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WHY ARE FEDERAL JUDGES SO ACQUITTAL PRONE?

ANDREW D. LEIPOLD*

ABSTRACT

Federal criminal defendants almost always prefer a jury trial to a bench trial, but it is unclear why. Statistically, federal judges are significantly more likely to acquit than a jury is—over a recent 14 year period, for example, the jury trial conviction rate was 84%, while the bench conviction rate was a mere 55%. Moreover, while the conviction rate for juries has remained nearly constant for many years, the judicial rate has fallen steadily since the late 1980s. This Article presents the first systematic attempt to explain this “conviction gap.” Using original compilations of government records on over 75,000 federal criminal trials, this Article explores a variety of possible stories that would explain why judges and juries behave so differently. It concludes that some, but not all, of the gap can be explained by identifiable features of those cases that defendants direct toward judges rather than juries. It also concludes, however, that the recent changes in judicial behavior cannot be fully explained on these grounds; instead, the Article hypothesizes that the federal sentencing scheme, which changed dramatically during the 80s and 90s, may well have affected the way judges evaluate the government’s case in bench trials. The latter conclusions may have significant implications for the changes in federal sentencing that are likely to occur over the next several years.

INTRODUCTION

Conventional wisdom tells us that criminal defendants are better off in front of a jury than in front of a judge.¹ If a defendant is innocent, he may

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1. In the well-known language of *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968): “Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” The

prefer a jury trial to a bench trial because of the jury's presumed superior ability to find facts and weigh credibility.² If a defendant is guilty, prosecutors frequently make attractive plea offers to avoid the "uncertainty of trial," by which they mean a risk that the jury will be swayed by some improper consideration and fail to convict. More generally, defendants hope that if their case is heard by a jury, good lawyering will lead to an acquittal regardless of whether they are guilty. Juror confusion, sympathy, or hostility toward the government might give the defendant an advantage he would not receive from a more level-headed or cold-hearted judge. So it is no surprise that more than three-quarters of the federal defendants who go to trial opt for a jury.³

To date, there appears to be no scholarly literature that systematically analyzes the evidence that contradicts the conventional wisdom. It turns out, however, that statistically, a defendant in federal court is almost never better off, and usually is much worse off, in front of a jury. Between 1989 and 2002, the average conviction rate for federal criminal defendants was 84% in jury trials, but a mere 55% in bench trials.⁴ Just as importantly, this "conviction gap" increased dramatically over this period—while the jury conviction rate has increased slightly in recent years, the judicial conviction rate has fallen dramatically.⁵ And if the current disparity were not interesting enough, these figures represent a substantial shift from prior eras. In the middle of the 20th century, federal judges *convicted* at much higher rates than juries; the consistently higher bench acquittal rate is a phenomenon of the very recent past.⁶ So while the conventional wisdom was once accurate, it has not been true for quite some time.

Embedded in these simple observations are two intriguing questions. First, why is there such a difference in outcomes? Even brief reflection suggests a variety of stories that could explain the divergence. Perhaps the

extent to which defendants prefer juries to judges is examined *infra* Part I.B.

2. See generally Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 205–06 (Autumn 1989) (summarizing the perceived advantages of group decisionmaking by juries over a single decisionmaker in bench trials, including increased range of life experiences, ability to consider alternative explanations for the evidence, and ability to identify and correct individual biases).

3. See *infra* note 29 and accompanying text.

4. These figures are derived from the BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 5.22, at <http://www.albany.edu/sourcebook/1995/wk1/t522.wk1> [hereinafter SOURCEBOOK ONLINE]. See *infra* Part I.C.

5. The jury trial conviction rate crept up from 81% in 1989 to 85% in 2002, while the bench trial conviction rate fell from 66% in 1989 to 56% in 2002. For details on these figures, see *infra* Part I.C.

6. See *id.*

type of cases that are presented to judges—felonies vs. misdemeanors, drug crimes vs. white collar crimes—are different from those heard by juries. Perhaps defendants steer cases toward judges or juries based on the strength of the evidence, with judges getting the lion's share of marginal prosecutions. Perhaps this is a regional phenomenon, limited to certain parts of the country or even a few judicial districts. Or perhaps juries are convicting too many people, or maybe judges are not convicting enough.

The second question relates to the first. Why do defendants (and defense counsel) consistently choose the factfinder that is more likely to return an adverse ruling? Similarly, why do prosecutors ever agree to bench trials, given the increased difficulty of winning the case? Maybe the lawyers who make these decisions are simply misinformed, or perhaps the judge/jury decision is so nuanced that aggregate conviction rates are meaningless, creating no more than a superficial anomaly.

A great deal turns on the answers to these questions. Even beyond the academic value of explaining the curious, the reasons that judges, juries, and lawyers act the way they do has enormous significance to the workings of the justice system. Every year thousands of federal defendants make the decision whether to waive or keep a jury, perhaps rationally, perhaps not. Federal juries reach thousands of verdicts and judges conduct hundreds of bench trials per year, with each decisionmaker considering cases that nominally are drawn from the same pool.⁷ If we can isolate factors that correspond to different conviction rates and different choices of factfinder, we may significantly increase our understanding of both jury and judicial decisionmaking.

This Article offers the first detailed study of the puzzle of federal judicial acquittals. The analysis proceeds by examining original compilations of government data on tens of thousands of federal criminal trials over a fourteen year period, a process that yields some useful and surprising insights. These data are then supplemented by interviews with both prosecutors and defense counsel, drawing on their experience to help explain the conviction gap.

Part I provides the factual background. It shows how trial outcomes differ depending on the identity of the fact-finder, both currently and over time. Part II considers a series of potential explanations for this phenomenon, and concludes that while none is entirely satisfactory, several are informative. Part III then looks in depth at two different types

7. Whether the cases considered by juries and by judges are in fact similar is discussed *infra* Part II.

of explanations, one premised on the possibility that juries are “over-convicting,” the other that judges are “under-convicting” defendants. Finally, Part IV looks at the implications of the data and offers suggestions for future study.

I. THE FACTUAL BACKGROUND: JURIES CONVICT, JUDGES ACQUIT

It may be useful to begin by reviewing the role of trials in the modern era⁸ of federal criminal practice.⁹

A. *The Role of Trials*

Although there have been important changes in contours of the jury trial right in recent years,¹⁰ the core protection enjoyed by the accused has remained remarkably stable. In all federal prosecutions where the authorized punishment is more than six months imprisonment, the accused has a constitutional right to have his fate determined by the unanimous vote of an impartial jury of twelve citizens drawn from the community where the crime occurred.¹¹

8. As used here, the “modern era” began with the enactment of the Federal Rules of Criminal Procedure in 1946. For a nice summary of the evolution of federal criminal practice, see 1 CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* §§ 1–4 (3d ed. 1999).

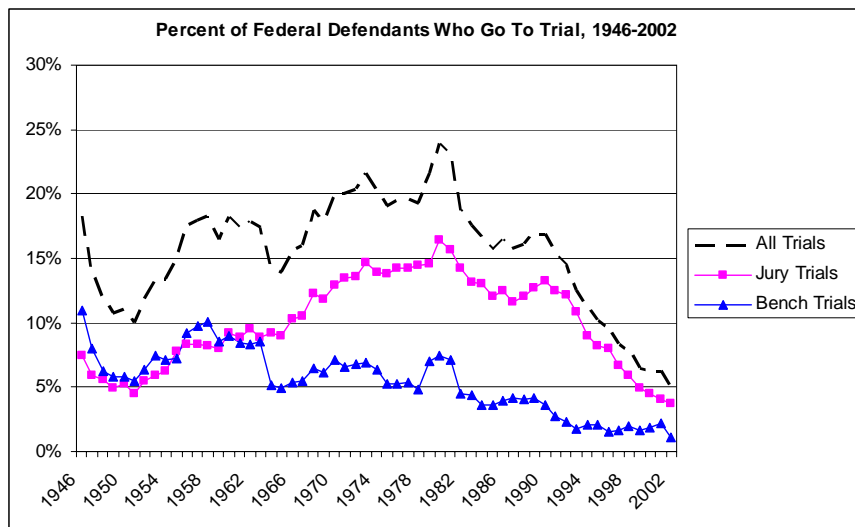
9. Throughout the paper the data and analysis are limited to criminal trials in federal court. Issues related to state criminal trials are considered briefly in Part IV.B. See *infra* note 256 and accompanying text.

10. The process of selecting the venire, for example, as well as the types of issues that are constitutionally left to the jury rather than the judge have been significantly altered by case law and by statute. See, e.g., Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–1873 (1994); *United States v. Booker*, 125 S. Ct. 738 (2005) (finding portions of the Federal Sentencing Guidelines invalid because they mandated sentences based on facts found by judges rather than juries); see also *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact except the defendant’s criminal record that may increase the punishment beyond the authorized maximum must be resolved by the jury) and *infra* notes 45–47 and accompanying text. See generally *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (clarifying and extending *Apprendi*).

11. U.S. CONST. art. III, § 2, cl.3 (“The trial of all Crimes, except in Cases of Impeachment, shall be by Jury”); 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”); see also FED. R. CRIM. P. 23(b) (jury must have twelve members, subject to limited exceptions); FED. R. CRIM. P. 31(a) (verdicts must be unanimous).

There have been some modifications to the core right. Over the last few decades the Supreme Court has clarified when a crime is “petty,” and thus not covered by the jury trial guarantee. See, e.g., *Baldwin v. New York*, 399 U.S. 66 (1970) (no crime may be categorized as “petty” when more than six months in prison authorized); see also *Lewis v. United States*, 518 U.S. 322 (1996) (defendant charged with several petty offenses may not aggregate the potential sentences for determining when a jury is required). In addition, the Court has made clear that the defendant’s right to waive a jury trial is not absolute. See *Singer v. United States*, 380 U.S. 24 (1965) (upholding FED. R. CRIM. P. 23(a), which requires consent of judge and prosecutor to waive jury trial). *Singer* is discussed in more detail

Nonetheless, there has long been a gap between the availability of the right and its exercise, and throughout the modern era trials have been the exception rather than the rule. Although the Supreme Court did not recognize plea bargaining as a legitimate way to induce guilty pleas until the 1970s,¹² the practice was common, even dominant, for decades before that.¹³ As a result, at no time since 1946 have more than one quarter of the formally charged federal defendants gone to trial.¹⁴ In fact, over the last twenty years the percentage of trial defendants has steadily declined, and in 2002 stood near a 50-year low. As shown in Figure 1, the percentage of defendants who chose trial over a guilty plea peaked at 24% in 1980, but dropped to about 5%–7% in recent years:

FIGURE 1¹⁵

below. See *infra* note 28 and accompanying text.

12. See, e.g., *Brady v. United States*, 397 U.S. 742, 750 (1970).

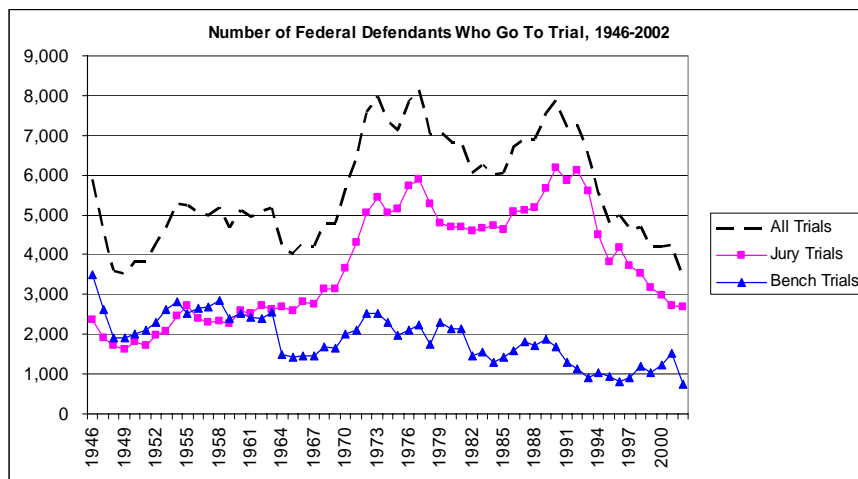
13. For a discussion of the evolution of plea bargaining, see GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979).

14. See SOURCEBOOK ONLINE, *supra* note 4, tbl. 5.22.

15. See *id.* The percentages in Figure 1 were calculated by (a) taking the total number of charged defendants and subtracting the number of defendants whose cases were dismissed, to get the number of "trial-eligible" defendants; and (b) dividing the number of defendants who went to trial by the number of trial-eligible defendants.

The fact that an increasingly small fraction of defendants persevere and stand trial is not itself a surprise. More defendants are being processed each year, which means prosecutors, defense lawyers, and courts must find increasingly efficient ways to dispose of criminal cases.¹⁶ Among its many other effects, the increased caseload gives prosecutors an incentive to offer (and judges to accept¹⁷) an increasing number of deals to induce a plea and avoid a time-consuming trial. Thus, the percentage drop in trials might reflect nothing more than a relative increase in the number of guilty pleas.

Interestingly, however, the absolute *number* of defendants going to trial has declined as well:

FIGURE 2¹⁸

As reflected in Figure 2, the raw number of trial defendants during the 1970s averaged over 7,200 per year. During the 1980s the average dropped to around 6,600, and from 1998 through 2002, the average number of trial defendants was fewer than 4,500.

A partial explanation for the decrease in trial defendants, at least over the last dozen years of the period studied, may be the Federal Sentencing

16. The number of criminal defendants processed by the U.S. District Courts doubled from 1946 to 2002, from slightly fewer than 40,000 defendants per year to slightly fewer than 80,000. *See id.*

17. Before a plea bargain will be enforced it must be approved by the court. *See* FED. R. CRIM. P. 11(c)(3).

18. The data for Figure 2 were compiled from SOURCEBOOK ONLINE, *supra* note 4, tbl. 5.22.

Guidelines.¹⁹ One of the few grounds for a sentence reduction under the Guidelines was that a defendant accept responsibility for his actions, a finding that was virtually never made unless the defendant pled guilty.²⁰ But even beyond this concrete inducement, the Guidelines themselves, by limiting judicial discretion at sentencing, may have reduced the uncertainty associated with any negotiated resolution. The more predictable the trial result (with “result” here including both likelihood of conviction and the potential sentence), the easier it is for the defense to accurately evaluate a plea offer, and thus the easier it should be for the parties to reach agreement.²¹ When the greater predictability of trial result is combined with the institutional pressures to resolve cases efficiently, the drop in the number of trials becomes easier to explain.²²

19. The Federal Sentencing Guidelines are a product of the Sentencing Reform Act of 1984, which, among other things, created the Federal Sentencing Commission. *See* 28 U.S.C. § 991 (1994). The Commission was charged with promulgating a set of guidelines that would restrict the range of sentences that a judge could impose for any federal offense. 28 U.S.C. § 994 (1994). For a brief but helpful description of how the Guidelines worked—at least until recently—see LAURIE L. LEVENSON, FEDERAL CRIMINAL RULES HANDBOOK 569–82 (2005) [hereinafter Primer on Federal Sentencing Law].

The mandatory nature of the Guidelines was recently struck down in *United States v. Booker*, 125 S. Ct. 738 (2005). *See infra* note 249 and accompanying text. The impact of *Booker* on this study is considered in more detail in Part IV, *infra*.

20. *See* UNITED STATES SENTENCING GUIDELINE MANUAL § 3E1.1 (2004) [hereinafter U.S.S.G.] (permitting a 2–3 level reduction in the offense level if the defendant “clearly demonstrates acceptance of responsibility for his offense”). Although refusing to plead guilty and proceeding to trial is not *per se* inconsistent with a defendant accepting responsibility, the Application Notes to the Guidelines made it clear that a defendant who insisted on a trial would “rarely” get the reduction. *See id.* Application Note 2.

Defendants also could receive a downward departure from the prescribed sentencing range if they provided substantial assistance to authorities in investigating and prosecuting others. *See* 18 U.S.C. § 3553(e) (1994); U.S.S.G., *supra* note 20, § 5K1.1. Before a judge could reduce a sentence on this ground, however, the prosecutor had to first bless the departure by filing a motion in support of the defendant’s claim of assistance. *See United States v. Wade*, 504 U.S. 181, 185 (1992). Obviously a defendant who refused to plead and puts the government to its proof was less likely to enjoy the government’s support for a reduced sentence.

21. *Cf. Booker*, 125 S. Ct. at 781 (Stevens, J., dissenting) (criticizing remedial majority for making it harder for parties attempting to reach a plea bargain to predict the potential sentence, there by making agreements more difficult to reach). The ability to predict the eventual sentence more accurately would seem especially useful when the agreement to plead guilty is not conditioned on the sentence actually imposed. Both before the Guidelines and now, defendants often enter plea bargains without knowing what the sentence would be *and* without the ability to nullify the agreement if the judge imposed a sentence that was unexpectedly high. *See* FED. R. CRIM. P. 11(c)(1)(B), (3)(B) (in return for a guilty plea, prosecutor can agree to “recommend, or agree not to oppose” a particular sentence, but court not obligated to follow recommendation or request); *cf.* FED. R. CRIM. P. 11(c)(1)(C) (prosecutor can agree to a specific sentence or range, which is binding on the court if the judge accepts the plea agreement.)

22. As scholars have recognized, the heavy use of plea bargains to induce guilty pleas comes at a cost, including a significant risk of distorting trial outcomes in counter-factual ways. For an excellent discussion of this issue, see Ronald F. Wright, Jr., *Trial Distortion and the End of Innocence in*

But even in a system dominated by guilty pleas, trials remain the indispensable focal point. The value of any proposed plea agreement can only be fully assessed when compared to the probable outcome of the alternative path of a full trial.²³ Any feature of the system that affects the likelihood of that alternative outcome should in turn inform and alter the bargaining. Stated differently, identifying and explaining characteristics of jury and bench trials that correlate to different outcomes should provide useful information not only about the few defendants who go to trial, but also about the many who do not.

B. Bench Trials vs. Jury Trials: The Choice

Long before a trial begins, the defense must decide if it wants a bench trial or a jury trial.²⁴ This choice is mostly within the defendant's control, but not entirely. The Federal Rules of Criminal Procedure treat juries as the presumptive factfinder: if a defendant is charged with a non-petty crime, his trial "must" be by jury unless waived, and a waiver will be scrutinized to ensure that it is voluntary and knowing.²⁵ But while defendants have an absolute right to a jury, there is no similar right to a

Federal Criminal Justice, 154 U. PA. L. REV. (forthcoming 2005), available at <http://papers.ssrn.com/abstract=702901>.

There is some debate about the degree to which the Guidelines made plea bargaining more predictable. An early study of the Guidelines' impact on plea bargaining found that although there was significant compliance in the plea process with the letter and spirit of the Guidelines, there was also some manipulation of charges and facts to alter the punishment. See Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992). To the extent these practices operated outside the Guidelines' formal structure, the predictability of outcomes was diminished.

23. See *Booker*, 125 S. Ct. at 762 (noting that plea bargaining "takes place in the shadow of (i.e., with an eye towards the hypothetical result of) a potential trial"). But cf. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (arguing that the "shadow of trial" model of plea bargaining is too simplistic); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) (discussing Bibas's article). Professor Bibas makes a sophisticated argument for why plea negotiations are influenced by far more than a simple prediction of the trial outcome; institutional pressures on the lawyers, biases, information deficits, and agency problems also influence how parties bargain and why they agree. For current purposes, however, it is unnecessary to decide how extensive these effects are. It is sufficient to conclude that discounted trial outcome remains a critical, and likely dominant, part of the plea calculation.

24. A motion to waive a jury is often made at the time a trial date is set. See generally 18 U.S.C. § 3161(a) (1994) (judicial officer shall set a trial date at the "earliest practicable time" once a defendant has been charged with an offense).

25. See FED. R. CRIM. P. 23; *Patton v. United States*, 281 U.S. 276, 312 (1930); *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997). For a useful history of jury waivers before the modern era, see Erwin N. Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655 (1934).

bench trial. Throughout the modern era, Rule 23 has provided that even if the defendant wants to be tried by the judge alone, the prosecutor or court can veto that choice and insist on a jury.²⁶ On rare occasions a trial judge will override the prosecutor's veto and allow the defense to proceed with a bench trial against the government's wishes²⁷ (a move that is possibly, although not indisputably, legal²⁸), but typically a trial court will follow Rule 23 and force an objecting defendant in front of a jury.²⁹

In federal court, defendants overwhelmingly are tried by a jury: between 1983 and 2002, more than three out of four (77%) trial defendants had their case decided by their peers.³⁰ Although there has been a slight rise in the percentage of bench trials in the last few years,³¹ only once, in 2001, has it risen above one-third.³²

26. FED. R. CRIM. P. 23(a) states: "If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves." The requirements of Rule 23(a) were part of the original 1946 Rules of Procedure, and were intended to "embod[y] existing practice." See FED. R. CRIM. P. 23 ADVISORY COMMITTEE NOTES, 1944 ADOPTION, reprinted in 3C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 297 (2004). For a critique of the Rule, see Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309 (1993).

27. See, e.g., *United States v. Braunstein*, 474 F. Supp. 1, 14 (D. N.J. 1979) (noting the complexity of the evidence in a case where government refused to consent to bench trial, and concluding "the court is convinced that a jury of laymen could not be expected to master the intricacies and complications of fact and law sufficiently to provide a fair trial"); *United States v. Panteleakis*, 422 F. Supp. 247, 249–50 (D. R.I. 1976) (finding government's refusal to consent to a bench trial "unreasonable and arbitrary" in light of the complexity of the case, which made it "unlikely" that defendant could receive an impartial jury trial).

28. In *Singer v. United States*, 380 U.S. 24 (1965), the Court upheld the constitutionality of Rule 23's requirement that the prosecutor consent to a jury waiver, but left open the question whether there may be circumstances where a defendant's right to an impartial trial would override the government's demand for a jury. See *id.* at 37–38. The Court has not spoken further on the issue, and in light of Rule 23's unqualified language, it is far from certain that the Court would agree today that a bench trial is permitted in the face of prosecutorial objection. The Court might conclude, for example, that if the defendant made a compelling argument that an unbiased jury could not be seated, a change of venue under Rule 21(a) would be the proper course rather than a bench trial.

29. See, e.g., *United States v. Gabriel*, 125 F.3d 89, 94–95 (2d Cir. 1997) (finding no error in the district court's refusal to order bench trial over prosecutor's objection); *United States v. Clark*, 943 F.2d 775, 784 (7th Cir. 1991) (same).

30. The annual rate of jury trials has been fairly consistent; the standard deviation for this twenty-year period is only 0.049. The percentage of jury trials ranged from a high of 86% in 1993 to a low of 64% in 2001. The latter year was an anomaly; it was the only time in the last 20 years that the percentage of jury trials dropped below 71%. For a complete chart of the percentages of jury and bench trials, see *infra* note 44. The data from which these figures were derived are from SOURCEBOOK ONLINE, *supra* note 4, tbl. 5.22.

31. The average rate of bench trials from 1998–2002 was 27%, slightly above the 20-year average of 23%. See *id.*

32. See *id.* But cf. 2 WRIGHT, *supra* note 26, at 446 & n.4 (claiming that jury trials are waived in roughly one-third of the cases, and that this figure has been "remarkably stable" over the years). It appears, however, that the numbers and calculations relied on to reach this conclusion are incorrect.

But while it is descriptively true that defendants seem to prefer juries, justifications or even explanations are hard to find. Trial practice manuals offer general advice on the *types* of cases where the defense might prefer a bench trial—thus, defense counsel are urged to consider whether “there is an angle in the case that may win over a jury but would be disregarded by a judge” (such as police brutality or an overzealous prosecutor);³³ or, whether “the defense involves complex issues or invokes a so-called ‘technicality.’”³⁴ Defense counsel are also advised to consider whether there is an emotional aspect of the case that is more likely to influence the jury; whether there is excluded evidence that a judge will find hard to put out of her mind; the identity of the judge who would try the case if there were a waiver; and so on.³⁵ But no explanation was found for why defendants should presumptively prefer juries, and no discussion on the relative conviction rates as a relevant consideration.

