

# PANEL ONE: PROSECUTORIAL DISCRETION AND ITS CHALLENGES

## WHEN PROCESS AFFECTS PUNISHMENT: DIFFERENCES IN SENTENCES AFTER GUILTY PLEA, BENCH TRIAL, AND JURY TRIAL IN FIVE GUIDELINES STATES

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*The research reported in this Essay examines process discounts—differences in sentences imposed for the same offense, depending upon whether the conviction was by jury trial, bench trial, or guilty plea—in five states that use judicial sentencing guidelines. Few guidelines systems expressly recognize “plea agreement” as an acceptable basis for departure, and none authorizes judges to vary sentences based upon whether or not the defendant waived his right to a jury trial and opted for a bench trial. Nevertheless, we predicted that because of the cost savings resulting from waivers, judges and prosecutors in any sentencing system would ensure that guilty plea convictions would generate the lowest sentences, with bench trial sentences averaging higher than plea-based sentences for the same offense, and sentences following jury trials averaging the highest of all, even after controlling for other factors associated with sentence severity. We found that a significant plea discount is evident for most offenses in all five states. Waiving a jury in favor of a bench trial has less consistent punishment consequences. Among states and even within a single state, the prevalence of process discounts is extraordinarily varied, as are the causes and methods of discounting. The Essay explores how these findings might inform sentencing reform and discusses the use of bench trials in sentencing guidelines systems generally.*

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INTRODUCTION

In the past thirty years, one of the primary goals of sentencing reform has been to eliminate disparity in the punishment of like offenders. Two sources of disparity have been particularly troubling for reformers. The first is prosecutorial discretion in charging, which produces vast differences in the punishment of similarly situated offenders, even where sentencing guidelines limit sentence disparity per charge. Few would argue with Michael Tonry’s conclusion that “[n]o jurisdiction has as yet devised an adequate system for controlling plea bargaining under a sentencing guidelines system.”<sup>1</sup> The target of most recent reform efforts, however, is not charging, but the sentencing phase, when prosecutors may recommend and judges have the opportunity to impose very different sentences for similarly situated defendants convicted of the very same crime. Sentencing guidelines have attempted to *regulate* disparity based upon “legal” factors, such as prior criminal history, and to *eliminate* disparity linked to “extralegal” or unapproved factors, such as the race, ethnicity, or gender of the offender or victim.<sup>2</sup> The research reported in

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1. Michael Tonry, *Sentencing Matters* 67 (1996).

2. The literature on the influence of legal and extralegal factors is extensive. Studies have examined *case level* factors, such as a defendant’s criminal history or the presence of a firearm, as well as *contextual* factors, such as a community’s caseload, crime rate, or racial composition. For recent collections, see, e.g., Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 *Law & Soc’y Rev.* 733, 733–36 (2001) (explaining that primarily legal factors, as opposed to overt bias, account for sentencing variations); Jeffery T. Ulmer & Brian Johnson, *Sentencing in Context: A Multilevel Analysis*, 42 *Criminology* 137, 137–38 (2004) (presenting local court culture as dominant factor in sentence determination); Robert R. Weidner et al., *The Impact of Contextual Factors on the Decision to Imprison in Large Urban Jurisdictions: A Multilevel Analysis*, 51 *Crime & Delinq.* (forthcoming 2005)

this Essay addresses disparity that is related to a factor that does not fit easily into either the “legal” or “extralegal” category: the defendant’s decision to waive his right to a jury or his right to trial. Specifically, we examine “process discounts”—differences in sentences imposed for the same offense, depending upon whether the conviction was by jury trial, bench trial, or guilty plea<sup>3</sup>—in five states that use judicial sentencing guidelines.

Among sentencing guidelines systems, only the federal scheme has attempted to regulate this sort of disparity. The United States Sentencing Commission recognized the importance of preserving predictably more lenient sentences for defendants who admit guilt, and included a sentencing credit for “acceptance of responsibility” that has effectively functioned as a discount for waiving trial.<sup>4</sup> By contrast, no state guidelines system has adopted a formal sentencing discount for accepting responsibility or pleading guilty. Few guidelines systems expressly recognize “plea agreement” as an acceptable basis for departure.<sup>5</sup> No guidelines system,

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(manuscript at 1–3, on file with the *Columbia Law Review*) (discussing impact of community level factors, such as crime rate and racial composition, on individual judicial decisions to imprison).

3. See also Jeffery T. Ulmer, *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines* 23 (1997) [hereinafter Ulmer, *Social Worlds*] (terming these sentence differences “mode-of-conviction disparity”).

4. See U.S. Sentencing Guidelines Manual § 3E1.1 (2004); see also William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 *Wake Forest L. Rev.* 181, 191 (1988) (finding that although the Commission “rejected the concept of an automatic discount for guilty pleas, it concluded that a defendant’s acceptance of responsibility for his conduct [provides] a potential basis for mitigation”). The preguidelines discount averaged about thirty to forty percent of the trial sentence. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 *Hofstra L. Rev.* 1, 28 (1998); see also U.S. Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004), available at [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm) (on file with the *Columbia Law Review*). This report notes that the “original Commission sought to maintain [the plea discount] so that defendants retained sufficient incentive to plead guilty and the number of trials facing an already overburdened federal court system would not be increased,” and that the credits under U.S. Sentencing Guidelines Manual § 3E1.1 were designed both “as a reward for offenders who plead guilty and also as a recognition of the reduced culpability of offenders who acknowledged guilt.” U.S. Sentencing Comm’n, *supra*, at 29–30 (citations omitted); see also Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 *Nw. U. L. Rev.* 1507, 1513–14, 1553 (1997) (noting that plea discount was viewed as necessary “incentive to encourage guilty pleas,” stating that the Commission apparently felt that section 3E1.1 could advance the same purposes of automatic plea discount without the “unseemly” results, and noting that section 3E1.1 “seems generally to function as a plea discount,” as it creates incentive for defendants to forgo their constitutional right to trial by jury). See also *infra* note 12 and accompanying text (discussing credit for acceptance of responsibility).

5. Only one of the five states in this study does so. See *infra* note 31.

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federal or state, authorizes sentence variance based upon a defendant's waiver of the right to a jury trial in favor of a bench trial.

Regulating the disparity that results from process discounts is one of a small handful of unexamined frontiers remaining in sentencing reform. Policymakers deciding if and how to address the different sentences that result from waivers of process need information about the nature, extent, and source of those differences. This Essay is a beginning step—an empirical snapshot of process discounts under contemporary guidelines systems. We examine these discounts using archival sentencing data provided by sentencing commissions, as well as information from a series of informal telephone interviews conducted with prosecutors and defense attorneys in five guidelines states—Kansas, Maryland, Minnesota, Pennsylvania, and Washington.<sup>6</sup>

The Essay begins in Parts I and II with a summary of existing scholarship concerning discounts in sentencing for waivers of process and a brief explanation of the design of our study. We predicted that because of the cost savings resulting from process waivers, judges and prosecutors in any sentencing system would ensure that guilty plea convictions would generate the lowest sentences, with bench trial sentences for the same offense averaging higher than plea-based sentences, and sentences following jury trials averaging the highest of all, even after controlling for other factors associated with sentence severity. Our findings are presented in Part III. We found that a significant plea discount—the difference between the average sentence given after a guilty verdict and the average sentence given after a guilty plea for the same offense—is evident for most offenses in all five states, but that waiving a jury in favor of a bench trial has less consistent punishment consequences. For many offenses, bench trial sentences fall between guilty plea and jury trial sentences, but other offenses produce different patterns. After a discussion in Part IV of alternative explanations for these findings, we examine in the last section how the study might help to inform future sentencing guidelines design.

#### I. PROCESS DISCOUNTS—PERVASIVE BUT IGNORED

The practice of exchanging punishment discounts for waivers of process is widespread, both in this country and elsewhere.<sup>7</sup> Nationwide data

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6. Other studies looking at multiple jurisdictions also rely on ethnographic data. E.g., Ulmer, *Social Worlds*, supra note 3, at 44–47; Ilene H. Nagel & Steven 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, 514–15 (1992); Peter F. Nardulli et al., *Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process*, 76 *J. Crim. L. & Criminology* 1103, 1104–05 (1985).

7. For an interesting discussion of sentencing discounts for guilty pleas in the United Kingdom, see Andrew Ashworth, *Sentencing and Criminal Justice* 141–48 (3d ed. 2000). Ashworth notes that a statute requires judges in sentencing to “take into account . . . the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty,” that the statute was passed in part “to avoid the waste of public resources caused by last-minute changes of plea,” that the court of appeals has explicitly

evaluating sentences for the same offense type show that guilty plea sentences are the least punitive, with jury trial sentences the most punitive, and bench trial sentences in between.<sup>8</sup> Economists,<sup>9</sup> historians,<sup>10</sup> and sociologists<sup>11</sup> have ready explanations for these graduated penalties. Sentences given to defendants who are convicted after any sort of trial may be higher than sentences given to defendants convicted by guilty plea due to the absence of remorse by the defendant who maintains his

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recommended “something of the order of one-third would very often be an appropriate discount from the sentence which would otherwise be imposed on a contested trial,” and that the most prominent justification for the plea discount is that it saves the time of prosecutors, courts, and victims.

8. See Gary D. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 *Criminology* 289, 300 tbl.3 (1985) (showing that across state courts, guilty plea sentences are on average lower than bench trial sentences, which are on average lower than jury trial sentences); Thomas M. Uhlman & N. Darlene Walker, “He Takes Some of My Time; I Take Some of His”: An Analysis of Judicial Sentencing Patterns in Jury Cases, 14 *Law & Soc’y Rev.* 323, 328 (1980) (finding bench trial sentences on average longer than guilty plea sentences but shorter than jury trial sentences); Thomas H. Cohen, U.S. Dep’t of Justice, *Impact of Bench and Jury Trial Convictions on the Sentencing of Felony Offenders in State Courts* 5 (Nov. 2004) (unpublished manuscript, on file with the *Columbia Law Review*) (finding bench trial sentences longer than guilty plea sentences, and jury trial sentences even longer using data drawn from seventy-five of the nation’s largest counties); see also Matthew R. Durose & Patrick A. Langan, U.S. Dep’t of Justice, NCJ 198822, *State Court Sentencing of Convicted Felons, 2000: Statistical Tables*, tbl.4.5 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf00.pdf> (on file with the *Columbia Law Review*) (showing jury trial sentences exceeding bench trial sentences, which exceeded guilty plea sentences for four of five offense categories using nationwide sample of state felony offenders); Claire Souryal & Charles Wellford, State Comm’n on Criminal Sentencing Policy, *An Examination of Unwarranted Sentencing Disparity Under Maryland’s Voluntary Sentencing Guidelines* (1997), available at <http://www.msccsp.org/publications/disparity.html> (on file with the *Columbia Law Review*) (finding jury trials more likely to lead to incarceration and longer sentences than bench trials or guilty pleas); Nancy J. King & Roosevelt L. Noble, *Jury Sentencing in Non-capital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 *J. Empirical Legal Stud.* (forthcoming 2005) (manuscript at 15, on file with the *Columbia Law Review*) [hereinafter King & Noble, *Comparing Severity*] (finding jury trial sentences exceed bench trial sentences for offenses in Arkansas and Virginia). But see Weidner et al., *supra* note 2 (manuscript at 13) (finding jury trial penalty, but no bench trial penalty). R

9. See, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 *Yale L.J.* 1969, 1969 (1992); William M. Landes, *An Economic Analysis of the Courts*, 14 *J.L. & Econ.* 61, 61 (1971); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *Yale L.J.* 1909, 1910 (1992); see also Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice, 1950–1990*, at 84–111 (1993) (explaining sentencing discounts as part of justice system’s need to reduce uncertainty).

10. For a classic history exploring the trial penalty, see, e.g., George Fisher, *Plea Bargaining’s Triumph* (2004). As to bench discounts in particular, see Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 *Harv. L. Rev.* 1037, 1063 (1984) [hereinafter Schulhofer, *Inevitable*] (describing bench trial discounting in Philadelphia).

11. See, e.g., Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 *Am. J. Soc.* 1357, 1383–85 (2000) (finding that operational goal of organizational efficiency drives sentencing variations).

innocence.<sup>12</sup> Alternatively, the higher sentences may be related to a judge’s emotional reaction to witness testimony or to other negative information about the defendant that the judge would not have seen or heard had the defendant pleaded guilty.<sup>13</sup> Additionally, public scrutiny of sentences may be highest in cases that go to jury trial. This may contribute to the reluctance of elected trial judges and prosecutors to select and recommend lenient sentences after a jury has returned a guilty verdict.<sup>14</sup>

The most popular explanation for graduated sentencing discounts is, however, that they are deliberately maintained by prosecutors and by judges in order to provide defendants with an incentive to forgo expensive procedural protections. This efficiency theory was expressed in one judge’s remark: “He takes some of my time, I take some of his.”<sup>15</sup>

There has been little research into mode-of-conviction disparity within state sentencing guidelines systems. When a plea or bench sentence discount does surface in discussions of state sentencing guidelines,<sup>16</sup> it usually appears as one more independent variable in the endless march of regression analyses testing for either guidelines compliance or the influence of some other factor, such as race, on sentencing.<sup>17</sup>

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12. For a recent endorsement of the practice of rewarding defendants who accept responsibility with lesser sentences, see *McKune v. Lile*, 536 U.S. 24, 36–37 (2002) (“Acceptance of responsibility in turn demonstrates that an offender ‘is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.’” (quoting *Brady v. United States*, 397 U.S. 742, 753 (1970))).

13. Jeffery T. Ulmer & Mindy S. Bradley, *Trials, Guilty Pleas, and the Potential Role of Emotion in Criminal Sentencing* 26 (2005) (unpublished manuscript, on file with the *Columbia Law Review*) (concluding that jury trials result in harsher punishment in part because jury trials are more “evocative events” than guilty pleas, and “negative emotions mobilized during the jury trial” may affect sentencing). This point was also made by several of the interviewees in our study.

14. See *infra* note 80 and accompanying text.

15. This remark became the title of an article on the topic by Professors Uhlman and Walker. Uhlman & Walker, *supra* note 8, at 324.

16. The reports from Kansas do not track sentences by type of conviction. See, e.g., Kan. Sentencing Comm’n, FY 2003 Annual Report (2004), available at <http://www.access.kansas.org/ksc/kscannual2003.htm> (on file with the *Columbia Law Review*). Minnesota Commission reports do not break out jury trial data from bench trial data. See Minn. Sentencing Guidelines Comm’n, *Sentencing Practices Data Reports* (2004), available at [http://www.msgc.state.mn.us/sentencing\\_practices\\_data\\_reports.htm#03data](http://www.msgc.state.mn.us/sentencing_practices_data_reports.htm#03data) (on file with the *Columbia Law Review*).

17. See, e.g., Souryal & Wellford, *supra* note 8. The authors analyzed racial disparity under guideline sentencing in Maryland. Their eight regression estimate tables, by type of offense, showed significant disparity by mode of conviction: Plea sentences are more lenient than bench sentences, which are more lenient than jury trial sentences. Mode of conviction often had a much greater effect on sentence length than race or any variable other than offense and offender score. This fact was barely mentioned in the study report itself, since the study focused on racial disparity.

A group of graduate students who studied Maryland sentences suggested that cases settled by “ABA” plea agreement (conditioned on the judge’s acceptance of the negotiated

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Rarely are the differences between sentences for defendants convicted after plea, bench trial, or jury trial examined directly.<sup>18</sup> The neglect is understandable. Guidelines were not adopted to control this sort of disparity. Reformers targeted other discrepancies, particularly disparity linked to the race of the offender and disparities between judges or between counties.<sup>19</sup>

The lack of attention may also reflect the ambiguous legal status of differences linked to waiver of trial or waiver of jury. Some reasons for sentence variation are clearly improper—race being the most prominent example. Others are clearly essential—criminal history, for example. Differences based on a defendant’s willingness to waive procedural rights occupy a hazy middle ground. There is no consensus about whether these differences should be discouraged, promoted, or even recognized.

Skepticism about the legality of recognizing sentencing discounts for waiving process is based on the belief that should a state codify, in statute or guideline, a sentencing reward for defendants who forgo their constitutionally protected procedural rights, the discount might be seen as an unconstitutional penalty for asserting those constitutional rights.<sup>20</sup> The Supreme Court has not yet addressed the constitutionality of *uniform* sentencing credits for waiving the right to a jury, the right to any trial, or the right to appeal.<sup>21</sup> Even if the constitutionality of blanket process dis-

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sentence) should not be included in the Maryland Commission’s assessments of compliance with sentencing guidelines, because of the prevalence of departures in negotiated cases. See Abraham BenMoshe et al., State Comm’n on Criminal Sentencing Policy, Issues in Maryland Sentencing—Judicial Compliance with the Maryland Sentencing Guidelines: Review and Recommendations (2001), available at [http://www.msccsp.org/publications/issues\\_compliance.html](http://www.msccsp.org/publications/issues_compliance.html) (on file with the *Columbia Law Review*) (commenting that “[t]o be fair to the judges, plea bargains in which the prosecutor, defense, and judge agree on the plea should not be counted as non-compliant,” and that “counting pleas with light punishment as non-compliant punishes urban judges more than their rural counterparts, as urban judges are often forced to take pleas to keep their caseload from backing up”).

