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Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges

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Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges

*Shari Seidman Diamond & Jessica M. Salerno**

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INTRODUCTION

All court observers agree that the modern era has brought a dramatic decline in jury trials, both civil and criminal.¹ The explanations for that decline are far more ambiguous, in part because commentators offer so many possible explanations. To evaluate these sources of decline and to assess what changes might slow down or reverse the disappearance of the American jury trial, we conducted a national survey of attorneys and judges.² The survey was designed to investigate how legal professionals who have firsthand experience with the decisions that lead to or away from

1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEG. STUD. 459 (2004); SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016).

2. This Article reports on results from a survey conducted by the authors at the request of the ABA Commission on the American Jury. The materials contained herein, including the analysis of the results, represent the views of the authors and should not be construed as the views of the American Bar Association or the ABA Commission on the American Jury. Further, nothing contained herein is to be considered as the rendering of legal advice, and readers are responsible for obtaining such advice from their own legal counsel.

jury trials explain the reduction in jury trials in recent years. This Article describes the results from this national survey of 1,460 legal professionals, both attorneys and judges.

Part I reviews the evidence for the disappearing American jury trial and discusses the range of reasons that have been offered for the decline. Part II describes the 1,460 attorneys and judges who participated in the survey. Parts III through VI use the survey responses to probe how respondents viewed the potential sources of the declining rate of the jury trial.

Part III shows that neither judges nor attorneys viewed either lack of attorney confidence or lack of attorney competence as deterrents to trial. In contrast, respondents, particularly judges, viewed litigant preference as a driver toward settlement rather than trial. Part IV describes how respondents compared jury trials with other case-resolution procedures. They ranked jury trials as less predictable, slower, and less cost-effective than alternative procedures like mediation, arbitration, and bench trials. Nonetheless, they saw jury trials, second only to mediation in civil trials, as the fairest procedure and the one they preferred most. This pattern suggests that perceived risk, costs, and delay deter the use of jury trials despite their attractiveness on other important dimensions. Part V examines potential system effects on the reduction of jury trials. The dominant perceived sources of decline in civil trials were damage caps and mandatory binding arbitration, with increased summary judgment viewed as having a more moderate effect. On the criminal side, the dominant perceived source of decline was mandatory minimums, with defense attorneys viewing sentencing guidelines and the bail system as additional drivers of reduced jury trials. Respondents did not see judicial decisions like *Daubert* or increased motions to dismiss as influential in reducing jury trial rates. Part VI considers how respondents weighed in on the role played by a potential source of the drop in trials that has received little prior attention: the existence and sources of pressure on litigants to settle or plead, rather than go to trial. In addition to the litigant's own attorney, respondents perceived judges and mediators in civil cases as the major sources of pressure. In criminal cases, defense attorneys perceived pressure as coming from themselves, but they identified the judge as a close second in exerting pressure on the defendant.

Part VII covers respondents' evaluation of whether jury trials are worth the cost associated with them. The answer was resoundingly affirmative from the attorneys and judges in both criminal and civil cases. Based on the survey results, this Article suggests a series of steps that should be taken to reverse the recent loss of jury trials. Finally, the Article

concludes with observations about what will be lost if the health of the jury system is not restored.

I. THE DISAPPEARING JURY TRIAL AND POTENTIAL REASONS FOR THE DECLINE³

The number of jury trials has dropped so dramatically in recent years in both federal and state courts that the jury trial is an exceptional rather than a commonplace outcome.⁴ Although civil case filings in federal courts, where the data are most reliable, have increased fourfold since the early 1960s, the percentage of civil cases disposed of by jury trial decreased from approximately 5.5% in 1962 to 1.2% by 2002 and to 0.8% by 2013.⁵ Likewise, the percentage of federal criminal cases disposed of by jury trial decreased from approximately 8.2% in 1962 to less than 5% in 2002 and to 3.6% by 2013.⁶ In states that maintain accurate records of bench and jury trials, jury trial rates also declined. From 1976 through 2002, civil jury trial rates fell from 1.8% to 0.6% in courts of general jurisdiction in the 22 most populous states, while felony jury trial rates declined from 3.4% to 1.3%.⁷ Bench trials have not taken the place of jury trials. Rather, the trial itself has been disappearing.⁸

In 2001, the American Bar Association convened a symposium for academics and practitioners to examine the causes of declining jury trial rates. The participants at the symposium identified a number of potential factors for civil cases. One factor was the emergence of alternative dispute resolution (ADR) procedures. Some forms of ADR offer a formal process in which a neutral mediator ostensibly can facilitate settlement negotiations by designing a more mutually agreeable case outcome sooner and at less cost than a jury trial would produce. Arbitration offers a quasi-adversarial process in which litigants present information about their respective positions to a privately retained expert, usually a lawyer, who then decides the case based on established legal principles. Many courts offer ADR on either a voluntary or mandatory basis.

3. See Paula Hannaford-Agor, *Jury System Management in the 21st Century: A Perfect Storm of Fiscal Necessity and Technological Opportunity*, in *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 505 (Peter M. Koelling ed., 8th ed. 2016); Shari Seidman Diamond & Mary R. Rose, *The Contemporary American Jury*, 14 ANN. REV. L. & SOC. SCI. 239 (2018).

4. Galanter, *supra* note 1, at 459.

5. *Id.* at 462–63; THOMAS, *supra* note 1, at 2.

6. Galanter, *supra* note 1, at 493; THOMAS, *supra* note 1, at 2.

7. THOMAS, *supra* note 1, at 2.

8. Galanter, *supra* note 1.

In addition to court-annexed ADR, many commercial litigants began including binding arbitration clauses in standard contracts. Initially, litigants implemented these clauses on a peer-to-peer basis between parties with relatively equal bargaining power, as a way for sophisticated litigants to ensure reasonably expeditious resolutions of any disputes that might arise in the future and to enable them to keep the results of the resolutions private. Increasingly, however, such clauses have become standard in a wide variety of employment and consumer contracts, such as credit card agreements, cellular telephone agreements, utility contracts, and residential leases.⁹ Although some courts initially ruled that binding arbitration clauses were contracts of adhesion and thus unenforceable under state law, more recent case law from the U.S. Supreme Court has greatly expanded the applicability of the Federal Arbitration Act to preempt state law in cases involving interstate commerce.¹⁰ The push by employers and other commercial actors to include arbitration clauses in their contracts appears to be rational. On average, workers who pursue legal claims through arbitration are less likely to prevail, and they receive smaller awards than those who pursue employment claims in court.¹¹ What is key about this trend toward arbitration is that it explicitly deprives potential litigants of the right to a formal public trial by a jury or a judge.

A number of U.S. Supreme Court cases have interpreted the Federal Rules of Evidence and the Federal Rules of Civil Procedure in ways that have tended to shift decision-making on factual issues from juries to district court judges. In a trio of cases decided between 1993 and 1999, the Court responded to concerns about the reliability of expert evidence by endorsing a judicial-gatekeeping requirement.¹² Historically, assessments of witness credibility and the weight to be accorded to expert evidence were the sole responsibility of the fact-finder at trial. The *Daubert* trilogy interpreted Federal Rule of Evidence 702, which governs the admissibility of expert opinion as trial testimony, to require trial judges to make a

9. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/X37C-HM5F>].

10. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

11. Katherine V.W. Stone & Alexander J.S. Colvin, *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights*, ECON. POL'Y INST. (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic> [<https://perma.cc/GW46-K4VC>].

12. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 597 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1996); *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

pretrial determination that the expert's evidence satisfies established scientific principles before it may be admitted at trial. Many but not all states followed the Supreme Court's lead and adopted the *Daubert* test. Because most civil cases and a large proportion of criminal cases now rely heavily on expert testimony, many commentators viewed the decisions as a substantial infringement on the right to a jury trial under the Sixth and Seventh Amendments.¹³

Commentators have also suggested that the increased use of dispositive motions, especially summary judgment motions, to decide cases pretrial has reduced the rates of civil jury trials in federal courts. Summary judgment is a procedural option that authorizes the trial judge to determine whether "a reasonable jury could return a verdict for the nonmoving party."¹⁴ In other words, the trial judge "decides whether factual inferences from the evidence are reasonable, applies the law to any 'reasonable' factual inferences, and as a result makes the determination as to whether a claim could exist."¹⁵ Although scholars debate why summary judgments have increased in the modern era, approximately 19% of cases filed in federal court are now disposed of by summary judgment.¹⁶ State courts, however, have not adopted the federal approach, and summary judgments account for only 1% of civil dispositions in state courts.¹⁷

Another area of civil case law that has altered the right to trial by jury involves the standard for granting motions to dismiss for failure to state a claim on which relief can be granted.¹⁸ For most of the 20th century, pleading requirements in federal court and in most state courts required only "a short and plain statement of the claim showing that the pleader is entitled to relief."¹⁹ In a pair of cases in 2007 and 2009, the U.S. Supreme Court changed the standard for deciding a motion to dismiss. Previously, federal trial courts had to assume that the claim alleged in the pleadings

13. Brandon Boxler, *Judicial Gatekeeping and the Seventh Amendment: How Daubert Infringes on the Constitutional Right to a Civil Jury Trial*, 14 RICH. J. L. & PUB. INT. 479 (2011).

14. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

15. Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 143 (2007).

16. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEG. STUD. 861 (2007).

17. Paula Hannaford-Agor et al., *The Landscape of Civil Litigation in State Courts*, NAT'L CTR. FOR ST. CTS. 19–23 (2015), https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/94VB-9REU>].

18. FED. R. CIV. PROC. 12(b)(6).

19. *Id.* at 8(a)(2).

was true when considering a motion to dismiss. In *Bell Atlantic Corp. v. Twombly*, the Court introduced a new requirement, namely, that trial courts consider the plausibility of the claim, stating that there must be “enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claim].”²⁰ In *Ashcroft v. Iqbal*, the Supreme Court clarified the role of the trial court in making such determinations by permitting judges to “draw on [their] judicial experience and common sense.”²¹ Critics of the *Twombly* and *Iqbal* decisions allege that, like summary judgment practice, the standards for deciding motions to dismiss have usurped litigants’ rights to have the merits of their claims decided by a jury.²²

Some observers have also attributed the drop in civil jury trials to a variety of tort reform initiatives. Statutory changes such as caps on damage awards, especially for general compensatory damages like pain and suffering and for punitive damages, have reduced the ability of litigants and their attorneys to recover substantial awards of compensatory and punitive damages.²³ Such limits potentially encourage early settlement or may even lead potential claimants to forgo pursuing their claims entirely. Many of these initiatives received favorable receptions in state and federal legislatures in response to sophisticated public relations campaigns by organizations such as the U.S. Chamber of Commerce, the American Tort Reform Association, the American Legislative Exchange Commission, and other pro-business entities that claimed the urgent need to curb unpredictable, irrational, and excessive jury verdicts. There is little support for that claim, but as Marc Galanter so wisely observed, “[L]itigants respond not to what is happening in the courts but to what they *believe* is happening.”²⁴

Criminal jury trial rates have also declined in both state and federal courts. Plea bargaining has become the primary, almost exclusive, outcome for a criminal charge. As Justice Kennedy recognized in *Lafler v. Cooper*, plea bargaining dominates the criminal justice system: “Ninety-seven percent of federal convictions and ninety-four percent of state

20. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

21. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

22. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

23. For example, Ohio caps non-economic damages at either \$250,000 or three times the amount of economic damages, whichever is greater, with a maximum of \$350,000 per plaintiff and \$500,000 per occurrence. OHIO REV. CODE ANN. § 2315.18 (West 2019).