One explanation for this silence may be that lawyers believe the issue was resolved forty years ago. Kalven and Zeisel’s classic study of the American jury looked at over 3,500 state criminal trials in the mid- to late-1950s, and found that while judges and juries usually agreed about the proper outcome of a case, when they disagreed, juries were more lenient toward defendants than judges were.³⁶ Although that study looked only at

Professor Wright claims, for example, that in fiscal year 1997, 2,854 defendants were tried by a jury, and that this represented 33.7% of all trials. *See id.* (citing STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. D-4 (1997)). Using the figures presented, however, the correct percentage of jury trial defendants is 24%. In any event, the numbers underlying the calculation appear to be misstated. *See* STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. D-4 (1997) (showing that 3,724 defendants tried to a jury in fiscal year 1997, or 19.5% of all trial defendants).

33. *See* ANTHONY G. AMSTERDAM, 3 TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 8 (1989).

34. 4 BNA CRIMINAL PRACTICE MANUAL 121–313 (Wheat et al. eds., 2002); *see also* AMSTERDAM, *supra* note 33, at 9 (“Is there a good legal defense that a jury will not be able to comprehend?”).

35. *See* 1 LEXISNEXIS, CRIMINAL DEFENSE TECHNIQUES § 1A.06 (Robert Cipes et al. eds., 2003) (encouraging defense counsel faced with the waiver issue to consider whether there are facts that would engender juror sympathy or bias, whether the evidence is too complex for juries, and whether the defense case is strong); *see also* AMSTERDAM, *supra* note 33, at 7–10 (listing similar factors for defense counsel to consider); BNA CRIMINAL PRACTICE MANUAL, *supra* note 34, at § 121.30[2][a] (same).

These guidelines for waiving jury trials have deep roots. In a 1925 *ABA Journal* article, a state judge listed the reasons defense lawyers typically waived jury, including fear of jury prejudice against the defendant “[c]harges of a revolting nature, [such as] crimes against women and girls,” and trials “when a defense is based mainly on a point of law.” *See* Carroll T. Bond, *The Maryland Practice of Trying Criminal Cases by Judge Alone, Without Juries*, 11 A.B.A. J. 699, 702 (1925).

36. *See* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966). Kalven and Zeisel’s conclusion about jury leniency was based on the observation that when the decisionmakers disagreed

jury trials, and thus did not address the precise question that lawyers face when choosing a factfinder,³⁷ it may be that Kalven and Zeisel's conclusions were so influential that the general notion ("juries are better for the defense") simply became accepted wisdom, handed down through generations of practicing lawyers. A similar, more recent study seems to confirm Kalven and Zeisel on this point,³⁸ which undoubtedly will further embed the attractiveness of the jury into the consciousness of the federal defense bar.

Even granting the enormous influence of the Kalven and Zeisel study, it remains odd that the preference for juries has received so little attention. In an effort to better understand the thinking of criminal law practitioners on this issue, a non-scientific survey was conducted as part of this study. Twelve current or former federal defense counsel (both private and public) and twelve current or former federal prosecutors were interviewed and asked their views on jury trials versus bench trials. The lawyers were from different parts of the country, so that the practice in a single district would not skew the results. The average experience for the lawyers interviewed was roughly 12 years of federal criminal practice for both prosecutors and defense.³⁹

On the defense side the results were strikingly consistent. When the lawyers were asked how often they waived or attempted to waive a jury, virtually every answer was "rarely" or "practically never."⁴⁰ When asked

about the outcome of a specific case, juries were more likely to acquit in cases where judges would have convicted than they were to convict in cases where a judge would have acquitted. *Id.* at 55–62.

37. The Kalven and Zeisel study looked only at jury trials, not at bench trials. The findings about judge and jury differences were based on the judges' statements about the ruling they *would* have made had the case not been tried to a jury. *Id.* at 10. Because those judge-jury disagreements were over the proper outcome of the *same* case, rather than on a comparison of the actual decisions that were made in different cases, the results of that study do not directly address one of the key questions considered here, namely, whether there are differences in the types of cases that wind up as jury or bench trials. See *infra* Part II.B.

38. See Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's* The American Jury, 2 J. EMPIRICAL LEGAL STUD. 171 (2005).

39. To encourage candor in the answers, each lawyer interviewed was assured that he or she would not be identified, even by location, and so the comments are presented here without citation. Quoting anonymous sources in support of a proposition is far from the scholarly ideal, of course, and so I have tried when possible to aggregate the answers and report consensus views, with qualifiers to indicate the strength of the agreement. Because of the small sample size and the lack of scientific polling method, I also have tried to use the lawyers' answers only as supportive information, rather than as a primary source for a specific point. The notes of all interviews, as well as a copy of the questions asked of both prosecutors and defense counsel, are on file with the author.

40. Each defense lawyer was then asked: (a) whether this preference reflected a policy of his or her office (it never did), and (b) whether the lawyer had any reason to think that he or she was unusual within the office, community, or district in preferring juries. All the lawyers who expressed a view thought that his or her preference was consistent with local practice—i.e., that the jury preference was

to explain the preference for juries, the answers varied but the baseline was constant—a strong belief that defendants almost always have a better chance at a favorable outcome. Several defense lawyers mentioned that juries look at cases from a less jaded perspective, at least when compared to the judge. Others thought that juries are preferable because they have not been exposed to as much prejudicial pre-trial information about the case as the judge. Still others (actually, many others) thought that judges are not very good at resisting the unspoken societal pressures to convict. Finally, a few candidly admitted that when the defense is weak, judges were more likely to “know what we are up to” in trying to undermine the evidence of guilt.⁴¹ But whatever the reason, practically all the defense counsel agreed that bench trials were a poor alternative. Several, in fact, repeated the cliché that “a bench trial is nothing more than a slow guilty plea,” while another concluded that “it would be legal malpractice for me to waive jury in a criminal case.”

Prosecutors were asked slightly different questions but their answers had a similar theme. All the prosecutors said that in their experience, defendants prefer jury trials as a matter of course. And while some expressed skepticism that the identity of the factfinder made any real difference,⁴² most agreed that from the defense perspective, juries often gave the accused a better chance at acquittal. Several prosecutors also agreed that defendants with weak cases were particularly likely to prefer a jury, hoping that confusion or juror sympathy would succeed where the legal defense would otherwise fail.

It thus appears that the preference for juries is broad and deep, and not surprisingly, is based on the assumption that defendants will have better luck in front of their peers. One interesting side-note to these conclusions is that the preference for juries has changed significantly over time. From the beginning of the modern era until 1963, federal defendants were almost equally likely to appear before a judge as a jury, with a slight preference for judges—53% to 47% on average.⁴³ Starting in the mid-

shared by the local defense bar.

41. This point is examined in more detail *infra* Part II.C.

42. See *infra* note 51 and accompanying text (discussing lawyer predictions of conviction rates). While defense counsel always preferred juries and prosecutors were often indifferent to the factfinder, both groups routinely qualified their views with a phrase such as “unless the judge assigned to the case was exceptionally good (or bad) for our side.” There obviously are a few judges whose perceived leanings are so strong that one party or the other would be inclined to change their typical selection practice.

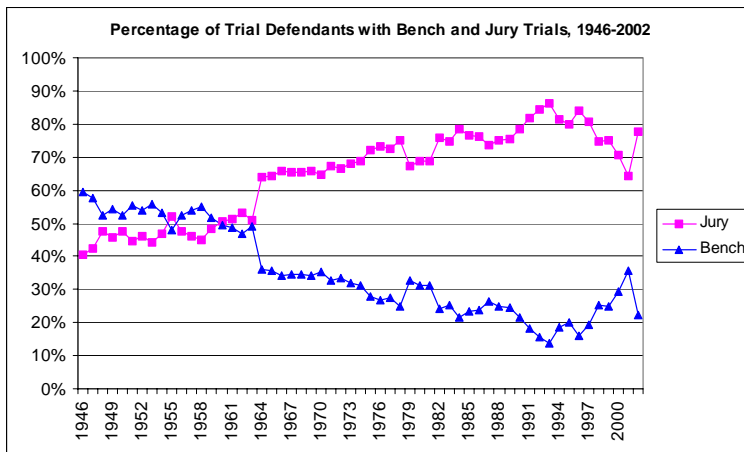
43. Statistics derived from SOURCEBOOK ONLINE, *supra* note 4, Table 5.22.

1960s the preference for a jury increased, moving gradually from a 1:1 ratio to the 3:1 ratio that exists today.⁴⁴

The modern shift toward juries is undoubtedly the product of legal change. The history of the jury trial since the 1960s has been a history of greater inclusiveness in the venire, and thus a reduced chance that defendants will be disadvantaged because of race or class bias. The fair cross-section requirement,⁴⁵ restrictions on the use of peremptory challenges,⁴⁶ and the Jury Selection and Service Act of 1968⁴⁷ broke down barriers to jury service and expanded the pool of citizens with a realistic chance to serve. If we assume that certain defendants—particularly racial minorities—previously avoided juries because of their unrepresentative character, we would expect similar defendants to be relatively amenable to a jury trial in recent years.

The trend toward juries *is* surprising, however, when we consider the different conviction rates of the two factfinders.

44. *Id.* The ratio of factfinders in federal trials since 1946 are depicted in the following chart:



See id.

45. The fair cross-section requirement of the Sixth Amendment has its roots in Supreme Court cases from the 1940s, and achieved constitutional status in *Taylor v. Louisiana*, 419 U.S. 522 (1975). For a brief history of the cross-section requirement, see Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 951–60 (1998).

46. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (reducing the burden on defendants to show discriminatory use of peremptory challenges); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (prohibiting the use of peremptory strikes based on gender); *Georgia v. McCollum*, 505 U.S. 42 (1992) (extending *Batson* doctrine to defense counsel).

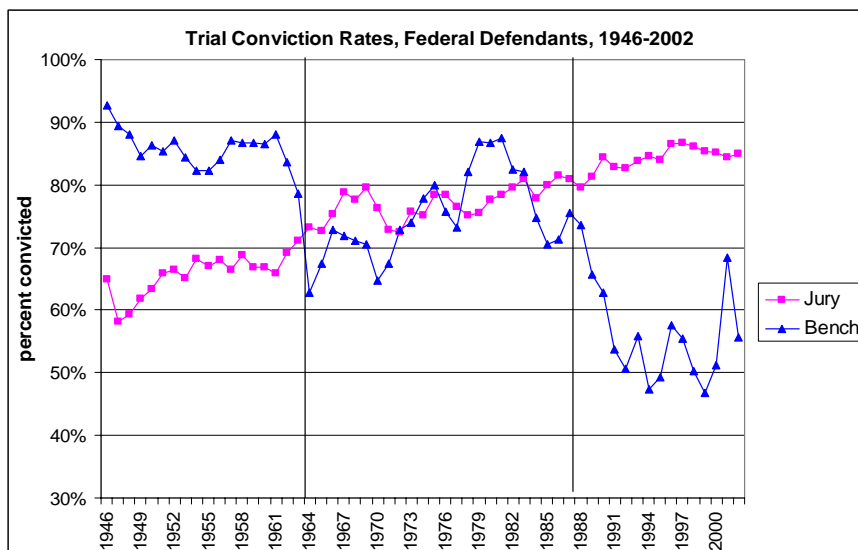
47. 28 U.S.C. §§ 1861–1873 (1994).

C. Bench Trials vs. Jury Trials: The Outcomes

Juries convict at very high rates.⁴⁸ The average conviction rate for juries since 1946 is 75%, with the trend line moving upward: over the last 10 years of this study, the average jury conviction rate was 85%.⁴⁹

In contrast, judges have not been convicting as frequently—at least not recently. If we consider the *aggregate* conviction rate since 1946, judges have convicted at an average rate of 73%, almost the same as the jury's 75% rate over the same period. But this average obscures important trends. For the first ten years of that period (1946–1955), judges convicted at an 86% rate; over the last ten years, judges have convicted only 54% of the time. The movement in rates is shown in Figure 3:

FIGURE 3⁵⁰



48. This may run counter to popular belief, but it should not. Neil Vidmar and his colleagues pointed out in 1997 that conviction rates for juries were high both in federal court and in the states they studied. See Neil Vidmar et al., *Should We Rush to Reform the Criminal Jury? Consider Conviction Rate Data*, 80 JUDICATURE 286, 287 (1997). For a more recent and detailed study about federal acquittals, see Wright, *supra* note 22.

49. See *infra* Figure 3. The data were compiled from the SOURCEBOOK ONLINE, *supra* note 4, tbl. 5.22.

50. See *id.* Trials in the District of Columbia prior to 1974 are excluded from the data. See *id.* at Note to Table. The data reflected in Figure 3 also does not include petty offenses, and for the years prior to fiscal year 1976, did not include misdemeanors. See *id.*; see also *id.* tbl. 5.9, Note to Table (discussing excluded data).

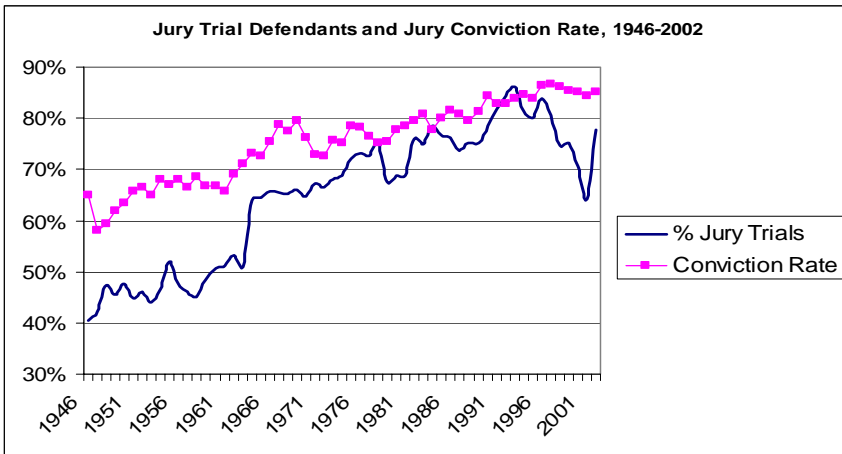
The recent disparity in outcomes is dramatic: between 1989 and 2002, juries always convicted at a rate at least fifteen percentage points higher than judges, and frequently more than thirty percentage points higher. But obviously there is another striking feature in Figure 3: the crossing trend lines, where judges have gone from being much more conviction prone to being much more acquittal prone. Based on these patterns, it is useful to think of the modern era of federal criminal trials as consisting of three phases. In "Phase I," which begins in 1946 and continues until the early 1960s, judges invariably convicted at higher rates than juries. In "Phase II," from the early 1960s until the late 1980s, the conviction rates were similar, with juries convicting more often for a time, then judges reemerging as the more government-friendly factfinder. In "Phase III," starting in the late 1980s, juries reemerged as the decisionmaker more likely to convict, and from 1989 until 2002, the difference in outcomes has been stark, primarily because the bench rate has dramatically declined.

For most of the lawyers interviewed for this study, the recent conviction rates were startling. Before being told of the data, each of the interviewed defense lawyers and prosecutors were asked to predict whether juries or judges were more likely to convict at trial, and to give some estimation of the size of the expected gap. Virtually all of the defense counsel and a plurality of the prosecutors believed that judges were more conviction prone.⁵¹ Estimates on the conviction rates ranged from "a lot" higher to "somewhat higher" for judges, with a few interviewees being unsure. Only three of the twenty-four lawyers (all prosecutors) predicted that federal judges were more acquittal prone.

When the data from this section and the prior section are laid side-by-side, the relationship between the defendant's preference for juries and the conviction rate is striking: while trial defendants are increasingly ending up before a jury, juries are increasingly prone to convict.

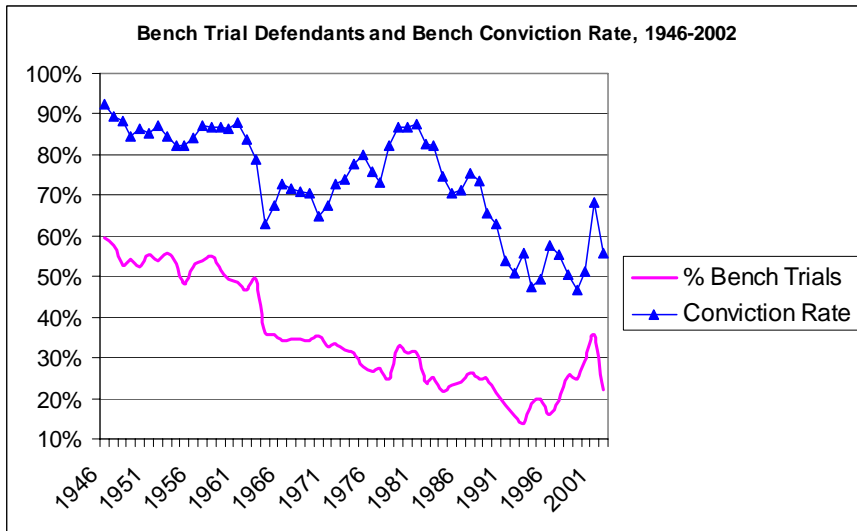
51. Eleven of the twelve defense counsel believed that judges were more conviction prone, and one said he did not know which factfinder was more likely to convict. Among the prosecutors, four said that judges were more likely to convict, four said that they thought the conviction rates were roughly the same, and one said she did not know. Three prosecutors said that they believed juries were more likely to convict, although even then, one of the three had reviewed the published data, and admitted that it had changed her previous belief that judges were more likely to convict.

FIGURE 4⁵²



During the same period, as bench trials became increasingly unpopular, judges acquitted an increasing percentage of defendants who appeared before them.

FIGURE 5⁵³



52. These statistics were derived from SOURCEBOOK ONLINE, *supra* note 4, tbl. 5.22.

53. *Id.*

In sum, in contemporary trial practice, more than three out of four federal defendants proceed before a jury, and statistically, pay a price for it in the form of a significantly higher chance of conviction.

The question, of course, is why: what factor or combination of factors tells a coherent story about these counter-intuitive patterns? This larger question contains two related subparts: (a) why do defense lawyers choose juries when judges are more likely to acquit; and perhaps more importantly, (b) why are judges more likely to acquit? Because the disparity with the most current salience occurs in Phase III (1989-2002), this is the period that will receive most of the attention.

II. EXPLANATIONS

A. *It's All Strategy (or Not)*

We begin with the most direct and least interesting explanation for why so many defendants choose a jury trial. Given the widening conviction gap during Phase III, we would have predicted that an increasing number of defendants would migrate to bench trials. But their failure to do so may tell us nothing more than that prosecutors are refusing to allow defendants to waive a jury. Recall that Rule 23 allows a defendant to waive only with the consent of the prosecution and the court.⁵⁴ Perhaps prosecutors have realized that judges collectively are more acquittal prone, and so as a matter of strategy, they routinely veto the defendant's request for a bench trial. Although we would still have to explain the 20%-25% of defendants who *are* permitted to waive, we might attribute these accepted waivers to prosecutorial overwork, to judicial pressure on the government to agree to a bench trial to save resources, or to some other case-specific variable that makes prosecutors indifferent to the factfinder's identity.

But as H.L. Mencken reminds us, "[t]here is always an easy solution to every human problem—neat, plausible, and wrong,"⁵⁵ and here there are significant problems with our simple hypothesis. Most significantly, no evidence was found to suggest that defendants would prefer a bench trial if they could get one. Each of the interviewed defense counsel were asked if they were frequently (or ever) prevented by the government from waiving a jury, and each prosecutor was asked if she had ever refused a request to

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

55. H. L. Mencken, *The Divine Afflatus*, in A MENCKEN CHRESTOMATHY 443 (1949), reprinted in RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS (Suzy Platt ed., 1989), at <http://www.bartleby.com/73/1736.html>.

waive a jury. The answers were consistent: defense counsel said they rarely asked, and when they did, the government virtually always agreed.⁵⁶ Prosecutors said they were rarely asked to consent to a bench trial, and when they were asked, they virtually always agreed.⁵⁷ In addition, no criminal defense manual was found that urged defendants to avoid jury trials, and very few cases were found where the defendant challenged the prosecutor's decision to veto a waiver, despite the possibility that there are limits on the government's discretion on this issue.⁵⁸ To put the matter positively, it appears that defendants usually proceed before a jury because they want to, not because they are forced to.⁵⁹

Given the surprising lack of lawyer awareness of the relative conviction rates,⁶⁰ it would be easy to attribute the defense preference for juries to ignorance of the data. But this explanation is ultimately too facile. Even if lawyers do not know the numbers, they may be able to identify features in *individual* cases that make them better suited for one factfinder rather than the other. And so while we can say with some confidence that the decision to proceed before a jury is not influenced by an overarching government strategy to discourage bench trials,⁶¹ a more refined

56. To account for the possibility that defense counsel rarely asked for a waiver because they anticipated a negative response, each defense counsel was asked if their failure to seek a bench trial was influenced by the anticipated response by the government. None of the lawyers interviewed said that they had failed to seek a waiver on this ground. Several added that if they believed a bench trial was appropriate, they would seek a jury waiver even if they believed the government would veto the request. Nor was there evidence that prosecutors frequently try to "buy" bench trials with charging concessions, stipulations, or potential sentencing recommendations. None of the defense counsel or prosecutors indicated that they had either offered or been offered inducements specifically for the jury waiver.

57. When prosecutors were asked why they would agree to defendants' requests for a bench trial, several mentioned the resource savings that come from not having to prepare for and conduct a jury trial. Several others, however, acknowledged that once the defendant asked for a bench trial, the risk to the government of offending the judge by refusing the attempted waiver was quite high, and in the long run (prosecutors being repeat players) counter-productive. As a result, most prosecutors said that if the defendant wanted to waive a jury, the government would not object unless the trial judge was viewed as extraordinarily defense-friendly.

58. See *supra* note 28. For citations to the cases where the defense challenged the prosecutor's veto, see 2 WRIGHT, *supra* note 26, at 449 n.12.

59. Under Rule 23 the court also must agree to the waiver, but none of the prosecutors or defense lawyers could recall an instance where the judge refused a waiver that had been agreed to by the parties. The lawyers who expressed a view uniformly agreed that the court did not impose any independent check on the defendants' jury decision. *Cf. Patton v. United States*, 281 U.S. 276, 312 (1940) (district court's duty in deciding whether to permit a jury waiver "is not to be discharged as a mere matter of rote, but with sound and advised discretion").

60. See *supra* note 51 and accompanying text.

61. Except as indicated, the balance of this paper will treat the decision to waive a jury as one resting entirely within the control of the defense.

explanation for the data is needed, one that looks more closely at the nature of the defendant's case.

B. Explanations Based on Case Type

The most obvious explanation for the difference in conviction rates is that judges and juries hear different types of cases. Indeed, given the studies indicating that juries are more lenient than judges when both are considering the same case,⁶² the fact that judges still convict at lower rates strongly suggests that judges and juries *must* be hearing cases that are somehow materially different.

In this section we will look at two distinctions between jury and bench cases: differences in the type of crimes charged, and differences in the seriousness of the crimes charged. Although existing, published data have been adequate up to this point, more is needed for the next step. For the balance of the study we will be using original compilations of information gleaned from relatively raw government data on more than 75,000 federal criminal trials that terminated between 1989 and 2002. Unless otherwise indicated, the Tables and Figures that follow will be based on these data.⁶³

1. The Crime Type Hypothesis

Perhaps defense lawyers believe that, while juries are normally preferable, certain types of crimes are better suited for the more legally-sophisticated judge. If so, perhaps the same characteristic that makes a judge the superior fact-finder in those cases also makes the case harder for the government to win. For example, we can hypothesize that financial and corporate crimes typically have complex evidence and defenses,

62. See *supra* notes 36–38 and accompanying text (discussing the Kalven & Zeisel study and the Eisenberg study).

63. A note on the data and citations: unless otherwise stated, the numbers and percentages used in the balance of the article are based on original extrapolations from the records compiled by the Federal Judicial Center, the research and education agency of the federal judicial system. See generally Federal Judicial Center, at <http://www.fjc.gov>. The data are made available through the Inter-university Consortium for Political and Social Research (ICPSR), located in Ann Arbor, Michigan. See <http://www.icpsr.umich.edu>. A citation will be given to the ICPSR study number the first time the records are referred to, but otherwise there will not be individual citations for the statistics or calculations. For more detail on the data, see the Appendix to this Article.