18. See, e.g., Ulmer & Bradley, *supra* note 13, at 5 (“Actually, there are comparatively few studies that really examine plea/trial sentencing differences *per se*, and try to unpack their meaning.”). The work of Ulmer in Pennsylvania and of Engen, Gainey, and Steen in Washington are admirable exceptions to this rule. See Rodney L. Engen et al., Wash. State Minority and Justice Comm’n, *The Impact of Race and Ethnicity on Charging and Sentencing Processes for Drug Offenders in Three Counties of Washington State* (1999), available at <http://www.courts.wa.gov/committee/pdf/FinalReport.pdf> (on file with the *Columbia Law Review*).

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19. See *infra* note 45 (collecting history of sentencing reform in several guidelines states).

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20. Consider, for example, the comments of one Pennsylvania prosecutor interviewed for this study: “It’s not uncommon for us to say to a defendant, you plead guilty, and we’ll stand mute [at sentencing]. . . . [W]e’ve got the right to negotiate that way. But if it is in the guidelines, now [his] right to jury trial is chilled.” Interview with PA-P2 (see *infra* note 53 for explanation of interview methodology).

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21. Legislated differences in sentence ranges based on mode of conviction raise some of the concerns that led the Supreme Court, in *United States v. Jackson*, to invalidate a provision of the Federal Kidnapping Act that provided that the death penalty could be

counts was established—a topic we do not resolve here<sup>22</sup>—it is still unclear whether the public would approve of exchanging predetermined sentence breaks for process waivers.<sup>23</sup>

In light of the doubts about the legal and social acceptability of state-wide punishment discounts for the waiver of constitutional rights, it is not surprising that no state guidelines system explicitly recommends that defendants who waive a jury trial in favor of either a guilty plea or a bench trial should be punished more leniently than defendants convicted of the very same offense who insist upon jury trial. Yet in many courtrooms, these sentencing differences are routine.

As an illustration of this tension between practice and principle, consider a recent case from one of the states examined in this study. In *Smith v. Maryland*,<sup>24</sup> the defendant agreed to waive his right to a jury and proceed with a bench trial in exchange for a sentencing break. In return for the jury waiver, the prosecutor offered to forgo other charges, to cap the defendant's sentence for the trial offense at ten years, and to recommend that any sentence for the probation violation run concurrently. Before agreeing, however, the defense attorney secured from the trial judge a commitment to abide by the ten-year cap, and from another judge who would be adjudicating the probation violation an agreement to run the sentence for the probation violation concurrently. Thus assured, the defendant waived his right to a jury and was tried by the judge. The prosecutor "characterized the negotiations and the very brief trial as a 'slow guilty plea.'"<sup>25</sup> Evidence was presented, the judge denied the defendant's motion for acquittal, convicted the defendant, and imposed the promised sentence of ten years. The trial judge then stated to the defendant, "If you . . . had gone to trial by jury and [been] convicted, with your background, you would have probably gotten at least 20 years."<sup>26</sup>

Subsequently, the defendant appealed his conviction, claiming that his waiver of jury was involuntary, and that he had been impermissibly

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imposed only if the defendant was convicted by jury. 390 U.S. 570, 583 (1968). But see *United States v. Corbitt*, 439 U.S. 212, 223 (1978) (finding constitutional a state rule granting possibility of more lenient sentence only to those who waive trial and plead non vult); see also Joseph L. Hoffmann et al., *Plea Bargaining in the Shadow of Death*, 69 *Fordham L. Rev.* 2313, 2379 (2001); Schulhofer, *Inevitable*, supra note 10, at 1090–93 (arguing that, although Court's plea bargaining cases are difficult to reconcile with unconstitutional condition and vindictiveness cases, set concessions for jury waivers should be constitutional).

The federal system's quasi plea discount, see supra note 4, has withstood attack as an unconstitutional trial penalty, see, e.g., *United States v. Jones*, 997 F.2d 1475, 1479–80 (D.C. Cir. 1993) (en banc).

22. For sources debating the constitutionality of set sentencing and plea discounts, see supra note 21.

23. See, e.g., BenMoshe et al., supra note 17 (stating that the community "is often hostile towards any reduction in offender punishments" from plea bargaining).

24. 825 A.2d 1055 (Md. 2003).

25. *Id.* at 1065 n.13.

26. *Id.* at 1061 (internal quotation marks omitted).

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coerced by what amounted to a penalty for exercising his right to jury trial. The Maryland Supreme Court observed, “If there was a practice . . . of penalizing defendants for choosing to be tried by jury, *i.e.*, by imposing more severe sentencing, *such a practice would clearly be unconstitutional*. But, the only thing the record in this case reflects is that appellant’s attorney might have formed that opinion.”<sup>27</sup> The court went on to declare,

[J]udges cannot take into account the waiver of a jury trial when sentencing, or in that sense (*i.e.* promise leniency) “barter” with a defendant over a lesser sentence in exchange for the waiver of a constitutional right. . . . Had the record indicated that the trial judge said or indicated, *prior* to appellant choosing a court trial, that he was going to give a harsher sentence if appellant chose a jury trial and was convicted, or a lenient sentence if he would forgo a jury trial and was convicted at bench trial, or that the trial judge told appellant that he (or other trial judges in [the county]) had a practice of imposing harsher sentences on those defendants who elected jury trials and were convicted, then the holding of this case might be different. That is a practice we do *not* condone. . . . A trial judge should not suggest leniency to induce a defendant to elect a court trial . . . . Nor should he or she base any sentencing decision on a previous exercise or waiver of a constitutional right. . . . If there is any such practice anywhere in Maryland, it is improper and unconstitutional.<sup>28</sup>

The *Smith* case addressed sentencing leniency as an incentive for a defendant to agree to a more efficient bench trial. At least one state has condemned departing from the guidelines even to reward a guilty plea. In Minnesota, the official sentencing policy does not allow parties to contract around the guidelines and exchange a sentence outside of the presumptive range for a guilty plea. Judges in Minnesota must state an independent reason, other than the defendant’s willingness to enter into a plea agreement, justifying a lower sentence.

In his recent review of sentencing in Minnesota, Professor Richard Frase describes the development of this position. After the state supreme court upheld an upward departure that had been agreed to by the defendant in return for a stayed prison sentence, the sentencing commission proposed to eliminate “plea agreement” from the list of acceptable reasons for departure, and to add statutory language making clear that the guidelines are not dispensable at the option of the parties. Judges, prosecutors, and defense counsel all opposed the measure. The commission compromised, adding to the guidelines commentary an admonishment

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27. *Id.* at 1067 (emphasis added).

28. *Id.* at 1077. The court also discussed cases from several other states in which defendants claimed that they decided to opt for bench trials because they were induced by promises of sentencing leniency from counsel, as well as cases where defendants successfully received relief on appeal after demonstrating that their judges directly informed them before the waiver that a bench trial would result in a more lenient sentence than a jury trial. *Id.* at 1070–76.

that if only “plea agreement” is listed as a reason for departure, the commission “cannot properly understand sentencing decisions and make sound policy decisions.”<sup>29</sup> The Minnesota Supreme Court later rejected the contrary position taken by the Supreme Court in the State of Washington,<sup>30</sup> which had explicitly recognized a negotiated agreement as a reason for departure, and held instead that a plea agreement, standing alone, is not a sufficient basis for departure.<sup>31</sup> Nevertheless, as Professor Frase concludes, it is likely that “tacit or explicit sentence bargaining . . . causes reduced sentence severity for defendants who plead guilty,” and that “lower limits on sanction severity are much less likely to be enforced than upper limits.”<sup>32</sup>

## II. STUDY DESIGN

To examine discounts for procedural waivers systematically, we selected states with the following features: 1) established judicial sentencing guidelines, 2) a sizeable number of bench trials in felony cases, and 3) data that would allow for regression analysis of the sentencing discounts for guilty pleas and for jury waivers. Sentencing commissions in each state provided sentencing data sets for varying periods between 1997 and 2004. Sentencing data from Pennsylvania included cases sentenced over a four-year period, data from Minnesota and Washington each covered five-year periods, and Maryland and Kansas each provided six years of data.

For several reasons, the study examined the waiver of a jury trial in favor of a bench trial as well as the waiver of trial altogether in favor of a guilty plea. First, compared to plea bargains or jury trials, relatively little is known about bench trials generally. The National Center for State Courts estimates that bench trials form only about one percent of state felony convictions nationwide—an even smaller percentage than jury trials, which account for about two percent of convictions.<sup>33</sup> Although

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29. See Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 *Crime & Just.* (forthcoming 2004) (manuscript at 50, on file with the *Columbia Law Review*).

30. See *In re Breedlove*, 979 P.2d 417, 423–24 (Wash. 1999) (finding that defendant’s stipulation to an exceptional sentence as part of plea agreement justified the sentence under the guidelines).

31. See Frase, *supra* note 29 (manuscript at 50–52). *Breedlove* was distinguished in *State v. Misquadace*, where the court stated that “unlike Minnesota law, [Washington’s act] ‘specifically authorizes agreements which recommend sentences outside the standard sentencing range.’” 644 N.W.2d 65, 70 n.3 (Minn. 2002) (quoting *Breedlove*, 979 P.2d at 424). The Minnesota court recognized that “the effect of [its] holding—that plea agreements cannot form the sole basis of a sentencing departure—may be to discourage such agreements.” *Id.* at 71. It concluded that “[i]t is for the legislature, however, to make the policy decision that sentencing pursuant to plea agreements alone does not seriously threaten the goal of rational and consistent sentencing.” *Id.* at 71–72.

32. Frase, *supra* note 29 (manuscript at 66–68).

33. See Nat’l Ctr. for State Courts, *Examining the Work of State Courts*, 2003, at 44 (2003), available at [http://www.ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_Criminal.pdf](http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Criminal.pdf) (on file with the *Columbia Law Review*) (reporting results from twenty-one states).

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some jurisdictions conduct more bench trials than jury trials, other states have virtually no bench trials in felony cases.<sup>34</sup> Researchers also disagree about whether bench trials involve any implicit or explicit negotiation about sentence.<sup>35</sup>

Second, the research examining bench trial sentences is relatively sparse and inconclusive compared to the plea discount literature.<sup>36</sup> For example, although most research shows that bench trial sentences average longer than plea-based sentences but shorter than jury trial sentences, one study recently found that individuals whose cases are disposed through a bench trial are much *less* likely to receive a prison sentence than those who pleaded guilty.<sup>37</sup>

Finally, our study includes bench trials because any discounts provided by prosecutors and judges in return for a defendant's decision to waive a jury and opt for bench trial are more likely to be premised on efficiency alone. Reasons other than efficiency could account for the gap between guilty plea and trial sentences. Such nonefficiency reasons include the judge's exposure at trial to live emotional testimony, to aggravating facts, or to a defendant's perjury; the greater publicity produced by trial; the remorse of the defendant who admits guilt and accepts responsibility; the defendant's cooperation in prosecuting others; and the defen-

The percentage of felony convictions by bench trial in state courts in the period 1992–2000, using data from the nation's seventy-five most populous counties, is estimated to be about 3.4%, with jury trials making up about 3.1%. Cohen, *supra* note 8, at 4. The Bureau of Justice Statistics reports in a study of the seventy-five largest counties that felony bench trials in 2000 were just as likely to result in a felony conviction as jury trials (69%) but were more likely to result in some sort of conviction because 12% of bench trials ended in misdemeanor conviction compared to only 5% of jury trials. Gerard Rainville & Brian A. Reaves, U.S. Dep't of Justice, NCJ 202021, *Felony Defendants in Large Urban Counties, 2000*, at 26 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf> (on file with the *Columbia Law Review*). See also Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 Wash. U. L.Q. (forthcoming 2005) (manuscript at 26–32, on file with the *Columbia Law Review*) (collecting statistics on federal bench trials).

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34. See Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885, 901 (2004) [hereinafter King & Noble, *Three-State*] (reporting on absence of bench trials in Kentucky); Nat'l Ctr. for State Courts, *supra* note 33, at 44 (showing that six of twenty-one jurisdictions reporting felony statistics had no bench trials). North Carolina's state constitution forbids felony bench trials. N.C. Const. art. I, § 24.

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35. Compare Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 Stan. L. Rev. 29, 79 (2002) (noting that bench trials in New Orleans do not involve sentence negotiation), with Schulhofer, *Inevitable*, *supra* note 10, at 1069, 1087–88 & n.166 (describing the practice of bargaining for jury waivers in Philadelphia and stating that less than fifteen percent of bench trials involved stipulations to the state's evidence).

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36. See sources cited *supra* note 6.

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37. Weidner et al., *supra* note 2 (manuscript at 15) (finding that compared to defendants pleading guilty, the odds of bench-tried defendants being incarcerated are 0.46). Like Cohen, *supra* note 8, this study also used data from the nation's largest urban jurisdictions. The authors were surprised by this "anomalous finding." Weidner et al., *supra* note 2 (manuscript at 19).

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dant's compassion by sparing witnesses the burdens of testifying.<sup>38</sup> These reasons are less likely to explain any differences between sentences after bench trials and sentences after jury trials, assuming bench trials are genuinely contested proceedings with live witnesses rather than recitations of stipulated facts.

Table 1<sup>39</sup> presents key background information about the criminal justice system in each of the five states that we studied. The first five rows concern features related to the availability and frequency of bench trials. Two of the states provide the defendant with a right to a bench trial, while the others follow the majority rule, allowing prosecutors to insist on a jury trial over the defendant's objection.<sup>40</sup> In some states, a defense attorney or prosecutor has a right under state law to exercise the equivalent of a peremptory challenge to bypass a judge assigned to try a case. These procedures, which increase the ability of defendants to avoid particularly punitive judges, may raise the attractiveness of bench trials to defendants.<sup>41</sup>

Trial judges in four of the five states face retention elections. Kansas elects some of its trial judges but not all. Some research suggests that the prospect of a contested election may lead to more punitive judicial behavior.<sup>42</sup>

Perhaps most importantly, only one of the five states grants defendants the option to plead guilty but also reserve for appeal a pretrial issue such as the constitutionality of a search or arrest. Where such conditional pleas are not available, it is more likely that cases recorded officially as bench trials actually involve defendants contesting only the legality of admitting a confession or evidence seized by the police—not factual innocence.<sup>43</sup>

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38. See *supra* notes 12–14 and accompanying text.

39. See Appendix for all tables and figures.

40. 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, 321 nn.39–43 (1993) (surveying authority on various state jury waiver rules); see also William C. Smith, Empowering Prosecutors, A.B.A. J., Mar. 1999, at 28 (noting Pennsylvania joined twenty-four other states allowing prosecutors to veto defendant's choice of bench over jury trial); Jon Fieldman, Comment, *Singer v. United States* and the Misapprehended Source of the Nonconsensual Bench Trial, 51 U. Chi. L. Rev. 222, 248–49 (1984) (proposing that Rule 23 be amended to suspend requirement that government consent to bench trial).

41. About one-third of the states allow some sort of challenge without proof of facts showing prejudice. 5 Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, Criminal Procedure Treatise § 22.4(d) (2d ed. 1999); see also Nancy J. King, *Batson* for the Bench? Regulating the Peremptory Challenge of Judges, 73 Chi.-Kent L. Rev. 509, 510 n.7 (1998) (collecting authority on judicial disqualification and substitution rules).

42. Gregory A. Huber & Sanford C. Gordon, Accountability and Coercion: Is Justice Blind When It Runs for Office?, 48 Am. J. Pol. Sci. 247, 261 (2004).

43. In Minnesota, such a bench trial is called a Lothenbach procedure, which allows the defendant to plead not guilty, waive his right to a jury trial, and then stipulate to the prosecution's case. "[T]he procedure is substantively distinct from a guilty plea, in which a factual basis is established, or a jury trial, in which the jury determines guilt or innocence

Table 1 also indicates the proportion of felony convictions by bench trial statewide, providing a comparison with other states and with the individual offenses examined from each state.<sup>44</sup> Bench trials appear to be more common in Pennsylvania and Maryland than in the other three states.

