |
| Philadelphia PA | 8,839 | 1,026 | 695 | 331 | 67.7% |
| Bexar TX | 18,930 | 124 | 12 | 112 | 9.7% |
| Dallas TX | 33,430 | 300 | 58 | 242 | 19.3% |
| Harris TX | 35,337 | 339 | 36 | 303 | 10.6% |
| Tarrant TX | 19,925 | 134 | 6 | 128 | 4.5% |
| Fairfax VA | 1,780 | 131 | 77 | 54 | 58.8% |
| Chittenden VT | 735 | 8 | 0 | 8 | 0% |
| King WA | 5,922 | 193 | 22 | 171 | 11.4% |
| Milwaukee WI | 5,555 | 397 | 30 | 367 | 7.6% |