24. Galanter, *supra* note 1, at 517.

convictions are the result of guilty pleas.”²⁵ This pattern led him to conclude that “criminal justice today is for the most part a system of pleas, not a system of trials.”²⁶ The most commonly cited cause of the drop in jury trials in criminal cases has been the development of sentencing guidelines in the 1980s and 1990s in many states. Most states have followed the approach of the federal sentencing guidelines, which provide a downward departure for defendants who accept responsibility for the offense as part of a plea agreement.²⁷ Many commentators have characterized this practice as a “trial penalty” imposed on defendants who opt to exercise their right to a trial by jury.²⁸ For example, in 2012, the average sentence received by a federal drug offender after trial was three times higher than the average sentence received after a guilty plea: 16 years versus 5 years and 3 months.²⁹ Evidence indicates that judges in state courts, too, impose lower penalties on defendants who plead guilty and waive their right to a trial.³⁰

The mandatory minimums for some federal offenses also increase the incentive to plead guilty to a lesser charge. Over one-fifth of all federal offenders in 2016 were convicted of an offense carrying a mandatory minimum penalty.³¹ In addition, at both the state and federal levels, the number of diversionary programs for nonviolent offenders that often make eligibility to the program dependent on the willingness to accept

25. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Justice Kennedy was referring to the rates of pleas among all convictions, rather than the rates of pleas among all indictments, but in light of the fact that trials are far more likely to result in convictions than acquittals, the plea bargain is the dominant outcome. *Id.*

26. *Id.*

27. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1.(a) (U.S. SENT’G COMM’N 2018) (“If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.”).

28. See, e.g., *An Offer You Can’t Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> [<https://perma.cc/PZ27-S8D5>].

29. LAURA I. APPLEMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* (2015).

30. J. Vincent Aprile II, *Judicial Imposition of the Trial Tax*, 29 CRIM. JUST. 30 (2014); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 90 (2005) (finding an average trial penalty of 44.5 months in state felony cases).

31. U.S. SENTENCING COMM’N, *AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* 29 (2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf [<https://perma.cc/N86A-BQHR>].

responsibility for the underlying offense create another pathway leading away from trial.³²

It is not clear which of these possible explanations has significantly contributed to the reduction in jury trials. Potentially, they have all influenced how parties evaluate the desirability of a jury trial and the extent to which procedural obstacles block access. This Article's survey provides an opportunity to learn how attorneys and judges gauge the impact of the factors that can affect the probability of a jury trial. The respondents are the lawyers whose decisions and recommendations to their clients regarding the desirability of a jury trial may drive the trend toward fewer jury trials and the judges who have a front row seat when parties decide to forgo a jury trial and whose rulings may affect the availability of a jury trial to the litigants.

II. SURVEY METHODOLOGY AND SAMPLE CHARACTERISTICS

We solicited participation from attorneys and judges across the country, inviting them to go to a website where they could complete the survey anonymously. In total, 1,460 respondents participated: 173 judges, 70% state and 30% federal, and 1,282 attorneys, 63% who handle primarily civil cases, 33% who handle primarily criminal cases, and 4% who did not indicate whether they primarily handle civil or criminal cases. The remaining 5 respondents could not be categorized as judges or attorneys. Respondents who indicated how they learned about the survey ($n=939$) named a variety of sources, including the American Bar Association (20%); state or local bar associations (7%); other professional associations and organizations like the American Board of Trial Advocates and the American College of Trial Lawyers (51%); and contacts, typically by email, from colleagues or others (19%). The remaining respondents (3%) learned about the survey from other sources, including legal publications, social media, and conferences.

The judges in the sample averaged 14 years on the bench, with an average of 21 years of experience as a trial attorney. The attorneys averaged 24 years of experience. The respondents do not represent a random sample of attorneys and judges in the U.S., but the sample does consist of a heterogeneous group of on-the-ground sources drawn from a range of jurisdictions. Although 45% of the sample came from five of the most populous states—Arizona, California, Illinois, Indiana, and Texas—

32. See, e.g., *Court Diversion FAQ*, VT. ASS'N CT. DIVERSION PROGRAMS, <https://vtcourtdiversion.org/court-diversion/faq/> [<https://perma.cc/FEQ7-JBPX>].

which account for 29% of the population of the country, respondents came from every state and the District of Columbia.

III. WHY CASES DO NOT GO TO TRIAL: ATTORNEY ABILITIES AND LITIGANT PREFERENCES

The survey asked both judges and attorneys about attorney abilities and litigant preferences as potential sources of influence on the decision to go to trial.

A. Judges

The survey asked the judicial respondents to indicate their extent of agreement or disagreement with four potential influences on the decision to go to trial: whether attorneys generally feel confident in going to trial, whether attorneys generally are competent enough to go to trial, whether the typical case does not go to trial because of costs, and whether litigants generally would rather settle than go to trial.³³ On the first three potential influences, the average responses fell near 3.50, the midpoint of the scale, between somewhat disagree (3) and somewhat agree (4), with the following values: whether attorneys feel confident in going to trial (3.45), whether attorneys are competent enough to go to trial (4.03), and whether cost prevents the typical case from going to trial (3.85). Agreement levels did not vary with the caseload of the judge, whether criminal, civil, or both.

By contrast, the judges' responses averaged 5.31, between agree and strongly agree, in response to the statement, "Generally, litigants would rather settle than go to trial." In total, 89% of the judges agreed or strongly agreed with that statement. This result was in contrast to between 16% and 35% of judges who agreed or strongly agreed with the remaining three statements. The caseload of the judge somewhat affected agreement with this statement.³⁴ Judges with a primarily civil caseload tended to agree significantly more (5.55) than judges who hear both civil and criminal cases (5.15).³⁵ Those with a primarily criminal caseload did not differ from the other two groups of judges (5.33).

To examine whether court vacancies were creating backlogs that make it more challenging to schedule jury trials, the survey asked judges whether there were vacancies in their court. Of the respondents, 40% said

33. The judges responded using a 6-point scale, with 1 meaning "strongly disagree," 2 "disagree," 3 "somewhat disagree," 4 "somewhat agree," 5 "agree," and 6 "strongly agree."

34. $F = 3.06, p < .01$.

35. $p < .05$.

there were vacancies, but most of those judges (79.2%) said that the vacancies had no effect on the likelihood of a jury trial; 16.7% of those judges reported that jury trials somewhat or moderately decreased as a result, and 4.2% said the vacancies had made a jury trial more likely.

B. Attorneys

The survey asked the attorney respondents the extent of their agreement or disagreement with a similar version of the three questions that judges were asked about influences on the decision to go to trial: whether they feel confident about taking a case to trial, whether in general they find other lawyers competent to take cases to trial, and whether in general their clients would rather settle than go to trial. The same 6-point scale that was used for the judges also measured the extent of attorney agreement or disagreement.

The similarities and differences of these responses are illuminating. Although judges and attorneys gave identical responses in their evaluations of actual lawyer competence—4.03 by judges and 4.04 by attorneys—attorneys, not surprisingly, reported feeling more personal confidence in going to trial (5.01) than judges saw in the attorneys in general (3.45). The difference may reflect the common overconfidence effect, in that people tend to overestimate their own abilities.³⁶ Alternatively, it may accurately characterize the greater confidence of the experienced attorney respondents, who averaged 24 years in practice.

Table 1 shows the perceived litigant preferences toward trial versus settlement for both judges and attorneys. The other striking difference between the judges and attorneys was in their assessment of the preference of litigants to settle rather than to go to trial.

36. Don A. Moore & Paul J. Healy, *The trouble with overconfidence*, 115 PSYCH. REV. 502 (2008).

Table 1. Perceived Attitude of Litigants toward Trial versus Settlement

Agreement or Disagreement with the statement:
For judges: “Generally, litigants would rather settle than go to trial.”
For attorneys: “In general, my clients would rather settle than go to trial.”

On both measures, (1 means “strongly disagree,” and 6 means “strongly agree”; neutral on the scale—neither agree nor disagree—would be 3.5)

Respondent Profession	Av. response	% agree or strongly agree
Judges (n=109)	5.31	89%
Attorneys (n=955)	4.71	63.6%
Civil attorneys (n=624)	4.80	67.4%
Representing: Plaintiffs (n=262)	4.99 _{ab}	72.9%
Defendants (n=229)	4.52 _d	59.4%
Both Plaintiffs & Defendants (n=133)	4.91 _{bc}	70.7%
Criminal attorneys (n=331)	4.54	56.5%
Prosecutors (n=197)	4.53 _d	53.3%
Defense attorneys (n=134)	4.56 _{cd}	61.2%

Note: Different subscripts denote significant differences at $p < .05$. Means that have the same subscript are not significantly different from each other at $p < .05$. The *ns* in this table and in the figures that follow indicate how many respondents answered the question.

A majority of respondents agreed that litigants prefer to settle, but agreement was significantly greater among judges than among attorneys.³⁷ While 63.6% of attorneys agreed or strongly agreed with that preference, the corresponding agreement among judges was 89%, with the averages being 5.31 for judges, that is, between “agree” and “strongly agree,” and 4.71 for attorneys, between “somewhat agree” and “agree.” The belief by both judges and attorneys that litigants prefer to settle may be one reason why so few cases go to trial. Whether or not the perception is accurate in describing what most litigants want, it may explain why judges and attorneys encourage—or pressure—litigants to waive trial and accept a settlement or a plea.

Although all groups of attorneys, on average, agreed at least somewhat that litigants prefer settlement to trial, responses differed based on whether the attorney handled civil versus criminal trials and, for civil attorneys, who their clients were.³⁸ Civil attorneys representing defendants did not agree as strongly that their clients prefer settlement to trial, perhaps because settlement in a civil case generally means the defendant must pay some amount in damages.