Table 1 next presents several features of the sentencing guidelines system in each state.<sup>45</sup> The amount of sentencing discretion retained by judges differs widely. In Pennsylvania and Maryland the guidelines are voluntary. In systems where judges have fewer constraints on their discretion, they may have more ability to use that discretion to maintain a sentencing discount for those who waive the entitlement to trial or jury. In some states, efforts to constrain judicial leniency in sentencing have included the release of judge-specific sentencing information.<sup>46</sup> It is possible that the combined effect of elections and judge-specific information may moderate the sentencing discounts given to defendants who waive process rights.<sup>47</sup>

Of existing multistate studies examining differences between sentences resulting from bench trials, jury trials, and guilty pleas, all but one aggregated offenses by offense type.<sup>48</sup> Our study compares sentences for the exact same offense by disposition type in order to eliminate the possibility that observed differences in sentences might be caused by different sentencing norms or other attributes specific to particular offenses. In each state, only offenses with at least thirty observations of

based on contested evidence.” State v. Johnson, 689 N.W.2d 247, 253–54 (Minn. Ct. App. 2004) (citations and internal quotation marks omitted). For an example of such a proceeding in Maryland, see, e.g., Bruno v. State, 632 A.2d 1192, 1193 (Md. 1993).

44. For nationwide comparisons, see supra note 33 and accompanying text.

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45. Comprehensive histories of sentencing reform in some of these five states include David Boerner & Roxanne Lieb, Sentencing Reform in the Other Washington, 28 Crime & Just. 71 *passim* (2001) (Washington); Frase, supra note 29 (Minnesota); John H. Kramer et al., An Assessment of the Impact of the 1994 and 1997 Changes to Pennsylvania’s Sentencing Guideline 11–17 (Nov. 19, 2003) (unpublished manuscript, on file with the Columbia Law Review).

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46. See Mark H. Bergstrom & Joseph Sabino Mistick, The Pennsylvania Experience: Public Release of Judge-Specific Sentencing Data, 16 Fed. Sent’g Rep. 57 *passim* (2003); Marc L. Miller, Sentencing Reform “Reform” Through Sentencing Information Systems, in The Future of Imprisonment 121, 146 (Michael Tonry ed., 2004) (noting that Pennsylvania and Minnesota provide, upon request, limited information on sentences handed down by individual judges); see also Marc L. Miller, Domination & Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1264 (2004) (calling for both judge-specific and prosecutor-specific information).

47. See Boerner & Lieb, supra note 45, at 107 (noting that since the State of Washington initiated publication of data on judicial sentencing, percentage of mitigated departures has steadily declined). Ulmer noted reports of media criticism of lenient sentencing in Pennsylvania in two of the three counties he studied. Ulmer, Social Worlds, supra note 3, at 118–19, 159–61.

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48. See supra note 8. The exception is King & Noble, Comparing Severity, supra note 8.

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both bench and jury trials were selected for analysis.<sup>49</sup> This selection method produced seven offenses from Kansas, eight offenses from Maryland, three offenses from Minnesota, eleven offenses from Pennsylvania, and twelve offenses from Washington. Tables 2 through 6 show the number and percentage of cases handled through each mode of conviction for each offense in each state.

For each offense, tobit or logistic regression analysis was used to examine the probability of the offender receiving incarceration. Ordinary least-squares (OLS) regression models were created to examine the length of sentence, and included only cases that received an incarceration sentence.<sup>50</sup> A correction factor for selection bias was included in the models of sentence length consisting of the “hazard rate,” or the risk of not being selected into the incarcerated population.<sup>51</sup> Case- and offender-specific variables, as well as case-processing variables associated with sentencing severity, were included when available, as was the contextual variable of court size.<sup>52</sup> In addition to the data analysis, the study included a series of telephone interviews of defense attorneys and prosecutors in urban and rural counties of each state.<sup>53</sup>

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49. There were a small number of exceptions to this rule where offenses with slightly fewer observations of bench trials were included. Those exceptions are noted in Tables 2 through 6.

50. See, e.g., Darrell Steffensmeier & Stephen Demuth, Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons, 39 *Criminology* 145, 158 (2001) (using OLS to measure decision to incarcerate and length of sentence); Ulmer & Bradley, *supra* note 13, at 16 (separately analyzing decision to incarcerate and length of sentence).

51. See Richard A. Berk, An Introduction to Sample Selection Bias in Sociological Data, 48 *Am. Soc. Rev.* 386, 391 (1983) (defining hazard rate); Ruth D. Peterson & John Hagan, Changing Conceptions of Race: Towards an Account of Anomalous Findings of Sentencing Research, 49 *Am. Soc. Rev.* 56, 60 (1984) (describing use of OLS analysis to correct for “hazard rate” selection bias).

52. A description of each variable and coding is available from the authors. For research demonstrating the significance of each of these variables, see James Eisenstein et al., The Contours of Justice: Communities and Their Courts 259–90 (1988) (showing importance of jurisdiction size); Cassia C. Spohn, Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process, in 3 *Criminal Justice 2000: Policies, Processes, and Decisions of the Criminal Justice System* 427 *passim* (Julie Horney ed., 2000) (impact of race and ethnicity); Cassia Spohn & David Holleran, The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders, 38 *Criminology* 281 *passim* (2000) (impact of gender, race, ethnicity, age, and employment status); Darrell Steffensmeier et al., The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male, 36 *Criminology* 763 *passim* (1998) (impact of age, race, and gender).

53. Between six and ten interviews were conducted in each state. All interviews were conducted by Professor King in 2004 and 2005. Questions were asked only after interviewees were informed about the nature of the research, were assured that they would be identified only by state and role, and only after they consented to being interviewed. Interviews involved open-ended questions about bargaining and sentencing practices. The interviews lasted between twenty and forty-five minutes each. In order to preserve anonymity, our citations here specify only an interviewee's state and role (e.g., defender or

## III. FINDINGS

Figures 1 through 10 summarize the findings for each state, by offense.<sup>54</sup> The efficiency hypothesis predicts that concerns about cost would lead judges to impose bench trial sentences that are generally more severe than plea-based sentences but generally less severe than sentences following jury trials. This prediction is strongly supported by the findings in two of the five states, but it is not strongly supported by the findings in the other three states.<sup>55</sup>

Of the five states, Maryland's sentences most resemble the predicted pattern (as seen in Figures 2 and 7). For seven of the eight offenses, all significant differences show that sentences after bench trials are more severe than sentences after guilty pleas, though less harsh than sentences resulting from jury trials. The most remarkable differences are for heroin distribution cases, where a jury trial produces an average sentence 350% longer than the average sentence after a guilty plea, and a bench trial produces an average sentence 150% longer than the average sentence resulting from a guilty plea. Defendants convicted of cocaine distribution after bench trial are twice as likely to receive incarceration as those who pleaded guilty, while those found guilty by jury are nearly seven times more likely to be sentenced to jail or prison. Only the sentences for theft greater than \$500 depart from the pattern, but not by much. Both types of trial produce sentences significantly higher than guilty pleas, but the difference for jury trials is slightly smaller than the difference for bench trials—bench trial sentences are 66% longer than guilty plea sentences, with jury verdict sentences 59% longer.

In Pennsylvania, the findings for six of the ten offenses (aggravated assault, burglary, indecent assault, theft by unlawful taking, receiving stolen property, and rape) are also consistent with the efficiency hypothesis, as seen in Figures 4 and 9. The five other offense comparisons in Pennsylvania reveal an odd assortment of relationships. For three of the five—robbery, possession of cocaine with intent to deliver, and simple possession—the odds of receiving a sentence of incarceration after a bench trial are higher than the odds for jury-tried defendants. In addition, analyses of sentences for simple possession show bench-tried defendants receiving significantly shorter incarceration sentences than defendants who pleaded guilty. Finally, for the crime of simple assault, incarceration

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prosecutor). For example, P1-KS indicates that the interviewee was a prosecutor in Kansas. Requests for further information about these interviews should be directed to the authors.

54. Tables 7 through 11, from which these charts are derived, can be found in the Appendix. More detailed information about the analysis, including complete tables for each separate offense, is available from the authors.

55. Because the statistical tests evaluate the entire population of convictions for each offense, it is arguable that the nonsignificant results have more meaning than they would have in an analysis of only a sample of cases. However, to be conservative, particularly given the inevitable missing values and coding errors that occur in archival data that is this complex, we focus only on results showing statistical significance.

sentences issued after bench trials are significantly longer than plea-based sentences, but sentences issued after jury trials are not.

Kansas data show fewer significant differences based on mode of conviction. Findings for six of the seven offenses are included in Figures 1 and 6. The single offense not included had a very large proportion of cases missing information on criminal history.<sup>56</sup> Looking at the in/out decision, the significant differences are in the expected direction. For theft and the two narcotics possession offenses, incarceration is more likely for defendants convicted after jury trial than after guilty plea; for both narcotics possession offenses, defendants who were convicted after bench trial are more likely to be incarcerated than those who pleaded guilty. The remaining differences either are not significant or follow no discernable pattern.

In Washington, not one of the twelve offenses shows differences of statistical significance that completely mirror the predicted graduated discount pattern. In terms of likelihood of incarceration, offenders convicted of some offenses are significantly more likely to be incarcerated if they were convicted after a bench trial than if they had pleaded guilty. Jury-tried offenders are also significantly more likely to be incarcerated than defendants who pleaded guilty, though the difference is smaller than the differences for bench-tried defendants. Comparing sentence length for those offenders who received sentences of incarceration, three fairly serious offenses—child molestation, theft two, and delivery of cocaine or heroin—show jury trial but not bench trial sentences that are significantly longer than the sentences issued in guilty plea cases. Yet sentences for five of the twelve offenses do not vary significantly by type of disposition at all. And for three others, bench-tried defendants fare worse than both defendants who pleaded guilty and those who were convicted after jury trial.

In Minnesota, sufficient bench trial observations were available for only three offenses, with both multivariate models producing nonsignificant results for one of the three offenses, precluding interpretation of the effects of mode of disposition for that offense. Of the two remaining offenses, the analysis of only one is consistent with the predicted pattern. For the serious drug offense, bench sentences are longer than plea sentences—though not significantly—and jury trial sentences even longer still, significantly longer than plea sentences. The less serious drug offense, however, shows bench-tried defendants receive the longest incarceration sentences, even longer than defendants convicted at jury trial.

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56. The offense with the unusually large proportion of missing values for criminal history was DUI third offense. Analysis of sentences showed that defendants convicted by jury trial were more than twice as likely to receive a sentence of incarceration, but the results showed no significant differences in the likelihood of incarceration between bench and plea, and no significant differences in sentence length depending upon type of disposition.



In sum, while the prediction that the average sentence after jury trial is more severe than the average sentence after guilty plea finds consistent support of selected offenses in these five states, the prediction that bench trial sentences would fall between guilty plea and jury trial sentences does not. In only some states do we see a consistent pattern of bench trial sentences greater than plea sentences but less than jury trial sentences.

#### IV. DISCUSSION

This Part first examines possible explanations for the predicted and consistent difference between plea-based sentences and jury trial sentences for the same offense in these guidelines systems. It then turns to possible explanations for the much less consistent patterns in bench trial sentences.

##### A. *Explaining Differences Between Plea and Jury Trial Sentences*

1. *The Mechanisms for Plea Discounting.* — In these sentencing guidelines states, there are no official discounts for waiving trial, and no specified downward adjustments for “acceptance of responsibility.” Yet for the very same charge—controlling for criminal history, enhancements, gender, race, multiple counts, and other factors associated with differences in sentence severity—judges and prosecutors are imposing more lenient sentences for defendants who plead guilty.

The mechanisms available to judges and prosecutors to maintain this differential vary from state to state. Alternatives include downward dispositional or durational departures from the presumptive or standard range,<sup>57</sup> dropping sentencing enhancements,<sup>58</sup> sentencing in the miti-

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57. E.g., Interview with D4-MN (reporting that during negotiations defense attorneys seek “caps” and “downward departures” in exchange for pleas, that many judges participate in bargaining, and that a “strong judge will help move them along, [and say] ‘Here’s your blue light special, you get it today and today only.’”); Interview with P2-MN (“If there is a departure down, it is always a person helping, a driver or lesser role.”); Interview with P1-KS (stating that for a plea in a case carrying a presumptive sentence of incarceration “we might stipulate to a downward departure or lop off a year”). In Maryland, “plea agreement” is the most common reason for downward departure. See Md. State Comm’n on Criminal Sentencing Policy, 2004 Annual Report 12 tbl.3 (2004), available at <http://www.msccsp.org/publications/ar2004.pdf> (on file with the *Columbia Law Review*).

58. This dropping of enhancements appears to be a common technique in both Washington and Pennsylvania. See Engen et al., *supra* note 18, at 27 (observing, in their study of charging and sentencing in three Washington counties, that enhancements were added following decisions not to plead guilty); *infra* note 64 (discussing Pennsylvania). In Washington, prosecutors use the deadly weapon enhancement as leverage in obtaining settlement. See, e.g., Interview with P1-WA (“Prosecutors will charge this up front, then drop it if the defendant pleads. . . . It is a big driver in drug cases. . . . [because] it bumps up the offense level. . . . For level two delivery of cocaine, if you get the enhancement, it adds on the extra years AND bumps up to the next level.”).

gated range<sup>59</sup> or at the bottom of the standard range,<sup>60</sup> capping the sentence within the standard range,<sup>61</sup> or making use of discretionary alternative sentences, such as treatment programs,<sup>62</sup> suspended sentences, or stayed sentences.<sup>63</sup> In Pennsylvania, prosecutors also use their option to invoke mandatory minimum sentences to ensure higher sentences for those who do not plead guilty.<sup>64</sup> Interviewees reported very little bargain-

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59. Interview with D3-PA (noting that “sometimes the judge will tell you if the defendant pleads open, I’ll give a sentence within the mitigated range of the guidelines. That happens quite often,” and also noting that aggravated range sentences are “typically only the ones that go to jury trial”).

60. E.g., Interview with P1-WA (“If the defendant pleads out, he’ll get the bottom of the standard range.”); see also Engen et al., *supra* note 18, at 32 (reporting finding that it was standard practice to recommend sentences in the lower end of range for pleas, and sentences in higher end of the range after trials).

61. E.g., Interview with D1-MN (noting that in all but one district, “you can tell your client to the day what time he was facing if he took the deal” and that “you might tell a client: ‘If you plead guilty, you are looking at three years of probation, but no more than ninety days in jail. If you go to trial, could [be] up to a year in jail.’ He’ll take the plea.”). Consider also Interview with D2-PA (noting defendants will negotiate for sentence capped at twenty-three rather than twenty-four months to get county instead of state time).

62. In Pennsylvania, there is a range of such options. One prosecutor reported bargaining over “RIP—restricted probation,” “the boot camp program [with] drug supervision afterward,” and “a brand new [treatment] program, with long term residential rehab.” Interview with P1-PA. For an explanation of restricted intermediate punishment (RIP), see Kramer et al., *supra* note 45, at 17, 29.

63. E.g., Interview with D3-MN (noting that defense attorneys are “always looking for . . . a stay. . . . Or if there is jail time, we’ll try to cap the jail time. State wants 120 days, we’ll plead him to time served . . . [or] bargain to the bottom of the box. . . . [W]e do that all the time.”); Interview with D4-MN (defining a “stay” as “a non-judgment, like a continuance for a long period of time” after which charge is dismissed if defendant completes the period without incident, and the guilty plea entered earlier is never filed). One Minnesota prosecutor described a similar procedure:

[W]hat I do is agree to what we call a 2705, diversion. So he pleads guilty to the offense, and he has a five-year period to be good. If he violates, then the plea is already there, he goes straight to prison. We do this for three reasons. First, it saves time. Second, it rewards him for cooperating. Third, chances are he’s going to violate, and we’ll get him easily at that point.

Interview with P2-MN.