The dataset used in this study, except as noted, includes records on 77,360 federal criminal defendants charged with non-petty crimes whose trials concluded between fiscal year 1989 and 2002, inclusive. Of this number, there were 62,184 jury trial defendants and 15,176 bench trial defendants. Because there were often missing values for some of the variables, many of the totals set forth below are less than the total amount of records available.

which might suggest to both parties that a bench trial is preferable, since each side is concerned that the jury will misunderstand its version of the evidence. The complexity of the case may in turn make the government's case especially hard to prove, and thus disproportionately likely to end in an acquittal.

Testing this "crime type" hypothesis is a two-step inquiry. First, if the crime charged helps explain the different conviction rates, we would expect to see a disproportionate number of acquittals in one or more specific types of crimes, rather than seeing the acquittals randomly distributed. Second, we need to identify a variable or set of variables that explains why that particular case type is more likely than others to end favorably for the defense.⁶⁴

a. Different Outcomes for Different Crimes?

The first step is to consider the various acquittal rates for six offense classifications: violent crimes,⁶⁵ property crimes,⁶⁶ drug crimes,⁶⁷ regulatory crimes,⁶⁸ immigration crimes,⁶⁹ and public order crimes.⁷⁰ These categories roughly correlate to the offense classifications used by the Administrative Office of the U.S. Courts.⁷¹

64. The statistics on federal criminal trials from 1989–2000 are derived from ICPSR 8429, Federal Judicial Center, FEDERAL COURT CASES: INTEGRATED DATABASE, 1970–2000 (Parts 59, 67–68, 76–79, 109–113, CRIMINAL DATA, 1989–2000) (computer file); 2nd ICPSR version, Washington, DC: Federal Judicial Center (2000); Ann Arbor, MI: Inter-university Consortium for Political and Social Research (2002). The data for fiscal year 2001 are from ICPR 3415, *id.*, 2001 (criminal data for 2001) (computer file). The data for fiscal year 2002 comes from the Administrative Office of the U.S. Courts, and is made available by the Federal Justice Statistics Resource Center, at <http://fjsrc.urban.org/index.cfm>. For more information on the datasets, see the Appendix to this Article.

65. This category includes all forms of homicide, kidnapping, assault, sexual abuse, robbery, threats against the president, and domestic violence. *See* Offense Classification Table, Federal Justice Statistics Resource Center, at <http://fjsrc.urban.org/noframe/dd/cross/aofjsp2002.pdf>.

66. The "property offenses" category includes both fraudulent and non-fraudulent offenses. *See id.*

67. This category includes manufacturing, selling, and possession of illegal drugs, as well as being part of a Continuing Criminal Enterprise. *See id.*

68. This category includes civil rights crimes, customs crimes, social security crimes, postal offenses, and similar violations. *See id.*

69. This category includes both illegal entry and illegal reentry offenses. *See id.*

70. This category includes weapons crimes, racketeering, extortion, criminal income tax evasion, and traffic offenses. *See id.*

71. The Administrative Office's Federal Justice Statistics Program Offense Classification divides individual federal crimes into the following: (a) violent offenses; (b) fraudulent property offenses; (c) other property offenses; (d) drug offenses; (e) regulatory/public order offenses; (f) other public order offenses; (g) weapons offenses; and (h) immigration offenses. *See id.*

In this Article I have combined both fraudulent and non-fraudulent property crimes into a single

Looking at all non-petty federal trial defendants⁷² from 1989 through 2002, the conviction rates are as follows:

TABLE A⁷³

Crime Category	Conviction Rates, 1989-2002		
	Jury	Bench	Difference
Violent	81%	69%	15%
Property	81%	54%	33%
Drug	87%	62%	29%
Regulatory	67%	56%	16%
Public Order	83%	47%	43%
Immigration	87%	80%	8%
All Crimes	84%	51%	39%

Table A shows that the conviction percentages vary significantly depending on the crime charged, at least in bench trials.⁷⁴ Judges convict 80% of those charged with immigration crimes, and more than two out of three (69%) of those charged with violent crimes. In contrast, defendants charged with property, regulatory, and public order offenses have a roughly 50-50 chance of acquittal when tried by the judge. So while we can not yet say that the case type *causes* the different rates, we can conclude that judicial outcomes are not distributed proportionately across the crime categories.

Perhaps the more interesting figure is the *gap* between judge and jury conviction rates, shown in the last column of Table A. Here we see two clusters of cases. In one group, consisting of violent, regulatory, and

category of "property offenses." I also have grouped weapons crimes with "other public-order" crimes (a practice that was followed for many years by the Administrative Office) and simply called the category "public order offenses." Weapons charges are disaggregated and considered separately below. *See infra* Part III.B.

72. For all of the original compilations of statistics used in this paper, the unit of measurement is a single defendant, not a single trial. When a defendant is charged with more than one offense, the disposition of the most serious offense is used for determining the trial outcome. *See generally* Appendix (discussing the data).

73. For a discussion of the source data used to compile these figures, see *supra* notes 63, 64 and Appendix. The percentage change in rates (the "Difference" column) was calculated by dividing the difference in jury and bench conviction rates by the jury rate. For example, for violent crimes the change in rates equals the jury rate minus the bench rate (81 - 69 = 12) divided by the jury rate (12 ÷ 81 = 0.15). Thus the bench conviction rate for violent crimes is 15% lower than the conviction rate for jury trials.

74. The standard deviation for the bench conviction rate is 0.108. In contrast, the standard deviation for the jury conviction rate is 0.067. Table A shows that the only real anomaly in jury behavior is for regulatory crimes, with a 67% conviction rate.

immigration offenses, the conviction rates vary, but the gap between judge and jury outcomes is relatively small. A second group, consisting of property, drug, and public order crimes, look more like our overall (“All Crimes”) average, where juries are substantially more likely to convict than judges.

These numbers make it easier to assess whether defense lawyers are steering certain case types toward judges. If it turns out that lawyers are disproportionately waiving jury trials in cases involving property, drug, and public order crimes, we might conclude that defense counsel are at least instinctively aware of the conviction data outlined above and are reacting accordingly. A slight variation on this explanation (and one more consistent with the interview responses) is that *regardless* of whether defense counsel are aware of the overall conviction rates, collectively they have recognized some recurring feature of these cases that improves their odds in a bench trial.

When we look at defendants’ choice of factfinder, however, we see mixed results. Table B shows the number and percentage of defendants who chose bench trials over jury trials by crime category.

TABLE B

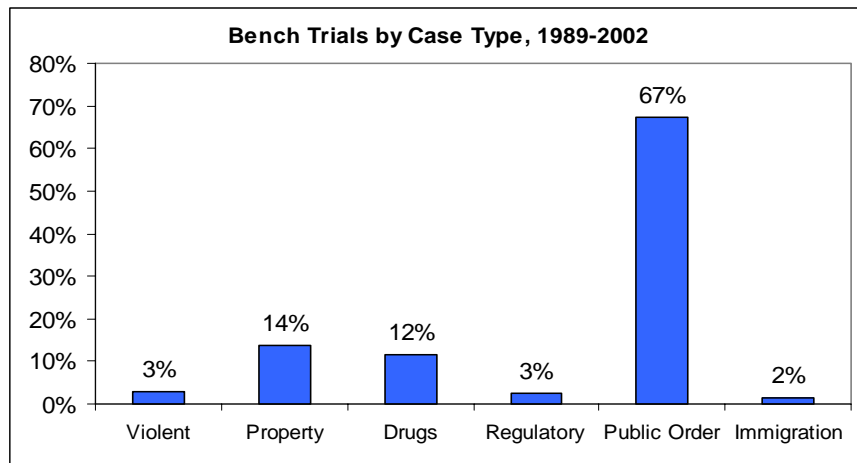
Crime Category	All Trials		Jury Trials		Bench Trials	
	Number	Percent of All Trials	Number	Percent of trials in category	Number	Percent of trials in category
Violent	4,907	6%	4,443	91%	464	9%
Property	14,506	19%	12,418	86%	2,088	14%
Drugs	31,841	41%	30,072	94%	1,769	6%
Regulatory	2,256	3%	1,854	82%	402	18%
Public Order	22,521	29%	12,313	55%	10,208	45%
Immigration	1,329	2%	1,084	82%	245	18%
Totals	77,360	100%	62,184	80%	15,176	20%

Table B partially clarifies the picture, because one crime group separates itself from the pack—public order offenses. We see in the first two columns of numbers (“All Trials”) that public order crimes are the second most common charge against trial defendants: 29% of those who are tried face such a charge, trailing only drug crimes as the most popular type. More importantly, public order crimes are disproportionately tried before a judge. Almost half (45%) of all public order trials were heard by

the bench, more than two and one-half times the rate of any other crime type.

But even these numbers do not fully capture the central role that public order trials play in the bench-versus-jury question. If we look *only* at bench trials, we see in Figure 6 that a remarkable *two-thirds* of these trials involve public order offenses.⁷⁵

FIGURE 6



The fact that public order crimes make up such a large percentage of all bench trials is instructive, because we saw in Table A above that: (1) bench trials for public order crimes have the lowest conviction rate of any crime category; and (2) the *difference* in conviction rates between judge and jury is higher for these crimes than for any other type. We therefore can say with confidence that there is something distinctive about public order offenses, something that explains at least part of the divergence between judge and jury outcomes.

Before asking the second question—why are public order crimes different—it is important to note the limits of the “crime type” hypothesis.

75. During Phase III there were 15,176 bench trials, 10,208 (67%) of which involved defendants charged with non-petty public order crimes. The numbers for the rest of the bench-trial docket were as follows: violent crimes, 464 defendants; property crimes, 2,088 defendants; drug crimes, 1,769 defendants; regulatory crimes, 402 defendants; and immigration offenses, 245 defendants. There were 23 defendants for whom the crime category variable was missing.

If we analyze all trials *except* those involving public order crimes, we can measure the influence of this one category on the overall conviction rates.

TABLE C

Category	Conviction Rates, 1989-2002		
	All Trials	Jury Trials	Bench Trials
All Trials	78%	84%	51%
Public Order Trials	67%	83%	47%
Non-Public Order Trials	82%	84%	60%

Table C shows that if public order trials are temporarily redacted from our dataset, the bench conviction rate increases significantly, from 51% to 60%, closing the gap in the overall judge and jury rates by more than 25%.⁷⁶ But this also means that the glass is still almost three-quarters empty; even without public order crimes, the difference in rates (84% for juries, 60% for judges) is still substantial. Given this, and given that juries convict at higher rates across *all* categories of crimes,⁷⁷ it is obvious that the crime type can provide at best a partial answer to our primary question.

b. What Is It About Public Order Crimes?

Nonetheless, the impact of this single crime category is large enough to justify asking the second question—*why* are public order crimes so much more likely to end in an acquittal if a judge hears the case? A fully satisfying explanation should have the following qualities:

- it should identify features of public order crimes that are not shared (or not shared to the same degree) by other crime types;
- it should explain why these distinctive features are more likely to affect judges than juries; and
- it should explain why judges have been *increasingly* affected by these features over the last 14 years.

An explanation that meets all these requirements is hard to find, in part because the “public order” category covers such a wide range of offenses.

76. The 25% figure was calculated by taking the difference in the judge/jury conviction rates *with* public order crimes counted (84% - 51%, or 33 percentage points), and subtracting the difference in the judge/jury rates *without* counting the public order crimes (84% - 60%, or 24 percentage points), leaving a total of nine percentage points. The nine percentage points were then divided by the original difference in rates (33 percentage points), leaving a figure of 0.27. Thus, more than one-quarter of the difference in rates can be attributed to the differences in trials involving public order crimes.

77. *See supra* Table A.

The Administrative Office of the U.S. Courts classifies roughly 50 crimes or groups of crimes as “public order” offenses, ranging from sabotage to migratory bird offenses to traffic violations on federal property.⁷⁸ Fortunately, the overwhelming majority (94%) of public order trials fall into one of five subgroups: (1) tax violations; (2) racketeering and extortion; (3) weapons crimes; (4) obstruction of process (including perjury, contempt, bribery, and intimidation of witnesses); and (5) traffic offenses, including driving while intoxicated.⁷⁹

When we look at the frequency of each of these sub-categories during Phase III, we see wide variations in both occurrence and factfinder.

TABLE D

Crime	Number and Percentage of Public Order Trials by Crime Type					
	Total Trial Ds	% of all PO Trials	No. Jury	% Jury	No. Bench	% Bench
Traffic Offenses	9,057	40%	352	4%	8,705	96%
Weapons Offenses	7,179	32%	6,586	92%	593	8%
Racketeering	1,901	8%	1,805	95%	96	5%
Obstruction	1,634	7%	1,430	88%	204	12%
Tax Offenses	1,335	6%	1,251	94%	84	6%
Total	21,106	94%⁸⁰	11,424	54%	9,682	46%

The obvious outlier in this group is traffic offenses: they are the most common public order crime that goes to trial, and nearly all of them go before a judge. (Digression: over 9,000 traffic trials in federal court since 1989; who knew?). The other numerically-large group is defendants charged with weapons crimes, who make up nearly one-third (32%) of all public order trials. In this subgroup, however, almost all the defendants (92%) chose a jury trial. Together, weapons and traffic trials make up 72% of all public order trials, so any explanation for the different conviction rates must at least account for these two crime groups.

The conviction rates for the sub-categories also fail to follow a predictable pattern, as shown in Table E:

78. See Offense Classification Table, *supra* note 65.

79. There were 22,521 defendants who stood trial for public order crimes during Phase III, including those who came within the five categories set forth in the text, and 1,415 defendants charged with other public order offenses.

80. See Offense Classification Table, *supra* note 65.

TABLE E

Category	Conviction Rate	
	Jury	Bench
Traffic Violations	66%	44%
Weapons Violations	84%	63%
Racketeering & Extortion	84%	49%
Obstruction of Justice	75%	64%
Tax Violations	85%	68%

When these figures are combined with those in Table D, they reveal that the real downward pressure on bench conviction rates comes from traffic trials: more than 85% of all public order bench trials (and more than 50% of bench trials of *any* kind) consist of traffic offenses alone.⁸¹ The combination of a high number of trials and a low conviction rate makes this category the dominant one in need of explanation.⁸²

With this data in mind, we can begin to sketch a theory. Recall that the various trial manuals advised defendants to waive a jury in certain kinds of cases.⁸³ To supplement the manuals, each lawyer interviewed for this paper was asked to describe the type of case where the defense was most likely to benefit from a bench trial. There was remarkable consistency in the responses; defendants are best-advised to waive a jury in:

(1) Cases with complex evidence and complex defenses, which might so confuse jurors that they simply throw up their hands and convict.⁸⁴ An example would be a securities fraud prosecution where the defense is based on a close reading of corporate documents. There appears to be a strong assumption that judges by training and experience are better able to follow intricate evidence and arguments.⁸⁵

81. Of the 10,208 public order bench trials during Phase III, 8,705 (85%) were for traffic offenses. Traffic trials made up 57% of all bench trials conducted during Phase III (8,705 traffic trials ÷ 15,176 all bench trials = 0.57).

82. Judges also convict at low rates in racketeering and extortion cases, but the number of these trials is small enough that the impact on the overall rate, and thus the explanatory power, is limited. As show in Table D, only 8% of all public order trials involve racketeering and extortion charges, and of these trials, only 5% are tried by the court.

83. See *supra* notes 33–35 and accompanying text.

84. While there appears to be moderate agreement among defense lawyers that complex cases are better tried before a judge, there is reason to question this assumption. See KALVEN & ZEISEL, *supra* note 36, at 149–62 (same); Eisenberg et al., *supra* note 38, at 190–92 (finding little evidence that legal or factual complexity explains judge-jury disagreements over case outcome).

85. See Michael Heise, *Criminal Case Complexity: An Empirical Perspective*, 1 J. EMPIRICAL LEGAL STUD. 331, 347–48, 365 (2004) (demonstrating how formal legal training may influence perceptions about complexity, with judges perceiving cases as less complex than jurors when viewing

(2) Cases with “legalistic” defenses, meaning those that are legally viable but might be inconsistent with a jury’s sense of justice. Examples include entrapment, insanity, duress, or when the defendant was engaged in some wrongdoing other than that charged by the government. A defendant charged with assault on federal property who defends by saying the alleged assault actually took place on state property, for example, would fall into this category.

(3) Cases with horrible facts or unpopular defendants that might repel a jury. Many of the lawyers interviewed gave as an example a child pornography defendant, where juries might be so outraged by the evidence that they rush to judgment.

These factors might help explain the higher bench acquittal rate for several of the public order categories. Tax crime trials are likely to be complex, and judges might be better than juries at spotting holes in the government’s documentary case. Racketeering and extortion trials also can be highly complicated,⁸⁶ and often involve both notorious defendants and legalistic defenses. Obstruction cases as a group are less complex, although it is easy to imagine white collar bribery and perjury cases where the evidence would be dense and the defendants unpopular. Some perjury cases, in fact, may be classic examples of a “legalistic” defense: the defendant intended to mislead, and in fact did mislead, but either the statement was literally true (although intentionally misleading)⁸⁷ or the lie told by the defendant turned out to be immaterial.⁸⁸

This hypothesis has some appeal, especially when we recall that the description does not have to cover *all* public order trials, only the 45% where the defendant waived a jury.⁸⁹ Perhaps defense counsel are moving cases like this toward the bench, where judges are more likely than juries to spot any weakness in the evidence amidst the complexity, or are less likely to be put off by the technical nature of the defense or the unpopularity of the defendants.⁹⁰

the same case).

86. Both tax and racketeering cases also seem likely to be longer than other types of trials, at least on average, and one recent study found that trial length correlates significantly with the perceived complexity of the case. *See* Heise, *supra* note 85, at 361–62; *see also id.* at 368 (concluding that among all the variables studied, “[t]he influence of trial length on case complexity is perhaps the most consistent and robust finding.”).

87. *See, e.g.,* *Bronston v. United States*, 409 U.S. 352 (1973) (in general, statements that are intentionally misleading may not sustain a perjury conviction if the statements are literally true).

88. *See, e.g.,* 18 U.S.C. § 1621 (1994) (intentionally false statements must be “material” to satisfy federal perjury statute).

89. *See supra* Table B.

90. This hypothesis is consistent with the idea that lawyers generally are unaware of the

But ultimately this explanation is unsatisfying. First, it is not obvious that public order crimes are *especially* likely to be complex, at least when compared with, say, regulatory offenses or complex fraud crimes (the latter of which are categorized as property crimes).⁹¹ Each of the other offense categories has its share of technical or inflammatory cases that will at times be more off-putting to a jury than the standard public order trial.⁹² Second, even granting that judges are better than juries at finding weaknesses in complex cases, it does not necessarily follow that judges are therefore better for the defense. A powerful alternative explanation is that complexity, and any resulting jury confusion, are friends of the defense—perhaps the more complicated the case, the more likely jurors may be to translate confusion into reasonable doubt. The data are not particularly supportive of this view, since juries convict with impressive consistency regardless of the type of case.⁹³ But the assumption that a confused jury is more likely to convict than acquit is not obviously correct.

The third and most important problem is that even if features like complexity and legalistic defenses explain *some* of the public order trial data, they may not tell us much about traffic offenses and weapons crimes, the two most frequent crimes within the category. These crimes do not seem intrinsically complex,⁹⁴ their facts are not especially scandalous, and while some weapons defendants will scare a jury, weapons defendants as a group seem unlikely to excite a distinct bias among jurors. One piece of evidence for this conclusion is the rate at which the two groups of defendants seek a bench trial: almost all traffic defendants waive a jury, while practically none of the defendants charged with weapons crimes

respective conviction rates. *See supra* Part II.C. It is sufficient for this explanation both that defendants recognize that the facts and law of *their* case are better suited for a bench trial, and that these distinctive features are prevalent in public order crimes.

91. Assessing the complexity of a criminal case is difficult because there is no universally accepted definition. *See Heise, supra* note 85, at 368 (“No clear consensus exists among the critical actors [in the criminal system] on complexity perceptions.”). More specifically, it appears that judges and juries do not view the issue of “complexity” in quite the same way. *See id.* at 368 (concluding that while “jurors and judges may agree much of the time on the outcome of cases, [they] . . . do not agree on what makes a criminal case complex.”); *see also id.* at 350 (noting limits on strength of conclusions about judge and jury perceptions of complexity).

92. Note, however, that regulatory and property crimes have the second and third lowest bench conviction rates, trailing only public order crimes. *See supra* Table A.

93. The exception to this general statement comes in trials involving regulatory crimes, where jurors are far less likely to convict than in other types of cases. *See id.* (showing a 67% jury conviction rate in regulatory crime trials, compared to an 81% – 87% jury rate for all other types of trials). Of course, even in this type of case, juries continue to convict at a higher rate than judges. *Id.*

94. *But cf. Heise, supra* note 85, at 360 (reporting that among state court judges studied, “cases involving death, *drunk driving*, rape, and assault were systematically more complicated for judges. *Drunk driving* . . . increased [the case’s] legal complexity.” (emphasis added)).

do.⁹⁵ If there is something distinctive about these crimes that makes judges a better factfinder, it apparently has escaped the notice of the thousands of defense counsel who take weapons cases to a jury.⁹⁶

Once we focus specifically on weapons and traffic crimes, however, other potential explanations emerge. A discussion of weapons crimes will be put off until Part III.B, where we will explore a hypothesis that includes weapons crimes but is not limited to that crime type. On the other hand, the heavy influence of traffic trials on the conviction rate raises its own alternative theory.

Virtually all the traffic offenses that go to trial, including driving under the influence, are misdemeanors.⁹⁷ Here the data line up nicely: defendants overwhelmingly waive a jury in these cases, and traffic offenses tried before a judge have the lowest conviction rate of any crime type. Perhaps, then, we are looking at “case type” through the wrong filter. The more probative variable for our purposes might be the *seriousness* of the crime, rather than the nature of the underlying offense. The data on traffic trials raises a question of whether misdemeanors *generally* are more likely to end up at trial. If so, perhaps there is something about less serious cases that make these trials especially likely to end in acquittal.

The misdemeanor/felony question is examined in the next section. But for the moment, we can conclude that one type of crime—public order offenses—has a demonstrable effect on the difference in conviction rates. We also can conclude, however, that the case type is no more than a partial explanation, and more importantly, that the *reasons* a judge is more likely to acquit in a public order case remain obscure.

2. Differences Based on the Seriousness of the Crime

A remarkably high number of misdemeanor trials end up before the bench. During Phase III:

- 89% of all misdemeanor defendants were tried before a judge;⁹⁸ and
- 74% of all bench trials involve misdemeanors.⁹⁹

95. See *supra* Table D (showing that 96% of traffic defendants waive a jury trial, while only 8% of weapons defendants do so).

96. This last point can be made with respect to *all* defendants charged with all types of crimes, since the conviction rate for bench trials is always lower than for juries. This point is considered more broadly in Part IV.A, below.

97. Of the 9,057 defendants who stood trial for traffic offenses, all but 40 (99.6%) were charged with misdemeanors.

98. Between 1989 and 2002 there were 12,525 misdemeanor trials, 11,164 of which (89%) were tried before a judge. These figures exclude petty offenses.

99. During Phase III, there were 15,176 bench trials in non-petty cases, 11,164 of which (74%)

So if we find that misdemeanors disproportionately end in acquittal, this could explain a significant part of the conviction gap. We still would have to take the next step, of course, and explain why defendants fare so well in trials for less serious crimes.

It turns out that the conviction rate *is* significantly lower for misdemeanors. As Table F shows, fully one-half of all misdemeanor trial defendants are acquitted, a much lower rate than for serious crimes.