In addition to the perceived preferences of litigants, other features of trials may motivate judges and attorneys to encourage litigants to waive jury trials and opt for other ways to resolve their cases. These include the alternative methods of case resolution that have been offered, and sometimes mandated, in recent years.

IV. PERCEPTIONS OF CASE RESOLUTION PROCEDURES

Next, the survey examined perceptions of the four primary case resolution procedures used in civil cases: arbitration, mediation, jury trial, and bench trial. For criminal cases, the questions compared reactions to bench and jury trials.

A. Civil Attorneys' and Judges' Rankings of Case Resolution Procedures

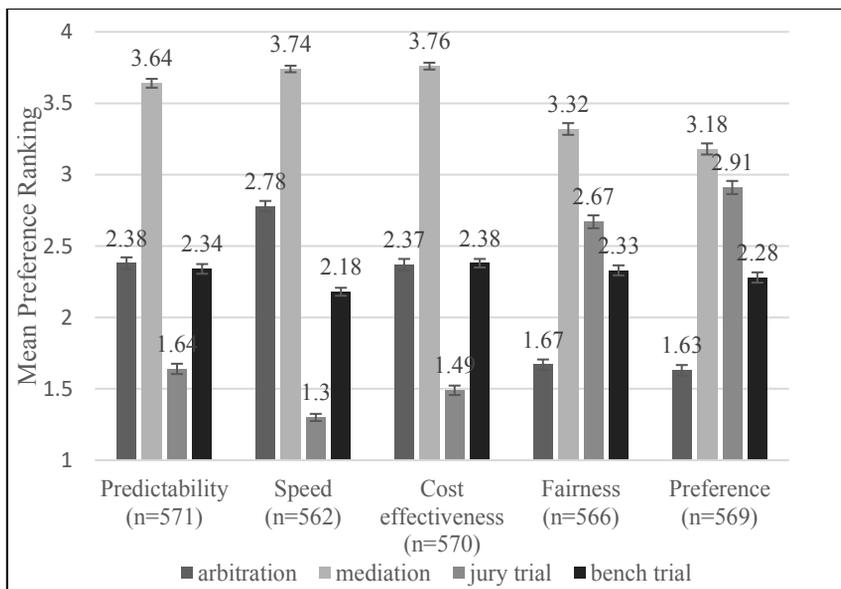
The survey asked civil attorneys and judges to rank four procedures used to resolve civil cases—arbitration, mediation, jury trials, and bench trials—based on their predictability, speed, cost effectiveness, fairness, and the respondent's overall preference for the procedure. The relative rankings range from 1 (least predictable, slowest, least cost-effective, least fair, and least preferred) to 4 (most predictable, fastest, most cost-effective, fairest, and most preferred). These rankings required

37. $F = 31.12, p < .0001$.

38. $F = 12.41, p < .0001$.

respondents to make trade-offs. That is, a higher ranking for one procedure necessarily meant a lower ranking for some other procedure. The overall results appear in Figure 1.

Figure 1. Rankings of Civil Case Resolution Procedures³⁹



Note. Error bars denote standard errors.

Mediation ranked significantly higher than the three other procedures in predictability, speed, cost effectiveness, and fairness. Respondents also personally preferred it significantly to both arbitration and bench trials, although not to jury trials. This overall pattern suggests one reason why voluntary forms of alternative dispute resolution are popular. If it is possible to resolve a dispute voluntarily through agreement between the parties, then that method of resolution is likely less costly than other alternatives, and that voluntary agreement increases the likelihood that the outcome will be satisfactory to both parties who could otherwise go to

39. The analyses in Figures 1 through 6 include only judges who reported that their docket consisted primarily of civil cases. We excluded judges who said their caseload was “roughly even between Civil and Criminal” because the ranking question did not specify whether the ranking was for civil or criminal cases, and it included arbitration and mediation, which are not relevant procedures in criminal cases.

trial. Successful resolution through mediation is more likely when the parties are not far apart in their evaluation of the value of the case.

Arbitration did not fare as well. Although ranked second on predictability, speed, and cost effectiveness, and tying with bench trials on predictability and cost effectiveness, arbitration dropped to last on fairness and personal preference. The question did not specify whether the arbitration was mandatory, as it often is, but the imposition of a decision by the arbitrator contrasts with the voluntary agreement of mediation and may account for part of the stark difference between reactions to mediation and arbitration. It is unclear whether the same contrast would have occurred if the question had specified that the arbitration was voluntary and non-binding.

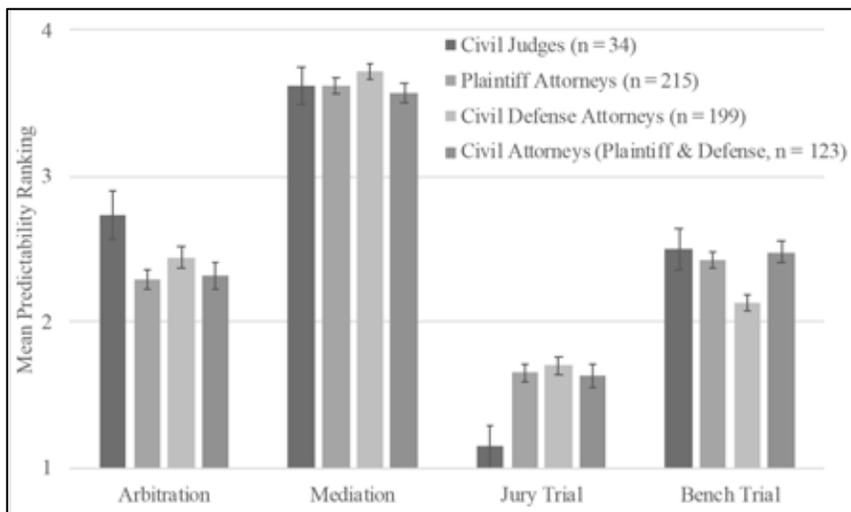
The ranking of bench trials trailed mediation on all measures and trailed arbitration on speed but significantly exceeded arbitration on fairness and general preference of respondents.

How then were jury trials perceived? They ranked lowest on predictability,⁴⁰ speed, and cost effectiveness, but they ranked significantly higher than both arbitration and bench trials in fairness. Further, on personal preference, respondents on average ranked juries at 2.91 out of 4, which is not significantly different from the ranking they gave to mediation (3.18).

We also tested whether the rankings of these features varied depending on who did the rating, comparing four groups of raters: civil judges, plaintiff attorneys, defense attorneys, and civil attorneys who work with both plaintiffs and defendants. There was substantial agreement across groups on the relative ratings of the procedures, but some differences emerged. Figures 2 through 6 show the results for each of the five features, beginning with predictability in Figure 2.

40. It is worth considering what the relatively lower rates of perceived predictability of jury trials mean. One process may be highly predictable but unfair because it is consistently likely to produce a biased result, whereas another may be less predictable because, particularly in the close cases that are more likely to go to trial, it is hard to predict before trial who will prevail because both sides have a chance.

Figure 2. Predictability According to Different Rater Groups



Note. Error bars denote standard errors

When responses were averaged across different rater groups, the case resolution procedures elicited different rankings for predictability.⁴¹ There were, in addition, some differences in the degree to which groups distinguished among the procedures.⁴² Although all groups ranked mediation as the most predictable procedure and juries as least predictable, judges rated arbitration as significantly more predictable than did attorneys who represent only plaintiffs or both plaintiffs and defendants.⁴³ The judges correspondingly ranked jury trials as significantly less predictable than did all other respondent groups.⁴⁴ Defense attorneys ranked bench trials as significantly less predictable than did all other groups.⁴⁵

In summary, there was an overall consensus that mediation is more predictable and jury trials less predictable than other case resolution procedures, with civil judges viewing arbitration as particularly

41. Overall difference by procedure, $F(3, 1692) = 245.92, p < .0001, \eta_p^2 = .31$.

42. Interaction between procedure and rater group, $F(9, 1692) = 3.71, p < .0001, \eta_p^2 = .02$.

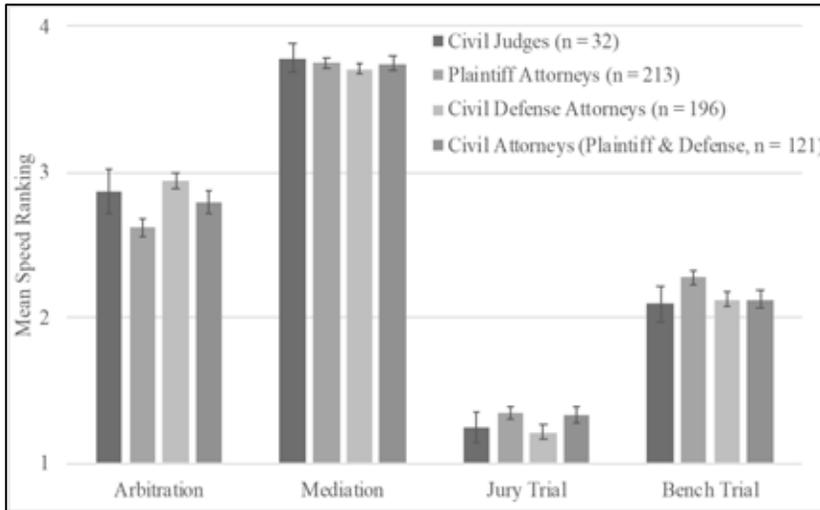
43. $p = .01$.

44. All $ps \leq .004$.

45. All $ps \leq .02$.

predictable and juries as particularly unpredictable, relative to the attorney respondents.

Figure 3. Speed According to different Rater Groups



Note. Error bars denote standard errors.

When responses were averaged across different rater groups, the case resolution procedures elicited different rankings for relative speed.⁴⁶ More specifically, all groups thought that mediation was the fastest, followed by arbitration, then bench trials, and then jury trials as the slowest form of case resolution.