64. E.g., Interview with P6-PA (“[I]f you plead guilty before filing motions, you don’t get the mandatory, if you choose not to take it, and you litigate motions, then convicted, we’ll invoke the mandatory. . . . [A]s a prosecutor they are really great tool . . . we would invoke them and [the judges] have to impose.”); Interview with P2-PA (“For pleading guilty, we’ll offer to drop some of the lesser counts if they plead to the top count. Or more often, we may waive the mandatory, so they get three to six instead or five to ten . . . . Tend not to waive the mandatory unless going to plead guilty.”); see also Jeffrey T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences 23–24* (unpublished manuscript, on file with the *Columbia Law Review*), where the authors found,

[T]hose convicted by trial receive mandatory minimums much more often than those who plead guilty. Those convicted by trial receive mandatories 40% of the time, while those convicted by negotiated or non-negotiated guilty pleas receive them 13% and 24% of the time, respectively. . . . [N]egotiated guilty pleas generally cut by about half the odds of prosecutors applying the mandatory. This suggests that prosecutors use the threat of applying the mandatories as a strong

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ing over defendants' criminal histories,<sup>65</sup> and little of the fact bargaining described in the federal system.<sup>66</sup>

2. *Reasons for Plea Discounting.* — Nonincarceration sentences, particularly treatment programs, are primarily reserved for offenders who admit their crimes through guilty pleas.<sup>67</sup> Likewise, mitigated sentences, or downward departures, are also reserved for those who admit guilt. "We would not offer a mitigated sentence unless the defendant was willing to accept responsibility."<sup>68</sup> As an alternative rationale, one prosecutor suggested, "We reward people for making our lives easy. We're not going to reward a person if he won't make our lives easier."<sup>69</sup> One defender reported negotiating downward departures in order to obtain treatment for mentally ill defendants.<sup>70</sup>

In Maryland, the prosecutor may enjoy an extra benefit from a negotiated sentence, above and beyond the usual advantages of an immediate settlement. The state has a unique process by which the trial judge can grant a reduction in sentence years after the imposition of sentence.<sup>71</sup> A

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bargaining chip in the process of negotiating plea agreements. In such cases, prosecutors would obtain a conviction through a guilty plea (and avoid the uncertainty of a trial), and offenders would avoid the imposition of the mandatory.

Id.

65. Consider the following exchange:

Q: You can negotiate criminal history points?

A: No, they are not too negotiable, let me explain. What we do is we negotiate[] it if we are not sure. I suppose you could just say there was one prior when there really were four. But that doesn't go on in my district. Where it may happen, for example, is when the convictions are from a foreign jurisdiction and there is some question about how to count it. We'll negotiate that, instead of leaving my client open for the worse interpretation at sentencing.

Interview with D3-MN; see also Ulmer, *Social Worlds*, supra note 3, at 96, 123 (noting no negotiating over prior record).

66. See, e.g., Interview with D1-MN (responding to question over whether date of offense is ever a subject of negotiation by saying "[n]ever have, but that's a good idea. I wish I could bargain over whether Wisconsin state law applies!").

67. E.g., Interview with P2-WA ("Generally, if someone wants a bench trial, we won't talk about recommending sentence. But they do know that alternative sentences are only available if [they] plead guilty. The way we put it, if you will accept responsibility for your crime, then you are ready for treatment.").

68. Id.

69. Interview with P1-WA; see also Interview with D3-PA ("I think the judges basically are rewarding the defendant for saving the system money, rewarding for accepting responsibility for their actions . . . ."); Interview with D1-KS (noting that although some prosecutors will not give anything for pleading guilty, "you plead no deal, the judges will usually give you something. . . . They will punish you if they can after trial, run everything consecutive . . . impose incarceration when there is a presumption of probation . . . .").

70. Interview with D3-WA.

71. The motion for modification must be filed within ninety days of the sentence, but it is often not ruled on for years. See Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. Balt. L. Rev. 1, 1, 38-43 (2003) (reporting results of survey of judges concerning use of modification, and noting that of all the states, Maryland gives its trial judges by far the broadest power to modify sentences).

negotiated and binding sentence agreement typically insulates the state from the potential of a future reduction. The binding plea is tantamount to a waiver of this review process.<sup>72</sup>

Across states, judges—conscious of the need to move their dockets—reportedly encourage charge and sentence concessions for defendants who plead guilty.<sup>73</sup> Practitioners report that judges have few incentives either to disturb the negotiated sentences that prosecutors have recommended or to reduce the differences between plea and trial sentences. According to reports, in only the extremely rare case does a judge question the sentence recommended after negotiation. Even if a judge tried to reject settlements in order to impose sentences more in line with the judge's own views, attorneys in some states have the ability to peremptorily challenge a judge. Noted one attorney, "We have a right to file an affidavit of prejudice. . . . once [per case]. . . . If a judge ignored sentencing recommendations, he would start hearing only contested sentencing[s]."<sup>74</sup>

### B. *Explaining Patterns in Bench Trial Sentences*

Although most offenses under these guidelines systems exhibit a marked differential between sentences after guilty pleas and sentences after guilty verdicts, defendants convicted after bench trials are not consistently receiving sentences that are less punitive than the sentences given to defendants convicted by juries. Nor is there a consistent pattern across states of bench trial sentences that are significantly more severe than sentences given to defendants who admit guilt. For some of the offenses examined, particularly in states other than Maryland, something else is happening. The interviews provide a few clues. The discussion below first addresses those findings consistent with the efficiency hypothesis, then turns to findings that are not.

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72. One interviewee reported that in some cases the parties will expressly reserve the right to seek reconsideration as part of their agreement, but he also noted this practice is unusual. Interview with D1-MD.

73. E.g., Interview with P1-KS ("[T]he judges almost always follow [our sentence recommendations], because they want to encourage guilty pleas too."); Interview with D1-MN ("[Deals] get better and better, right up until you start asking the jurors questions on voir dire. A judge might say, 'I'm not taking settlements after the jury's here,' but . . . [o]f course the judges try to resolve these."). Consider also this assessment from one defense attorney:

Let's face it, judges are not interested in jury trials, nobody wants to try jury trials. Judges are not quick to reject agreements. Even in the past, [if] a deal has been rejected . . . once we got close to trial the judge will take the very same deal. The judge thinks, "Dammit, I don't want to try this case." They're not going to say this out loud, but that's what's going on.

Interview with D3-MN.

74. Interview with D2-WA; see also Interview with D1-WA (reporting that judges "will not stray too far from the agreed-upon sentence. There is an understanding that if they did they'd stop getting pleas.").

1. *The Efficiency Hypothesis Supported: When Jury Sentences Are More Punitive than Bench Sentences, as Compared to Plea-Based Sentences.* — Less punitive bench trial sentences are expected as rewards for the savings of resources needed for jury trials.<sup>75</sup> We also might expect less punitive sentences due to the absence of jury members and absence of the heightened press coverage that attends many jury trials. In other words, sentences after bench trials are more likely to be “under the radar,” escaping public scrutiny, leaving judges the political space to sentence more leniently. In Kansas, Minnesota, and Washington, where most defendants who opt for bench trials do so in order to preserve pretrial issues for appeal and do not contest the state’s facts,<sup>76</sup> an even greater discount would be expected. With stipulated fact “trials,” there is no inflammatory or emotional witness testimony. Defendants tried by the bench often waive several other time-consuming trial privileges, including the right to cross-examine witnesses or the right to testify.<sup>77</sup>

At least some interviewees in each state suggested that a sentencing discount is expected in exchange for a jury waiver, even if the discount is not explicitly negotiated.<sup>78</sup> And in most of the states examined, there are

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75. E.g., Interview with D2-PA (“Another reason you’d go to a bench trial would be to circumvent the guidelines. If you go to jury trial you are going to get whacked. . . . Because the judges don’t want to be tied up with the jury.”). This defender also explained that after bench trial, judges are much more likely to “hear what you are saying about [drug] amount than [they would be] after a jury trial; [you are] more likely to get a mandatory after a jury trial.” *Id.*

76. E.g., Interview with P2-WA. That interviewee reported,

[I]t is extraordinarily rare for a case to be tried before a superior court judge ever, in any county. [In all my years as a prosecutor,] it has happened once. The defense attorney was very experienced, and he saw a new judge and thought he might get his way with [that judge] and was right. It was a good call. He did get an acquittal on one count; the jury would have convicted. But this is very rare. If you look at the data, you will see more [bench trials] than that. We have a handful of bench trials every year, but they are actually trials on stipulated facts. For example, someone goes through drug court and they fail the treatment program, they stipulate to all the facts and go to bench trial. . . . And there are other cases where a defendant has a good legal issue to preserve . . . [like search and seizure issues, usually, in drug cases.

*Id.*; see also Interview with D3-WA (reporting bench trials are uncommon and that “most are stipulated facts where we are going on a legal issue”); Interview with D1-KS (“[W]e take a few to bench trial only when we are trying to preserve a legal issue. After losing a motion to suppress, we’ll do a stipulated fact trial.”); Interview with P2-KS (“[M]ostly where there is only an issue of law, say a search and seizure issue, and the defendant wants to preserve it for appeal.”).

77. Interview with D2-WA (noting that bench trial “doesn’t have the flavor of a trial [and] is really like the conditional plea,” involving a written waiver to right to cross, to call witnesses, to testify, “everything related to trial except the burden of proof,” as well as agreement about the proof that will comprise the record).

78. Consider also the following exchange with a Washington defense attorney:

Q: Do you ever include understandings about sentence as part of the agreement to a stipulated trial?

A: Yes.

some offenses that do seem to support the prediction of graduated discounts, with plea cases sentenced most leniently, followed by more severe sentences after bench trials, followed by the most severe sentences following jury trials.

2. *When Bench Trial Sentences Are More Punitive than Jury Trial Sentences, as Compared to Plea-Based Sentences.* — Why then, for several offenses, are bench trial sentences the most severe among the three types of convictions? This differential holds true for four offenses in Pennsylvania and Washington—particularly on the first measure of likelihood of incarceration—and for one offense in Maryland and Minnesota.

One explanation is suggested by interviewees' reports that in at least some cases, defendants may prefer bench trials because the defense attorney believes the facts are unusually horrible and hopes that the judge will

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Q: What kinds of concessions would you get, say in our case of first offense delivery, for agreeing to a stipulated trial?

A: Well, it changes over time. Usually you have an enhancement that will apply for most drug charges. Zones of prohibition, there are in urban areas all sorts of these, school bus zones, schools, etc. There are enhancements in the guidelines, after these were added these became bargaining chips because they substantially increase the sentence. If the prosecutor sees your client as small time, not a major player, it wouldn't surprise me if the prosecutor agrees not to file the enhancement. It is both an equities and a workforce compromise.

Q: Are these enhancements charged up front, or are they threatened if you don't plead?

A: In [x] County, the practice is to charge low and threaten with additional enhancements. It depends on when you cut your deal.

Interview with D2-WA; see also Interview with D1-WA (“[I]f it is a trial on stipulated facts . . . when you are trying to preserve a suppression issue. There might be bargaining on the sentence as part of that.”). Consider this description provided by a Minnesota defense attorney:

If we are doing a Lothenbach plea, the client knows he's going down on that count, so there is no charge bargain. We'll try to get a cap out of the court so it's not a blind plea. Or there will be an agreement from the state, that they'll not ask for an upward departure, or they'll agree to the middle of the box. . . . [T]he negotiation takes place with the prosecutor and the bench, almost always on the record. The court will say that even though the recommended sentence says X, it'll be Y. It is rare they back down on these.

Interview with D4-MN; see also Interview with P2-KS (reporting similarly that sentence after “a bench trial might be just as low as a plea if it is a stipulated facts trial, [judges] will give you the lower sentence there”).

This experience was not universal, though. Consider the following exchange with a Washington Prosecutor:

Q: Are the agreements to waive a jury ever accompanied by an understanding about sentence or sentence recommendation?

A: No. The prosecutors wouldn't consent to a sentence recommendation when a person isn't going to plead guilty. . . . [It c]ould happen if the defendant agrees to stipulate to the facts making up the crime and argues only a legal issue. But that would be only then. Absent that, why give him the break he'd get if he pleaded guilty?

Interview with P1-WA; see also Interview with D2-MN (reporting no sentencing discounts for Lothenbach cases because “[t]o get a sentence break you have to get the lower charge”).

be able to apply the law more objectively than a jury.<sup>79</sup> Bypassing a jury may result in a better chance at succeeding on a legal defense, or it may result in the judge selecting a lesser sentence than she would have selected in the same case had it been tried to a jury. Consider one attorney's explanation:

Q: What kind of strategy considerations would lead a defendant to ask for a bench trial if he's not hoping for greater chance at acquittal?

A: If the jury feels really strongly, it puts pressure on the judge at sentencing. If the defendant has committed a really heinous crime, he might want a bench trial. There is less press coverage, [which] leaves [the] judge with less pressure to respond harshly. So if you have someone with no redeeming character, [you] can spend less time in front of the jury seeking an acquittal that is unlikely anyway, [and] more time arguing about sentence. Bench trials tend to be really horrible crimes. The defense attorney thinks, ok, I can shorten this up by going to bench trial and it may help out at sentence.

Q: So why would the prosecutor agree?

A: [T]he prosecutor knows he's not going to lose the conviction, and it is more efficient. Plus prosecutors want to avoid the risk of having one lone juror hang it up. He's handed an easier conviction and will take it, even if sentencing might be a bit more lenient.<sup>80</sup>

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79. E.g., Interview with D1-WA (reporting bench trials when legal issue "is the nut of the case," when "the facts are so gruesome and revolting that you think a judge who has seen it before would be less turned off and be able to pay attention to the defense;" or where defendant wants "to preserve a pretrial issue, since we don't have conditional pleas"); Interview with D3-PA ("A judge might be better at addressing things that are emotional that end up confounding the jury."); Interview with D1-MN ("Other attorneys sometimes would take grievous sexual contact cases with horrible evidence to bench trial. They were worried about its effect on jury. But I never did this.").

Other Pennsylvania practitioners disagreed, reporting that the cases and offenders that went to bench rather than jury trial were not typically worse, some reported no differences, and others reported that bench trial cases tended to be less severe than jury trial cases.

80. Interview with P1-WA. Several attorneys commented on the effects of public opinion on sentencing behavior. For example, one defense attorney's interview pointed to the interaction of elections and sentencing:

Q: [Does the fact that your judges are elected] change the way they sentence?

A: Not in an average case that no one is paying any attention to. Usually it is not part of the election campaign that this judge is the lowest sentencer consistently. But it will change the way they sentence in high profile cases.

Interview with D2-WA. A Pennsylvania prosecutor described the connection between sentence severity and the public scrutiny of sentencing practices this way:

Q: Are sentencing practices ever an issue in trial judge elections?

A: If it is, it's a rare thing. But I deal with enough judges to know that they think it is an issue. They get very nervous about it. We now have a thing called "judge specific reporting" on sentencing. At first it started because [some] judges wanted their sentencing information published, [judge x] because [of] consideration for a federal judgeship and [others to refute] claims [of

The data available for the regression models did not allow us to control for inflammatory facts. If interviewees' perceptions are accurate, then the bench trial cases, as a group, may contain a larger proportion of cases with particularly aggravated features than the jury trial cases.

A second intriguing possibility was suggested in the interviews. Several interviewees reported that a defendant might agree to a plea-based sentence that is more severe than the predicted sentence after trial, as part of a bargain that allows the defendant to avoid a higher charge that would have carried an even stiffer average sentence.<sup>81</sup> The sentence after a negotiated jury waiver could be more punitive for the same reason. In Pennsylvania in the early 1990s, defendants reportedly obtained dismissals or acquittals on the top charges by going to bench trial; interviewees stated this is still true today.<sup>82</sup> Defendants in other states, too, will sometimes agree to bench trials in return for the prosecutor's promise to drop

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discrimination] on the basis of race in sentencing. They wanted their record made public. . . . So they approved it. Eventually for all judges. Judges from the big counties, though, were the ones abusing sentencing power by imposing really low sentences. They were fighting this because they were imposing below guidelines sentences. In the smaller counties, the judges had always felt like they had been under the spotlight, because it was so easy to figure out which judge it was from the county-specific reports. These big counties' judges were sentencing below—even beneath the mitigating ranges—in over fifty percent of their sentences. Once the judge's specific sentencing info came out, they started to sentence in accordance with the guidelines. They were concerned that their political opponents would get the public to be concerned about their record. After judge-specific reports, sentences went back up.

Interview with P1-PA. Consider also the following remarks from a Minnesota defense attorney:

Before the unified courts came in, there were district judges doing all the criminal cases except for misdemeanors. The county judges did the misdemeanors. We had [x] counties, we had three hard-working district judges but they traveled around. They rotated. We always had a different judge. They were bolder, because they weren't always home. Now that we have added an interim appellate court, all the county judges were elevated to district judge, and they are here in their counties ninety percent of the time, they are less bold. You get 'em out of their home county then they get some guts.

Interview with D3-MN.

81. See discussion of Minnesota case law, *supra* note 31. In Washington, this was reported in three strike cases: R

Q: How about aggravating sentences—are they given to defendants who plead guilty?

A: They can be. We have to spell out the terms of any agreement. In a three strike case a defendant may agree to an exceptional sentence as part of that.

Q: Agree to plead guilty to a nonstrike charge?

A: Right, we give up the strike charge, they agree to an exceptional sentence, say twenty years instead of ten.

Interview with P2-WA; see also Interview with D2-WA (“[S]ometimes [an agreement calls for] even an exceptional sentence above the standard range when there is a charge bargain as well. Mostly in three strikes cases. You’ll see that a lot.”).