TABLE F

Crime Level	Conviction Rates		
	Jury	Judge	All
Misdemeanor	72%	48%	50%
Felony	84%	60%	83%

We also see that, once again, judges acquit far more often than juries. In fact, misdemeanor defendants tried by a judge have a slightly better than 50-50 chance of being acquitted.

It is not terribly surprising that so many misdemeanor defendants waive a jury. Those who pay for their lawyer may prefer a bench trial because it means a less costly defense.¹⁰⁰ Appointed defense counsel may need to spend their discretionary time on more serious felony cases, and so perhaps are willing to set aside their normal preference for a jury.¹⁰¹ This latter possibility is mildly troubling, because it suggests that commitments to other clients can influence a decision about which factfinder is best for the particular misdemeanor defendant.¹⁰² But putting aside these concerns

involved misdemeanor charges. This number contrasts sharply with the percentage of *all* trials that involve misdemeanors. If we look at both judge and jury trials, only 16% involve misdemeanors (12,525 out of 77,638 trial defendants).

100. Cf. William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 155 ("If one wanted to understand how the American trial system for criminal cases came to be the most expensive . . . in the world, it would be difficult to find a better starting point than *Batson* [expanding the rules for challenging peremptory strikes].").

101. Cf. Edward C. Monahan & James Clark, *Coping with Excessive Workload*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER* 318 (Rodney J. Uphoff ed., 1995) ("Every person representing indigents accused or convicted of a crime eventually confronts the harsh reality of whether competent representation is provided given the number of clients, the demands of the cases, and the necessity of other work.").

102. Darryl Brown has nicely summarized the point this way: defense counsel, he says, must, and commonly do, vary their level of representation among cases toward two ends (the second mandated by the first): allocating extremely limited defense budgets and giving priority to some clients in the most important cases. I want to suggest that this practice is problematic-not because it occurs, but because lawyers largely deny it occurs and as a consequence do it poorly.

for the moment, (a point re-examined in Part IV, below), it does seem plausible that less serious matters are natural candidates for the process that consumes fewer resources.

But while it is easy to understand why more defendants charged with misdemeanors *have* a bench trial, it is less clear why judges are more inclined than a jury to *acquit* in these cases. It seems unlikely that the type of the evidence, the identity of the defendant, or the complexity of the issues would lead to a division of outcomes. The question becomes even more complex when we realize that, although the gap in conviction rates endures in these cases, *both* judges and juries convict misdemeanor defendants at significantly lower rates than they do felony defendants.¹⁰³ This indicates there is something systemic at work (explaining the lower conviction rate in all cases when compared to felonies) and also something specific to judges (explaining why judges convict at lower rates than juries).

One highly plausible explanation is that the minor nature of the charge affects both the quality of the government's case and the factfinder's reaction to it. The quality of the affirmative evidence is likely to be lower in misdemeanor trials, primarily because all of the relevant actors devote fewer resources to its investigation and prosecution.¹⁰⁴ The prosecutor assigned to the case is probably going to be less experienced than those assigned to felonies. Many misdemeanors will be initiated and investigated by law enforcement officials who may be less well-versed in federal criminal practice than those who uncover felonies—federal park police and state officers arresting for minor federal crimes, rather than FBI or DEA agents, for example. In addition, law enforcement officers of all types undoubtedly spend less time investigating minor cases, and are more likely to assign junior people to investigate. Government witnesses may be somewhat less prepared by the lawyers, the lack of a grand jury investigation may mean that important documents are never uncovered,¹⁰⁵ and useful but non-essential experts are less likely to be retained, simply

Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L.J. 207, 207 (2003–2004).

103. As shown in Table F, *supra*, there is an almost 15% drop in the jury conviction rate when we compare felonies to misdemeanors (84% felony conviction rate - 72% misdemeanor rate = 12 percentage points ÷ 84% = 14.3% decrease).

104. My thanks to the many interviewed prosecutors and defense counsel who both suggested and helped develop this point.

105. There is no right to grand jury review of misdemeanor charges. *See* FED. R. CRIM. P. 58(b)(1). Therefore, prosecutors are less likely to present these matters to the grand jury for investigation.

because the hours and dollars can be better used for major crimes. And while many of the same pressures and incentives will also operate on the defense, the government's burden of production and proof may make the "inexperience factor" particularly significant to the prosecution. If true, this would help explain why the conviction rate for misdemeanors is lower regardless of the factfinder.

It may also be that the lower quality of case presentation affects judges and juries differently. Juries often sit for only a single case, and typically have no sense of how the presentation in this case compares to any other; they may not know whether the presentation they are seeing is relatively good or bad. Judges, on the other hand, have seen many prosecutions, and may read the relatively lower-quality presentation as a sign of weakness in the case or relative indifference by the government to its outcome. Against this backdrop, judges may be more inclined to make close decisions on credibility or the sufficiency of the evidence against the government.¹⁰⁶

Many of the lawyers interviewed supported this explanation, while others offered supplemental reasons for why judges acquit more often in misdemeanor trials. Some lawyers suggested that sometimes late in the pretrial process prosecutors realize that they do not have a strong case, but for institutional or political reasons cannot simply dismiss the charges.¹⁰⁷ Because of the relatively low stakes, the government has no interest in a full blown jury trial, and is content to proceed with the more expeditious and lower-profile bench trial, despite the higher risk of acquittal. According to this explanation, the defense realizes that the government has a weak hand, and is content to have a judge decide the matter rather than run the risk that a jury will do something unexpected.

These potential explanations are not exhaustive, but probably explain a significant part of the judge/jury disparity for misdemeanors. In fact, the misdemeanor explanations not only seem more plausible than the "public order" explanation offered above,¹⁰⁸ but also, because of the very large

106. Cf. KALVEN & ZEISEL, *supra* note 36, at 376, 381 (noting that in virtually every case where the judge disagreed with the jury's decision to convict, the evidence of guilt was rated as "close" by the judge). *But cf.* Heise, *supra* note 85, at 361 (noting that attorney skill level did not change judges' perceptions of complexity of the case).

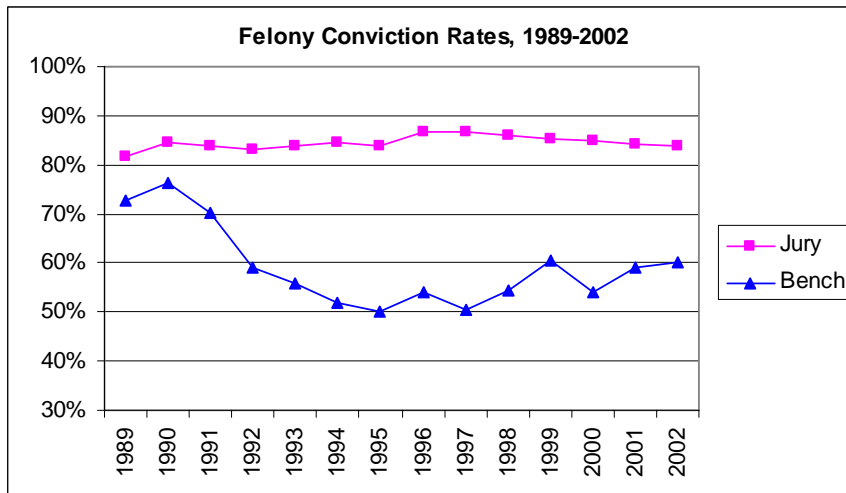
107. One of the lawyers interviewed noted that the victims' rights movement has increasingly put pressure on prosecutors to go forward in cases that might have been dropped in the past. For a discussion of the impact of the victims' rights movement on the adjudication process, see Paul H. Robinson, *Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication?* 33 MCGEORGE L. REV. 749, 755-57 (2002).

108. See *supra* notes 86-88 and accompanying text.

percentage of misdemeanors in the group of public order bench trials, the explanations nicely and largely cover both variables.¹⁰⁹

Again, however, we should note the limits of the “case seriousness” hypothesis. As with public order crimes, the different conviction rates are pronounced in misdemeanor trials, but not unique. Even if we disregard misdemeanor trials and look only at felonies, we still see a significant difference in results. As shown in Figure 7, felony juries still convicted 84% of the defendants during Phase III, while judges convicted only 60%.¹¹⁰

FIGURE 7



As a final step in this section we might try to close the conviction gap further by combining the two variables identified above—category of crime (public order offenses) and seriousness of crime (misdemeanors)—to see if this overlapping combination better explains what is only partially explained by separate analysis. When we analyze a pool of cases that consists of all misdemeanors plus all public order crimes, we see that this

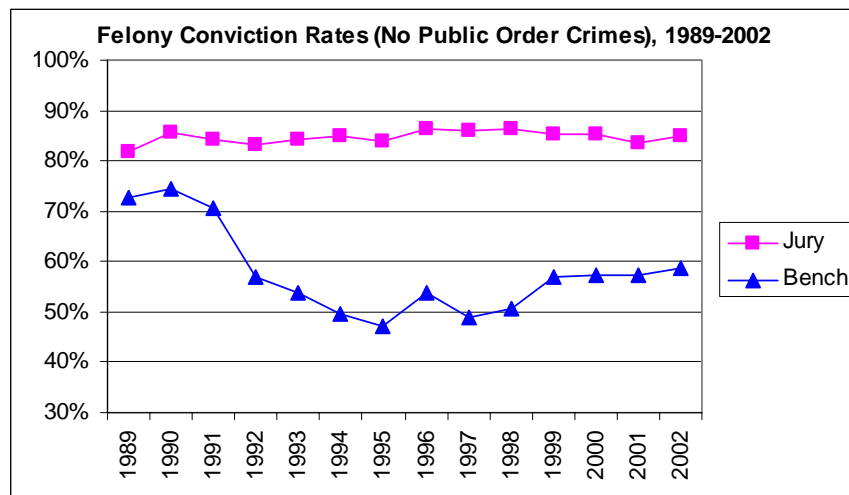
109. The overlap between public order bench trials and misdemeanor bench trials is substantial. During Phase III, there were 10,208 public order bench trials, 9,286 of which (91%) were for misdemeanors.

110. During those years there were 65,113 felony defendants who stood trial. Of these, 61,077 (94%) were tried by jury, and 51,504 of the jury defendants were convicted. The remaining 4,036 (6%) defendants were tried by the court, and 2,436 were convicted. The trend lines for felony convictions are similar to the trend lines for all crimes, although the slope is less dramatic and the movement in recent years for bench trials has been slightly upward.

pool captures 80% of the bench trials.¹¹¹ We also see that this “combination” category has a bench conviction rate of 49%, far lower than the 82% rate for juries in comparable cases.¹¹² While coupling the crime type with the seriousness of the offense does not, of course, get us closer to explaining the reasons for the acquittals, it does describe a substantial portion of the cases where the disparity most often arises.

But even after combining the two variables, the fault lines remain. As reflected in Figure 8, once we redact the two main classes of bench trials, juries still convict 85% of the time,¹¹³ judges still convict only 59% of the time, and the trend lines still widen between 1989 and 2002 (although less so than for all crimes).¹¹⁴

FIGURE 8



111. There were 15,176 defendants who had bench trials during Phase III. Within this group there were 10,208 public order bench trials *including* misdemeanors, and an additional 1,878 misdemeanor bench trials that did *not* involve public order crimes, for a total of 12,086 bench trials that involved a public order crime, a misdemeanor, or both. This last number made up 80% of the total bench trials. In contrast, this combination category of public order/misdemeanor made up only 21% of the jury trial defendants (12,313 public order jury defendants plus 789 non-public order jury misdemeanors = 13,102, divided by 62,184 jury defendants for whom a crime category was recorded = 0.21).

112. Of the 12,086 defendants charged with a misdemeanor and/or a public order crime who received a bench trial, fewer than half (5,925, or 49%) were convicted. The remaining 13,002 defendants within this combined category received a jury trial, 10,770 of whom (83%) were convicted.

113. During Phase III, there were 49,336 defendants who were tried before a jury for some felony other than a public order offense. Within this group 41,715 were convicted, for a rate of 85%.

114. During Phase III, there were 3,114 defendants who received a bench trial for some felony other than a public order offense. Of this group 1,841 were convicted, for a rate of 59%.

And while we need to be increasingly cautious in interpreting these figures—eliminating 80% of the bench trials from the dataset leaves a relatively small number¹¹⁵—it nonetheless seems safe to conclude that while “case type” may provide part of the answer to our main questions, there is still a great deal left unexplained about why judges are so much more inclined to acquit.

C. An Explanation Based on the Strength of the Case

An alternative story is that a defendant’s decision to waive jury, and in turn the likelihood of conviction, are based more on the strength of the evidence than on the nature of the crime charged. This explanation suggests that judges acquit more because they see weaker prosecution cases, and they see weaker cases because defendants direct those trials away from juries.¹¹⁶

At some early point in a criminal case, defense counsel will make a rough calculation about the strength of the government’s evidence. If she concludes that the prosecution has a strong case—incriminating, provable facts and no obvious legal bars to prosecution—demanding a jury trial may seem like the better bet. The chances of undermining the government’s case with at least one or two jurors intuitively seems better than the chances of explaining to an experienced judge why the government’s impressive evidence is deficient.¹¹⁷

On the other hand, if the evidence is weak or the government’s legal theory dubious, the defense should prefer a bench trial.¹¹⁸ Judges are almost certainly more adept at spotting small but critical defects in the evidence, probably less inclined to defer to the views of a marginal expert witness, and perhaps less trusting of certain kinds of government evidence that experience has shown to be frequently unreliable (jailhouse

115. Once we eliminate misdemeanors and public order crimes, the total number of bench trials between 1989 and 2002 is 3,114, an average of only 222 per year.

116. Researchers have found that although the strength of the evidence is highly significant in explaining judge and jury outcomes (a comforting thought), different decisionmakers may evaluate the strength of evidence somewhat differently. *See* Eisenberg et al., *supra* note 38, at 196–98.

117. As one of the interviewed lawyers put it, “with a jury you can have a mistrial, which sometimes is all you are hoping for; it’s hard to have a ‘hung judge.’” *See also* Heise, *supra* note 85, at 335 (“A defense attorney . . . need only persuade a jury that the ‘beyond a reasonable doubt’ standard is not met. One tactic designed to achieve this goal is to impress a case’s complicating factors upon a jury.”).

118. *See generally* CRIMINAL DEFENSE TECHNIQUES, *supra* note 35, at § 1A.06 (advising defense counsel considering the waiver issue that if there is a strong legal defense, “counsel should opt for the safety of a bench trial”).

informants or cross-racial eyewitness identifications, for example).¹¹⁹ In short, as Judge Richard Posner puts it:

If juries are less accurate guilt determiners than judges, innocent defendants will choose to be tried by judges rather than run the risk of jury mistake, while guilty defendants will choose to be tried by juries, hoping *for* a mistake. The acquittal rate should therefore be higher in bench trials—and it is.¹²⁰

The beauty of this hypothesis is that it explains almost everything. Judges are more likely to acquit because defense counsel direct weak cases toward the bench, and they do so because they trust judges more than juries to find the genuine flaws in the government's case. In contrast, juries convict more because they see stronger prosecutions, and they see these cases because defense counsel believe that their chances are *better* before a jury, even if the odds are slim in absolute terms. Under this view, there is nothing irrational about defense counsel sending most cases to a jury despite its higher conviction rate. Perhaps judges, if presented with the same cases that juries now hear, would convict an even *higher* percentage of these defendants.¹²¹

The simplicity of this argument is also its shortcoming. There is a threshold problem of circularity. The only objective evidence we have of the strength and weakness of adjudicated cases is the verdict, and if “weak” cases are defined as those that end in acquittal, we have not advanced the ball very far. Note that the circularity does not *refute* the hypothesis that case strength helps explain the conviction gap; it simply means that without some way to measure the merits of the prosecution independent of the verdict, supportive evidence is hard to find.

A second problem is that this explanation was only obliquely supported by the lawyers interviewed. Not surprisingly, several prosecutors agreed

119. The risks of cross-racial identifications and the dangers of using jailhouse informants have been widely discussed in legal circles. See, e.g., Robert M. Bloom, *Jailhouse Informants*, 18 CRIM. JUST. 20 (2003); Sherri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001); see also Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf> (noting the high incidence of cross-racial misidentification and informant perjury in cases of wrongful convictions). Judges presumably are aware of these concerns, but it is unlikely that juries would have a similar understanding.

120. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1501 (1999) (footnote omitted).

121. See *supra* notes 36–38 and accompanying text (discussing empirical studies finding that when judges and juries consider the same cases, juries are more likely to be lenient).

that defendants often prefer juries because their best strategy was to rely on factual or legal confusion, a condition that is presumptively easier to create in a jury trial.¹²² A few defense counsel also acknowledged that judges were less likely to be persuaded by creative defense techniques (as one lawyer put it, “judges are more likely to see through our strategy”), perhaps a tacit admission that juries are more easily misdirected than judges are. But none of the lawyers directly identified the “strength of the evidence” as an operative principle in choosing a decisionmaker.¹²³

Third, and more critically, although the strength-of-the-evidence hypothesis may inform the question of why judges acquit more often, it fails to satisfy the third requirement of a full explanation outlined above.¹²⁴ Namely, it does not explain why the conviction rate in bench trials has *changed* so significantly over the last 14 years while the jury rate has not. For that, we will need to look at the possibility that prosecutors collectively are bringing increasingly weak cases over time.¹²⁵ Because this issue ties in closely with an alternative explanation, we will postpone its consideration until Part III.

This is not to deny that the strength of the government’s case influences both the choice of factfinder and the difference in outcomes—it almost certainly does. In its crudest form, the notion that “sometimes defendants want the factfinder to be confused, and sometimes they don’t,” coupled with a strong sense that judges are harder to misdirect than laypeople, is quite appealing.¹²⁶ And note that to the extent this sorting

122. The notion that judges are harder to confuse than jurors has some empirical support. *See* Heise, *supra* note 85, at 333 (noting that in an empirical study, “judges reported the lowest levels of complexity [in criminal cases], jurors the highest.”).

123. One defense lawyer interviewed went even further, expressing doubts that the strength of the case had any bearing on the decision. He observed that if the government’s case really is weak, demanding a jury does not deprive the defendant of the protection of the judge. Defendants can always move under FED. R. CRIM. P. 29 for a judgment of acquittal if the government’s case fails to satisfy all of the elements of the crime, or if the defendant has a valid but technical defense. To paraphrase the lawyer, a jury trial gives two chances at acquittal—one by jury verdict and one by a judge’s ruling, while a bench trial provides only a single chance.

124. *See supra* Part II.B.1.b (setting forth three criteria for a full explanation for the judge-jury differences).

125. One variation on this reasoning is that cases are getting increasingly complex over time, a view that has some scholarly support. *See* Heise, *supra* note 85, at 335–36 (documenting an increase over time in the percentage of cases that judges find to be “complex”). If cases are getting more complicated, this could explain a higher conviction rate without any change in government philosophy or practice. It is unclear, however, why this trend would affect bench trials but not jury trials, other than as a function of the strength of the evidence.

126. As Judge Jerome Frank famously put it, “while the jury can contribute nothing of value so far as [interpreting] the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour.” *Skidmore v. Balt. & Ohio R.R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948).

does occur, it tells us something important about prosecutors' charging decisions. If strong government cases typically wind up before juries, the fact that 80% of all recent trials¹²⁷ (and 94% of the recent felony trials¹²⁸) wind up before a jury strongly suggests that even defense counsel believe that prosecutors usually bring well-founded charges.

Thus the hypothesis is potentially quite useful, but limited by the lack of measurable evidence to test it. So while we can add this theory to the others in our effort to explain the different conviction rates, we should proceed with caution, recognizing that both the existence and the extent of the impact are very hard to prove.

D. An Explanation Based on Defense Counsel

Another potential story is that different types of defense lawyers dictate different factfinders and results. If we indulge in gross stereotyping, we can readily imagine several ways that the defense lawyer and the defense strategy might be correlated. Perhaps defendants who can pay for their own lawyer also can pay for a more complex defense, one that chases down every conceivable lead, or one that relies heavily on creative legal arguments, expert witnesses, and technical explanations.¹²⁹ If so, such a defendant might prefer a bench trial, reasoning that a more sophisticated judge will be more receptive to this type of argument. Alternatively, these attorneys might prefer jury trials, assuming that aggressive lawyering might more easily persuade a jury that there is reasonable doubt somewhere in the blizzard of arguments and issues. In contrast, hard-pressed appointed counsel might think that the client's best chance is before a judge, an option that typically requires fewer resources; on the other hand, appointed counsel might conclude that without adequate pretrial funding, the defense strategy should focus on in-court efforts to sway a jury.

If there were a significant correlation between type of lawyers, the decision to waive jury, and trial outcomes, it would tell us something

127. See *supra* Table B.

128. During Phase III there were 65,113 felony defendants who stood trial in federal court, 61,077 of whom (94%) elected to proceed before a jury.

129. For a discussion on the resource problems faced by appointed defense counsel and their impact on the quality of the defense, see Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 245-51 (1997). See also Lorraine Adams & Serge F. Kovaleski, *The Dream Team's Dream Resources*, in *POSTMORTEM: THE O.J. SIMPSON CASE* 126, 126 (Jeffrey Abramson ed., 1996) ("[I]n the story of how O.J. Simpson's defense attorneys won [their case], prestige and guile counted for less than far more powerful tools: money, speed, detailed legal work, and the inexact science of jury consulting.").

significant about the impact of wealth on trials. To extend the stereotypes offered above, we might, for example, predict that defendants with money receive better trial representation on average than those with appointed counsel, a prediction that would be supported (although not proved) by significantly different pre-trial choices and post-trial results.

But in fact, the evidence doesn't support this story, or any similar story based on the source of defense counsel's funding. The data allow us to look at four types of representation: private attorneys, public or community defenders, court-appointed private attorneys ("panel" attorneys),¹³⁰ and "no attorney," cases where counsel was waived. In Phase III cases for which the type of advocate can be determined,¹³¹ there is no meaningful difference in the percentage of cases where the defendant waived a jury based on the type of defense counsel. Among the three types of lawyers—private, public defender, and panel—the percentage of defendants who choose a jury trial is nearly identical: 87%, 88%, and 91% respectively.¹³² Only those without a lawyer appear before the bench in significant numbers.¹³³

Nor is there a meaningful difference in the conviction rates, as shown in Table G:

TABLE G

Lawyer Type	No. of Defendants	Conviction Rates, 1989-2002		
		All Trials	Jury Trials	Bench Trials
Private	21,395	79%	82%	60%
Public Defender	8,241	81%	84%	64%
Panel	20,174	85%	87%	67%
No Lawyer	8,403	43%	82%	41%

130. A "panel" attorney is one appointed by the district court from a list of private attorneys on a case-by-case basis. See 18 U.S.C. § 3006A (1994); see also CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 2 (2000), available at <http://www.ojp.usdoj.gov/bjs/abstract/dccc.htm>.

131. For the 77,638 defendants who went to trial between 1989 and 2002, information on the type of counsel was available for 58,213 of them. Information on the remaining 19,425 was not reported.

132. During Phase III, there were 21,395 trial defendants represented by private attorneys, 18,581 of whom (87%) chose a jury. During this same period there were 8,241 trial defendants represented by public defender offices, 7,232 of whom (88%) appeared before a jury. Finally, there were 20,174 trial defendants represented by panel attorneys, 18,380 of whom (91%) elected a jury.

133. In 14% of all trials during this period, the defendant waived counsel and proceeded pro se. Perhaps not surprisingly, defendants without lawyers overwhelmingly prefer bench trials: 7,808 out of 8,403 defendants (93%) waived a jury.

Although these figures suggest a small advantage for defendants with private counsel, the difference is relatively slight in both jury and bench trials. The gap in conviction rates also is nearly identical across the three categories of attorneys.

The intriguing outlier in this group is pro se defendants, who seem, based only on these figures, to do quite well for themselves. It turns out, however, that a huge majority (94%) of those cases were misdemeanors,¹³⁴ and so the impact and explanation for these cases may be largely subsumed in the impact and explanation for misdemeanor trials generally.