Groups differed modestly on the degree to which they perceived each case resolution as speedy.⁴⁷ Defense attorneys ranked arbitration as significantly faster relative to trials, both bench and jury, than did plaintiff attorneys.⁴⁸ Although all groups ranked the four case resolutions similarly, plaintiff attorneys were more optimistic about the relative speed of bench trials than the other attorney groups.⁴⁹ Further, defense attorneys viewed jury trials as relatively slower than did plaintiff attorneys.⁵⁰

46. Overall difference by procedure, $F(3, 1671) = 574.41, p < .0001, \eta_p^2 = .51$.

47. Interaction between procedure and rater group, $F(9, 1671) = 3.07, p = .001, \eta_p^2 = .02$.

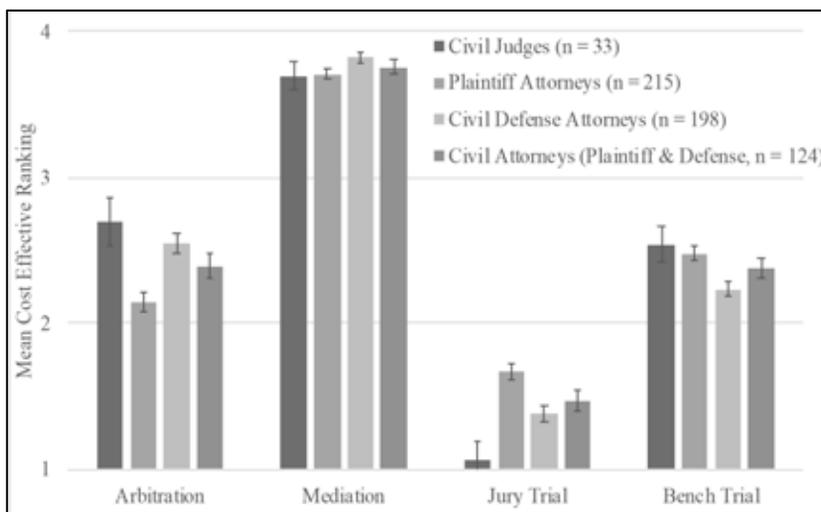
48. $ps < .0001$.

49. $ps \leq .04$.

50. $p = .03$.

In summary, there was a consensus on average that jury trials are slower than other forms of case resolution, with defense attorneys seeing jury trials as particularly slow relative to plaintiff attorneys.

Figure 4. Cost Effectiveness According to Different Rater Groups



Note. Error bars denote standard errors.

As with predictability and speed, when responses were averaged across different rater groups, the case resolution procedures elicited different rankings of their relative cost effectiveness.⁵¹ More specifically, all groups thought that mediation was the most cost-effective, followed by arbitration and bench trials, which ranked similarly. All groups ranked jury trials to be the least cost-effective.

Groups differed somewhat on the degree to which they perceived each case resolution procedure to be cost-effective relative to other procedures.⁵² Plaintiff attorneys viewed arbitration as relatively less cost-effective than did other groups,⁵³ and defense attorneys rated bench trials as relatively less cost-effective than did plaintiff attorneys and judges.⁵⁴ Plaintiff attorneys ranked jury trials to be relatively more cost-effective

51. Overall difference by procedure, $F(3, 1692) = 395.00, p < .0001, \eta_p^2 = .41$.

52. Interaction between procedure and rater group, $F(9, 1692) = 6.38, p < .0001, \eta_p^2 = .03$.

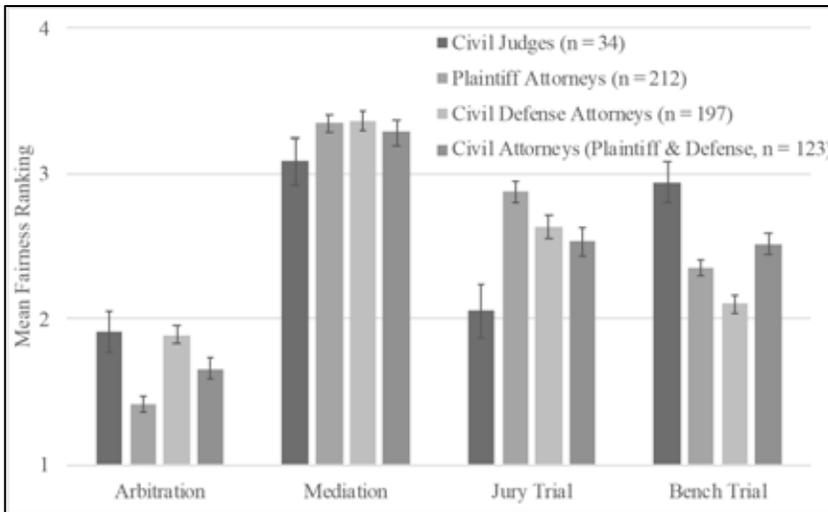
53. $ps \leq .02$.

54. $ps \leq .02$.

than did all other groups,⁵⁵ whereas civil judges ranked jury trials to be relatively less cost-effective than did all other groups.⁵⁶

In summary, there was a consensus on average that jury trials are relatively less cost-effective than other forms of case resolution procedures, although plaintiff attorneys were more positive about the jury's cost effectiveness, and civil judges were particularly skeptical compared to other groups.

Figure 5. Fairness According to Different Rater Groups



Note. Error bars denote standard errors.

Across groups, the average perceived fairness differed for the different procedures, and the order of their ranking differed from the orders for predictability, speed, and cost effectiveness.⁵⁷ More specifically, the respondents ranked mediation as the fairest, but that ranking was followed by jury trials, and then bench trials, with arbitration judged as the least fair of the procedures.

This overall pattern is qualified by the fact that groups differed somewhat in the degree to which they perceived the fairness of each case resolution procedure relative to other procedures.⁵⁸ Plaintiff attorneys

55. $ps \leq .02$.

56. $ps \leq .03$.

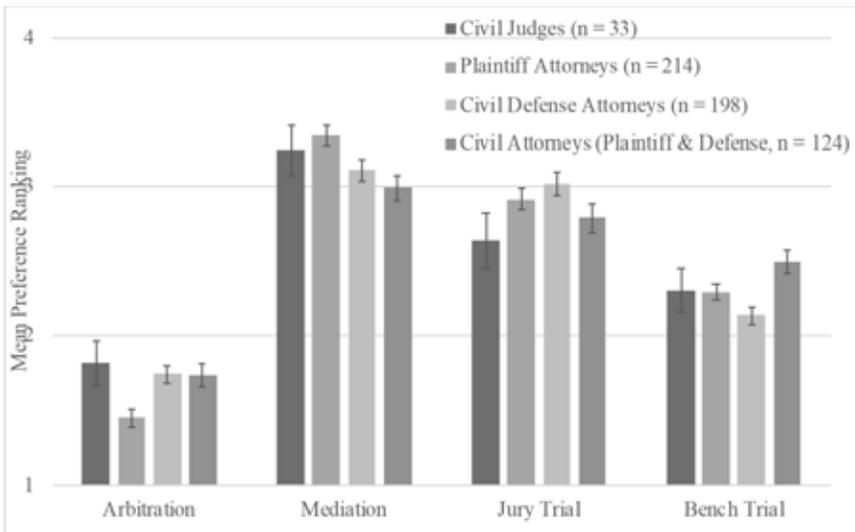
57. Overall difference by procedure, $F(3, 1680) = 113.24, p < .0001, \eta_p^2 = .17$.

58. Interaction between procedure and rater group, $F(9, 1680) = 7.72, p < .0001, \eta_p^2 = .04$.

viewed arbitration as even less fair than did other groups.⁵⁹ Groups did not differ on their relative ranking of mediation. Plaintiff attorneys ranked jury trials to be relatively fairer than did all other groups,⁶⁰ whereas civil judges ranked jury trials to be relatively less fair than did all other groups.⁶¹ Defense attorneys rated bench trials as relatively less fair than did all other groups.⁶² Civil judges ranked bench trials as fairer than other groups did, which may explain the judges' relatively lower ranking for both jury trials and arbitration.

In summary, each group of attorney respondents perceived jury trials as less fair than mediation but fairer than arbitration—and about as fair on average as bench trials. There was variability among the rater groups, however. In contrast to the other groups, judges did not perceive jury trials as fairer than arbitration. Moreover, whereas judges rated bench trials as relatively fairer than jury trials, the attorney groups tended to rate jury trials as fairer than bench trials.

Figure 6. Overall Preferences of Rater Groups



Note. Error bars denote standard errors.

The rankings of preference were more similar to the rankings of fairness than to the rankings of predictability, speed, and cost

59. $ps \leq .01$.

60. $ps \leq .02$.

61. $ps \leq .02$.

62. $ps \leq .002$.

effectiveness. When averaging responses across the rater groups, the different case resolution procedures elicited different preference rankings.⁶³ The order was the same as for perceived fairness. Mediation ranked as the most preferable, followed by jury trials, and then bench trials, with all groups ranking arbitration as their least preferred option.

Although averaging answers within respondent groups produced the same overall ordering of procedure preference for each group, the respondents differed somewhat on the strength of their preference for each method of case resolution.⁶⁴ Plaintiff attorneys ranked mediation as significantly more preferable than did defense attorneys and plaintiff-and-defense attorneys.⁶⁵ All groups ranked jury trials as similarly preferable. Regarding bench trials, attorneys representing both plaintiffs and defendants ranked bench trials as significantly more preferable than did plaintiff attorneys and defense attorneys.⁶⁶ Further, plaintiff attorneys ranked bench trials as significantly more preferable than did defense attorneys.⁶⁷ Although all respondent groups ranked arbitration as least preferable, plaintiff attorneys ranked it as significantly less preferable than did all other groups.⁶⁸

In summary, although the respondents ranked jury trials as the least predictable, slowest, and least cost-effective procedure, attorneys on average viewed jury trials as second only to mediation as the fairest form of case resolution. All respondent groups, both judges and attorneys, on average viewed jury trials as second only to mediation as the most preferred form of case resolution.

B. Ranking of Predictability, Speed, Cost Effectiveness, and Fairness as Predictors of Overall Preference

To further understand what drives a preference for jury trials, we tested the legal professionals' rankings of the predictability, speed, cost effectiveness, and fairness of jury trials as simultaneous predictors of overall preference for jury trials.

The overall model explained 62% of the variance in overall preference ratings.⁶⁹ Participants' ranking of the fairness of jury trials was the

63. Overall difference by procedure, $F(3, 1695) = 120.22, p < .0001, \eta_p^2 = .17$.

64. Interaction between procedure and rater group, $F(9, 1695) = 3.72, p < .0001, \eta_p^2 = .02$.

65. $ps \leq .02$.

66. $ps \leq .04$.

67. $p \leq .04$.

68. $ps \leq .02$.

69. $F(4, 557) = 85.76, p < .0001$.

strongest predictor of their overall preference for jury trials.⁷⁰ The fairer they thought jury trials were, the more likely they were to rank them as more preferable overall. Their ranking of the predictability of jury trials was also a significant but weaker predictor of their preference for jury trials.⁷¹ Ratings of speed and cost effectiveness were unrelated to overall preferences for jury trials.⁷²

In summary, overall preference for jury trials appears to be driven by concerns about procedural and distributive justice,⁷³ such as fairness and predictability, and not by practical concerns, such as speed and cost.