82. E.g., Interview with P6-PA (noting prosecutors may drop higher charge if defendants waive jury).



or decline to pursue a higher charge.<sup>83</sup> If convicted, these defendants may receive *higher* sentences—reflecting the full extent of their criminal behavior—than defendants convicted of the same offense after jury trials.

A third possible explanation may account for bench trial sentences that are on average more severe than jury trial sentences. Some interviewees who reported that most bench trials were stipulated fact proceedings also noted that although prosecutors usually do not mind stipulated fact trials (prosecutors as well as defense attorneys recognize the importance of the legal issue being preserved for appeal), sometimes prosecutors resent the extra appellate work that these proceedings entail. This resentment might account for higher bench trial sentences in some cases, if judges are similarly annoyed with the prospect of reversal and remand, or if judges routinely follow prosecutorial recommendations. After all, a defendant may be less interested in the ultimate sentence in these cases, and more interested in the possibility of avoiding conviction entirely through the appellate process.<sup>84</sup>

Finally, Washington interviewees report that offenders who fail the drug court's diversion program for nonviolent drug offenders face a bench trial. There, having already received leniency once in being sent to therapy, defendants may not receive the sentence concessions that other defendants might.<sup>85</sup> The prospect of severe bench trial sentences functioned as an incentive to complete treatment programs in some of these alternative sentence cases. Given that most of the bench trials in Washington are either conducted as drug court violations or to preserve search and seizure issues for appeal, this may explain the severity of sentences following bench convictions for three of the four drug offenses examined in that state—sentences that are even more severe (when compared to plea-based sentences) than those received by defendants convicted by jury.

3. *When Bench Trial Sentences Are More Lenient than Guilty Plea Sentences.* — Most of the bench trial sentences for the offenses examined in these five states are either significantly higher, or not significantly different, than plea-based sentences. But there is one surprising exception: For the crime of simple possession in Pennsylvania, bench-tried defendants receive significantly shorter sentences than defendants who pleaded guilty. In other words, sentences after bench trial are undercutting prosecutors' plea offers. It is possible that defendants are receiving signals

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83. See *supra* notes 24–26 and accompanying text.

84. Cf. Interview with D3-MN (“The sentences [for trials on stipulated facts] are the same as trial sentences. Around here the judges don’t really penalize you for going to trial. The key is the charge bargain, that’s where you get the difference.”).

85. E.g., Interview with P2-WA (“One judge we have here will tell the defendant, if you fail drug court, I’ll be sentencing you at the top of the range.”). This same prosecutor, describing the relationship of bench trial sentences to guilty plea sentences, stated, “If a defendant failed drug court, they’d be higher. If it is not a drug court case, those that go to stipulated facts trials should be about the same . . . .” *Id.*

from the judge or have some other reason to expect that the judge will impose a shorter sentence if the defendant rejects what the prosecutor is offering in favor of a bench trial.<sup>86</sup> One Pennsylvania defense attorney suggested that, particularly in cases where defendants are convicted of possession after being released from prison, prosecutors will offer three months' county time under the guidelines, but if a defendant agrees to a bench trial on stipulated facts, the judges will give state probation, because they do not want the county to have to pay for more jail time.<sup>87</sup> Another prosecutor suggested that this cost consciousness would be found only in smaller counties where the judges had more contact with county officials.<sup>88</sup>

### C. *Variation by Crime Type*

Additional patterns are discernable by crime type. Generally, sex, assault, drug, and firearm offenses have the highest percentage of bench trials. In Washington, over six percent of child molestation convictions come from bench trials, along with nearly five percent of cocaine/heroin delivery convictions. Interviewees suggested that sex abuse cases go to bench trial in order to allow the victim to testify without the presence of the jury.<sup>89</sup> In Pennsylvania, the large percentage of rape and aggravated assault convictions by bench trial is also consistent with this explanation.<sup>90</sup> Felony assaults show the highest percentage of bench trial convictions in Maryland as well, which might also be explained by the same desire on the part of the defense to escape the damaging effects that the testimony of a victim of violent crime might have on a jury.

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86. E.g., Interview with D3-PA (suggesting that in some possession cases when law enforcement testimony at suppression hearing is particularly weak, judge may prompt defendant to waive jury by telling him that bench trial conviction would result in probation). See also Ulmer, *Social Worlds*, supra note 3, at 89-93 (citing interviews pointing to idea that some judges used bench trials to alter charges so as to give sentences more in line with judge's conceptions of what was deserved). The amount of variation in sentences explained by the regression model for this particular offense was the lowest of all of the offenses examined in Pennsylvania, suggesting that factors other than the ones included in the model are influencing sentence length for this offense.

87. Interview with D2-PA.

88. Interview with P8-PA ("[I]n a smaller county, where there are only two or three judges . . . they go golfing with the commissioners. They would . . . have to justify anytime the county has to pay.").

89. See, e.g., Interview with D1-MN ("Attorneys sometimes would take grievous sexual contact cases with horrible evidence to bench trial. They were worried about its effect on jury.").

90. Because aggravated assault is a lesser-included offense for most sexual assault charges, its disproportionate bench trial showing also reflects Ulmer's earlier finding that judges in that state, at least in one large county, will often convict of a lesser offense at bench trial. See Ulmer, *Social Worlds*, supra note 3, at 89 (discussing judicial practice of searching through guidelines to find charge carrying low enough sentence range to fit judge's conception of appropriate sentence for offender).

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Interviewees from Kansas, Washington, and Minnesota reported that drug cases are tried to the bench, often on stipulated facts, in order to preserve the defendant's right to appeal the judge's denial of a suppression motion. But in Pennsylvania, bench trials are reportedly used less often for this purpose. There, bench trials are more frequently selected in hopes of securing an acquittal or sentencing break from a lenient judge.<sup>91</sup>

#### D. Variations by Guidelines System

Researchers have posited that the more sentencing flexibility a guidelines system allows for any given offense, the more room judges and attorneys have to negotiate discounts using sentencing concessions rather than resorting to charge concessions.<sup>92</sup> We found this difference reflected in interviewees' reports of greater reliance on sentencing bargaining as opposed to charge bargaining in Pennsylvania and Maryland—the two states with voluntary, rather than mandatory, guidelines.<sup>93</sup>

In Pennsylvania, explained one prosecutor, “the ranges are pretty broad. They give us enough room to negotiate within the range without dropping a charge some of the time.”<sup>94</sup> As an added bonus for prosecutors, the flexibility to sentence bargain rather than charge bargain allows

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91. *Id.*; Interview with P1-PA (claiming that judges often “see the world through the eyes of the criminal defendants”).

92. One of the most vocal proponents of the view that reducing judicial discretion increases prosecutorial power is Professor Albert Alschuler. Nearly thirty years ago, Alschuler summed up the dangers of shifting sentencing discretion away from judges to prosecutors:

The exercise of prosecutorial discretion is more frequently made contingent upon a waiver of constitutional rights. It is generally exercised less openly. It is more likely to be influenced by considerations of friendship and by reciprocal favors of a dubious character. It is commonly exercised for the purpose of obtaining convictions in cases in which guilt could not be proven at trial. It is usually exercised by people of less experience and less objectivity than judges. It is commonly exercised on the basis of less information than judges possess. Indeed, its exercise may depend less upon considerations of desert, deterrence and reformation than upon a desire to avoid the hard work of preparing and trying cases.

Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, 126 U. Pa. L. Rev. 550, 564 (1978).

93. E.g., Interview with D1-MD (pointing to certainty of result where sentence bargain has been reached, saying that where “time is based on agreement of everybody, everybody's happy with it”); see also *supra* notes 71–72 and accompanying text (relating sentence negotiation in Maryland). A similar pattern appears in two other states with advisory guidelines—Arkansas and Virginia. See King & Noble, *Comparing Severity*, *supra* note 8.

94. Interview with P1-PA; see also Interview with D3-PA (stating that “[w]e usually negotiate on the sentence in drug cases” but when there are several grades of a serious offense, “we tend to negotiate [ ] on the grades of offense . . . .”); Interview with P6-PA (“[T]here are usually ways to make the guidelines more palatable [so you don't have to charge bargain]. There is boot camp, or a mixed disposition, say nine months in prison with another three months with work release, and maybe home with an ankle bracelet for another six.”).

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the state to preserve the higher weighting of greater offenses in future calculations of criminal history.<sup>95</sup> Notably, in these two states, Maryland and Pennsylvania, judges and prosecutors have aligned sentences more closely than in the other three mandatory guidelines states to the pattern predicted by the efficiency hypothesis: Sentences after bench trials are more severe than sentences after guilty pleas, and sentences after jury trials are stiffer yet.

Washington is a mandatory guidelines state with very narrow ranges. The analysis of several offenses in this state shows no predictable mode-of-conviction disparity at all. Consistent with earlier research by Engen and Steen, which showed that charge concessions were predominant under guidelines sentencing in Washington,<sup>96</sup> prosecutors and defendants reported little sentence bargaining, mostly charge bargaining. Sometimes, in reaching agreements to charges, the parties work backwards from the desired sentence to find the charge that will produce it.<sup>97</sup> Charges are added or increased if the defendant is not going to plead guilty. Explained one prosecutor, “Typically if defendants choose jury trial we do what we call ‘law school charging,’ and go ahead and charge whatever the evidence will prove. Otherwise, they get the first charge.”<sup>98</sup> Consider this exchange:

Q: [I]f you didn’t have the option of charge bargaining, but could only offer a defendant the bottom of the range if he

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95. See Kramer et al., *supra* note 45, at 11 (noting that for serious charges, courts prefer sentence departures to charge reductions so as to preserve the most serious charge for inclusion in future calculations of criminal history); see also Ulmer, *Social Worlds*, *supra* note 3, at 125 (pointing to judges who accept negotiated sentence without looking at guidelines).

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96. Engen & Steen, *supra* note 11, at 1384 (noting that “severity of charges at conviction changed significantly following each change in the [sentencing guidelines] law, which suggests the manipulation of charges (and subsequent sentences) rather than a strict application of the charges committed”).

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97. Engen et al., *supra* note 18, at 31–32 (noting that “[c]harging decisions in many cases may be as much a consequence of the [sentencing] recommendation that a particular charge allows (given the standard ranges that apply) as they are a determinant of the sentencing recommendation”); see also *id.* at 60–63 (finding that strongest predictor of severity of charge producing primary conviction for defendants initially charged with delivery is whether or not defendant pleads guilty or is convicted at trial, and finding significant charge concessions for pleading guilty).

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98. Interview with P2-WA. Consider also the following exchange with a different Washington prosecutor:

A: It is efficient to charge low, harder to take off a charge later. They know if you don’t plead guilty, you’ll add counts and amend to whatever can be proven. But the stats won’t show much charge bargaining, not many charges being dropped. There are some counties that charge high then drop, and charge bargain. But I like charging low. Always easier not to have charged than to get rid of it. It frustrates law enforcement sometimes. They’ll see that less than what could be charged is charged, but they forget it isn’t because this is all we can get, it is because this is what we would accept and it will take care of the case. A lot of counties have the general rule, charge up to three counts. Three’s enough.

Q: If you go to trial, add more?

pleaded guilty, would that be enough? Would that change defendant's willingness to roll dice at trial rather than plead guilty?

A: Let me start by saying I don't know how a legislature could require us to charge every provable charge up front. Ethically, I don't think we have enough information at that point. We don't know all the evidence. There may be issues to investigate. But even [if we] were stuck with the charge, [and] had to bargain within [the] range, it wouldn't be enough. In Washington, the range can't be more than seventy-five percent higher than [the] bottom. That is not enough room to do anything substantial. What is the difference really between fourteen and eighteen months, especially after factoring in good time, which is now about fifty percent? At least at the bottom end, the differences in sentences are not much.

Q: What about at the top end?

A: There we do more sentencing bargaining. The assistant will be negotiating for a recommendation within the range, not for charges. There is more room to move.

Q: Where is the tipping point, where you move from charge bargaining to sentencing bargaining?

A: That's a good question. I would say where the difference between the top and bottom of the range approaches a year. With the fifty percent good time, that means six months. That's probably about where we can start us[ing] sentencing bargaining.<sup>99</sup>

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A: Sure, but low charging at the outset usually works. Everybody is happy: the judge, the prosecutor, the defendant knows he's getting something. The only way to do it with the high volume.

Interview with P1-WA.

99. Interview with P2-WA. Consider also the thoughts of another Washington prosecutor:

Q: What about bargaining within the range?

A: Most of the standard ranges are not broad enough so that it is not much of an incentive. If you're looking at twenty-eight to thirty-four months, with one-half good time, you are looking at a difference of two months total.

Q: How big would the ranges have to be before it would make sense to negotiate within them?

A: Murder ranges, those are big enough. Murder Two is 123 to 220, a 100-month swing. We do negotiate on the recommended months there . . . .

Q: [W]hat about burglary? Robbery?

A: Usually it's the counts, not the months.

Interview with P1-WA. A similar practice was reported by a Washington defense attorney:

Q: Do you ever negotiate over where in the range to sentence, or just over the charge and enhancements?

A: It depends on the charge and the range and the crime. Whether the range is narrow or broad. Narrow ranges for crimes that don't have enhancements result in a higher number of trials. Look at drug cases. When I started practicing, there were no enhancements, and the range was twelve months and one day to fourteen months. Virtually nobody pled to drug delivery, it was all about the lower charge. Defendants would come in, and say, "Give me possession or I'll go to trial." Possession was a lot lower, nine months or less. Now with enhancements, you bargain over them. Enhancements can double the time.

Minnesota's ranges, too, are very narrow, and interviewees there suggested that charge concessions are more common than sentencing concessions for many offenses.<sup>100</sup> For example:

Q: Do you ever negotiate within the guidelines for a particular offense?

A: Not really, they are such tight ranges. You get a range from eighty-two to ninety-one months, with one-third good time, you're talking about only a couple of months. Not much of a difference. . . . [Y]ou might see [it] with an armed robbery, plead to the lower sentence. But still the focus is on the charge. There is some proposal to make the ranges bigger.

Q: How would that change bargaining?

A: It would make the judge a factor. Now the judge is a potted plant. The judge just sits there and applies this little grid, the parties negotiate the grid. If there was a bigger range, thirty months, you'd see the judges get more involved.<sup>101</sup>

One defender also suggested that the Minnesota Supreme Court's declaration that a negotiated settlement alone will not justify a departure has caused even more charge bargaining:

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That's a pretty big incentive to take a deal. The gun and deadly weapon enhancements, in a case like second degree assault, where normally [the sentence is] three to nine months, will bring it up to twenty-four months. That's a significant increase. . . . [F]ive years is significant when the standard range on the crime is under five years. The flip side of this, from the standpoint of the criminal defendant, is that a charge bargain feels a lot better to them.

Q: Why?

A: Because it represents a benefit that is more tangible for them to understand, a recommendation at the bottom of the range rather than at the top just doesn't have the same satisfaction. Although I like the fact that the prosecutor here charges low, it makes it much harder to explain the potential benefits of a deal, talking about a charge they didn't bring, the defendant thinks they didn't bring it because there is something wrong with it.

Interview with D2-WA.

100. E.g., Interview with D1-MN ("In a probation case, you negotiate conditions. In a prison case, you negotiate less time. You do that by agreeing to plead to attempt (that carries half the sentence) or a lesser charge. . . . The guidelines keep sentences . . . predictable, but charge bargaining allows for settlement."). Consider also the experience of this Minnesota Prosecutor:

Q: Do you ever use a recommendation or agreement to a lower sentence within the range in negotiating a guilty plea?

A: You mean high/low? I'll use it as a little kicker sometimes. But not much room, say with a forty-four to fifty-two month range, I'll recommend forty-four, that may turn the deal. But in drug cases . . . Jeepers, you walk in and there is a video of a guy handing over two ounces. It's not hard to get a conviction. If it is a commit [offense carrying prison time] then they're going to prison, if it isn't a commit, I don't care as much about how much jail time they do.

101. Interview with D2-MN; see also Interview with D4-MN ("The boxes are so small—if you agree to the middle of the box, [there's] very little incentive. Say . . . [r]ange is 105 to 115 [months]. Very little incentive there. With good time even less. Not enough not to go to trial.").