Of course, nothing in the data refutes the larger point that money matters in criminal cases. Every honest observer would agree that resources can materially affect criminal cases from the initial setting of charges through sentencing and appeals.¹³⁵ For this study, however, the only conclusion we can safely draw is that any difference among types of trial counsel does not significantly manifest itself in either the choice of factfinder or the trial outcomes.

E. Explanations Based on the Court

The data examined so far include federal trials nationwide. It is possible, however, that these national figures hide regional biases. We know that different parts of the country have different case mixes, different docket pressures, different local rules, and different jury pools, variations that could affect both the types of cases in which a defendant waives a jury and the trial outcomes. If it turned out that the gap in conviction rates between judge and jury were peculiar to certain circuits or even certain judicial districts, this might help us identify regional characteristics that create the disparity.¹³⁶

134. During Phase III, 7,888 of the 8,403 defendants who proceeded to trial without a lawyer were charged with a misdemeanor.

135. For a useful report on the differences that correlate to different types of counsel, see HARLOW, *supra* note 130.

136. Regional differences in sentencing was one of the many reasons that Congress enacted sentencing reform, including the Sentencing Guidelines. As (now Justice) Stephen Breyer, a member of the original Sentencing Commission, observed when describing the original purpose of the Guidelines:

Congress recognized that the personality of a judge mattered in a criminal case. . . . [Pre-Guideline] [s]tudies indicated that a defendant sentenced by a Southern judge was likely to serve six months more than the average, while a defendant sentenced in Central California was likely to serve twelve months less.

Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT. RPTR. 180, 180 (1999); *cf.* Eisenberg et al., *supra* note 38, at 183–85 (noting that the degree of judge-jury disagreements may vary depending on geographic location).

When we look at the Phase III data circuit-by-circuit, the first thing we notice is that juries are much the same everywhere—perhaps a surprising notion. As shown in the first column of figures in Table H, jury conviction rates range from 80% for trials in the First Circuit to 89% in the Seventh Circuit, with a nationwide average rate of 84%.¹³⁷

TABLE H

Circuit	Conviction Rate		Bench Trials, 1989-2002	
	Jury	Bench	Number of Defendants	Percent of Circuit Trials
CADC	82%	56%	63	4%
CA1	80%	42%	167	7%
CA2	86%	51%	278	6%
CA3	83%	61%	207	5%
CA4	86%	67%	3,417	33%
CA5	84%	60%	946	11%
CA6	82%	54%	800	14%
CA7	89%	78%	314	8%
CA8	83%	66%	332	7%
CA9	86%	68%	1,123	12%
CA10	81%	56%	308	9%
CA11	83%	37%	7,245	38%
ALL	84%	51%	15,200	20%

There is much greater variation in the bench conviction rates. The second column of figures shows that while the overall bench rate is 51%, the range among the circuits is wide, from a low of 37% in the Eleventh Circuit to a high of 78% in the Seventh Circuit.¹³⁸ In nine of the twelve circuits, however, the conviction rate falls within a now-familiar range, somewhere between 50% and 68%.¹³⁹ Interestingly, judges *always* convict less often than juries *within* a circuit, and even the most conviction-prone district judges in the country (those in the Seventh Circuit) convict less often than the most tender-hearted juries, those found in the First Circuit.

137. During Phase III there were 62,438 defendants tried by jury, 52,489 (84%) of whom were convicted. The standard deviation for the circuits' jury conviction rate is 0.024.

138. From 1989–2002 there were 15,200 defendants tried by the bench, 7,766 of whom (51%) were convicted.

139. The standard deviation for the circuits' bench trial conviction rate is 0.109. The D.C., First, Second, Third, Fifth, Sixth, and Tenth Circuits are within one standard deviation of the national average.

As we look closer at Table H, it is easy to spot the circuit most responsible for the low bench conviction rate—the Eleventh. Not only do its trial judges have the lowest conviction rate, it also has both the highest number and highest percentage of bench trials among all the circuits. So if there is some regional factor or set of factors that helps explain the disparity in judge/jury behavior, it seems most likely to manifest itself in trials within that Circuit.¹⁴⁰

But the closer we look, the less interesting the Eleventh Circuit becomes. When we examine the Circuit district-by-district, we see that a huge percentage of its bench trials (87%)¹⁴¹ and bench acquittals (92%)¹⁴² come from a single district: the Middle District of Georgia. When we zero in on this District, we see that almost all of its trials (93%) involved misdemeanors—overwhelmingly drunk driving and other traffic offenses.¹⁴³ In fact, if we redact the misdemeanor defendants *just* from the Middle District of Georgia, trial courts in the Eleventh Circuit lose their distinctiveness entirely. Their revised conviction rates would still be 83% for jury trials, but would rise to a more-conventional 61% for bench trials.¹⁴⁴

140. If the Eleventh Circuit data is removed from the analysis, the overall conviction rate for bench trials increases from 51% to 64%, while the jury trial rate remains at 84%. Although the First Circuit has a similarly low conviction rate (42%), only 7% of the First Circuit trials were by the court, and thus the impact on the national bench conviction rate is small. *See supra* Table H.

141. During Phase III there were 6,298 bench trials held in the Middle District of Georgia, which represents 87% of all bench trials in the Eleventh Circuit, and an astonishing 41% of all bench trials held nationwide during that period. The Middle District of Georgia is one of nine judicial districts in the Eleventh Circuit.

142. Between 1989 and 2002, there were 4,554 bench acquittals in district courts in the Eleventh Circuit, of which 4,189 (92%) were from the Middle District of Georgia.

The Middle District of Georgia is the home of both Fort Benning and Robins Air Force Base. According to the Clerk of the Court for the Middle District, there is an arrangement whereby all misdemeanors that occur at Fort Benning, whether committed by civilians or military personnel, are handled by the federal court. Thus, all the misdemeanor traffic offenses committed on the military base, even those committed by soldiers, wind up going through the federal criminal process. The Clerk of the Court was unaware of any other military installations where cases involving soldiers were routinely sent to the civilian court, which may explain in the odd statistical pattern for this District. Telephone Interview with Greg Leonard, Clerk of the Court for the Middle District of Georgia (June 28, 2004).

143. During Phase III, there were 6,852 trial defendants in the Middle District of Georgia, 6,390 of whom (93%) were charged with misdemeanors. Of the misdemeanor defendants, 97% (6,167) were charged with a traffic offense.

144. Without the misdemeanor cases from the Middle District of Georgia, there were 12,764 defendants tried in the district courts in the Eleventh Circuit during Phase III, 92% of whom (11,798) elected a jury trial. Defendants were convicted by those juries 83% of the time (9,776 defendants). For bench trial defendants, 594 of 966 were convicted, for a rate of 61%.

There are other anomalous districts besides the Middle District of Georgia,¹⁴⁵ but the story is the same in every circuit: (1) a significant share of the bench acquittals come in misdemeanor cases; (2) if we look at just felonies, the disparities within the circuits is significantly reduced; but (3) a meaningful difference in conviction rates between judges and juries endures in the trial courts of every circuit, even if felony trials are the only ones considered.¹⁴⁶

In fact, the district level data allow us to make an even stronger statement: in virtually every individual federal judicial *district* in the country—89 out of 94, to be precise—juries convict at a higher rate than judges.¹⁴⁷ This is true both if misdemeanors are considered and if they are not.¹⁴⁸

We thus can draw two conclusions from a geographic inquiry. The disparity among the district courts in the various circuits is driven in large part by the proportion of misdemeanor cases that go to trial, and so to the

145. Among the courts with both a significant number of bench trials and a conviction rate below the mean are those courts in two of the three Florida districts. During Phase III, judges in the Middle and Southern Districts of Florida held 100 and 187 bench trials respectively, and had conviction rates of 40% and 39%.

146. Looking only at Phase III felony trials shows the strength of the outcome disparity across circuits:

Felony Conviction Rates by Circuit, 1989–2002					
Circuit	Jury	Bench	Circuit	Jury	Bench
CADC	82%	57%	CA6	82%	54%
CA1	81%	39%	CA7	89%	81%
CA2	86%	51%	CA8	83%	61%
CA3	83%	59%	CA9	87%	71%
CA4	86%	68%	CA10	81%	51%
CA5	84%	59%	CA11	83%	51%
			Total	84%	60%

Note that the total conviction rate for bench trials is nine percentage points higher when misdemeanors are excluded from the analysis. *Cf. supra* Table H.

147. There are only five districts where this is not true, and in none of these districts is the difference dramatic. The courts are the District of Colorado (71% jury conviction rate, 71% bench conviction rate); the Western District of Arkansas (80% jury conviction rate, 82% bench); the Western District of Wisconsin (83% jury, 88% bench); the Eastern District of Wisconsin (88% jury, 92% judge); and the Eastern District of Missouri (88% jury, 94% judge).

148. If only felonies are considered, there are four districts where the bench conviction rate is higher than the jury rate, although it is a slightly different group of districts than the one identified in footnote 147. The bench conviction rate remains higher for felonies in the Eastern District of Wisconsin and the Eastern District of Missouri; the other two districts that meet this description are the District of Hawaii and the District of Wyoming. Again, it is important to be cautious with the statistics once we begin subdividing bench trials into smaller units. The number of bench trial each year in an individual circuit or district is typically small, and so minor changes in numbers can create misleadingly large percentage swings.

extent the theory outlined above about misdemeanors is persuasive—that less serious cases receive less attention from the government, and the conviction rate suffers as a result¹⁴⁹—we have largely explained the circuit disparity. More broadly, we can conclude that the difference in behavior between judge and jury is not limited to a certain circuit or even certain districts within the circuits. Both the disparity in conviction rates and the rough size of the disparity endure almost everywhere, regardless of the differences in jury pools, case mix, or local rules.

III. EXPLANATIONS BASED ON ERROR

There is a final pair of stories worth exploring. If we accept that judges and juries are reaching different results (which seems undeniable) and if we accept that some of the hypotheses offered above explain a portion of the gap, we are left with two related problems. The first is that the variables examined so far, even collectively, do not seem to account for the full difference in conviction rates. The second is that none of the variables can easily explain why the conviction gap has become larger over the last 14 years of the study. To address these shortcomings, we should consider two other alternatives. Either (1) juries are increasingly “over-convicting” defendants, that is, they are convicting in cases where they should not, or (2) judges are increasingly “under-convicting,” by acquitting in cases where there is sufficient proof of guilt.

A. *Juries are Over-Convicting*

The different conviction rates might be caused by juries increasingly finding a defendant guilty even though the prosecution failed in some objective sense to prove its case beyond a reasonable doubt. The crime problem has been a major source of public concern over the last few decades,¹⁵⁰ and perhaps jurors have internalized the attitude that it is

149. See *supra* Part II.B.2.

150. During the 1990s, there was a curious jump in the percentage of people who identified crime as the primary problem facing this country, even though the crime rate declined during the decade. From 1984 through 1992, people were asked in a Gallup poll: “What do you think is the most important problem facing this country today?” The percentage who answered “crime, violence, guns or gun control” fluctuated between 1% and 6%, with a mean score of 3.5%. When the same question was asked in 1993, the percent giving one of those same answers rose to 9%, then jumped to 37% the following year. The percentage of people who thought crime or guns was the most important problem facing the country then stayed above 20% until 2001, when it dropped back down to 10%. The average percentage of people for whom crime and weapons was the major concern from 1993 through 2001 was 22%. See SOURCEBOOK ONLINE, *supra* note 4, tbl. 2.1.

socially appropriate to be tough on crime. If so, they may come to the jury box more ready to believe the prosecutor and its witnesses, and less willing to afford the defendant a full presumption of innocence than in years past.¹⁵¹

This hardening of juror attitudes may in turn have affected prosecutors' behavior. If jurors are increasingly willing to convict, prosecutors may be increasingly willing to bring more aggressive, hard-to-prove cases, ones that they would not have pursued in prior years because of the difficulty of securing convictions. Less charitably, a more pro-government jury pool might lead prosecutors to bring more marginal or under-developed cases to trial, rather than declining to prosecute or resolving them through plea bargains. Common sense tells us that if a prosecutor normally would spend X hours preparing for trial, but increasingly receptive juries are willing to convict even if she spends X - 1 hours preparing, the prosecutor will spend that extra hour elsewhere. The quality of the case presentation might suffer as a consequence, but prosecutors are rewarded for results, not effort or style.

Under this hypothesis, the prosecutor's willingness to bring difficult cases to trial and/or the decreased quality of the prosecutions (call these collectively "weak" cases) have not affected the jury's conviction rate, but the trend *has* been detected by judges. Now when bench trials occur, judges find themselves increasingly unpersuaded by the government's claims, and thus, are quite properly more inclined to acquit.

It is difficult to measure how popular attitudes and culture have affected juror attitudes, just as it is hard to measure judicial attitudes toward the relative quality of the prosecutions in bench trials. We do, however, have proxies that can help measure if juries are over-convicting. If jurors are becoming more willing to convict on relatively weak evidence, and if prosecutors are bringing weaker cases to trial as a result, we would expect to see two trends: an increasing number of cases dismissed *prior* to trial, and an increasing number of convictions reversed *after* trial.¹⁵²

151. See generally SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL, PSYCHOLOGICAL PERSPECTIVES 156 (1988) (noting that experimental research supports view that, relative to the judge, jurors impose a less rigorous standard of proof on the prosecution). *But cf.* Eisenberg et al., *supra* note 38, at 185-89 (concluding that, with qualifications, jurors have a more stringent view of what constitutes proof beyond a reasonable doubt than judges do); see also KALVEN & ZEISEL, *supra* note 36, at 189 (same).

152. Prior to trial, a defendant may move to dismiss on the grounds that the indictment fails to state an offense, FED. R. CRIM. P. 12(b)(3)(B), or that the indictment was otherwise legally deficient. See 1A WRIGHT, *supra* note 26, at 322. *But cf. id.* at 324 (motion to dismiss not proper if it will require

These are admittedly imperfect measures, because like most proxies they are both over- and under-inclusive. Pretrial dismissals can occur for a variety of reasons, and unless the data allowed us to pinpoint the reason a case was dismissed (which they do not) a change in rate might reflect nothing more than an increase in speedy trial act violations,¹⁵³ an increase in the number of suspects who die or flee before trial, or other circumstances unrelated to the merits of the charge.¹⁵⁴ By the same token, even if the affirmance rate on appeal remained constant, this might mask an upswing in weak cases simply because appellate courts give such extraordinary deference to jury verdicts.¹⁵⁵

Nonetheless, the proxies are likely to capture a meaningful part of what we hope to study. The critical question the data can help answer is whether the dismissal and affirmance rates have *changed* in recent years; if so, we need to ask why, but if not, it would undercut the theory that juries are over-convicting. Our working hypothesis is that juries are becoming more conviction prone in ways that judges are not, and so a flat or declining dismissal rate during Phase III would suggest that judges are not seeing an increase in cases that are so weak as to warrant a pre-verdict dismissal.¹⁵⁶ Similarly, if the affirmance rate on appeal did not change during Phase III (regardless of whether it was high or low to begin with), this would suggest that appellate courts are not seeing an increase in cases where the jury convicted on the basis of insufficient evidence.

In fact, pre-trial dismissals since 1989 have been dropping, both in absolute terms and as a percentage of all defendants. The number of dismissed defendants was roughly 8,400 in 1989, and has declined steadily since then—by 2002 the number was 7,217, a 14% drop.¹⁵⁷ The

a trial on the general issue) (citing cases). At the close of the government's evidence or the close of the entire case the defendant also can move for judgment of acquittal before the case is submitted to the jury. FED. R. CRIM. P. 29(a). Within 7 days of a guilty verdict, the defendant can again ask the judge to set aside the verdict and enter a judgment of acquittal. FED. R. CRIM. P. 29(c).

153. See 18 U.S.C. § 3162(a)(2) (1994) (if defendant not brought to trial within the time period specified in the Speedy Trial Act, the indictment or information "shall be dismissed").

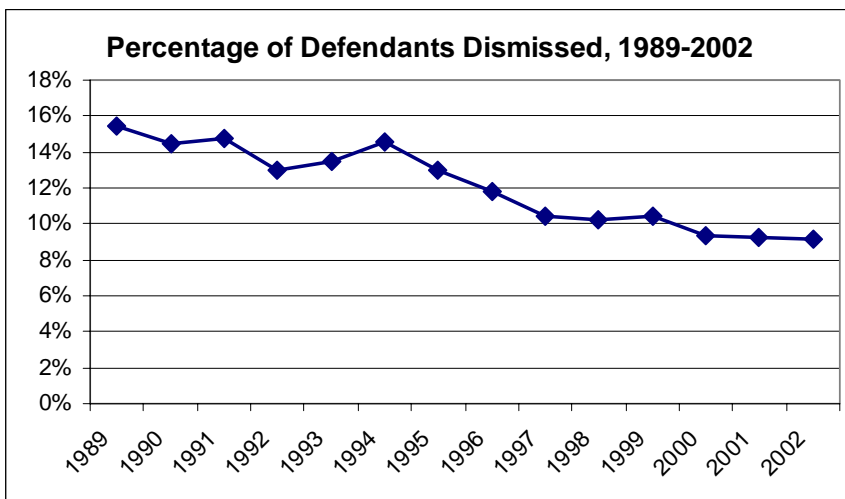
154. See 1A WRIGHT, *supra* note 26, at 322–24 (listing proper pretrial motions to dismiss).

155. In reviewing a challenge to the sufficiency of the evidence considered by a jury, the court of appeals "must view the evidence in the light most favorable to the Government and sustain the verdict if any rational juror could have found the elements of the crime beyond a reasonable doubt." *United States v. Cothran*, 286 F.3d 173, 175 (3d Cir. 2002).

156. It is theoretically possible that a flat or even declining dismissal rate could mask an upturn in weak prosecution cases. If, for example, the total number of dismissals over a period of years remained at a constant level, there could still be a large increase in the total number of dismissals that were based on insufficient evidence or other merits-related grounds, provided that the other, *non-merits* based dismissals decreased at the same relative rate. Nothing was discovered in the literature, however, to support this alternative hypothesis.

157. See SOURCEBOOK ONLINE, *supra* note 4, tbl. 5.22. Until 2001, the dismissal data included

percentage of defendants whose case is dismissed has also declined. As shown in Figure 9, more than 15% of all defendants had their cases dismissed in 1989, but by 2002 the number had fallen to slightly more than 9%.

FIGURE 9¹⁵⁸

If trial judges are seeing weaker cases, this perception is not translating into dismissals. Indeed, the figures are more consistent with the government bringing stronger cases over time.¹⁵⁹

The reversal rate on appeal is also inconsistent with a theory of juries over-convicting. We begin by setting aside appeals from bench trials,¹⁶⁰ as well as appeals that challenge the sentence but not the underlying conviction. A modest number of criminal appeals focus solely on

defendants who were committed pursuant to the Narcotic Addict Rehabilitation Act, 28 U.S.C. § 2902 (1994). *See id.*

158. *See* SOURCEBOOK ONLINE, *supra* note 4, tbl. 5.22. The percentages were calculated by dividing the annual number of dismissals (the third column of data in Table 5.22) by the number of charged defendants.

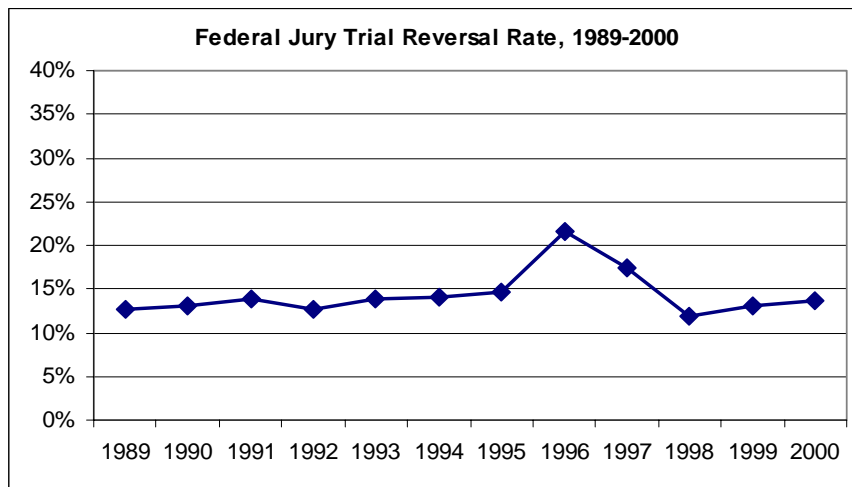
159. The diminishing rate of dismissals is also consistent with Congress and appellate courts changing the law to make it harder to dismiss cases, regardless of the merits of the charge. But even this theory lends no support to the hypothesis that juries are improperly over-convicting. It simply provides an alternative explanation for the decrease in dismissals, one that is unrelated to the relative strength of the evidence.

160. There were 395 appeals from bench trials in our final dataset. For more detail on these cases, see *infra* note 166.

punishment issues, and since only judges sentence defendants, these appellate decisions tell us nothing about the likelihood that jurors have become excessively receptive to the government's case.

Looking only at appeals that challenge a jury verdict of guilt, we see that between 1989 and 2000,¹⁶¹ the reversal rate has ranged from 12% to 22%, but with the exception of one spike in the mid-1990s, it has remained steady around its average of 14%.

FIGURE 10¹⁶²



161. The dataset used for calculating appellate behavior only includes appeals terminated through fiscal year 2000. See FEDERAL JUDICIAL CENTER, FEDERAL COURT CASES: INTEGRATED DATABASE, 1970–2000 (Parts 62, 70–71, 82–84, 96, 100–101, 107, 119–120: Appellate Terminations, 1989–2000) (computer file); 2nd ICPSR version, Washington, D.C.: Federal Judicial Center (2000); Ann Arbor MI: Inter-university Consortium for Political and Social Research (2002). There are data available from other sources for 2001 and 2002, see Federal Justice Statistics Resource Center, at <http://fjsrc.urban.org/noframe/download/dtsheet.cfm> (Standard Analysis Files, Appellate Termination Data for 2001, 2002), but differences in coding between datasets make it difficult to combine the later records with the earlier ones in a reliable way. See also Appendix (describing data compilation for appeals).

162. From 1989 through 2000 there were 11,469 appellate decisions resolving challenges to jury convictions. The data separate these decisions into one of six categories: (a) affirmed or enforced (N = 9,680); (b) reversed or vacated (N = 569); (c) affirmed in part and reversed in part (N = 897); (d) dismissed (N = 151); (e) remanded (N = 172); and (f) other (N = 70). To err on the side of making the conclusions conservative, when calculating the “reversal rate” I combined three of the categories: “reversed,” “affirmed in part and reversed in part,” and “remanded.” Thus the overall reversal rate for challenges to jury trials during this period was 14% ($569 + 897 + 172 = 1,638 \div 11,469 = 0.143$). The standard deviation for the annual reversal rate during this period is 0.025.

These figures suggest that appellate courts are *not* seeing much difference in the validity of verdicts, which works against the over-conviction hypothesis.¹⁶³

The conclusion that juries have not changed their behavior is bolstered by looking at earlier appeal data. If we look at the years just prior to 1989, we see that the reversal rate was similar to what it was during Phase III. From 1980 through 1987, the average reversal rate following a jury conviction was 12%¹⁶⁴ (vs. 14% during Phase III). Then, as now, appellate courts were remarkably consistent in their review of verdicts: with the exception of one year, the range of annual reversals was only 10% - 13%.¹⁶⁵ Surely if the quality of prosecutions had degraded enough over time to explain the higher rate of bench acquittals, there would be more indication of it in this data, even allowing for the defects of the proxy.¹⁶⁶

It might well be true that juries have been influenced by a tough-on-crime mindset, and perhaps that attitude is reflected in an increasing willingness to convict. If so, it is also plausible to believe that prosecutors are bringing more difficult or marginal cases, and that judges, while not immune from social pressures, are better able to cabin these feelings and rule strictly on the merits of the weaker cases. But this is speculation only. The data give little support for the notion that juries are over-convicting.¹⁶⁷

163. Jury verdicts are probably even more consistent than these figures suggest. If we look only at jury cases where there was an outright reversal or remand, and do not count cases that were affirmed in part and reversed in part, see *supra* note 162, the reversal rate was between 6% and 8% each year between 1989 and 2000. Cases that were reversed in part were less predictable, ranging from 6% to 14% of the appeals. It is these cases that cause the spike in 1996 and 1997 shown *supra* Figure 10. The data are not coded in a way that allows a determination of the basis on which a case was reversed.