C. Criminal Attorneys' and Judges' Rankings of Case Resolution Procedures

The survey also asked attorneys and judges with criminal trial experience to rank a set of potential case resolution procedures in terms of predictability, speed, cost effectiveness, fairness, and overall preference. However, given that attorneys and judges in criminal trials typically do not deal with arbitration or mediation, the analysis included only their rankings of whether bench trials or jury trials were higher on each factor. The analysis also tested whether these rankings depended on who did the ranking, comparing judges, prosecutors, and defense attorneys. Figure 7 shows the rankings on the four factors by rater group. Figure 8 shows the overall preference rankings of each rater group.

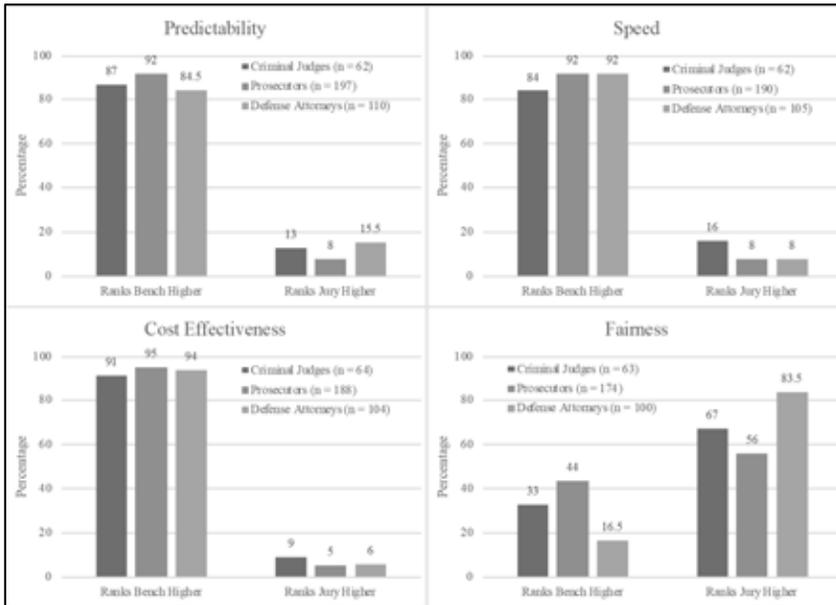
70. $B = .53, SE = .04, t = 14.12, p < .0001$.

71. $B = .15, SE = .05, t = 2.99, p = .003$.

72. Speed: $B = .04, SE = .07, t = .58, p = .56$; cost effectiveness: $B = .05, SE = .05, t = 1.04, p = .30$.

73. Kjell Törnblom & Riël Vermunt, *Towards an Integration of Distributive Justice, Procedural Justice, and Social Resource Theories*, 20 SOC. JUST. RES. 312 (2007).

Figure 7. Rankings on Predictability, Speed, Cost Effectiveness, and Fairness by Rater Groups



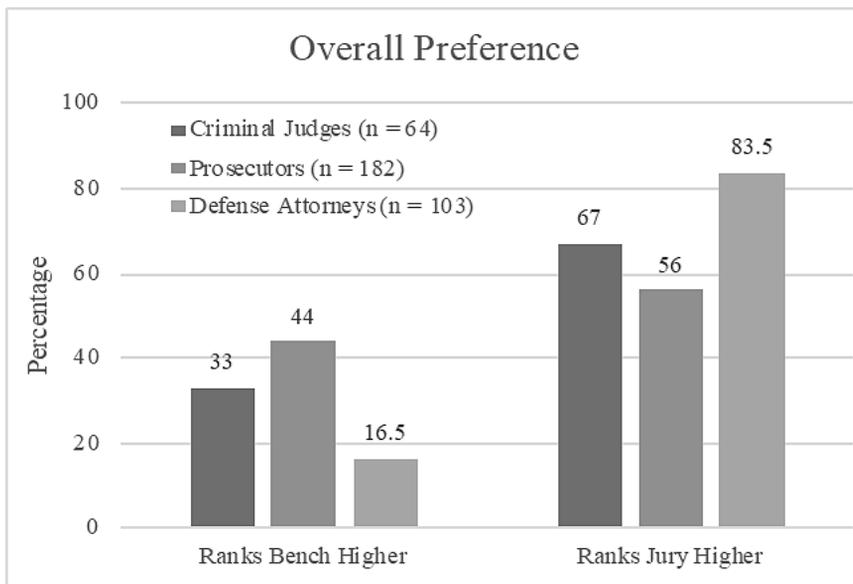
The vast majority of the respondents who dealt with criminal cases ranked bench trials as more predictable, speedier, and more cost-effective than jury trials, and this result did not differ by group.⁷⁴ All groups ranked juries as fairer than bench trials, but the extent of the advantage they gave to the jury on fairness depended on who did the ranking.⁷⁵ More specifically, defense attorneys ranked jury trials as fairer than did criminal judges and prosecutors.⁷⁶ Judges and prosecutors did not differ. As with civil trials, a positive judicial evaluation of the bench trial may reflect the natural tendency for judges to view themselves in a positive light, but despite that inclination, two-thirds of the judges viewed the jury trial as fairer than the bench trial in criminal cases.

74. Predictability: $\chi^2(2, N = 396) = 4.08, p = .13$; speed: $\chi^2(2, N = 357) = 4.25, p = .12$; cost effectiveness: $\chi^2(2, N = 356) = 1.40, p = .50$.

75. $\chi^2(2, N = 337) = 22.08, p < .001$.

76. Defense attorneys versus judges: $\chi^2(1, N = 163) = 11.43, p = .001$; defense attorneys versus prosecutors: $\chi^2(1, N = 274) = 20.66, p < .0001$.

Figure 8. Rankings on Preference by Rater Groups



As with the rankings on fairness, all three groups preferred jury trials to bench trials, but the degree of that preference depended on the group.⁷⁷ More specifically, defense attorneys preferred jury trials more than did judges and prosecutors.⁷⁸ Judges and prosecutors did not differ significantly.

In summary, as with civil trials, although the majority of criminal attorneys and judges ranked jury trials as less predictable, slower, and less cost-effective than bench trials, they viewed them as fairer. The majority of criminal attorneys and judges preferred a jury trial to a bench trial, and this preference was strongest among defense attorneys.

D. Ranking of Predictability, Speed, Cost Effectiveness, and Fairness as Predictors of Overall Preference

To evaluate which factors were driving the overall preference of respondents for jury trials, a regression analysis tested the legal professionals' ranking of the predictability, speed, cost effectiveness, and

77. $\chi^2(2, N = 349) = 22.18, p < .001$.

78. Defense attorneys versus judges: $\chi^2(1, N = 167) = 5.97, p < .01$; defense attorneys versus prosecutors: $\chi^2(1, N = 285) = 22.08, p < .0001$.

fairness of jury trials as simultaneous predictors of overall preference for jury trials.

The overall model explained 17% of the variance in overall jury preference ratings, which was statistically significant.⁷⁹ Participants' ranking of the fairness of jury trials was the strongest and only significant predictor of their overall preference for jury trials.⁸⁰ If a respondent thought that jury trials were fairer than bench trials, they were 5.71 times more likely to prefer a jury trial than a bench trial. None of their opinions about other features such as predictability, speed, and cost effectiveness were associated with their overall preference for jury trials.⁸¹ In summary, the overall preference for criminal jury trials over bench trials appears to be driven by concerns about fairness.

The results of the survey to this point suggest that attorneys are competent and confident about going to trial, and that attorneys perceive juries as fair and prefer them overall, except when compared to mediation in civil cases. The results also suggest that cost and perceived litigant preferences lead cases away from being resolved by juries. The next question is whether additional features of the civil and criminal justice systems have also altered the appeal of the jury trial.

V. SYSTEM EFFECTS AS SOURCES OF THE REDUCTION IN JURY TRIAL RATES

Both court decisions and legislative actions have potentially changed access to jury trials. The survey included questions probing the extent to which the organizational features of the legal system that have changed in recent years have played a role in reducing the rate of jury trials.

A. System Effects as Sources of the Reduction in Civil Jury Trial Rates

The survey asked all of the judges and attorneys who try civil cases to evaluate the effects on jury trial rates of five actual or claimed system changes: damage caps, mandatory binding arbitration, increases in successful summary judgment motions, increases in successful *Daubert* motions, and increases in successful motions to dismiss. In each instance, the survey asked: "Do you think that [the system change] has led to a reduction in the number of civil jury trials?" Respondents could choose

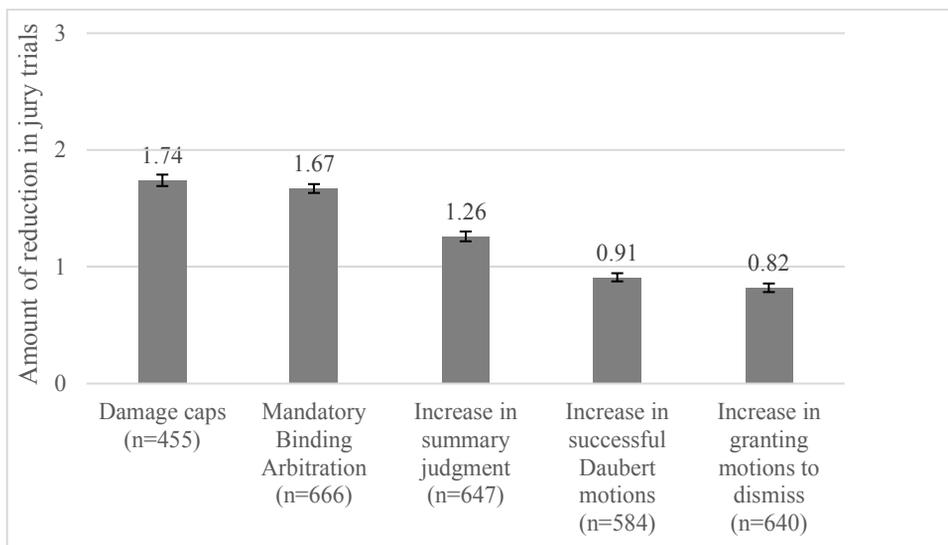
79. $\chi^2(4, N = 414) = 48.00, p < .001$.

80. $B = 1.74, SE = .30, Wald = 34.57, p < .0001, OR = 5.71$.

81. Predictability, $B = .51, SE = .62, Wald = .68, p = .41, OR = 1.67$; speed, $B = -.29, SE = .58, t = .25, p = .62, OR = .75$; cost effectiveness, $B = 1.86, SE = 1.10, t = 2.88, p = .09, OR = 6.43$.