The object in [drug] cases is to get the charge down. Usually, on say a first degree, we'll take state time on a [third degree]. We have had cases where the judge will depart downward on the first [degree charge] because of the agreement of the parties. But the Court said [we] can't do that. Plea agreement is not a basis for departure. We will get reversed if it is appealed. So we have to charge bargain.<sup>102</sup>

Kansas practitioners reported that the narrow ranges left them little room to negotiate a sentence. For the lower level, nonviolent felonies where the defendants are not likely to receive incarceration no matter what the disposition, prosecutors reported charge bargaining instead of sentence bargaining.<sup>103</sup> "You might be able to recommend field services probation instead of a residential program, or negotiate the terms of probation," explained one prosecutor, "but there is very little to work with."<sup>104</sup> This prosecutor reported trying more of these cases as a result.<sup>105</sup> Another prosecutor provided this summary: "The guidelines have really controlled a lot of the bad judicial decisions. . . . Now the disparity is really in the way the prosecutor handles the case."<sup>106</sup>

#### V. POLICY IMPLICATIONS

One contribution of this study—the first to compare sentences after bench trials as well as jury trials and guilty pleas for individual offenses in several states—is to shed light on the use of bench trials in sentencing guidelines systems generally. Theoretically, bench trials could be an attractive way to provide an efficient, yet fully adversarial testing of the government's proof. Defendants in all five states continue to use the intermediate option of bench trial as a compromise between the efficient guilty plea and prohibitively expensive jury trial. But this use of bench trials does not appear to be widespread, at least outside of one large urban area in Pennsylvania, where bench trials are institutionalized in a separate disposition track.<sup>107</sup>

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102. Interview with D2-MN. Instead, sentence bargaining was reportedly a means for dealing with unusual increases in caseload:

Q: Is [downward departure] standard practice for the judge there?

A: No. What happened was there was a big drug bust, all of a sudden they have [a large number of] cases. They can't try them all. Judge says "Jesus Christ, I'm not going to try all of these!" How much of the pig can the python swallow, you know? So it happens where there are more cases than the system can handle.

Id.

103. Interview with P1-KS ("At the bottom end [there is] more charge bargaining.").

104. Interview with P2-KS.

105. Id.

106. Interview with P1-KS.

107. See Schulhofer, *Inevitable*, supra note 10, 1048–53 (reporting usage of bench trials in several American cities, and then providing detailed description of bench trial system in Philadelphia); see also Ulmer, *Social Worlds*, supra note 3, at 77, 82, 170 (describing bench trial usage in three Pennsylvania counties). Interviews from Pennsylvania conducted for this study also reported a "waiver court" or "waiver track" in

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Interviewees suggest that one reason why so few contested bench trials occur is the apprehension by defendants and defense counsel that trial judges are less likely to acquit than juries. Some attorneys report that judges outside of the largest urban communities are wary of the electorate’s reactions to acquittals. Others report that judges in their counties are all ex-prosecutors and therefore less open to questioning guilt.<sup>108</sup> If a defendant is not going to admit guilt, then a jury trial rather than a bench trial is the more common choice (as is apparent in Tables 2–6).

Second, even when the defendant prefers a bench trial, in some communities the prosecutor may deny him that option, insisting that the defendant choose between a guilty plea and a jury trial.<sup>109</sup>

Most importantly, as the uneven sentencing patterns in Kansas, Washington, and Minnesota suggest, defendants who opt for bench trials cannot always count on sentencing leniency. In some counties in Pennsylvania and Maryland, defense lawyers are able to secure assurances from trial judges about the sentences that would be imposed should a jury be waived. Similar exchanges were not reported in the three mandatory guidelines states. With no predictable advantage to defendants over jury trials on either guilt or sentence, bench trials in Kansas, Washington, and Minnesota are used primarily in cases in which a trial of some sort is required in order to preserve an issue for appeal.

The findings also provide more information for policymakers addressing two pressing issues in sentencing reform: first, the choice of how much discretion to retain for judges within a guidelines system, and second, the decision of whether and how to regulate mode-of-conviction disparity in guidelines sentencing. Both are subjects of current debate.<sup>110</sup>

How much discretion judges retain in any sentencing scheme depends upon a number of factors, including budget constraints<sup>111</sup> and the

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one large city, consisting of cases with one to three witnesses and no mandatory sentence enhancements—often drug cases involving small amounts of drugs.

108. See, e.g., Interview with D1-KS (“[A]ll the judges came to the bench from this DA’s office. So they think there is proof on every charge and don’t dismiss anything . . . they think they wouldn’t have been charged unless they were guilty.”); see also King & Noble, Three-State, *supra* note 34, at 907 (discussing rarity of bench trials in Kentucky); *supra* note 80 (discussing impact of public opinion on sentencing).

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109. E.g., Interview with P1-KS (“[A] lot of times the defendant will . . . want a bench trial and we’ll object. . . . [T]here might be a fairly liberal judge and the defendant will be hoping for some leniency there, but we think the case has a lot of jury appeal, so we prefer a jury.”); see also Interview with D3-PA (“The prosecutor may seek a jury trial too if he’s about to end up in waiver court before a judge he doesn’t like.”); Interview with D2-PA (recalling cases where prosecutor demanded jury trial).

110. See sources cited *supra* note 8 and *infra* notes 115–118. See also Candace McCoy, Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform, 49 *Crim. L.Q.* (forthcoming 2005) (manuscript at 2, on file with the *Columbia Law Review*) (proposing limit on plea discount and referencing parallel article for Canadian system).

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111. Am. Law Inst., Report, Model Penal Code: Sentencing 72–85 (Kevin R. Reitz reporter, Apr. 11, 2003), available at [http://www.ali.org/ali/ALIPROJ\\_MPC03.pdf](http://www.ali.org/ali/ALIPROJ_MPC03.pdf) (on file with the *Columbia Law Review*) (arguing that states facing budget constraints have adopted



relative political strength of the trial bench and prosecuting attorneys.<sup>112</sup> Yet even in the face of these constraints, sentencing reformers may have design options. A jurisdiction may wish, for example, to maximize transparency and minimize the extent to which sentences turn on unreviewable charging decisions by prosecutors.<sup>113</sup> The limited information provided by the interviews reported here suggests that this goal demands that a sentencing system allow enough room for prosecutors and judges to secure guilty pleas and jury waivers through *sentencing* concessions, so that *charge* concessions are not necessary for the bulk of convictions.

In several of these states, interviewees provided insights into what sort of sentencing ranges might be required to accomplish this. They report that the broad sentencing ranges common for serious offenses make feasible the substitution of sentencing bargaining for charge bargaining, while charge bargaining is prevalent for the lesser offenses, particularly where the ranges are narrow. In Pennsylvania and Maryland, where judges are not bound by mandatory guidelines, sentencing concessions seem to be more common than in the other states. With access only to conviction data, this study cannot confirm whether states with advisory guidelines or wider sentencing guideline ranges actually experience lower rates of charge bargaining than states with narrower, mandatory guidelines. The findings, though, are at least consistent with the story the interviewees tell.

The data analysis and interviews also suggest that regulating the *amount* of any sentencing discount for waiving process could present significant challenges. Set discounts for waiving juries and jury trials could be beneficial. There is no doubt that increasing the certainty of a discount will make settlement easier.<sup>114</sup> And, theoretically, by keeping the discount small, fewer innocents will be coerced into pleading guilty in

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determinate sentencing structures to enable better forecasting and control of prison population growth); Daniel F. Wilhelm & Nicholas R. Turner, *Vera Inst. of Justice, Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?* 7 (2002), available at [http://www.vera.org/publication\\_pdf/167\\_263.pdf](http://www.vera.org/publication_pdf/167_263.pdf) (on file with the *Columbia Law Review*) (reporting findings that “[s]tates with presumptive sentencing guidelines have significantly lower rates of incarceration than similar states without presumptive guidelines”).

112. See, e.g., William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 *Harv. L. Rev.* 2548, 2568 (2004) (describing increasing power of federal prosecutors at expense of judicial discretion).

113. Professors Wright and Miller favor sentencing bargaining over charge bargaining because sentence bargaining can be limited by legislatures in changing sentencing ranges, and conceivably could be vetoed by the judge. See Wright & Miller, *supra* note 35, at 111.

114. E.g., Interview with D2-WA (“Where you are talking pleas, you want to know where you are on the grid. . . . Certainty is good, because when it is all about the numbers, it makes it much easier to get settlement.”); Interview with D2-MN (“[A set discount] would help. Then I could say to the defendant in the county I was talking about, I could save you this time if we don’t go to trial. That would be a good thing.”).

order to avoid the risk of a severe trial penalty.<sup>115</sup> As Professor Alschuler has argued, a set discount would reduce the risk that a defendant's sentence would depend upon judicial or prosecutorial whim, on weak evidence, on vindictiveness, on the zealotry of the defense attorney, or on the intensity of publicity.<sup>116</sup> A set sentencing discount for pleading guilty or waiving a jury would also be subject to oversight by the judicial and legislative branches.<sup>117</sup> Two obstacles in the way of replacing covert discounts and charging concessions with specified sentencing discounts are suggested by the findings in this study.

A first difficulty will arise in attempting to standardize punishment discounts. Discounts are now far from uniform. Indeed, this is perhaps our most notable finding. Every state studied showed at least one offense with no significant sentencing discounts at all for those who plead guilty or waive a jury. Even within the same state, the average sentencing "penalty" for asserting the right to trial varies drastically between offenses. For example, it ranges from 13% to 461% in Washington, from 58% to 349% in Maryland, and from 23% to 95% in Pennsylvania. (Tables 8, 10, & 11.) Substituting a uniform discount for one that now varies that widely will significantly affect the length of sentences for several offenses. It will also limit the wide open bargaining flexibility that prosecutors currently enjoy.

Second, given the many avenues for evasion, trying to enforce either a floor or ceiling on a waiver discount may be "hopeless."<sup>118</sup> One Minnesota defender stated the problem this way: "You couldn't keep to a standard deal if you tried. Someone will want something better than the standard deal and somebody else would have a reason not to give the standard deal. 'My victim is still suffering.' Or, 'We still think this is a good case.'"<sup>119</sup> In other words, the reasons for varying the discount—including the varying bargaining skill of attorneys, the varying strength of

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115. See, e.g., John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. Pa. L. Rev. 88, 96-97 (1977) (stating that sentencing disparities between plea bargains and trial convictions can induce innocent defendants to plead guilty). For a contemporary example of this, see Oren Bar-Gill & Oren Gazal, *Plea Bargains Only for the Guilty?* (Harv. Law & Econ. Discussion Paper No. 481, Jun. 2004), available at <http://ssrn.com/abstract=560401> (on file with the *Columbia Law Review*) (arguing that limiting sentencing discretion helps lessen likelihood that innocent defendants will plead guilty). Others have recommended similar explicit regulation of sentencing concessions. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2464, 2535 n.320, 2538 n.331 (2004) (collecting sources); McCoy, *supra* note 110 (manuscript at 40, 52) (noting that some American scholars recommend ten percent discount for truly remorseful offenders, not dependent upon time of plea, and independently suggesting that only small discount is appropriate).

116. Alschuler, *supra* note 92, at 575.

117. See Wright & Miller, *supra* note 35, at 111.

118. Bibas, *supra* note 115, at 2536. Professor Bibas recognizes this, but goes on to argue nevertheless that discounts for guilty pleas should be limited to a ten or fifteen percent reduction in sentence. *Id.* at 2538.

119. Interview with D1-MN.

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evidence, and unanticipated disruption in sentencing law (like *Blakely*<sup>120</sup>)—are not eliminated when a commission announces a set discount for a guilty plea or a jury waiver.

The one attempt to regulate the plea discount in a mandatory guidelines system—in the federal guidelines—was not notably successful. As Professor Ronald Wright has observed, the discount became deeper and less uniform over time with prosecutor-controlled sentencing concessions.<sup>121</sup> After fifteen years of experience with the credit for “acceptance of responsibility,” the U.S. Sentencing Commission concluded that additional sentencing concessions for “substantial assistance” are used unevenly in plea negotiations, and that “the system of regularized incentives for guilty pleas that was put in place by the original Commission has never operated in isolation from statutory minimum penalties. Department policies allow prosecutors to invoke statutory minimum penalties and statutory enhancements as further incentives for guilty pleas . . . .”<sup>122</sup> Mandatory minimum sentence enhancements are also available in most state systems as well, ready to be utilized by prosecutors whenever a standard discount is not quite enough of an incentive to prompt a settlement. Once discounts are set, state prosecutors, like their federal counterparts, will simply shift to other discretionary mechanisms to sweeten offers if the formal discount is not enough to close deals.

A final barrier to regulating process discounts through sentencing guidelines is suggested by reports of interviewees in Pennsylvania and Washington. According to those interviewees, mode-of-conviction disparity often is preserved not by granting discounted sentences that are below presumptive or recommended sentences to defendants who plead guilty, but instead by invoking mandatory minimum enhancements when defendants opt for trial.<sup>123</sup> In other words, in a state like Pennsylvania, the unenhanced, presumptive sentence is the one you get if you plead guilty. The mandatory enhancement is not mandatory at all, but is used to encourage settlement like a higher charge. When the presumptive sentence is already discounted, substituting a set sentencing discount for this quasi-charging discretion would require a state to boost presumptive sentences to the enhanced levels imposed after jury *trial*, so that those who waive process would receive designated sentence reductions.<sup>124</sup> The cost of switching from a plea-based presumptive sentence system to a trial-based presumptive sentence system may be too steep for cost-conscious state governments to bear.

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120. *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

121. Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 *Colum. L. Rev.* 1010, 1012 (2005).

122. See U.S. Sentencing Comm’n, *supra* note 4, at 85 (commenting on substantial assistance motions); *id.* at 30 (commenting on regularized guilty plea incentives).

123. See, e.g., *supra* notes 58, 64, 75, 78.

124. See, e.g., Bibas, *supra* note 115, at 2533 (arguing that guidelines should be based on going rates after trial, so that plea sentences are seen as “gain[s]”).

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In Virginia, the Sentencing Commission has been able to maintain presumptive sentences at the guilty plea rate because, in that state, *juries* sentence after jury trials without knowledge of the moderate guidelines governing judicial sentencing. Even though sentences after jury trials are much higher than sentences after bench trial or guilty plea, the difference can be characterized as the product of “jury sentencing” rather than as a trial penalty.<sup>125</sup> In other states where judges must apply the same sentencing guidelines after jury trial or plea, the issue is not quite as simple. Unless a state is willing to adjust presumptive sentences to jury trial levels, process discounts may have to remain in the hands of prosecutors—unregulated and functioning outside of the guidelines themselves. In such systems, bargaining over charges or mandatory minimum sentence enhancements may be the only realistic option for maintaining a predictable punishment discount for defendants who waive a jury or plead guilty.

As improved sentencing data collection provides further evidence of mode-of-conviction disparity, proposals to regulate process discounts will continue to attract attention. This study offers a preliminary glimpse into the dimensions of these sentence differences, as well as the mechanisms used to maintain them, in five guidelines jurisdictions. This closer look reveals that the challenge for regulators is daunting: Among states and even within a single state, the prevalence of process discounts is extraordinarily varied, as are the causes and methods of discounting.

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125. See King & Noble, *Comparing Severity*, *supra* note 8 (manuscript at 24) (finding that jury sentencing resulted in significantly higher penalties than bench trials or guilty pleas, “consistent with judicial maintenance of systematic sentence discounts for jury waivers”).

APPENDIX

TABLE 1: BACKGROUND INFORMATION BY STATE

	Kansas	Maryland	Minnesota	Pennsylvania	Washington
Prosecutor May Veto Bench Trial	Y	N	N	Y (after 1998)	Y
Challenge of Judge	N	N	Y	N	Y
Elected Bench	Y&N	Y	Y	Y	Y
Conditional plea	Y	N	N	N	N
% of Convictions by Bench—Merged Data	1.2%	2.2%	1.1%	2.6%	2.0%
Guidelines Began	1993	1983	1980	1982	1984
Guidelines Mandatory	Y	N	Y	N	Y
Judge-Specific Reporting	N	N	N	Y (after 1998)	Y

TABLE 2: MODES OF CONVICTION BY OFFENSE, KANSAS 1998–2003

Offense	Guilty Pleas	Bench Trials	Jury Trials	Total
Driving While a Habitual Violator	2709 (96.4%)	46 (1.6%)	54 (1.9%)	2809
DUI: Third or Subsequent Conviction	3153 (96.1%)	42 (1.3%)	86 (2.6%)	3281
Theft: Loss Between \$500–\$25,000	4327 (97.8%)	27 (0.6%)	71 (1.6%)	4425
Opiates or Narcotics Possession	6870 (96.0%)	134 (1.9%)	150 (2.1%)	7154
Opiates or Narcotics Possession: Second Offense	2041 (95.3%)	27 (1.3%)	73 (3.4%)	2141
Depressants or Stimulants Possession: Second Offense	1310 (95.3%)	26 (1.9%)	38 (2.8%)	1374
Depressants or Stimulants: Sale or Possession with Intent to Sell	1702 (95.9%)	28 (1.6%)	45 (2.5%)	1775
Driving While a Habitual Violator	2709 (96.4%)	46 (1.6%)	54 (1.9%)	2809

TABLE 3: MODES OF CONVICTION BY OFFENSE, MARYLAND 1999–2004\*

Offense	Guilty Pleas**	Bench Trials	Jury Trials	Total
Assault—1st Degree (Felony)	1,051 (87.1%)	56 (4.6%)	99 (8.2%)	1,206
Assault—2nd Degree (Misdemeanor)	4,300 (92.6%)	151 (3.3%)	192 (4.1%)	4,643
Robbery with a Deadly Weapon	1,347 (92.6%)	35 (2.4%)	72 (5.0%)	1,454
Robbery	1,727 (95.1%)	38 (2.1%)	51 (2.8%)	1,816
CDS and Paraphernalia Distribution—Cocaine	12,930 (97.4%)	163 (1.2%)	183 (1.4%)	13,276
CDS and Paraphernalia Distribution—Heroin	6,717 (98.8%)	37 (0.5%)	42 (0.6%)	6,796
CDS and Paraphernalia Distribution—Cocaine	1,509 (95%)	38 (2.4%)	41 (2.6%)	1,588
Theft, \$500 or Greater (Felony)	2,136 (95.1%)	61 (2.7%)	48 (2.1%)	2,245

\* The Maryland Sentencing Guidelines worksheet also collects information on sentence reconsiderations, reviews, and probation revocations. However, worksheets for cases involving these three disposition types are vastly undersubmitted to the Commission. Therefore, they account for less than one percent of the cases contained in the Maryland Sentencing Commission database and are excluded from these analyses.