164. The data for the appeals results were taken from FEDERAL COURT CASES: INTEGRATED DATA BASE, 1970–2000, *supra* note 161 (Parts 24–28, 34–36, Appellate Terminations: 1980–87). See also Appendix.

165. In 1981 the reversal rate for jury verdicts was 20%. For the 1980–87 period, the number of appeals of jury verdicts was 7,185, of which 867 (12%) were reversed in whole or in part.

166. There has been greater variation in the reversal rate from bench trials. After backing out the “sentence only” appeals, there is a range of reversals (in whole or in part) from 0% to 31% for the 1989–2000 period, a variance more than 2.5 times the rate for juries. While superficially surprising, the aggregate reversal rate for these years is virtually the same as it is for juries (15% bench vs. 14% jury). More importantly, the total number of appeals from bench trials is sufficiently small—always under 50 per year nationwide—that the larger variation becomes both easier to explain and less informative.

167. There are a host of other reasons why a jury might convict where a judge would not, beyond a tough-on-crime mindset. Kalven and Zeisel identify several such reasons in their study, including the impression the defendant makes if he takes the stand, the fact that the defendant did not take the stand, and a superior performance at trial by the prosecutor. See KALVEN & ZEISEL, *supra* note 36, at 381–94.

B. Judges are Under-Convicting

Looking at the other side of the ledger, it might be that the gap in conviction rates is caused by changes in the criminal law, changes that lead judges, but not juries, to acquit more often than in the past. When we look back over the last couple of decades, one legal change looms larger than most—the movement to reduce judicial discretion in setting criminal sentences, coupled with an increase in the statutory severity for many of those sentences.¹⁶⁸ The primary (although not exclusive) vehicle through which these changes have come about was the Federal Sentencing Guidelines.¹⁶⁹ Although the Guidelines have recently undergone a dramatic change (and may change again in the near future),¹⁷⁰ their potential influence on the acquittal rates over the last 15 years is too intriguing to ignore, as it may tell us something important about sentencing policy.

A connection between the Guidelines and acquittal rates is not patent, but the hypothesis is simple: a steady upward turn in sentence severity, coupled with a dramatic reduction in judicial discretion to adjust those sentences, increasingly put judges in a position where they know that a conviction will compel a sentence that seems—at least to the judge—disproportionate. To avoid imposing an unjust sentence, according to this theory, judges in bench trials scrutinized the prosecution's evidence with more than the usual care, perhaps even holding the government to a more exacting standard of proof than in the past, when the possibility of a more lenient post-conviction sentence remained open. Put more bluntly, judges

168. Other important changes include the increased federalization of the criminal law. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); JOHN S. BAKER, JR., MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION (2004), available at <http://www.fed-soc.org/Publications/practicegroupnewsletters/criminallaw/crimreportfinal.pdf>. Another important change is the shifting enforcement priority toward drug crimes. See generally MICHAEL MASSING, THE FIX (1998) (describing the history of the war on drugs). As to the former, the increased federalization should be reflected in the weights assigned to various crime types, see *supra* Table A. As to the latter, the heightened emphasis on drug crimes is addressed in detail below. See *infra* notes 213–14 and accompanying text.

169. See KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 2 (1998) (characterizing the Federal Sentencing Guidelines as “probably the most significant development in judging in the federal judicial system” since the 1938 adoption of the Federal Rules of Civil Procedure). Professor Stith and Judge Cabranes describe how the statutory use of mandatory minimum sentences increased the severity of criminal sentences generally during the 1980s, although they note that the Guidelines themselves increased the severity independent of the statutory changes. See *id.* at 59–60.

170. In *United States v. Booker*, 125 S. Ct. 738, 756–57 (2005), the Supreme Court invalidated the mandatory nature of the Guidelines, see *infra* note 249 and accompanying text. For discussion of the impact of *Booker* on this study, see *infra* Part IV.

may acquit more often because they found it to be the only way to avoid imposing an unjust sentence that they know would follow a conviction. If true, this could explain why judges are more lenient than juries, just as it could explain why judges acquitted more often during Phase III than in a pre-Guideline world.

The hypothesis is easy to state but hard to prove. Suggesting that judges changed their behavior at the guilt stage because they had lost much of their traditional sentencing authority sounds perilously like a claim that judges are petulant, even lawless.¹⁷¹ Because of this, direct evidence for the hypothesis will be hard to find. Judges may not realize that they had increased the scrutiny they give the government's case in bench trials, and if they realize it, they probably would not admit it. The indirect evidence, however, paints an intriguing picture.

First, the timing of the decline in judicial conviction rates is suggestive. As noted,¹⁷² the decline began in earnest in about 1989, the same year the Guidelines were declared constitutional.¹⁷³ Because the Guidelines applied only to crimes committed after November 1987 (fiscal year 1988),¹⁷⁴ the percentage of defendants sentenced under the Guidelines started relatively small and grew steadily over the first few years of their existence.¹⁷⁵ In rough terms, the increase in the percentage of defendants sentenced under the Guidelines tracks the downward slope of the judicial conviction rate during the early 1990s.

171. Cf. *In re United States*, 345 F.3d 450, 453 (7th Cir. 2003) ("A judge could not properly refuse to enforce a statute because he thought the legislators were acting in bad faith or that the statute disserved the public interest").

172. See *supra* Figure 3 and accompanying text.

173. See *Mistretta v. United States*, 488 U.S. 361 (1989). Although the Guidelines took effect on November 1, 1987, uncertainty over their constitutionality delayed their full implementation. See W. Clinton Terry III, *The U.S. Sentencing Guidelines and Police Officer Discretion*, in *THE U.S. SENTENCING GUIDELINES, IMPLICATIONS FOR CRIMINAL JUSTICE* at 23 (Dean J. Champion, ed. 1989) ("By late 1988, 244 federal district judges had ruled on [the Guidelines'] constitutionality. In 140 of those cases, judges declared the guidelines unconstitutional.").

174. See U.S.S.G., *supra* note 20, § 181.1 (Historical Note).

175. In calendar year 1988, only 17.9% of federal criminal defendants were sentenced under the Guidelines. The percentage jumped to 54.5% in calendar year 1989, 70% in fiscal year 1990 (when the U.S. Sentencing Commission switched from a calendar to fiscal year method of record-keeping), and 74% in fiscal year 1991. See Memorandum from Timothy Drisco, Research Associate, United States Sentencing Commission, to Andrew Leipold (Mar. 26, 2004) (on file with author). After 1991, the Commission only tracked cases that were governed by the Guidelines, leaving it unable to calculate the percentage of cases that were not so governed. *Id.* Presumably, however, by the mid-1990s, nearly 100% of the defendants convicted in federal court were sentenced under the Guidelines. The exception is for crimes classified as Class B misdemeanors and below; the Guidelines do not apply to these petty offenses. See U.S.S.G., *supra* note 20, § 1B1.9.

Second, there is no doubt that the primary purpose and impact of the Guidelines was to deprive judges of sentencing discretion. Throughout most of our modern history federal judges had broad authority to punish defendants, and their decisions were subject to almost no appellate review.¹⁷⁶ Because most criminal statutes in the modern, pre-Guideline world provided for large sentencing ranges,¹⁷⁷ judges were free to tailor the punishment not only to the crime but to the particular offender. Sentencing reforms of the mid-1980s changed that.¹⁷⁸ During the period of this study, judges were required to sentence according to the Guideline grid, which typically restricted the sentencing range to a few months for less serious crimes and a few years for more serious ones.¹⁷⁹ Just as importantly, judges were severely restricted in considering what, in a prior era, were common sentencing factors.¹⁸⁰ The Guidelines put defendant-specific variables such as employment record, family responsibilities, military service, and community or charitable work out of bounds, or at best, made their application extremely limited.¹⁸¹ Moreover, the trend toward narrowing judicial authority between 1987 and 2002 was a steady process, as the Guidelines were amended over the years to lower or close

176. See STITH & CABRANES, *supra* note 169, at 9.

177. Many federal criminal statutes simply provide for a maximum sentence, without specifying a minimum or a range. See, e.g., 18 U.S.C. § 32 (1994) (providing a sentence of “not more than twenty years” for destroying or attempting to destroy an aircraft). See generally 18 U.S.C. § 3581 (1994) (setting maximum sentences only for Class A through Class E felonies, and Class A through Class C misdemeanors).

178. See STITH & CABRANES, *supra* note 169, at 1 (“On November 1, 1987, two centuries of sentencing practice in the federal courts came to an abrupt end. A regime of ‘Sentencing Guidelines’ . . . went into effect. The purpose of the new regime was to divest the independent federal judiciary of the power to determine criminal sentences.”).

179. Once the proper offense level and criminal history category is determined, the Sentencing Table provides a range of months within which the judge was required (pre-*Booker*) to set the sentence, subject to any departures. By statute, the maximum number of months within each cell of the Sentencing Table cannot exceed the minimum number of months of that same cell by more than 25% or six months, whichever is greater. See 28 U.S.C. § 994(b)(2) (1994). The exception is for the most serious crimes, where the range is 30 years to life in prison. *Id.* For a description of the sentencing process and a current example of the Sentencing Table, see LEVENSON, *supra* note 19, at 569–73, 582.

180. See STITH & CABRANES, *supra* note 169, at 79–80 (noting that under pre-Guideline practice, “the largest section of the presentence report dealt with the personal history and circumstances of the defendant: family background, education, military service, work history, criminal record, dependents, and activities (good and bad) in the community.”).

181. See U.S.S.G., *supra* note 20, § 5H1.5 (2004) (defendant’s employment record not ordinarily relevant to sentencing); *id.* § 5H1.6 (family ties and responsibilities not ordinarily relevant to sentencing); *id.* § 5H1.11 (“Military, civic, charitable, or public service; employment related contributions; and similar good works are not ordinarily relevant in determining whether a departure is warranted.”); *cf. id.* § 5K2.0(a)(4) (individual characteristics listed as “not ordinarily relevant” may be the basis of a sentencing departure only if they are present “to an exceptional degree”).

the remaining windows of discretion,¹⁸² with the result that “departures [were] not available in every case, and in fact [were] unavailable in most.”¹⁸³

Along with the reduced judicial control over sentencing came an increase in sentence severity, at least for some crimes. The Sentencing Reform Act of 1984 abolished parole and mandated that prisoners serve at least 85% of imposed sentences,¹⁸⁴ a significantly higher percentage than was typically served before the Act.¹⁸⁵ For these and other reasons, a 1999 study found an increase in the percentage of convicted defendants sentenced to incarceration after the Guidelines were enacted (although it also found that the increase was in part a continuation of a pre-Guideline trend).¹⁸⁶ In addition, the study found that while there had not been an

182. See *United States v. Flores*, 336 F.3d 760, 768 (8th Cir. 2003) (Bright, J., concurring) (noting that a pre-*Booker* amendment to the Guidelines “will exacerbate the problems with the Guidelines by making it even more difficult for district judges to do justice under the law as circumstances warrant”). As one group of authors put it:

It appears that this tension between the judiciary’s traditional and important role to take into account the ‘nature and circumstances of the offense and the history and characteristics of the defendant’ [quoting 18 U.S.C. § 3553(a)(1)] and Congress’ apparent goal of imposing an ever-increasing uniformity of sentences, perhaps without regard to the facts and circumstances of each case, is just beginning.

THOMAS W. HUTCHINSON ET AL., *FEDERAL SENTENCING LAW AND PRACTICE 2000* (2004). The quoted passages are referring most directly to the so-called “Feeney Amendment,” named after Congressman Tom Feeney, which directed the Federal Sentencing Commission to pass rules to “substantially reduce” downward departures by sentencing judges. The Amendment also provides for de novo review by appeals courts of downward departures. See Rhonda McMillion, *Second Effort: ABA Supports Push to Restore Judicial Discretion in Sentencing*, 90 A.B.A. J. 62 (2004).

183. *United States v. Booker*, 125 S. Ct. 738, 750 (2005).

184. See 18 U.S.C. § 3624 (b) (1994) (limiting good behavior credit to 54 days per year).

185. See Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1050–55 (2001) (describing evolution of federal sentencing law) [hereinafter *Quiet Rebellion I*].

186. See Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentencing Severity: 1980–1998*, 12 FED. SENT. RPTR. 12 (1999). The study concluded:

The guidelines appear to have accelerated a shift toward imprisonment that began prior to their implementation. Moreover, that shift, while dramatic in the first years under the guidelines, has been partially reversed. [The data shows] merely a temporary acceleration of the long-term trend toward [the] increasing use of imprisonment, a trend that has largely returned to its pre-guideline trajectory.

Id. at 15. Note that the study looked primarily at felony sentences, making the pool of cases considered slightly different than the cases analyzed in this article.

Looking at the 1990s as a whole partially obscures the immediate impact of the Guidelines, which was to dramatically increase the percentage of convicted defendants who were incarcerated. See NICOLAS N. KITTRIE ET AL., *SENTENCING, SANCTIONS, AND CORRECTIONS 261* (2d ed. 2002) (citing data from a 1992 Justice Department Study, and noting that in 1990, 74% of defendants sentenced under the Sentencing Reform Act were incarcerated, compared to 52% of pre-guideline defendants sentenced in 1986). It is easy to imagine that this early spike in incarceration rates made an impression on district judges, particularly those who were already unhappy with the Guidelines scheme.

overall increase in severity of sentencing throughout most of the 1990s¹⁸⁷ there were important counter-trends. In particular, the authorized sentences for drug¹⁸⁸ and firearm¹⁸⁹ offenses increased significantly after the Guidelines took effect, in part because higher ranges were written into the Guidelines themselves,¹⁹⁰ and in part because of the increasing popularity of mandatory minimum sentences.¹⁹¹

Given these trends, it is unsurprising that a large number of federal judges came to believe that the sentencing reforms of the 1980s and 1990s were quite undesirable. The criticism began soon after the Guidelines took

187. See Hofer & Semisch, *supra* note 186, at 16 (noting that the data “suggest a slow, steady, long-term trend toward slightly increased severity in sentences imposed from 1980 until 1993, with a slight downward trend since then.”). The fact that the sentences imposed fell during most of the 1990s tells only part of the story, as the study authors are careful to note:

The guidelines for many crimes were designed based on a large-scale study of past practices that took into account the time actually served by offenders convicted of these offenses in the pre-guideline era. So sentences imposed fell under the guidelines to compensate for the greater proportion of the sentence that offenders would actually be serving.

Id. (footnote omitted).

188. See *id.* at 16–17; see also Bowman & Heise, *Quiet Rebellion I*, *supra* note 185, at 1068 (“[A]most all changes . . . in statutes, Guidelines, and case law between 1991 and 1999 were neutral in effect or, all else being equal, tended to increase drug sentences”). But see *id.* at 1065–66 (noting decline in sentences actually imposed for drug crimes throughout most of the 1990s).

189. The severity increase was especially pronounced for weapons crimes. See Hofer & Semisch, *supra* note 186, at 17 (“Even more than drug trafficking offenders, firearm offenders . . . have shown dramatic increases in expected incarceration lengths, with time served more than tripling since 1984.”).

190. The Federal Sentencing Commission read the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), as requiring a general increase in drug sentences over historical levels. See Bowman & Heise, *Quiet Rebellion I*, *supra* note 185, at 1060. The Commission was candid that it was setting drug sentences at levels higher than the pre-Guideline practice. In the Introduction to the Guidelines it noted that it “has departed from the [historical sentencing] data at different points for various important reasons. Congressional statutes, for example, may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences.” See FEDERAL SENTENCING GUIDELINES MANUAL § 1A3 (2004). The result of these changes, Bowman and Heise conclude, is “a system which, if honestly implemented, requires judges to impose much longer sentences for drug offenses than had previously been the norm, and which seeks to restrict the discretion of those judges to ameliorate the severity of the sentences the law commands.” Bowman & Heise, *Quiet Rebellion I*, *supra* note 185, at 1062.

191. Hofer & Semisch, *supra* note 186, at 16–17. A 1991 Report by the U.S. Sentencing Commission noted that although there were at the time roughly 100 mandatory minimum penalties specified in 60 different criminal statutes, the overwhelming majority of cases in which a mandatory minimum was imposed involved only four statutes, all concerning illegal drugs and weapons: 21 U.S.C. § 841 (1994) (manufacture and distribution of controlled substances); 21 U.S.C. § 844 (1994) (possession of controlled substances); 21 U.S.C. § 960 (1994) (penalties for importing or exporting controlled substances); and 18 U.S.C. § 924(c) (1994) (carrying or possessing a firearm during or in furtherance of a drug trafficking or violent crime). See UNITED STATES SENTENCING COMMISSION SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 10 (1991).

effect and continued throughout the life of this study.¹⁹² Justice Kennedy, for example, while finding the Guidelines as a whole necessary,¹⁹³ nonetheless found them too harsh and too lacking in judicial discretion.¹⁹⁴ Chief Justice Rehnquist said that the Guidelines raise concerns about “judicial independence.”¹⁹⁵ A sustained and devastating critique was presented by Circuit Judge Jose Cabranes and Professor Kate Stith,¹⁹⁶ who concluded that the Guidelines were “[un]principled” in “foundation [and] application,”¹⁹⁷ are overly harsh,¹⁹⁸ and, among other things, inappropriately shifted power away from judges into the hands of legislators and probation officers.¹⁹⁹

Periodic surveys of judges confirmed the high level of dissatisfaction with the Guidelines, particularly with the twin features of decreased discretion and increased severity. When polled by the Federal Judicial Center in 1996, for example, 80% of the district and appellate judges who responded thought that Congress should allow judges more discretion in

192. For an extensive list of citations to articles and court opinions containing judicial criticism of the Guidelines, see STITH & CABRANES, *supra* note 169, at 195 n.12. Cf. Michael Goldsmith & James Gibson, *The U.S. Sentencing Guidelines: A Surprising Success*, in OCCASIONAL PAPERS FROM THE CENTER FOR RESEARCH IN CRIME AND JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW XII 2 (1998) (concluding that Guidelines have been more successful than generally believed, but noting “[w]hen the guidelines were first introduced . . . the chorus of hisses and boos from the federal bench was deafening. Academics and practitioners were not kindly disposed either. Of the more than 600 articles written about the guidelines [as of 1998] only a handful have been favorable.”).

193. Justice Kennedy dissented in *Blakely v. Washington*, 124 S. Ct. 2531, 2550 (2004), and dissented from the portion of the *Booker* opinion that found portions of the Guidelines unconstitutional. See *United States v. Booker*, 125 S. Ct. 738, 802 (2005).

194. See Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (copy on file with author) (“[T]he compromise that led to the guidelines led also to an increase in the length of prison terms. We should revisit this compromise. The Federal Sentencing Guidelines should be revised downward.”). Justice Kennedy is particularly critical of mandatory minimum sentences, which he sees as a feature of the sentencing scheme distinct from the Guidelines. *Id.* (“By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences.”). While some mandatory minimums are imposed independent of the Guidelines, the Guidelines themselves typically set a floor below which it was difficult for a judge to go, giving rise to the same problems and lack of judicial discretion.

195. See Bill Mears, *Rehnquist Slams Congress over Reducing Sentencing Discretion* (Jan. 1, 2004), at <http://www.cnn.com/2004/LAW/01/01/rehnquist.judiciary/>; see also Administrative Office of the U.S. Courts, *Downward Departures Debate Continues* (Aug. 2003), at <http://www.uscourts.gov/ttb/aug03ttb/downward/> (quoting Chief Justice Rehnquist).

196. See STITH & CABRANES, *supra* note 169. Professor Stith is actually described as the principal author of the book. Judge Cabranes has served on the federal bench for over two decades, first as a district judge and now on the Second Circuit Court of Appeals.

197. *Id.* at 103.

198. *Id.* at 59–77.

199. *Id.* 85–91. Professor Stith and Judge Cabranes also note the positive effects that they saw coming from the Guidelines, although their overall assessment was quite negative.

sentencing than was permitted by the Guidelines²⁰⁰ More recently, the Federal Sentencing Commission solicited views on a variety of Guideline-related issues,²⁰¹ and received some interesting responses:

- There was a high degree of dissatisfaction among both district and appellate judges with the amount of flexibility afforded by the Guidelines.²⁰²
- Although most judges thought the Guidelines did a good job of matching the sentence to the seriousness of the crime, “[a] large majority (roughly 75% or more) of both district and circuit judges reported that drug trafficking guideline punishment levels were greater than appropriate.”²⁰³ In addition, “circuit court judges saw weapons trafficking sentencing lengths as being greater than appropriate.”²⁰⁴
- Judges generally found that the impact of mandatory minimums on drug cases often prevented them from sentencing drug defendants appropriately (that is, in a way that furthered the goals of sentencing). Curiously, judges as a group did not find that the mandatory minimums had a similar effect in weapons cases.²⁰⁵

There was other evidence of judicial dissatisfaction with the Guidelines—one scholar, for example, concluded that the implementation

200. See Molly Treadway Johnson & Scott A. Gilbert, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* 6 (1997), at [http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/\\$File/gssurvey.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$File/gssurvey.pdf). In addition, a 1993 judicial poll for the ABA Journal showed that 45% of federal judges believed the Guidelines should be scrapped entirely. See Don J. DeBenedictis, *The Verdict Is In: Throw Out Mandatory Minimum Sentences, Judges Tell ABA Journal Poll*, 79 A.B.A. J. 78, 79 (1993).

201. See Michael Edmund O'Neill, *Surveying Article III Judges' Perspectives On the Federal Sentencing Guidelines*, 15 FED. SENT. RPTR. 215 (2003). The survey was sent to all active Article III judges; half of the district court judges and a third of the appellate judges responded. *Id.* at 215. The full survey report can be found at <http://www.uscc.gov/judsurv/judsurv.htm>.

202. O'Neill, *supra* note 201, at 216. One of the statutory goals of the Sentencing Guidelines was to maintain “sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.” See 28 U.S.C. § 991(b)(1)(B) (1994). When asked if “more” of the sentences given out under the Guidelines met this goal of flexibility, “fewer” of the sentences met this goal, or a “middle” number met the goal, a significant minority (45%) said that fewer sentences did so. O'Neill, *supra* note 201 at 216.

203. O'Neill, *supra* note 201, at 216.

204. *Id.* The study description did not reveal the attitudes of district judges towards weapons trafficking sentences.

205. *Id.* at 217. This summary does not fully portray the diversity of judicial views revealed in the survey. Thus, for example, the judges were more positive than the summary might suggest on some parts of the Guidelines—they believed that the Guidelines had done a good job, for example, in avoiding unwarranted sentence disparities. *Id.* at 215. On the other hand, judges were critical about the sentences for crimes other than drugs and weapons; thus immigration sentences were seen by many judges as being too high, while those for fraud and theft were often considered too low. *Id.* at 216.

of the Guidelines led district court judges to take senior status earlier than they otherwise would have.²⁰⁶ And so while the judicial criticisms were not universal and had shades of grey within them, it seems fair to say that a great many judges opposed the direction of sentencing reforms during the time period in question.²⁰⁷

Given this unhappiness, it is only a small inferential step to conclude that the federal sentencing scheme at times created a tension between the judge's duty to follow the law and the duty to see that justice is done. Although not addressing the more dramatic act of acquitting defendants, Professor Stith and Judge Cabranes recognized (prior to *Booker*) the judicial urge to interpret their remaining sentencing authority generously:

Many judges are not at ease operating within [the federal sentencing] system, and may be sorely tempted to manipulate their Guidelines calculations to avoid the results called for by the Guidelines. Where the Guidelines, mandated sentencing range seems inadequate or too harsh, the judge may be tempted to reconsider factual "findings" in order to alter the Guidelines calculation, or to devise a basis for departure that may be largely irrelevant to the culpability in the case at hand but at least may pass muster in the court of appeals.²⁰⁸

Another (anonymous) federal judge made the point more sharply when he said: "[T]he Guidelines . . . have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring *the law* in an effort to achieve a just result. All under the banner of 'truth in sentencing'!"²⁰⁹

Actually translating judicial dissatisfaction into a causative agent for acquittals is a more daunting task, because the statistical evidence is mixed. If the "sanction effect" hypothesis is correct we would expect the

206. See Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEGAL STUD. 231, 251 (2004) (suggesting "that the sentencing guidelines have led district court judges to select senior status earlier. Specifically, judges take senior status after .4 years instead of after 3 years of eligibility.").