“no reduction” (0), “a small reduction” (1), “a medium reduction” (2), or “a large reduction” (3). As Figure 9 below indicates, respondents viewed the different changes as having different effects on the number of jury trials.

Figure 9. System Sources of Reductions in Civil Jury Trial Rates



Note. Error bars denote standard errors.

For the question of damage caps, the analysis included only those respondents who said they practiced in jurisdictions with damage caps.

Overall, respondents indicated that damage caps and mandatory binding arbitration have had the greatest influence in reducing jury trial rates, on average approaching medium reductions (1.74 and 1.67, respectively). More than half of respondents perceived each of these two features as causing medium or large reductions in the rate of jury trials, 61.6% for damage caps and 52.1% for mandatory binding arbitration. These results comport with the practical and economic realities of mounting a jury trial. Damage caps limit the incentive for plaintiff attorneys both to accept cases and to assume the costs necessary to take them to trial by reducing the opportunity to obtain substantial compensation at trial, even if the case warrants that compensation in light of the defendant’s behavior and the plaintiff’s injuries. In addition, access to a jury trial is limited when binding arbitration is mandatory.

The respondents also perceived increases in summary judgment on average as causing more than a small reduction (1.26) in trials, with 39.9%

seeing the trend as causing a moderate or large reduction. There is some controversy over whether judges have granted summary judgment motions more frequently in recent years, but these survey results suggest at least some sense among civil attorneys that summary judgment is more likely, which may fuel a willingness to settle early rather than to push toward trial.

In contrast to the other three procedures, respondents perceived increases in successful *Daubert* motions and motions to dismiss as having small or no effects in reducing jury trials. Although a minority of respondents saw both as causing moderate to large reductions in jury trials—22.8% for *Daubert* motions and 21.2% for motions to dismiss—the majority evaluated the effects as small at most. As with summary judgment, there is some controversy over whether rates of successful motions to dismiss have indeed risen, but as with mandatory arbitration, decisions from the U.S. Supreme Court have endorsed greater use of both summary judgment and motions to dismiss.⁸²

The survey also asked respondents more generally about the effect of tort reform measures. It asked whether tort reform measures had been enacted in the respondent's jurisdiction. Although 9.9% of respondents were unsure, 72.1% reported that tort reform measures had been enacted. The survey then asked those respondents who indicated that tort reform measures had been enacted in their jurisdiction to describe the tort reform measures that had, in the respondent's opinion, been most responsible for causing any decline in jury trials. Although respondents described a wide range of reforms, including medical review panels and limitations on joint and several liability, more than half explicitly named damage caps. This response to the general, open-ended question, asked before we explicitly questioned respondents on the effect of damage caps, reinforces the finding that respondents perceived damage caps as a factor having an outsized influence on the reduction in jury trials.

Although respondent groups showed some differences in their responses, judges, plaintiff attorneys, defense attorneys, and attorneys representing both plaintiffs and defendants all rated caps and mandatory binding arbitration as the two largest influences on reductions in jury trials, with increases in summary judgment in the third position, and increases in *Daubert* motions and motions to dismiss in last place. Overall, plaintiff attorneys tended to see all of these system changes as more influential than did other groups. The plaintiff attorneys attributed particularly high

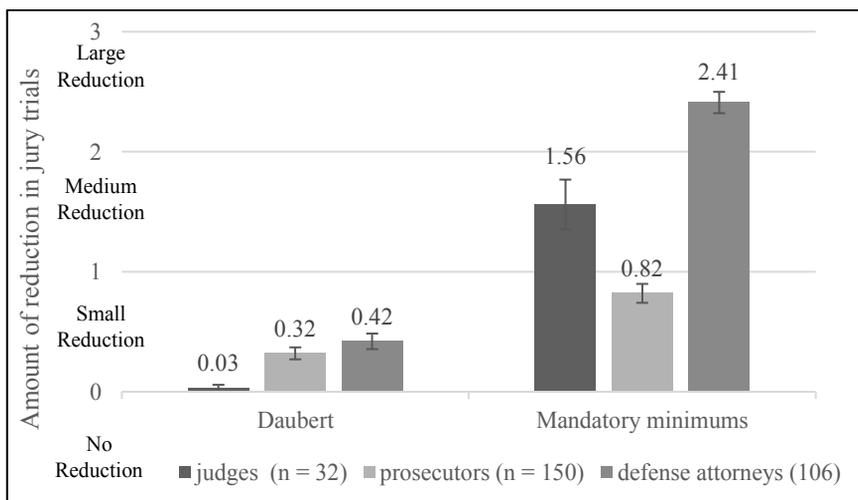
82. Regarding summary judgment, see, for example, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Regarding motions to dismiss, see *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

influence to damage caps, rating it as the source of more than a medium reduction in jury trials (2.25), whereas the other three respondent groups saw caps as responsible for between a small and medium reduction in jury trials, with judges at 1.35, defense attorneys at 1.29, and attorneys representing both plaintiffs and defendants at 1.71.

B. System Effects as Sources of the Reduction in Criminal Jury Trial Rates

The survey asked all of the judges and attorneys who try criminal cases to evaluate the effects of two system changes on jury trial rates: an increase in successful *Daubert* motions and the introduction of mandatory minimums. In each instance, the survey asked: “Do you think that [the system change] has led to a reduction in the number of criminal jury trials?” Respondents could choose “no reduction” (0), “a small reduction” (1), “a medium reduction” (2), or “a large reduction” (3). As Figure 10 shows, respondents viewed the two changes as having markedly different effects.

Figure 10. Reductions in Criminal Jury Trials Due to *Daubert* and Mandatory Minimums



Note. Error bars denote standard errors.

Both judges and attorneys in criminal cases viewed *Daubert* as playing the same role that judges and attorneys in civil cases reported that it played. That is, all respondent groups viewed *Daubert* as having caused little or no reduction in jury trials. Mandatory minimums evoked a very different response, although that response varied by rater group. Whereas

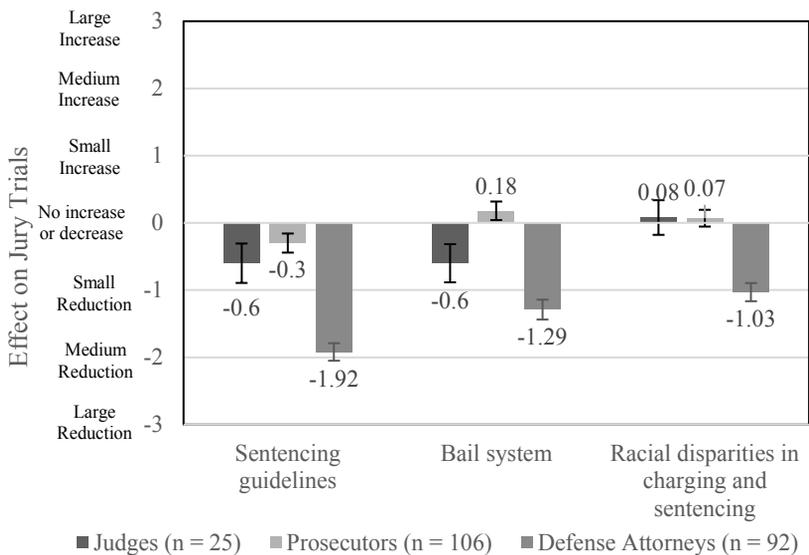
prosecutors on average viewed mandatory minimums as responsible for just under a small reduction in jury trials (0.82), with 25.7% reporting it played a medium or large role, both judges and defense attorneys saw mandatory minimums as markedly more influential. Overall, judges rated the influence as between a small and medium effect (1.56), but half of them saw its effect as medium or large. Defense attorneys on average viewed mandatory minimums as the source of more than a medium reduction in jury trials (2.41), and 85% of them viewed that effect as medium or large. The three groups differed from one another significantly.⁸³

The substantial weight that defense attorneys gave to mandatory minimums and the lower weight that prosecutors and judges attributed to them likely reflect the different positions of those decisionmakers when contemplating going to trial. Faced with a mandatory minimum if convicted, the defendant must decide whether it is worth taking the chance of going to trial when the penalty if convicted will be predictably and unavoidably harsh. The alternative of pleading guilty to a lesser charge that carries no mandatory minimum and that instead leads to a reduced sentence is the harsh choice the defense attorney and defendant must make. Although the overall perceived effect of mandatory minimums is to deter going to trial, in some cases a mandatory minimum may actually increase the likelihood of a trial. If the prosecutor is unwilling to offer a reduced charge that will take a mandatory minimum off the table, then the defendant may have nothing to lose by going to trial. In general, however, mandatory minimums provide the prosecutor with a powerful tool that is likely to induce the defendant to plead guilty, thereby waiving the right to a jury trial.

The survey also examined perceptions of three other features of the justice system that might influence jury trial rates: sentencing guidelines, the bail system, and racial disparities in charging and sentencing. Respondents evaluated whether each feature had caused a reduction to or an increase in jury trials on a 7-point scale ranging from a large reduction (-3) to a large increase (+3), with -2 indicating a medium reduction, -1 a small reduction, 0 no reduction and no increase, 1 a small increase, and 2 a medium increase. As Figure 11 shows, respondent groups differed in their evaluation of how these features have affected jury trial rates.

83. $F = 83.8, p < .001$ (post hoc comparisons among groups all $ps < .001$).

Figure 11. Effects on Jury Trial Rates of Sentencing Guidelines, Bail Systems, and Racial Disparities in Charging and Sentencing



Note. Error bars denote standard errors

Overall, averaging responses across groups, respondents perceived each of the three features as responsible for a modest decline in jury trial rates, with sentencing guidelines at $-.94$, the bail system at $-.57$, and racial disparities at $-.30$. All groups agreed that the three features have affected the reduction in jury trials to different extents.⁸⁴ Averaging across groups, respondents viewed sentencing guidelines as more influential in reducing jury trials than the bail system,⁸⁵ and the bail system as more influential in reducing jury trials than racial disparities.⁸⁶ Defense attorneys saw each feature as a greater driver of trial reductions than did judges and prosecutors.⁸⁷ Judges and prosecutors did not differ significantly overall.⁸⁸

Moreover, although defense attorneys thought all features were drivers of trial reductions, they rated sentencing guidelines as a significantly greater source of reductions in jury trials than the bail

84. $F(2, 440) = 12.39, p < .0001$ (main effect of feature).

85. $F(1, 234) = 8.49, p < .01$.

86. $F(1, 282) = 9.25, p < .01$.