\*\* Includes ABA plea agreements, non-ABA plea agreements, and no agreement pleas.

TABLE 4: MODES OF CONVICTION BY OFFENSE, MINNESOTA 1999–2003

Offense	Guilty Pleas	Bench Trials	Jury Trials	Total
Firearms*	319 (77.4%)	38 (9.2%)	55 (13.3%)	412
1st Degree Drug Offense	1,033 (92.8%)	33 (3.0%)	47 (4.2%)	1,113
5th Degree Drug Offense	6,823 (97.9%)	95 (1.4%)	51 (0.7%)	6,969

\* For this offense, both the logistic ( $\chi^2= 12.9, p=.299$ ) and OLS ( $F=1.4, p=.150$ ) models were nonsignificant. Therefore, the output for these models is not reported.

TABLE 5: MODES OF CONVICTION BY OFFENSE, PENNSYLVANIA 1997–2000

Offense	Guilty Pleas	Bench Trials	Jury Trials	Total
Rape/Involuntary Deviant Intercourse	446 (74.5%)	44 (7.4%)	109 (18%)	599
Aggravated Assault	2,870 (82%)	380 (11%)	263 (7%)	3,513
Robbery	3,782 (86%)	368 (8%)	261 (6%)	4,411
Possession with Intent to Deliver—Cocaine	5,954 (95.7%)	105 (1.7%)	159 (2.6%)	6,218
Burglary	6,045 (95.6%)	170 (2.7%)	110 (1.7%)	6,325
Simple Assault	13,467 (94.1%)	656 (4.6%)	192 (1.3%)	14,315
Indecent Assault*	1,507 (94%)	49 (3%)	51 (3%)	1,607
Theft (by Unlawful Taking)	10,797 (97.9%)	181 (1.6%)	55 (.5%)	11,033
Carrying Gun Without License	2,274 (87.5%)	278 (11%)	40 (1.5%)	2,592
Simple Drug Possession	10,191 (97.5%)	233 (2%)	52 (.5%)	10,476
Receiving Stolen Property	2,274 (96%)	195 (3%)	73 (1%)	6,712

\* Indecent assault is basically defined as “indecent contact” with the victim without consent, or if the victim is unconscious, or under 13 years of age, or similar conditions. See 18 Pa. Cons. Stat. § 3126 (2004) (presenting offense conditions).



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TABLE 6: MODES OF CONVICTION BY OFFENSE, WASHINGTON 1999–2003

Offense	Guilty Pleas	Bench Trials	Jury Trials	Total
Firearm	2224 (96.1%)	31 (1.3%)	60 (2.6%)	2315
Child Molestation 1	500 (82.9%)	40 (6.6%)	63 (10.4%)	603
Assault 3	5785 (96.6%)	27 (.5%)	178 (3%)	5990
Burglary 2	3565 (96.3%)	33 (.9%)	105 (2.8%)	3703
Theft 1	3570 (96.5%)	43 (1.2%)	85 (2.3%)	3698
Theft 2	6517 (97.8%)	78 (1.2%)	67 (1%)	6662
Possession of Stolen Property 2	4674 (97.9%)	44 (.9%)	55 (1.2%)	4773
Forgery	7511 (97.3%)	133 (1.7%)	73 (.9%)	7717
Manufacture or Deliver Marijuana	1985 (93.5%)	85 (4%)	54 (2.5%)	2124
Manufacture or Deliver Heroin or Cocaine	1547 (93.5%)	28 (1.7%)	79 (4.8%)	1654
Possession Schedule I/II Substance	7921 (91.6%)	502 (5.8%)	226 (2.6%)	8649
Possession Other Illegal Substance	14477 (94.6%)	532 (3.5%)	290 (1.9%)	15299

TABLE 7: KANSAS—SUMMARY TABLE OF BENCH AND JURY TRIAL EFFECTS FOR VARIOUS OFFENSES, 1998–2003 (COVARIATES INCLUDED IN MODELS BUT NOT SHOWN)

	Incarceration Odds (std. error)	Logged length <sup>^</sup> b (standardized B) [antilog of b]
Driving while Habitual Violator		
Bench trial	+ 2.223 (.3390)	+ .07994 (.00726) [1.0832]
Jury trial	2.321 (.2991)**	.22510 (.02266) [1.1524]
Theft \$500-\$24,999		
Bench trial	1.681 (.5498)	.3950 (.0225) [1.4844]
Jury trial	2.212 (.3147)*	.9090 (.1026) [2.4818]***
Opiates/Narcotics Possession		
Bench trial	1.635 (.2347)*	+ .2436 (.0191) [1.2758]
Jury Trial	2.846 (.2088)***	1.1240 (.1238) [3.0771]***
Opiates/Narcotics Possession 2nd offense		
Bench trial	2.956 (.5173)*	+ -0.7746 (-0.0745) [.4609]*
Jury trial	2.945 (.3332)**	-0.3326 (-0.0549) [.6821]
Depressants/Stimulants Possession 2nd		
Bench trial	+ 1.769 (.4501)	1.3501 (.1183) [3.8578]*
Jury trial	1.796 (.4212)	1.6733 (.1781) [5.3297]**
Depressants/Stimulants, Sale		
Bench trial	0.988 (.4244)	.4839 (.03453) [1.6224]
Jury trial	1.628 (.3396)	.3517 (.03596) [1.4215]

+ Model did not converge, validity is questionable.

\* Denotes coefficients significant at .05 or less.

\*\* Denotes coefficients significant at .01 or less.

\*\*\* Denotes coefficients significant at .001 or less.

<sup>^</sup> The logged length included only incarceration cases, and has a two-step hazard correction for selection bias included but not shown.

TABLE 8: MARYLAND—SUMMARY TABLE OF BENCH AND JURY TRIAL EFFECTS FOR VARIOUS OFFENSES, 1999–2004 (COVARIATES INCLUDED IN MODELS BUT NOT SHOWN)

	Incarceration odds Exp(B) (std. error)	Logged length <sup>^</sup> b (standardized B) [antilog of b]
Felony Theft (over \$500)		
Bench trial	1.442 (.362)	.506 (.066) [1.66]**
Jury trial	3.887 (.530)**	.455 (.057) [1.58]*
CDS Distribution—Cocaine		
Bench trial	2.001 (.284)*	.472 (.051) [1.60]***
Jury trial	6.568 (.518)***	.821 (.101) [2.27]***
CDS Distribution—Heroin		
Bench trial		.897 (.058) [2.45]***
Jury trial		1.501 (.141) [4.49]***
Misdemeanor Assault		
Bench trial	1.344 (.228)	-.028 (-.004) [0.97]
Jury trial	3.105 (.263)***	.703 (.124) [2.02]***
Felony Assault		
Bench trial	1.854 (.636)	.403 (.075) [1.50]*
Jury trial	2.532 (.609)	.888 (.211) [2.43]***
CDS Possession—Cocaine		
Bench trial	.893 (.448)	.523 (.069) [1.69]*
Jury trial	5.006 (.761)*	.747 (.126) [2.11]***
Robbery		
Bench trial		.430 (.050) [1.54]*
Jury trial		.690 (.104) [1.99]***
Robbery with Deadly Weapon		
Bench trial		.198 (.032) [1.22]
Jury trial		.469 (.104) [1.60]***

\* Denotes coefficients significant at .05 or less.

\*\* Denotes coefficients significant at .01 or less.

\*\*\* Denotes coefficients significant at .001 or less.

<sup>^</sup> In all offense-specific models, the logged length included only incarceration cases, and has a two-step hazard correction for selection bias included but not shown.

TABLE 9: MINNESOTA—SUMMARY TABLE OF BENCH AND JURY TRIAL EFFECTS FOR VARIOUS OFFENSES, 1999–2003 (COVARIATES INCLUDED IN MODELS BUT NOT SHOWN)

	Incarceration Odds (std. error)	Logged length <sup>^</sup> b (standardized B) [antilog of b]
5th Degree Drug Cases		
Bench trial	.840 (.344)	.550 (.041) [1.734]***
Jury trial	1.569 (.603)	.199 (.011) [1.220]
1st Degree Drug Cases <sup>^^</sup>		
Bench trial		.241 (.053) [1.272]
Jury trial		.355 (.092) [1.426]**

\* Denotes coefficients significant at .05 or less.

\*\* Denotes coefficients significant at .01 or less.

\*\*\* Denotes coefficients significant at .001 or less.

<sup>^</sup> The logged length included only incarceration cases, and has a two-step hazard correction for selection bias included but not shown.

<sup>^^</sup> The incarceration model is not shown as all cases that were disposed via bench trial or jury trial received incarceration.

TABLE 10: PENNSYLVANIA—SUMMARY TABLE OF BENCH AND JURY TRIAL EFFECTS FOR VARIOUS OFFENSES, 1997–2000 (COVARIATES INCLUDED IN MODELS BUT NOT SHOWN)

	Incarceration Odds (std. error)	Logged length <sup>^</sup> b (standardized B) [antilog of b]
Rape/IDSI Bench trial Jury trial	n/a: all bench and jury trial cases received incarceration.	.13 (.06) [1.14] .23 (.17) [1.26]***
Aggravated Assault Bench trial Jury trial	2.76 (.19)*** 3.68 (.39)***	.17 (.06) [1.21]*** .49 (.14) [1.63]***
Robbery Bench trial Jury trial	2.65 (.27)*** 1.23 (.38)	.07 (.02) [1.08] .28 (.07) [1.32]***
Burglary Bench trial Jury trial	2.03 (.24)** 2.33 (.43)*	.16 (.03) [1.17]* .47 (.08) [1.60]***
PWID Cocaine Bench trial Jury trial	6.57 (.47)*** 2.38 (.40)*	.02 (.01) [1.02] .21 (.05) [1.23]***
Indecent Assault Bench trial Jury trial	.99 (.35) 3.12 (.45)***	.22 (.04) [1.25] .30 (.07) [1.35]**
Simple Assault Bench trial Jury trial	1.20 (.10) 3.68 (.17)***	.19 (.05) [1.21]** .15 (.03) [1.16]
Theft by Unlawful Taking Bench trial Jury trial	1.61 (.18)** 2.40 (.34)***	.39 (.07) [1.48]*** .67 (.08) [1.95]***
Receiving Stolen Property Bench trial Jury trial	1.71 (.17)** 2.48 (.33)**	.33 (.08) [1.39]*** .62 (.11) [1.85]***
Simple Possession Bench trial Jury trial	3.35 (.15)*** 2.17 (.31)*	-.61 (-.17) [.54]*** -.24 (-.03) [.78]

\* Denotes coefficients significant at .05 or less.

\*\* Denotes coefficients significant at .01 or less.

\*\*\* Denotes coefficients significant at .001 or less. Guilty pleas are the reference category for mode of conviction.

<sup>^</sup> The logged length included only incarceration cases, and has a two-step hazard correction for selection bias included but not shown.

TABLE 11: WASHINGTON—SUMMARY TABLE OF BENCH AND JURY TRIAL EFFECTS FOR VARIOUS OFFENSES, 1999–2003 (COVARIATES INCLUDED IN MODELS BUT NOT SHOWN)

	Incarceration Exp(B) (std. error)	Logged length# b (standardized b) [antilog of b]
Possession of a Firearm Bench trial	.30 (.66)	.204 (.019) [1.226]
Jury trial	1.17 (.67)	.166 (.021) [1.181]
Child Molestation <sup>^</sup> Bench trial		-.433 (-.061) [.649]
Jury trial		1.725 (.307) [5.613]**
Burglary 2 Bench trial	.75 (.72)	.073 (.004) [1.076]
Jury trial	2.09 (.58)	.125 (.014) [1.133]
Theft 1 Bench trial	1.35 (.56)	.009 (.001) [1.009]
Jury trial	1.42 (.36)	.203 (.018) [1.225]
Theft 2 Bench trial	1.61 (.35)	.169 (.012) [1.184]
Jury trial	1.64 (.44)	.244 (.016) [1.276]*
Forgery Bench trial	3.37 (.38)***	.253 (.022) [1.29]***
Jury trial	2.14 (.39)*	.219 (.014) [1.245]*
Possession of Stolen Property 2 Bench trial	1.90 (.62)	.035 (.003) [1.035]
Jury trial	.49(.67)	.164 (.012) [1.178]
Manufacturing or Delivery of Marijuana Bench trial	.62 (.26)	.435 (.051) [1.544]**
Jury trial	1.31 (.34)	.134 (.014) [1.143]
Manufacturing or Delivery of Heroin or Cocaine <sup>^^</sup> Bench trial		-.004 (-.001) [.996]
Jury trial		.125 (.045) [1.133]*
Assault 3 Bench trial	.63 (.58)	.054 (.002) [1.055]
Jury trial	.86 (.24)	.046 (.005) [1.047]
Possession Schedule I/II Substance Bench trial	2.50 (.20)***	.130 (.020) [1.14]***
Jury trial	1.28 (.28)	.163 (.018) [1.177]**
Possession Other Illegal Substance Bench trial	2.29 (.13)***	.146 (.019) [1.157]***
Jury trial	1.48 (.16)**	.077 (.007) [1.08]

<sup>^</sup> Incarceration model results not shown; Only 19 offenders did not receive incarceration; none of the variables in the model were significant.

<sup>^^</sup> Incarceration model results not shown; only 5 offenders did not receive incarceration.

\* Denotes coefficients significant at .05 or less.

\*\* Denotes coefficients significant at .01 or less.

\*\*\* Denotes coefficients significant at .001 or less. Guilty pleas are the reference category for mode of conviction.

# The logged length included only incarceration cases, and has a two-step hazard correction for selection bias included but not shown.