207. See *id.* at 236–38 (summarizing literature on why the Guidelines may make judging less attractive).

208. STITH & CABRANES, *supra* note 169, at 90.

209. See Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 365 (1992) (quoting survey response of anonymous trial judge from the Eastern District of New York); see also Bowman & Heise, *Quiet Rebellion I*, *supra* note 185, at 1123 ("Anecdotal information and conversations with lawyers and judges across the country suggest a creeping increase in the willingness by all parties, lawyers and judges alike, to fudge the facts a little to achieve desired sentencing outcomes.").

data to show two things. First, since the sentencing guidelines applied to all serious federal crimes and all federal courts, and since the permissible sentencing range under the Guidelines was considerably narrower than in the past, presumably the percentage of cases in which judges believed that the mandated punishment would not fit the crime on conviction would increase across the board. We therefore would expect to see a lower conviction rate for judges across all categories of offenses and in all regions of the country. As noted above, this disparity has in fact emerged.²¹⁰

But in addition, we might expect to see a *greater* difference in conviction rates for certain types of offenses, notably drug and weapons crimes. These are the categories most criticized for their harshness, and so if judges had increasingly resolved doubts in favor of defendants to avoid a perceived sentencing injustice, these are the cases in which we would expect to see the largest gap in outcomes.

Before turning to the data itself, two preliminary points are necessary. First, for this particular inquiry we will limit the trials under consideration to felonies. Because we are trying to evaluate the impact of reduced discretion on judicial decisionmaking, with particular attention to cases where judges may find the required sentence unduly harsh, eliminating misdemeanors from the data should provide a more focused picture.²¹¹

Second, we should identify precisely what is being measured. Our working hypothesis is that the change in law in the late 1980s altered judicial, but not jury, behavior when making decisions about guilt. Since we have no benchmark to tell us what the “correct” percentage of convictions are, we can only evaluate the impact of the legal changes by comparing the conviction rate of those who operate under the Guidelines—here, judges in bench trials from 1989 to 2002—to those making similar decisions unaffected by the Guidelines: juries, on the one hand, and *pre*-Guideline judges on the other. Thus we will ask: (a) is the gap between judge and jury conviction rates during Phase III greater for drug and weapons crimes than for other types of offenses; and (b) if we compare pre-1989 bench conviction rates to post-1989 bench rates, do the

210. See *supra* Tables D, E, F, H and accompanying text (showing greater acquittal rates for judges in all categories of crimes, for both felonies and misdemeanors, and in all circuits).

211. The Guidelines do not apply to Class B and C misdemeanors, see *supra* note 175, which include only petty offenses. Cases charging petty crimes have not been part of the dataset for any part of this study, see *supra* note 50, and thus in this section we are only eliminating those cases where at least six months but less than one year is authorized. Because the maximum penalty a judge would *have* to give for this type of misdemeanor was only 6 months, see LEVENSON, *supra* note 19, at 582, it is less likely that judges would often feel that these sentences are unduly harsh.

conviction rates for drug and weapon crimes change in ways that were different than for other types of crimes?²¹²

When we compare the conviction rate gap across crime types, we see the following:

TABLE I

Crime Category	Felony Conviction Rates, 1989-2002		
	Jury	Bench	Difference ²¹³
Property	81%	46%	43%
Regulatory	67%	44%	35%
Drug	87%	63%	27%
Public Order (no weapons)	82%	62%	25%
► Weapons ²¹⁴	85%	67%	21%
Violent	81%	67%	17%
Immigration	86%	80%	8%

There is in fact a large gap between judge and jury conviction rates in drug and weapons cases, but not unusually so. In fact, these cases are close to the middle of the pack, with significantly larger gaps in property and regulatory cases and significantly smaller ones in violent crime and

212. There are other measures that could be used, but it is doubtful they would be as informative. We might, for example, look only at bench trials and simply ask if judges are more likely to acquit in drug and weapons felony trials than in other cases. It turns out that they are not. In Phase III felony cases the conviction rate for weapons defendants is 68%, and the rate for drug defendants is 63%. Both of these figures are *higher* than the conviction rate for all other felonies—i.e., all felony trials except those involving drugs and weapons—where the conviction rate for bench trials is a mere 56%.

These data point us away from the sub-hypothesis that judges are *particularly* prone to acquit when the sentences are high and inflexible, as they are for these two types of crimes. The value of these numbers is greatly diminished, however, in the absence of a baseline for comparison. Comparing the bench acquittal rate of drug and weapons defendants in a post-Guidelines world to the bench acquittal rate of all other defendants during that same period obviously tells us nothing about what those rates would have been in the absence of the Guidelines. Because we are trying to evaluate the impact of the sentencing changes on bench conviction rates, the bench numbers only become meaningful when compared to the conviction rates by judges or juries operating without the influence of the sentencing reforms. Thus, the better comparisons are between Phase III judge and jury rates, and between bench rates in Phase III and earlier bench rates.

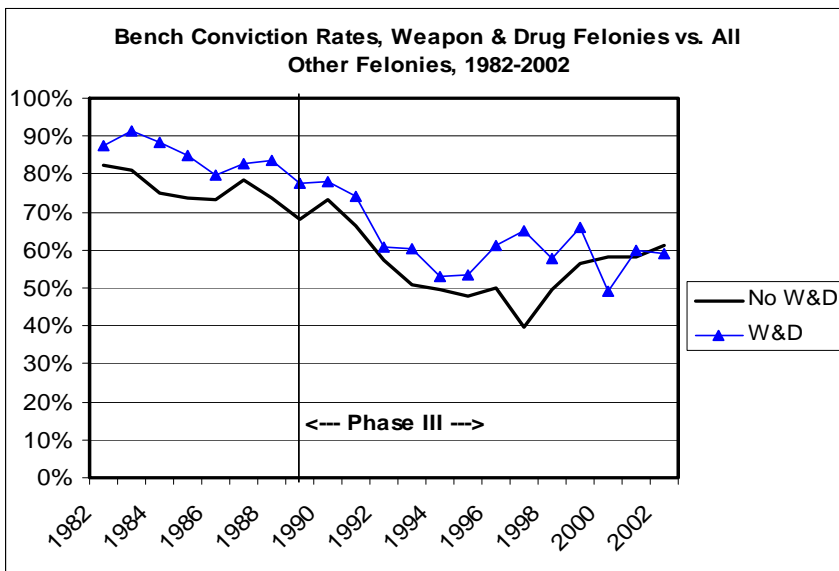
213. The last column in Table I was calculated by subtracting the Bench rate from the Jury rate, then dividing the difference by the Jury rate. Thus, the bench conviction rate for public order is 43% lower than the jury conviction rate ($83 - 47 = 36$ and $36 \div 83 = 0.43$).

214. "Weapons" offenses were traditionally categorized for statistical purposes as a subset of public order crimes; in recent years, however, weapons have been placed in their own category. In this Article, the analysis in the prior sections combined public order and weapons crimes. *See supra* note 71 and accompanying text. In this section, however, the "public order" category does not include weapons crimes, but includes the rest of the offenses within that group. Weapons crimes are treated separately.

immigration cases. The best that can be said for these figures is that they are neutral—they neither bolster nor undermine the theory that the Guidelines have influenced judicial decisionmaking. The range of disparities simply confirms that whatever combination of factors ultimately explains the difference in conviction rates, it is not limited to drug and weapon cases.

A second way of looking at the data is to compare the bench conviction rates from Phase III with those from the recent past. The dataset allows us to study the rates for only the seven prior years, from 1982 through 1988. We then can compare the conviction rates for weapons and drug felonies (combined) with conviction rates for all felonies *except* those involving weapons and drugs, to see if the trend lines for the former category moved differently than those in the latter.

FIGURE 11



Here we see a familiar trend pattern: judicial conviction rates for weapons and drug felonies did indeed drop significantly after the Guidelines took effect, but the rate did not drop much faster or slower than the rate for all other offenses. These figures again suggest that there is nothing unusual about drug and weapons crimes when it comes to judicial acquittal rates.

The data, then, offer two competing stories. The first is that the diminished judicial role in setting the punishment does not have an impact

on determinations of guilt in bench trials. Judges may have disliked the Guidelines, and may have believed that some of the mandated sentences were unfair, but perhaps they left those concerns in chambers, to be brought out at judicial conferences and congressional hearings rather than at trial.

The second interpretation is that the sanction does affect trial decisions, but that the effect does not apply only to drug and weapons cases. Perhaps the sanction effect is fact-specific, turning more on the characteristics of the defendant and the circumstances of the case than on the nature of the crime charged. Under this view, a sympathetic (broadly defined) defendant charged with a property crime facing only a few years in jail might receive the benefit of the sanction effect in a way that a weapons defendant facing a larger sentence would not. Critically, this would suggest that it is not the *severity* of the sentence that matters so much as its *inflexibility*—judges may examine the government’s case with a more critical eye even if the Guidelines require only a short amount of prison time, if they believe that time is unwarranted on the facts of the case. Ironically, it is precisely the inflexible nature of the Guidelines—that is, the portions of the sentencing statutes that made the application of the guidelines mandatory—that was found to be unconstitutional in 2005.²¹⁵

Ultimately, there is no way to tell which of these stories is more accurate, and given our usual presumption that judges follow the rules, it would be easy to dismiss the hypothesis out of hand. It would be easier still were it not for the fact that the core notion—that the severity of a sanction can affect a decisionmaker’s judgment on liability—is both common and unremarkable in other parts of the law, including the criminal law.

Once again direct evidence is hard to find, but there is social science literature to support the idea that guilty verdicts may decrease as the consequence of a conviction increases.²¹⁶ Interestingly, one study found

215. See *United States v. Booker*, 125 S. Ct. 738, 756–57 (2005).

216. See Martin F. Kaplan & Sharon Krupa, *Severe Penalties Under the Control of Others Can Reduce Guilty Verdicts*, 10 *LAW & PSYCHOL. REV.* 1 (1986); Norbert L. Kerr, *Severity of Prescribed Penalty and Mock Jurors’ Verdicts*, 36 *J. PERSON. & SOC. PSYCHOL.* 1431, 1439 (1978) (“Increasing the severity of the prescribed penalty for an offence resulted in an adjustment of subjects’ conviction criteria such that more proof of guilt was required for conviction and thus resulted in a reduced probability of conviction.”); Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 *LAW & SOC’Y REV.* 781, 793–94 (1979) (study finding juries more likely to acquit if charged offense is serious, which may “reflect the use of a higher standard of proof for these crimes”); Neil Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 *J. PERSON. & SOC. PSYCH.* 211, 216 (1972) (reporting result of mock jury study, and while acknowledging limitations of study, concluding: “The present data indicate that restricting the decision

that this phenomenon is most likely to occur if the decisionmaker is not in control of the punishment that would follow a conviction, *i.e.*, if some other authority will decide the fate of the guilty person. The reasoning is that unless the decisionmaker can be sure that an appropriate sentence will be imposed, through direct control or other means, he or she will be slower to convict.²¹⁷

The social science studies are intriguing, although it is important not to over read them. Not only is there a dispute about the strength of the conclusions,²¹⁸ the experiments always involved students or other lay-people, not judges or lawyers. Thus, while the research may reflect an intuitive human tendency, they do not provide any focused guidance on how judges might have reacted to a loss of discretion. Here we need to look at less scientific but more concrete examples.

The best known historical example comes from 17th and 18th century England, where judges and juries often collaborated to ensure that a defendant charged with a minor crime would not end up with a capital sentence. (This practice was common enough that one historian describes it as “a central element of criminal administration” during this period.²¹⁹) A defendant charged with the theft of goods worth more than 40 shillings was statutorily subject to hanging, but in many cases juries would find the defendant guilty of stealing items worth 39 shillings even though the goods were plainly worth more.²²⁰ In this “pious perjury”²²¹ the jurors

alternatives available to [mock] jurors, especially when the guilty alternative has a consequence which is perceived to be too severe, may increase the likelihood of obtaining a not guilty verdict.”)

217. See Kaplan & Krupa, *supra* note 216, at 8.

218. See Jonathan L. Freedman et al., *Severity of Penalty, Seriousness of the Charge, and Mock Juror’s Verdicts*, 18 LAW & HUM. BEHAV. 189, 202 (1994) (reviewing studies, and concluding that “within the context of the limitations we have considered, we would argue that the present studies offer strong evidence that mock jurors are not affected by the severity of penalty or seriousness of the charge.”). The Freedman article was critical of, *inter alia*, the Kaplan & Krupa study cited *supra* note 216. Professor Kaplan responds to the criticisms in Martin F. Kaplan, *Setting the Record Straight (Again) on Severity of Penalty: A Comment on Freedman et al.*, 18 LAW & HUM. BEHAV. 697 (1994). Professor Freedman then responds to the Kaplan defense in Jonathan L. Freedman, *Penalties and Verdicts: Keeping the Record Straight*, 18 LAW & HUM. BEHAV. 699 (1994). Cf. Norbert Kerr, *Stochastic Models of Juror Decision Making*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 126–27 (Reid Hastie ed. 1993) (“Attorneys, judges, and legislators believe that as penalty increases, all other things being equal, jurors will become less likely to convict.” But “[w]hen we turn to the experimental research literature, we find less consistent support for the hypothesis of penalty effects on verdicts.” (citations omitted)).

219. J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 424 (1986); see also JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 57–60 (2003).

220. BEATTIE, *supra* note 219, at 424–26. The jury’s exercise of discretion was not limited to finding a defendant guilty of some lesser charge. At times, juries would acquit entirely rather than subject the defendant to capital punishment, although this exercise of leniency was more common with minor crimes than with serious ones. See *id.* at 429 (describing how “minor” sheep stealers were often

were often abetted by the judge, who would “recommend” verdicts, indicate to the jurors what conclusion the judge himself had reached, or “merely hinted at the options the jury had before them.”²²² It was unnecessary for the judge to be more direct, because while sentencing was the province of the court, English juries “could anticipate precisely the sentence that would follow particular decisions.”²²³

Modern courts have also recognized the risk that the sanction will influence the underlying judgment, often in the context of jury decisionmaking. As in England, the U.S. Supreme Court’s death penalty jurisprudence has been influenced in part by “the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences.”²²⁴ Kalven and Zeisel’s study of the American jury identified numerous cases where the judge explained a not-guilty verdict by saying that the anticipated punishment seemed to strike the jury as disproportionate to the crime charged.²²⁵ Indeed, the black-letter rule that juries should not be told of the possible sentence a defendant would face if convicted is justified in part by the fear that juries will let that knowledge affect its verdict.²²⁶

acquitted while robbers were not); LANGBEIN, *supra* note 219, at 59 (making a similar point).

221. This phrase apparently is a Blackstone creation, although as Professor Langbein notes: “The historical literature has settled on the term ‘partial verdict’ to describe these verdicts that convicted the defendant but reduced the sanction.” LANGBEIN, *supra* note 219, at 58.

222. BEATTIE, *supra* note 219, at 425–26; *see also id.* at 420–21 (“Jurors and judges were both agents in this manipulation; both possessed discretionary powers that enabled them to temper the application of the law so as to achieve a result that seemed appropriate. Cooperation and agreement between them was essential to the working of the system.”).

One important difference between the English practice and the modern sentencing scheme is the expectation of the legislative branch. In 18th century England:

It is likely that parliament expected the law to be enforced with discretion, though that could hardly have been announced in the statutes themselves. . . . [I]t seems clear that in parliament as in the courts it was understood that a range of considerations beyond mere guilt or innocence would determine whether any particular offender would suffer as the statute directed.

Id. at 421.

223. *Id.* at 429.

224. *See* Woodson v. North Carolina, 428 U.S. 280, 290 (1976) (plurality opinion) (invalidating state statute making capital punishment mandatory for first degree murder). This concern was almost certainly one of the guiding principles behind *Witherspoon v. Illinois*, 391 U.S. 510 (1968), where the Court upheld the practice of removing potential jurors for cause if they would refuse to impose the death penalty in the event of a conviction.

225. *See* KALVEN & ZEISEL, *supra* note 36, at 306–12; *see also id.* at 307 (noting that while jurors are not told of the potential punishment, “the threatened penalty may come to dominate the deliberation, because the jury guesses at the magnitude of the legal penalty, or because it has special reason to know what the penalty actually is.”).

226. *See* Shannon v. United States, 512 U.S. 573, 579 (1994) (“providing jurors sentencing information invites them [*inter alia*] to ponder matters that are not within their province”); Pope v.

More to the point, judges have recognized their own tendency to be influenced by the likely consequences when making decisions formally unrelated to the punishment. When Judge Jack Weinstein surveyed his colleagues in the Eastern and Southern Districts of New York on matters related to the Sentencing Guidelines, he found that judges often calibrate the standard of proof they require in sentencing to the seriousness of the issue before them. Twenty judges responded to Judge Weinstein's question whether, in practice, they used the "preponderance of the evidence" standard when resolving factual disputes at sentencing hearings.²²⁷ The law is clear that a preponderance is all that is required,²²⁸ but more than half of the judges were equally clear that they sometimes require more. As Judge Weinstein characterized the responses:

Nine of the twenty judges stated outright that they relied on a sliding-scale approach, in which the burden of proof changes relative to the effect on the defendant of the issue being proved. Thus, for example, with respect to facts that, if proved, would significantly enhance a defendant's sentence, these judges would require clear and convincing evidence or, in some cases, proof beyond a reasonable doubt.²²⁹

Other judges gave more qualified answers, but generally agreed with the point that the degree of certainty they required might change depending on the sentencing impact of the finding.²³⁰ And while the sample size was

United States, 298 F.2d 507, 508 (5th Cir. 1962) ("To inform the jury that the court may impose minimum or maximum sentence, will or will not grant probation, when a defendant will be eligible for a parole, or other matters relating to disposition of the defendant, tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided."); see also 3 A.B.A. STANDARDS FOR CRIMINAL JUSTICE 18.16 & n.4 (2d ed. 1986) (recommending abolition of jury sentencing because *inter alia*, it may "undercut the integrity of its determination of defendant's guilt," and because it may prevent appropriate findings of guilt because jury cannot agree on a sentence). See generally Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 656 (2004) (describing effects of jury compromise on guilt in jury sentencing scheme). *But cf.* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 989 (2003) (state court judge describing and rejecting criticism of jury sentencing as inviting compromise verdicts).

The extent to which juries would in fact be influenced by the potential sentence is, of course, speculative, although our understanding of jury sentencing has benefited greatly from the valuable study conducted recently by Nancy King and Rosevelt Noble. See Nancy J. King & Rosevelt Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885 (2004).

227. Weinstein, *supra* note 209, at 360.

228. *Id.* at 359 (citing *United States v. Lee*, 818 F.2d 1052 (2d Cir. 1987), *cert. denied*, 484 U.S. 956 (1987)).

229. Weinstein, *supra* note 209, at 361 (footnotes omitted).

230. Thus, for example, one judge said that he applied a uniform clear-and-convincing standard rather than the required preponderance, while another required 60% certainty on factual findings. Even

small and the judges not randomly distributed, the responses collectively support the view that judges will sometimes increase the level of scrutiny to keep pace with the severity of the outcome.

Moreover, recent empirical work supports the notion that federal judges (and prosecutors) found the Guidelines unduly severe in drug cases, and that this harshness could distort judicial rulings. In two studies Professors Frank Bowman and Michael Heise have persuasively demonstrated that federal drug sentences actually *declined* during the 1990s, even while remaining long in absolute terms.²³¹ Bowman and Heise attribute much of the decline to discretionary choices made by judges and prosecutors in favor of leniency,²³² both in sentencing²³³ and in the structuring and accepting of plea bargains.²³⁴ And while they are properly cautious in assigning reasons for these choices, Bowman and Heise conclude that at times prosecutorial and judicial decisions were influenced, even distorted, by the harshness of the potential sentence, and as a result, were sometimes made with only a glancing regard for the facts. Thus, for example, the authors describe cases where judges apparently turn a blind eye toward relevant conduct in sentencing, or approve a plea agreement where some relevant conduct was plainly stipulated away by the parties.²³⁵ In short, the researchers make a well-reasoned case that judges and prosecutors were prepared to aggressively interpret, or even circumvent, the Guidelines to soften the harshness of the drug laws. They conclude:

The system we have described is one in which lawyers and judges are actively manipulating the Guidelines system to avoid sentencing

among the judges who said they applied a preponderance standard there were important qualifications. One judge said that he required on a preponderance of evidence, but said that this meant that he had to be “sixty-six and two-thirds percent” certain. *See id.* at 360–62.

231. *See* Bowman & Heise, *Quiet Rebellion I*, *supra* note 185, at 1063–66; *see also id.* at 1131 (“Federal drug sentences, even after a decade of incremental decline, are simply, undeniably, very long.”). For an updated study on drug sentencing that largely reaffirms the first study, *see* Frank O. Bowman III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477 (2002) [hereinafter Bowman & Heise, *Quiet Rebellion II*].

232. *See* Bowman & Heise, *Quiet Rebellion I*, *supra* note 185, at 1126 (noting that the empirical evidence shows “(1) at virtually every point in the Guidelines sentencing process where prosecutors and judges can exercise discretionary authority to reduce drug sentences, they have done so; and (2) where we can measure trends, the trend since roughly 1992 has always been toward exercising discretion in favor of leniency with increasing frequency.”).

233. *Id.* at 1107–16 (noting, for example, the high and increasing percentage of drug defendants who are sentenced at or near the bottom of the applicable Guidelines range).

234. *Id.* at 1119–26 (discussing judicial acquiescence in charge and fact plea bargaining).

235. *See id.* at 1121–22 (noting, for example, cases where the defendant pleads guilty to using a telephone to carry out a drug crime, in violation of 21 U.S.C. § 843(b), but is not charged with nor sentenced for the drug crime itself).

consequences that the rules, rigorously applied, would otherwise require. Some of the methods employed are consistent with the letter and spirit of federal sentencing law, but other methods routinely employed are not.²³⁶

In their later work Bowman and Heise slightly soften the strength of this conclusion (while still reaffirming its likely validity),²³⁷ and their study does not address the more extreme step of judicial acquittals.²³⁸ But the general notion that a sanction effect can influence judicial rulings is generally, even strongly, supported by these studies.

There are other instances where judges' liability findings are widely believed to be influenced by the consequences. Both supporters and critics of the Fourth Amendment exclusionary rule agree that the prospect of suppressing evidence of a defendant's guilt, especially for serious crimes, has led judges to recoil from finding a constitutional violation in the first instance.²³⁹ In Section 1983²⁴⁰ cases, the doctrine of qualified immunity has been defended on the ground that if judges had to impose liability on government actors even when the law was not well-settled, those judges

236. *Id.* at 1134.

237. See Bowman & Heise, *Quiet Rebellion II*, *supra* note 231, at 556–58. Among the newly discovered information that causes the authors to question strength of their earlier assessment is that the declining drug sentences occur only in a slight majority of the judicial districts; in the rest, the sentences increased during the period covered by the study. *Id.* at 531, 556.

238. Indeed, some of the reasoning to support the conclusion is inconsistent with a sanction effect that results in acquittals. Bowman and Heise suggest, for example, that prosecutors and judges may be more inclined to deviate from the Guidelines because the defendant will still serve a lengthy prison sentence. See Bowman & Heise, *Quiet Rebellion I*, *supra* note 185, at 1132–33.

239. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994) (“The exclusionary rule renders the Fourth Amendment contemptible in the eyes of judges and citizens. Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated.”); Donald A. Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 2 (2001) (“Judges are reluctant to free obviously guilty criminals. Trial judges, therefore, tilt fact-finding against exclusion, while appellate judges give constitutional rights crabbed and grudging interpretations.”); Robert L. Misner, *In Partial Praise of Boyd: The Grand Jury as a Catalyst for Fourth Amendment Change*, 29 ARIZ. ST. L.J. 805, 822 (1997) (“When the Court ‘gets it wrong,’ [about society’s expectation of privacy] one suspects that the looming remedy of exclusion tips the scales against Fourth Amendment inclusion of the privacy interest.”) (footnote omitted); see also OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE, TRUTH IN CRIMINAL JUSTICE REPT. NO. 2 (1986), reprinted in 22 U. MICH. J.L. REF. 573, 614 (1989) (“Because judges are sensitive to the problem of allowing criminals to go free, they have an incentive to find that the basis for police action was sufficient. The quantum of evidence necessary to constitute probable cause falls ever lower as precedents accumulate.”). The same point could be made, of course, with respect to the exclusion of evidence under the Sixth Amendment right to counsel, as well as the right to be free of coercive police interrogation under *Miranda v. Arizona*, 384 U.S. 436 (1966).

240. 42 U.S.C. § 1983 (1994) (providing a cause of action for civil rights violations made under color of state law).

may be less inclined to find a constitutional violation at all.²⁴¹ Still others have argued that the non-retroactive application of new constitutional rules in criminal cases is a product of these same concerns.²⁴² The degree to which these inclinations do or should influence the doctrine is a fair subject for debate, but it seems clear that the basic principle—that substantive judicial decisions are at times influenced by the resulting sanctions—is broadly recognized.²⁴³

Given all this, it would be surprising, even extraordinary, if judges did *not* take into account the potential sentence when assessing guilt. We need not characterize judges as having “nullified” the law or otherwise acted lawlessly to reach this conclusion; the more likely and benign explanation is that judges, like the rest of us, weigh the consequences of their actions when making decisions, especially in close cases.²⁴⁴ So while the indicators are not uniform, and the degree of the sanction effect cannot be

241. For an extended discussion of this point, see John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98–105 (1999). Compare John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 78–80 (1998) (discussing the “dilution” of constitutional law development that would occur if judges had to impose the full costs of remediation for a § 1983 violation on the government, concluding “[w]hat one can say—and with confidence—is that constitutional rights defined in a world of strict liability would be different from and narrower than those rights that would be defined (by the same judges) under a regime of qualified immunity.”) with Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091 (criticizing Jeffries’ view) and Sheldon Nahmod, *From the Courtroom to the Street: Court Orders and Section 1983*, 29 HASTINGS CONST. L.Q. 613, 640–42 (2002) (discussing Jeffries’s view). My thanks to Professor Sheldon Nahmod for helping me develop this point.

242. See, e.g., *Jenkins v. Delaware*, 395 U.S. 213, 218 (1969) (observing that making criminal procedure decisions non-retroactive allows the Court to make “long overdue reforms, which otherwise could not be practically effected” if they had to be applied to past cases); Sam Kamin, *Harmless Error and the Rights/Remedy Split*, 88 VA. L. REV. 1, 34–39 (2002) (noting and criticizing the jurisprudential parallels between qualified immunity, non-retroactivity of new constitutional rules, and the harmless error doctrine).

243. For other examples of this phenomenon in the civil context, see Stephen S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705 (2000) (discussing criticism of bifurcated civil trials, including the claim that splitting consideration of liability and damages infringes on the jury’s ability to compromise in verdicts); Joan Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 663 n.359 (“One danger of requiring courts to award punitive damages is that a court might be reluctant to find a violation of the lemon law in order to avoid awarding punitive damages in close cases.”).

244. Cf. *United States v. Merlino*, 204 F. Supp. 2d 83 (D. Mass. 2002). In *Merlino*, the jury convicted defendant of several counts, but the judge granted a judgment of acquittal as to one of the charges that carried a severe mandatory minimum. Although the judge concluded that the evidence on the count in question was sufficient to support the jury’s decision—saying, “in a purely legal sense, the verdict is unimpeachable”—the judge nonetheless concluded that the evidence was “too slender a reed to support the mandatory thirty year consecutive sentence that the law otherwise requires as an addition to the substantial punishment that William Merlino will almost certainly receive.” *Id.* at 92. Earlier in the opinion the judge had noted that defendant was a recovering heroin addict with a record of petty crimes, and that he was “deeply affected by the recent death of his wife and was peculiarly susceptible to the influence of his domineering uncle,” a co-defendant. *Id.* at 91.

measured precisely, a reasonable inference of the evidence is that part of the disparity between the judge and jury conviction rates can be attributed to the impact that mandatory sentencing laws had on judicial decisionmaking.

IV. IMPLICATIONS AND FUTURE STUDY

A. *Implications*

We return to where we began: why *do* defendants proceed so often before juries, when judges are statistically so much more likely to acquit? More importantly, why are federal judges so acquittal prone?

On the first question, there now seem to be several possibilities. As noted, defense lawyers may just be making bad decisions, because outdated data and inertia have led them to believe—incorrectly—that juries are more favorable. Although the reaction of the lawyers interviewed for this study were not uniform, the lack of awareness of the different acquittal rates was widespread.²⁴⁵ This would explain, for example, why a very low percentage of defendants choose a bench trial in drug cases, even though statistically they are 27% *more* likely to be convicted by a jury.²⁴⁶

A second possibility is a variation of the first. Here the lawyers' knowledge of the relative conviction rates is irrelevant, because they would not care even if they knew. Perhaps the overall conviction rates, even when broken down by crime type and crime seriousness, are too blunt a tool to guide a lawyer in a specific case, and so the micro decision is unaffected by the macro numbers. Even with all the imperfections in the data, however, this explanation seems implausible. A defendant cares about an acquittal above all other things, and an explanation that demoted or ignored *any* variable that had a demonstrable impact on the defendant's chances for success seems far fetched.

A third, more troubling possibility, is that lawyers are generally aware that bench trials are statistically more favorable, and care about this difference, but feel institutionally constrained from waiving a jury. This presents a classic agency problem, where the lawyer's interest and the client's interest diverge ever so slightly. Going to trial is risky enough, and the preference for juries ingrained enough, that most lawyers are undoubtedly reluctant to waive a jury without a very good reason, one that

245. See *supra* note 51 and accompanying text.

246. See *supra* Tables A, B, and accompanying text.

can be articulated and later defended to co-workers, supervisors, and the defendant. The fact that judges acquit more often as a general matter may not be a compelling enough reason to ignore the safety that comes from following the conventional wisdom.

A final explanation is that lawyers are acting perfectly rational by choosing a jury trial, regardless of their awareness of the conviction rates. Even though juries convict 85% of the time, it might be that if defendants had a bench trial *in those same cases* a judge would convict 85%, 90% or even 95% of the time. Under this view, the lower conviction rate in bench trials is entirely a function of the differences in the cases considered by a judge and by a jury. Much of the current study has been devoted to a search for those differences, and the absence of a clear, easy-to-apply explanation for the lower bench rate may be enough to keep lawyers from changing their traditional jury preference.

The ultimate explanation is probably a combination of these reasons. It appears that many lawyers are in fact unaware of the relative rates, and to the extent they become aware of the data, we would expect to see the percentage of bench and jury trials change in the coming years. But any increase in the number of bench trials will probably be modest, because even among lawyers who have learned of the rate gap, several expressed doubts that they would dramatically alter their practices. When asked why, some lawyers still insisted that juries were better for the defense, while others frankly admitted to the agency problem described above.

Many lawyers, however, continue to believe that their selections are entirely appropriate, and that judges and juries simply consider different types of cases, which brings us to the second question. As described above, the differences that have the most explanatory promise are:

(1) *Crime type*. Public order crimes make up such a high percentage of bench trials and have such low conviction rates that it seems that there *must* be some distinctive feature of these cases that explains the pattern. As shown in Part II.B.1, however, identifying these features, ones that are shared disproportionately by both tax crimes and traffic offenses, is extremely difficult.

(2) *Crime Seriousness*. Focusing on less serious crimes has more promise, because most bench trials are for misdemeanors, and most misdemeanors trials are heard by the bench. Here there is an obvious similarity across all cases in this category—the stakes are relatively low. One explanation for the difference in conviction rates, then, is that the size of the case dictates the level of government effort in prosecution, and that the presumed reduced effort for misdemeanors translates into a higher

acquittal rate among judges, who have a greater opportunity to evaluate the relative strengths of government cases.

(3) *Strength of Evidence.* We hypothesized that judges hear a disproportionate number of the marginal, difficult-to-prove prosecutions because defense counsel steer such cases toward the bench. Although this hypothesis is hard to prove (how do we measure strength of the evidence except through the outcome?), and even if measurable, would not fully explain some of the data (why are public order crimes so much more likely to be weak than other types of crimes?), the idea has great intuitive appeal.

Each of these explanations has its strengths, weaknesses, and limits. The largest limit on each is also the one with the largest implications. Perhaps the most interesting finding of this study is that the proposed explanations do not, either individually or collectively, clearly explain the entire gap in conviction rates. The difference in the judge and jury rates is amazingly robust: judges are more inclined to acquit in trials for all types of crimes, for both felonies and misdemeanors, in practically every judicial district. Of course, the sturdiness of the disparity may reflect nothing more than a weakness in the research; perhaps there are unconsidered variables that would explain the bulk of the disparity. But unless there is an overlooked factor waiting in the wings,²⁴⁷ even the most statistically telling variables are only a partial explanation.

Just as importantly, neither the variables measured nor a simple lack of information explains why jury conviction rates have remained constant while the bench rate has declined in recent years. Here we must identify something that has changed over the last two decades, something that affects judges but not juries, something that applies to all types of crimes in all parts of the country. One of the few things that fits that description is the change in federal sentencing law. Despite the lack of direct support provided by the data—in particular, the absence of an unusually large conviction disparity in drug and weapons cases—the circumstantial evidence that this change has influenced judicial decisionmaking is moderately strong.

If restrictions on judicial sentencing authority explain even part of the difference, the implications are large indeed. Although mandatory minimum sentences remain popular and are a significant limit on judicial discretion, an important part of the Federal Sentencing Guidelines has recently been declared unconstitutional in *United States v. Booker*.²⁴⁸

247. See *infra* Part IV.B.

248. 125 S. Ct. 738 (2005).

While only a portion of the Guidelines structure was invalidated, it was the part most pertinent to the presence of any sanction effect—those portions of the federal statutes that say judges *must* follow the Guidelines in sentencing.²⁴⁹ As a result, if the pre-*Booker* Guidelines structure is replaced with a more flexible sentencing scheme that gives the judges greater discretion to take defendant-specific variables into account, we may see the sanction effect diminish,²⁵⁰ and judicial conviction rates rise as a result.

It seems likely, however, that *Booker* will not be the last word on federal sentencing law; the decision invites a legislative response, and here is where the real importance of the sanction effect may emerge. No matter what the Congressional response,²⁵¹ one of the key philosophical issues will be the degree to which judges should be constrained in setting sentences in individual cases. The data and analysis offered above can inform this debate, although its policy implications are unclear. Perhaps we should monitor judicial acquittals more carefully to make sure that judges are not subjecting the government's case to scrutiny that is inappropriately rigorous. We might conclude that new legislation should seek ways to reaffirm that sentencing severity is the province of the legislature, and that if judges believe that a narrow range of sentences frequently leads to injustice, they should make these feelings known through normal channels, not by altering their assessment of cases.²⁵²

249. Specifically, the Court in *Booker* found unconstitutional two provisions of the federal sentencing statutes:

the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see 18 U.S.C. § 3553(b)(1) (Supp. 2004), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, see § 3742(e).

Booker, 125 S. Ct. at 764.

250. It seems unlikely that the effect would disappear entirely since mandatory minimum sentences are not implicated by *Booker*.

251. As Judge Paul Cassell noted when declaring the Guidelines unconstitutional following the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), even if the Guidelines as a whole were invalidated, it would not necessarily follow that judges would regain the sentencing discretion they enjoyed in a pre-Guidelines world. In Judge Cassell's view, the more likely possibility is that "Congress might replace the carefully-calibrated Guidelines with a series of flat mandatory minimum sentences There is every reason to expect that those mandatory minimum sentences will be quite high." *United States v. Croxford*, 324 F. Supp. 2d 1230, 1254 (D. Utah 2004) (Cassell, J.); see also *infra* note 254 (discussing preliminary Congressional reaction to *Booker*).

252. Under this approach, one way of monitoring judicial behavior might be the increased use by the government of a procedure that allows "a party" to request the judge in a bench trial set forth its findings of fact. See FED. R. CRIM. P. 23(c). While these findings would not be appealable, the need to articulate their conclusions might provide a mild check on judicial behavior.

Alternatively (and in my view preferably), we might view the existence of a sanction effect as a cautionary tale. The tension between the legislative need to set prospective sentencing ranges and the judicial need to set a punishment that fits specific facts is both inevitable and healthy, but only if some rough equilibrium is maintained. Boundless judicial discretion in sentencing gave rise to the problems that led to the Guidelines in the first instance, but surely too little judicial discretion is undesirable as well. No informed person would favor *completely* determinate sentences, regardless of the underlying facts (“all defendants convicted of manslaughter shall be sentenced to 15 years in prison”), so the only real question is where to strike the best balance.²⁵³ Reasonable minds can differ on this issue, but it would be a mistake to ignore a signal from judges—if we can correctly read it—that the sentencing scheme has become so tilted toward certainty and consistency that fairness and proportionality have suffered.²⁵⁴ As long as we trust the integrity, intelligence, and character of the federal bench, we ignore their wisdom about the best way to distribute justice at our peril.²⁵⁵

B. Future Study

There are at least four areas of future research worth pursuing, ones that could materially strengthen or weaken the current conclusions. The

253. The possibility of completely determinate sentencing is not as far fetched as it once seemed. In his dissent in *Blakely*, Justice Kennedy outlined the possible Congressional responses that could follow a successful challenge to the Guidelines. *Blakely*, 124 S. Ct. at 2552. One option he set forth is “a simple, pure or nearly pure ‘charge offense’ or ‘determinate’ sentencing system.” *Id.* Justice Kennedy noted that “[s]uch a system assures uniformity, but at intolerable costs.” *Id.* at 2553; *cf.* STITH & CABRANES, *supra* note 169, at 79, noting that while justice should be blind on the question of guilt or innocence:

[w]hen it comes to the imposition of punishment, the question is always one of degree. The need is not for blindness, but for . . . what Aristotle called “the correction of the law where it is defective owing to its universality.” This can occur only in a judgment that takes account of the complexity of the individual case.

Id. (footnote omitted).

254. *Cf.* Bowman & Heise, *Quiet Rebellion I*, *supra* note 185, at 1136 (“When the entire class of those who are on the front lines of the fight against crime express, through their conduct over many years, a settled judgment about some aspect of the criminal law, it behooves policy makers with less personal experience to listen.”).

255. Early Congressional reaction to *Booker* have not been promising in this regard. One proposal would, among other things, prohibit courts from considering almost three dozen mitigating factors if the result would be that the defendant was sentenced below the now-advisory Guideline range. For a discussion of this so-called “Booker fix,” found in Section 12 of H.R. 1528, see the Sentencing Law & Policy Blog, at http://sentencing.typepad.com/sentencing_law_and_policy/2005/04/details_concern.html. For the text of H.R. 1528, see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?abname=109_cong_bills&docid=f:h1528in.txt.pdf.

first and most obvious is to study acquittal rates after the change in the Guidelines, and compare them to the Guidelines-based data presented above. Depending on how the federal sentencing world changes after *Booker*, there may be a rare chance to compare two distinct sentencing schemes, which could allow us to isolate more precisely the extent, if any, to which the punishment influences the judgment. This is a chance not to be missed.

The second would simply fill a hole in the data. One variable that should have been studied was defendant characteristics. It is plausible to think a defendant's race, ethnicity, gender, age, and most significantly, criminal record, might be correlated to the decision whether to waive a jury. If it turns out, for example, that first-time offenders overwhelmingly prefer a bench trial, this potentially could tell us something important about the gap in conviction rates.

Unfortunately, for privacy reasons these variables are redacted in the publicly available datasets of federal criminal cases, making it impossible (at least with the extensive but futile efforts to date) to measure their effects. The information gleaned from these missing data might explain little or it might explain a lot, but the inability to study these factors leaves the study unhappily incomplete.

A third useful area of future research would be to compare the federal conviction rates to those of the States. States still handle the overwhelming percentage of criminal cases, and a comparative study could shed great light on the behavior of both judges and juries. A study of specific states might reveal, for example, whether elected judges acquit at the same rate as appointed judges, or whether states with sentencing guideline schemes differ from states that have a more traditional sentencing model.²⁵⁶ Such a

256. A brief look at a handful of states suggests how varied the results of a comparison might be. During calendar years 2001 and 2002, for example, Illinois judges in felony bench trials convicted at *higher* rates than juries did. See 2002 Caseload and Statistical Records, Circuit Courts of Illinois 45–47, at <http://www.state.il.us/court/SupremeCourt/AnnualReport/> (showing 82% felony bench trial conviction rate, 70% jury conviction rate in Circuit Courts); *id.*, 2001 Caseload and Statistical Records 45–47 (showing 80% bench conviction rate, 68% jury rate in Circuit Courts). In contrast, during 2001 and 2002, Texas courts followed a pattern more like the federal system's: a high jury conviction rate and a relatively low bench rate. See 2002 Texas Judicial System Annual Report, District Courts, Statewide Summary of Reported Activity, at http://www.courts.state.tx.us/publicinfo/AR2002/district/statewide_summary.pdf (showing in fiscal year 2001 a 79% jury conviction rate and 49% bench conviction rate); *id.*, 2001 Annual Report, at http://www.courts.state.tx.us/publicinfo/AR2001/district/statewide_summary.pdf (showing in fiscal year 2000 an 80% jury conviction rate and a 55% bench rate). California's pattern is similar to Texas's, although as with all state comparisons, different methods of record keeping make comparison's problematic. See Judicial Council of California, 2003 Court Statistics Report 55 tbl. 8, at <http://www.courtinfo.ca.gov/reference/documents/csr2003.pdf> (showing for fiscal year 2001–2002, 80% jury conviction rate in felony trials and 46% bench rate in

study would be complex, but would be useful precisely because of its multivariate complexity.

A final area of study would be one that focused solely on judges. If the sanction effect really does influence liability determinations, and *if* federal sentencing law is revised in a way that limits judicial discretion in a similar way as the Guidelines did, we might expect to see different conviction rates between those judges who had sentencing experience both before *and* after the Guidelines took effect, and those judges who had only sentenced in a post-Guidelines world. To the extent the former group has reacted negatively to the loss of sentencing authority, we would anticipate that their conviction rates would be lower than those judges who never felt the loss of authority, and we would expect that the bench conviction rate would begin to rise again as retirements reduce the size of the pre-Guidelines bench.²⁵⁷ In any event, looking at judges as individual rather than fungible decisionmakers (as this study does) would provide a more nuanced and useful look at judicial behavior.²⁵⁸

CONCLUSION

A few things are clear about judge and jury behavior in federal criminal cases but many things are not. It is clear that judges acquit more often than juries across all categories of cases and in all parts of the country. It also is clear that judicial conviction patterns have undergone a dramatic change in recent years, while jury behavior has changed relatively little. Why this is true is less clear. We can be fairly confident that the trends are not a product of collective strategy by defense counsel or prosecutors, but beyond that, the best we can do is identify the critical features of bench

Superior Courts; cases where jury convicted but reduced charge from felony to misdemeanor not counted in percentages); *id.*, 2002 Court Statistics Report 51 tbl. 8, at <http://www.courtinfo.ca.gov/reference/documents/csr2002.pdf> (showing for fiscal year 2000–2001 an 82% jury conviction rate in felony trials and a 53% bench rate in Superior Courts; cases where jury convicted but reduced charge from felony to misdemeanor not counted in percentages).

257. As of early 2002, near the endpoint of the data used in this study, only 19% of the active judges were appointed before the effective date of the Sentencing Guidelines. In contrast, 92% of the senior judges were appointed before that Guidelines became law. These figures were calculated from the list of judges in 200 F. Supp. 2d vii–xxvi (volume containing cases decided in Spring 2002).

258. Such a study might also include variables such as the political party of the president who appointed the judge, although the influence of senatorial privilege and other political considerations might so distort this analysis as to make this proxy for judicial viewpoint unusable. For a discussion of the potential benefits and risks of focusing on judicial ideology, see Sylvia R. Lazos Vargas, *Does A Diverse Judiciary Attain a Rule of Law that Is Inclusive?: What Grutter v. Bollinger Has To Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 1 (2005); Gregory C. Sisk & Michael Heise, *Judges & Ideology: Public and Academic Debates About Statistical Measures*, 99 N.W. U. L. REV. 743 (2005).

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and jury trials that seem to correlate to, and may partially explain, the higher or lower rates.

The most provocative inference drawn by this study is that the decrease in judicial discretion brought about by federal sentencing reform may have an impact on judges when they make the decision to convict or acquit. The evidence is indirect, and the statistical data are less focused than we would like. But the circumstantial evidence is strong enough, and the implications important enough, that the possibility should not be dismissed lightly. At a minimum, further study is needed to explain more precisely why this intriguing phenomenon is occurring in federal criminal trials.

APPENDIX

Many of the statistics in this article are presented without citation to an underlying source, other than an initial, general citation to a dataset (see, for example, footnotes 64 and 161). This Appendix describes where those datasets can be found and supplies some qualifications of the data.

Most of the numbers and statistics are compilations based on the records found in the Federal Court Integrated Database: 1970–2000, which provides records of civil and criminal cases, as well as appeals. The data for criminal cases through fiscal year 2000 can be found at the Inter-University Consortium for Political and Social Research website at <http://www.icpsr.umich.edu> under study number ICPSR 8429. The 2001 Federal Court Integrated Database can be found at the same website under study number ICPSR 3415.

The 2002 trial data came from a slightly different source. Because at the time this article was written the 2002 Federal Court Integrated Database was not yet available, the 2002 statistics were taken from records compiled by the Administrative Offices of the United States Courts, which can be found at the website of the Federal Justice Statistics Resource Center, <http://fjsrc.urban.org/index.cfm>, an organization funded by the U.S. Department of Justice's Bureau of Justice Statistics. The file containing the records can be found in the "Download Data" section under "Standard Analysis Files." Under the AOUSC Section for 2002 the relevant file is "adj02.out" (AOUSC Defendants in Cases Terminated). The codebook for this dataset is available at the same location.

The appeals data presented more of a challenge, because there does not appear to be any single source that (a) tracks criminal cases all the way through trial and appeal; (b) distinguishes between bench and jury trials; and (c) tracks both convictions and acquittals. The result was that to get the information on appeals found in Part III(A) of the article (which asks whether juries are over-convicting), I had to merge the trial records found in Parts 11-14, 29-32, 58-59, 67-68, 76-79, and 109-113 of the Federal Court Integrated Database (ICPSR 8429) with the appeal records found in Parts 24-28, 34-36, 62, 70-71, 82-84, 96, 100-101, 107, and 119-121. By using the district court docket number as a key variable, I could merge the files in a way that allowed some tracking of the cases by factfinder and appeal result. The process undoubtedly excluded a number of cases that should have been counted, however, and so the numbers on appellate affirmance and reversal rates should be approached with particular caution.

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During the primary years covered by the study (1989-2002), there was a change in the reporting period. Up until 1991, the data were reported on a “statistical year” basis, which ran from July 1 through June 30 of the following year. In 1992, the reporting period changed to the standard government fiscal year, running October 1 through the following September 30. The 1992 data therefore covers a 15 month period to accommodate the change.