87. Both $ps < .0001$.

88. $p = .39$.

system.⁸⁹ Their ratings of the bail system and racial disparities as sources of reductions in jury trials did not differ significantly.

This section of the Article described how respondents evaluated the influence of features of the formal legal system on jury trial rates. On the civil side, respondents viewed damage caps and mandatory binding arbitration as the two most influential system features, followed by increased summary judgment. On the criminal side, respondents viewed mandatory minimums as the dominant force, with defense attorneys perceiving sentencing guidelines as a key additional driver of reduced jury trials. Respondents did not see judicial decisions like *Daubert* or increased motions to dismiss in civil cases as influential in reducing jury trial rates.

Less formal sources may also reduce jury trial rates by leading a party to waive a jury trial. These sources, considered next, may exert pressure on civil litigants to settle and on criminal defendants to plead guilty.

VI. PRESSURES ON PARTIES TO SETTLE OR PLEAD GUILTY

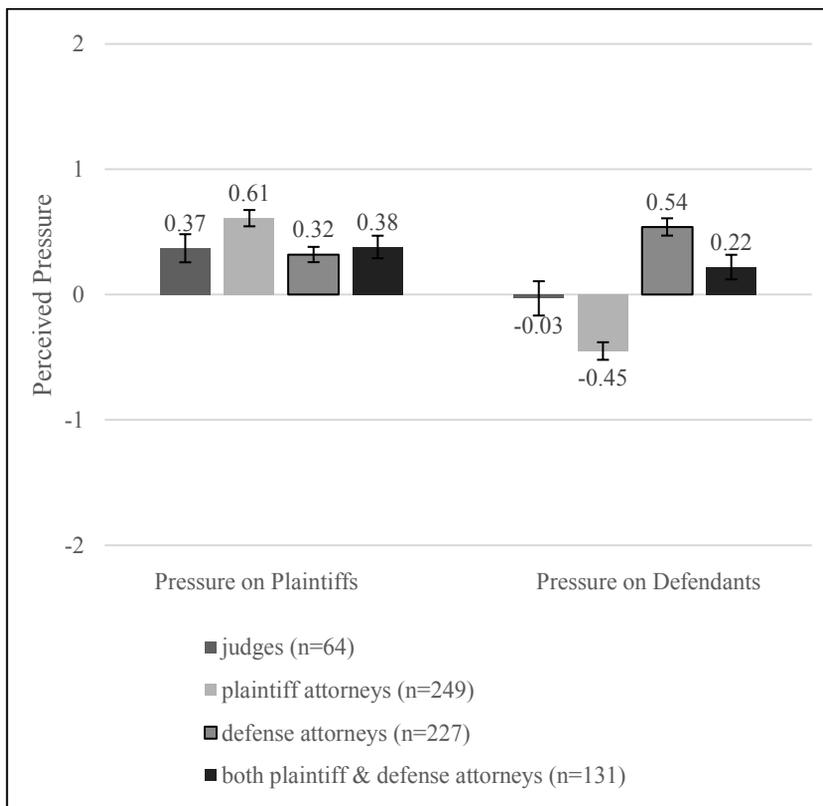
Pressures on litigants to waive the right to a jury trial may operate through the actions of official actors in the legal system, such as judges and attorneys, or through the influence of more informal sources, such as business associates or family members. To explore the perceived role of pressure in influencing litigant decisions, the survey began by asking respondents to indicate the extent to which pressures were likely to occur and then to rate how often they arose from various sources.

A. Pressures on Civil Litigants to Settle

The survey asked civil judges and attorneys two questions about the likelihood that litigants are pressured to settle, with one question concerning plaintiffs and the other concerning defendants. Specifically, the question read: “Do you believe [plaintiffs/defendants] are pressured to accept a settlement, thereby waiving a jury trial?” Respondents recorded their answers on a 5-point scale, with -2 indicating “definitely not,” -1 “probably not,” 0 “might or might not,” 1 “probably yes,” and 2 “definitely yes.” Figure 12 shows the different patterns of perceived likelihood of pressure on plaintiffs and defendants.

89. $p < .05$.

Figure 12. Perceived Likelihood of Pressure on Plaintiffs and Defendants



Note. Error bars denote standard errors

All four groups perceived plaintiffs as somewhat likely to receive pressure to settle, although the groups differed significantly in their estimates of how influential that pressure was.⁹⁰ The significant difference in perceived pressure on the plaintiff between respondent groups arose from the different responses of the plaintiff and defense attorneys, with the former perceiving significantly greater pressure than the latter.⁹¹ Judges and attorneys representing both sides did not differ from each other or from either of the other groups.

The pattern for defendants was different. The groups differed in their perceptions of whether defendants were likely to receive pressure to

90. $F = 4.10, p < .007$.

91. $p < .006$.

settle.⁹² Judges were neutral regarding the likelihood of pressure on defendants, whereas plaintiff attorneys saw defendants as somewhat *unlikely* to be subjected to pressure, and defense attorneys saw defendants as somewhat likely to be subjected to pressure. Operating from different vantage points, the attorneys are exposed more directly to the sources of pressure that impinge on their own clients. Thus, it may be that the pressures on defendants are not as visible to judges and especially not to plaintiff attorneys. That explanation may be why the attorneys who represent both plaintiffs and defendants, like the defense attorneys, reported some likelihood, albeit less, that defendants are subject to pressure.

The overall pattern is consistent with the fundamental attribution error, or the tendency for people to under-emphasize situational explanations for the behavior of others.⁹³ In the litigation context, a failure to recognize the presence and influence of these external forces may distort negotiation, making the other side appear more powerful and in control than they actually are.

B. Who Pressures Civil Plaintiffs to Settle?

The survey gave respondents who indicated that plaintiffs were probably or definitely likely to be pressured to accept a settlement a list of seven potential sources of pressure. These sources were their lawyer, the judge, family members, friends, mediators, court staff, and business associates. The survey did not specifically ask about pressure from insurers, but respondents had the opportunity to identify other sources of pressure in addition to the seven on the provided list.

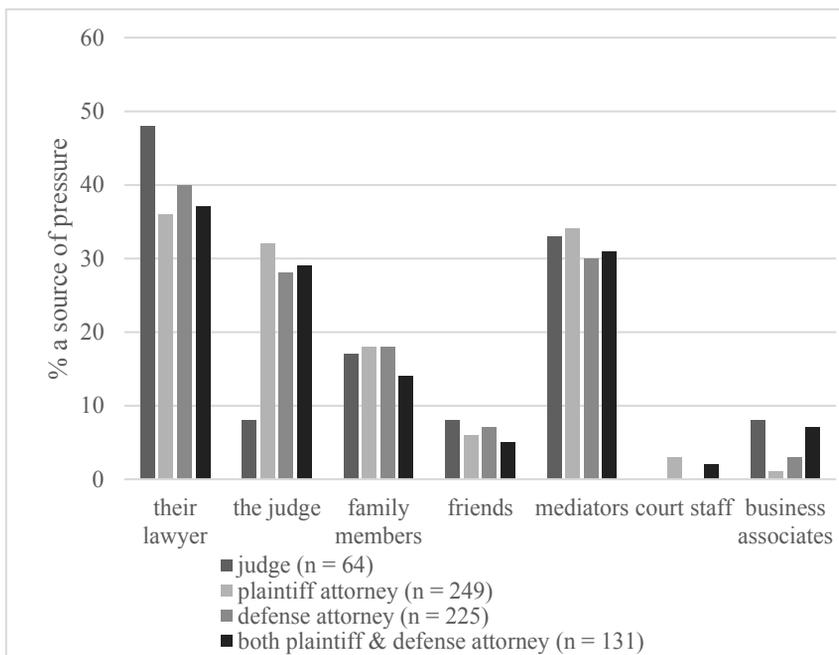
Figure 13 shows how often each of these respondent groups indicated that the seven listed potential sources exert pressure on plaintiffs to accept a settlement.⁹⁴

92. $F = 33.86, p < .001$.

93. Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY*. 173 (Leonard Berkowitz ed., 1977); D.L. Hamilton, *Dispositional and Attributional Inferences In Person Perception*, in *ATTRIBUTION AND SOCIAL INTERACTION* 99 (John M. Darley & J. Cooper eds., 1998).

94. Respondents who had previously responded that pressure might or might not occur or that it definitely or probably does not occur were treated in this analysis as not having identified any of the seven potential sources as exerting pressure.

Figure 13. Perceived Sources of Pressure on Plaintiffs



Across groups, respondents on average perceived that some sources were significantly more likely than others to exert pressure on plaintiffs to settle.⁹⁵ They perceived that a plaintiff's attorney was significantly more likely to apply pressure than were mediators.⁹⁶ The plaintiff's attorney was followed closely, however, by the judge and mediators as sources of pressure according to all groups, with one exception: judges did not see themselves or their fellow judges as a frequent source of pressure. The judicial respondents rated judges as exerting significantly less pressure than did all other respondent groups.⁹⁷ The other groups did not differ from one another in their impressions of the likelihood that judges exert pressure on plaintiffs. On average, respondent groups viewed family members and

95. $F(6, 3990) = 124.74, p < .0001, \eta_p^2 = .16$.

96. $F(1, 665) = 20.56, p < .0001, \eta_p^2 = .03$.

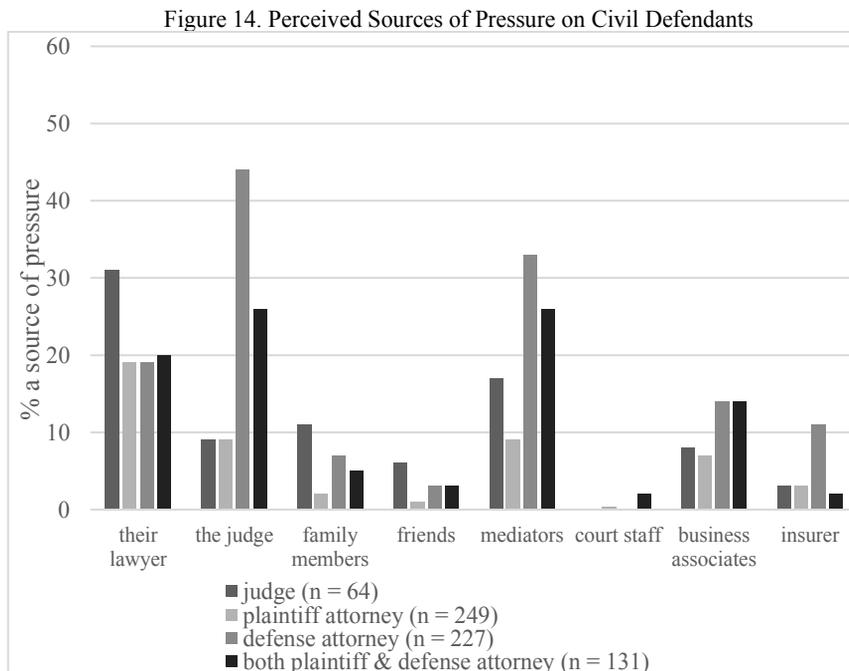
97. All $ps \leq .01$.

other unofficial sources as playing a less frequent role.⁹⁸ Court staff were rarely identified as sources of pressure.