FIGURE 1: KANSAS—CHANGE IN LIKELIHOOD OF INCARCERATION ASSOCIATED WITH TYPE OF DISPOSITION (SOLID SHADING INDICATES STATISTICAL SIGNIFICANCE)

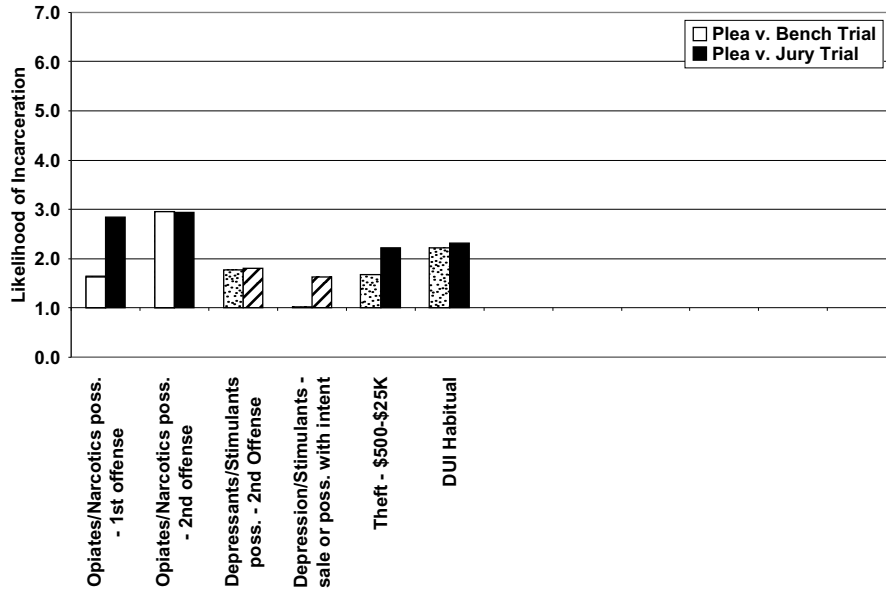
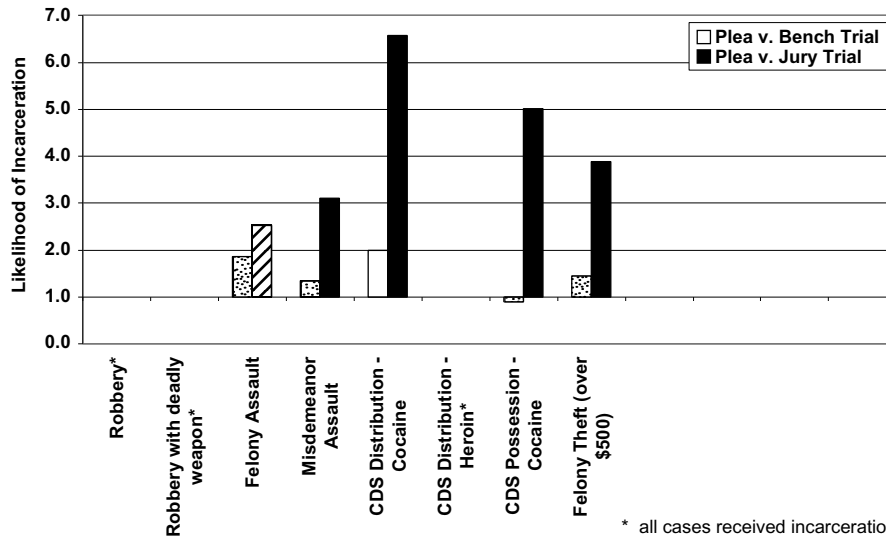


FIGURE 2: MARYLAND—CHANGE IN LIKELIHOOD OF INCARCERATION ASSOCIATED WITH TYPE OF DISPOSITION (SOLID SHADING INDICATES STATISTICAL SIGNIFICANCE)



\* all cases received incarceration

FIGURE 3: MINNESOTA—CHANGE IN LIKELIHOOD OF INCARCERATION ASSOCIATED WITH TYPE OF DISPOSITION (SOLID SHADING INDICATES STATISTICAL SIGNIFICANCE)

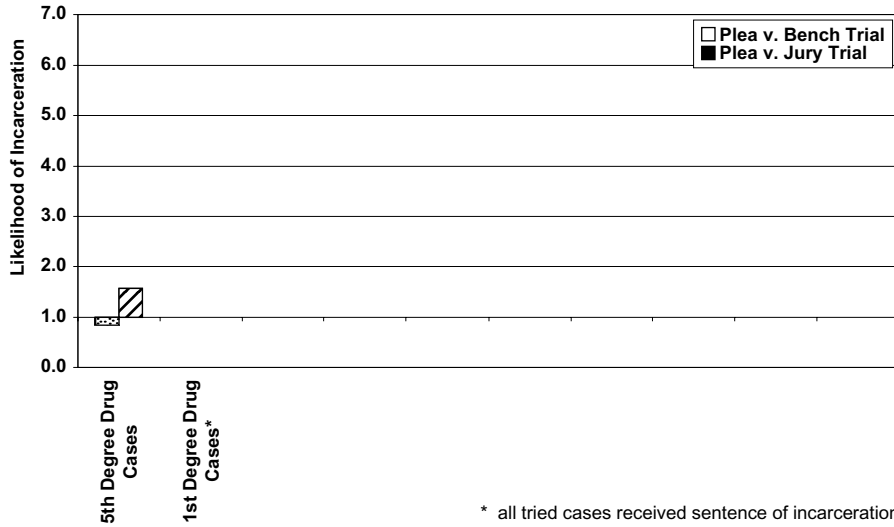


FIGURE 4: PENNSYLVANIA—CHANGE IN LIKELIHOOD OF INCARCERATION ASSOCIATED WITH TYPE OF DISPOSITION (SOLID SHADING INDICATES STATISTICAL SIGNIFICANCE)

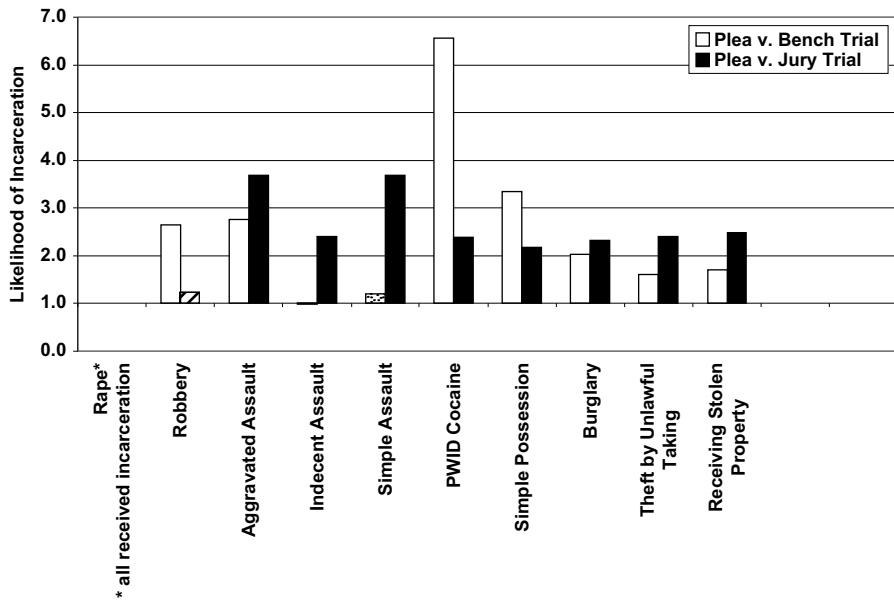




FIGURE 5: WASHINGTON—CHANGE IN LIKELIHOOD OF INCARCERATION ASSOCIATED WITH TYPE OF DISPOSITION (SOLID SHADING INDICATES STATISTICAL SIGNIFICANCE)

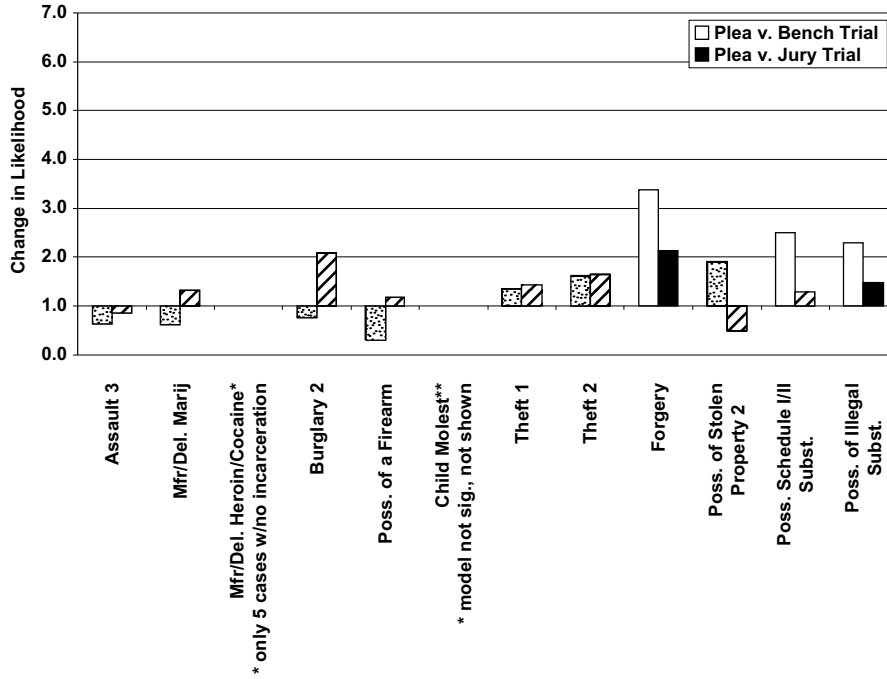


FIGURE 6: KANSAS—CHANGE IN SENTENCE LENGTH ASSOCIATED WITH TYPE OF DISPOSITION (SOLID SHADING INDICATES STATISTICAL SIGNIFICANCE)

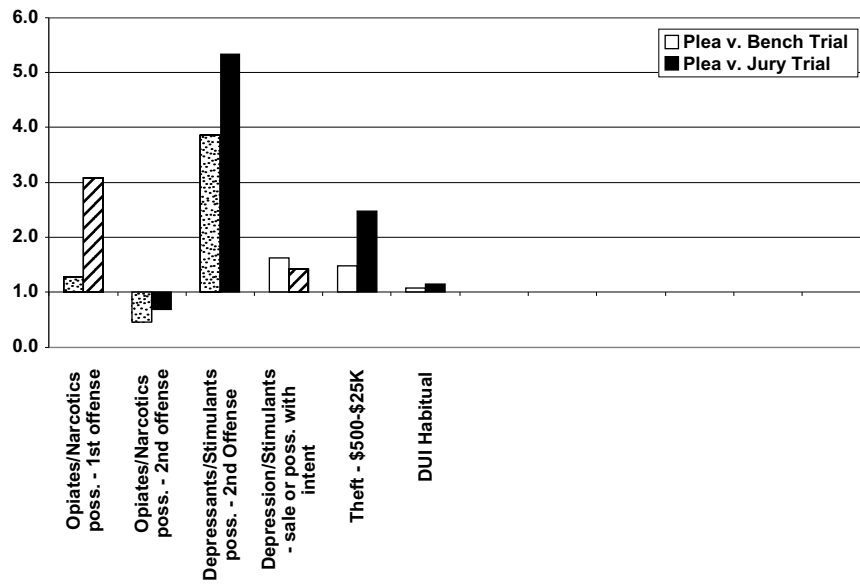


FIGURE 7: MARYLAND—CHANGE IN SENTENCE LENGTH ASSOCIATED WITH TYPE OF DISPOSITION (SOLID SHADING INDICATES STATISTICAL SIGNIFICANCE)

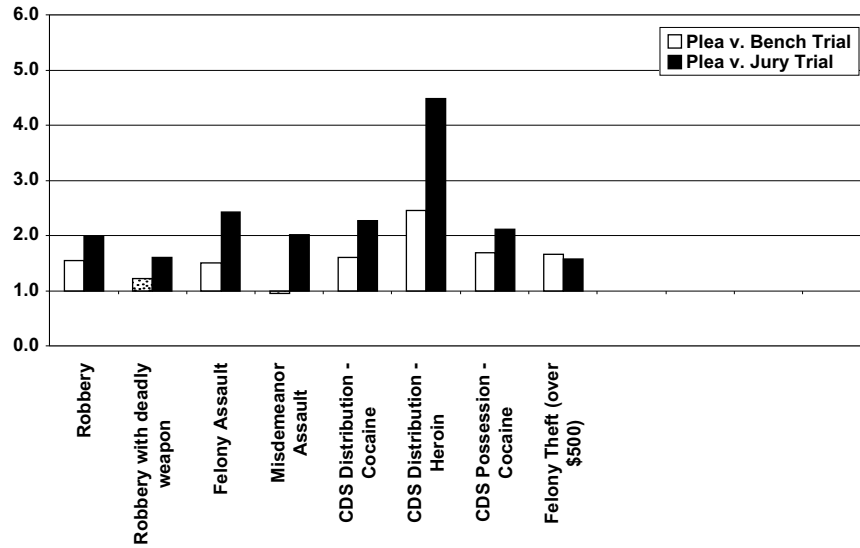


FIGURE 8: MINNESOTA—CHANGE IN SENTENCE LENGTH ASSOCIATED WITH TYPE OF DISPOSITION (SOLID SHADING INDICATES STATISTICAL SIGNIFICANCE)

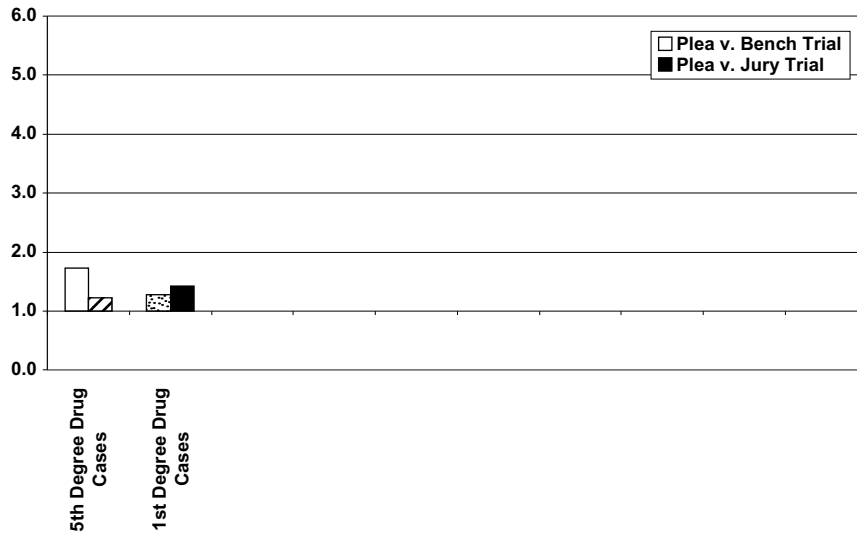


FIGURE 9: PENNSYLVANIA—CHANGE IN SENTENCE LENGTH ASSOCIATED WITH TYPE OF DISPOSITION (SOLID SHADING INDICATES STATISTICAL SIGNIFICANCE)

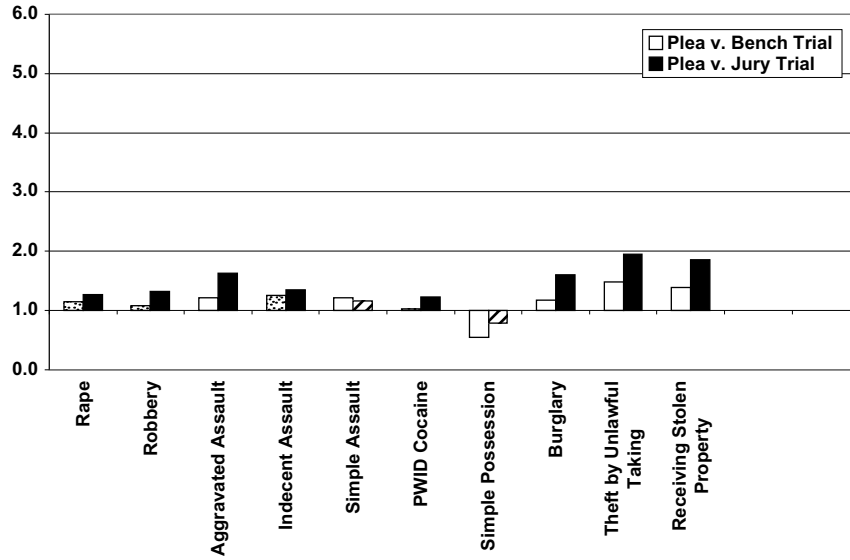
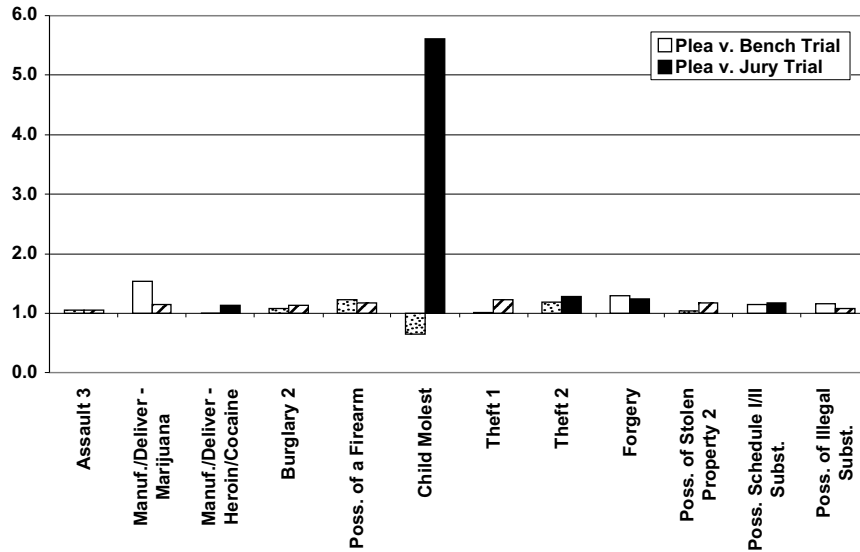


FIGURE 10: WASHINGTON—CHANGE IN SENTENCE LENGTH ASSOCIATED WITH TYPE OF DISPOSITION (SOLID SHADING INDICATES STATISTICAL SIGNIFICANCE)



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