C. Who Pressures Civil Defendants to Settle?

The survey also gave respondents who indicated that defendants were probably or definitely likely to feel pressure to accept a settlement a list of seven potential sources of pressure. These sources were their lawyer, the judge, family members, friends, mediators, court staff, and business associates. The survey did not specifically ask about pressure from insurers, but respondents had the opportunity to identify other sources of pressure in addition to the seven on the provided list.

Figure 14 shows how often these respondent groups indicated that each of the potential sources exerted pressure on defendants to accept a settlement.⁹⁹



Averaging across respondent groups, respondents perceived some sources as significantly more likely than others to exert pressure on civil

98. All $ps < .04$.

99. See *supra* note 94.

defendants to settle.¹⁰⁰ Overall, respondents viewed defense attorneys, judges, and mediators similarly as the major sources of pressure, all of them significantly more likely than business associates to exert pressure.¹⁰¹ In turn, they saw business associates as significantly more likely to exert pressure than family members and friends, with family members more likely to exert pressure than friends.¹⁰² They rarely saw court staff as sources of pressure.

Perceptions of some sources of pressure differed, however, depending on the respondent group. In general, the plaintiff attorneys viewed the defendants as subject to fewer sources of pressure than did other attorney groups.¹⁰³ The defense attorneys and attorneys who represent both plaintiffs and defendants viewed judges as significantly more frequent sources of pressure on defendants than did plaintiff attorneys and judges.¹⁰⁴ As with plaintiffs, judges rarely saw themselves or fellow judges as sources of pressure on defendants; they attributed pressure most often to the defense lawyer and secondarily to mediators.

Although the survey did not specifically ask about pressure from insurers, 1 in 10 defense attorneys explicitly identified insurers as a source of pressure. In civil litigation, insurance companies are often crucial decisionmakers, both in hiring the attorneys and in approving settlement offers and agreements, so it is likely that they would have been cited even more frequently if the survey had specifically included them in the set of potential sources of pressure.

In summary, the respondents saw both plaintiffs and defendants in civil cases as subject to pressure to settle. Overall, the most prominent sources of pressure were the litigant's own attorney, judges, and mediators. The pressure from mediators is understandable in that a mediation that ends without agreement is often characterized as a failure, and the mediator needs to get all of the parties to accept a suggested outcome in order to finalize it. The legitimacy of pressures from the judge are more ambiguous. These results also reveal that the different participants see the pressures from different perspectives, minimizing themselves as sources of pressure and failing to recognize sources of pressure on opponents.

100. $F(6, 4002) = 66.96, p < .0001, \eta_p^2 = .09$.

101. $F(1, 667) = 42.14, p < .0001, \eta_p^2 = .06$.

102. Business associates versus family: $F(1, 667) = 4.45, p = .03, \eta_p^2 = .01$; family versus friends: $F(1, 667) = 18.22, p < .0001, \eta_p^2 = .03$.

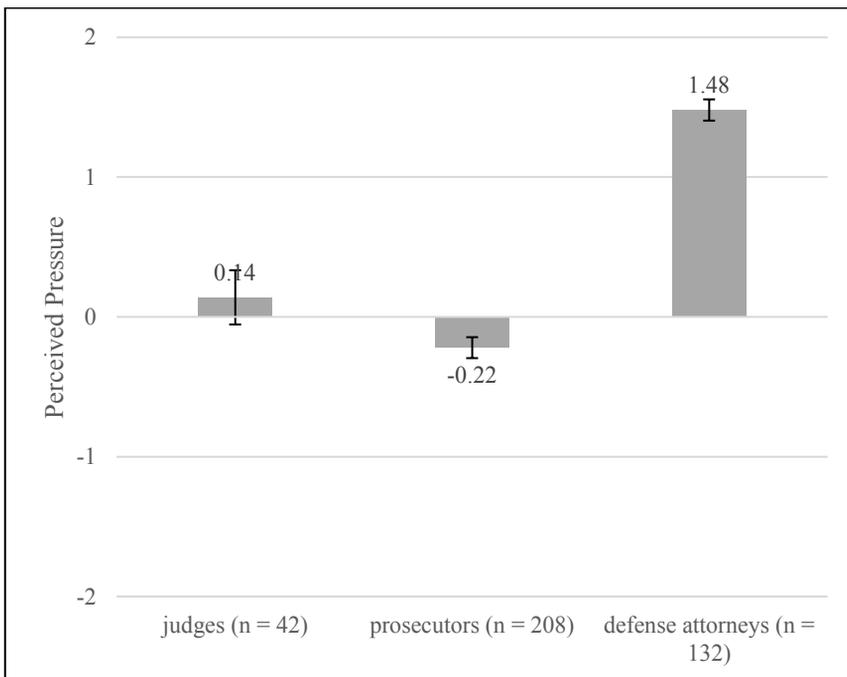
103. $ps < .01$.

104. $ps < .01$.

D. Pressure on Criminal Defendants to Plead Guilty

The survey asked judges and attorneys who handle criminal cases about the likelihood that defendants feel pressure to plead guilty. Specifically, the question read: “Do you believe defendants are pressured to plea bargain, thereby waiving a jury trial?” They recorded their responses on a 5-point scale, with -2 indicating “definitely not,” -1 “probably not,” 0 “might or might not,” 1 “probably yes,” and 2 “definitely yes.” Figure 15 shows how the three groups assessed the perceived pressure on criminal defendants to plead guilty.

Figure 15. Perceived Likelihood of Pressure on Criminal Defendants to Plead Guilty



Note. Error bars denote standard errors

Overall, the average perceived pressure was above the scale midpoint, at .41, but the three groups of respondents differed significantly in their ratings.¹⁰⁵ Whereas the judges averaged just slightly above the neutral point on the scale at .14, defense attorneys on average rated pressure as substantially likely, averaging 1.48, that is, midway between “probably

105. $F = 110.39, p < .001$.

yes” and “definitely yes.” Prosecutors, in contrast, tended to reject the view that defendants are pressured to plead guilty, averaging -.22. The large difference between the prosecutors and defense attorneys, -.22 versus 1.48, was significant, as was the lesser gap between the judges and defense attorneys.¹⁰⁶

E. Who Pressures Criminal Defendants to Plead Guilty?

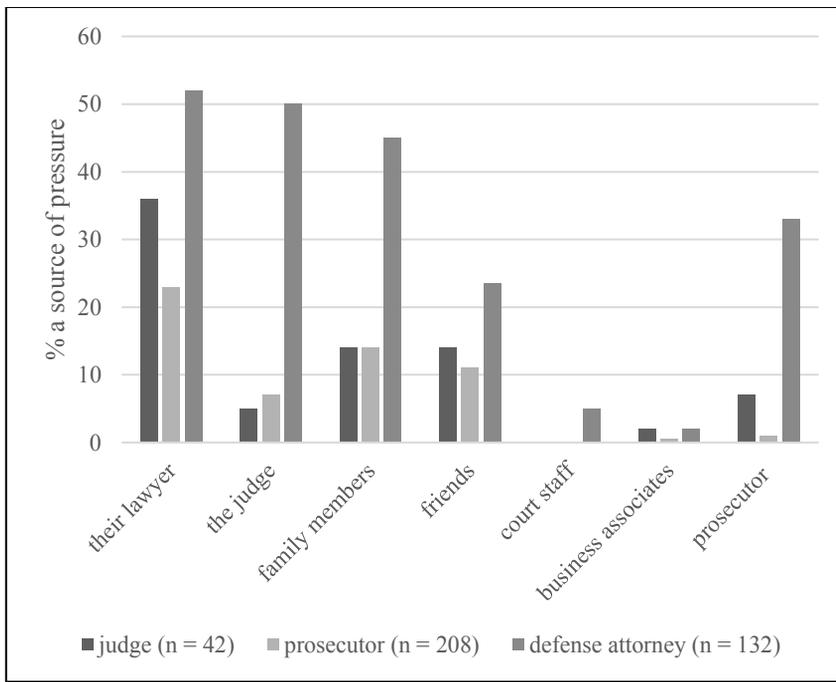
The survey gave respondents who indicated that defendants were probably or definitely likely to be pressured to plead guilty a list of six potential sources of pressure. These sources were their lawyer, the judge, family members, friends, court staff, and business associates. The survey did not specifically ask about pressure from the prosecutor, but respondents had the opportunity to identify other sources of pressure in addition to the six on the provided list.

The survey asked each of these respondents which of the potential sources they thought exerted pressure on defendants to plead guilty.¹⁰⁷ Figure 16 reflects their responses.

106. $ps < .001$.

107. See *supra* note 94.

Figure 16. Perceived Sources of Pressure on Criminal Defendants



Overall, respondents perceived some sources as significantly more likely than others to exert pressure on criminal defendants.¹⁰⁸ Respondent groups agreed that the most frequent source of pressure on the criminal defendant to plead guilty was likely to be the defense attorney. They perceived the defense attorney to be a significantly more likely source of pressure than family members and judges, who did not differ from each other.¹⁰⁹ Respondents perceived judges to be a significantly more likely source of pressure than friends.¹¹⁰ They perceived friends as significantly more likely to exert pressure than court staff.¹¹¹ Few respondents perceived pressure from court staff and business associates.

The groups differed markedly, however, in their perceptions of some sources of likely pressure.¹¹² Roughly half of the defense attorneys saw themselves (52%), as well as the judge (50%) and family members (45%),

108. $F(5, 1895) = 61.04, p < .0001, \eta_p^2 = .14$.

109. $F(1, 379) = 24.44, p < .0001, \eta_p^2 = .06$ (defense attorney versus family members); $F(1, 379) = 2.74, p = .22, \eta_p^2 = .004$ (defense attorney versus judge).

110. $F(1, 379) = 4.15, p = .04, \eta_p^2 = .01$.

111. $F(1, 379) = 36.99, p < .0001, \eta_p^2 = .01$.

112. $F(2, 379) = 1.21, p = .30, \eta_p^2 = .01$.

as sources of pressure. Prosecutors were significantly less likely to see the defense attorney as a source of pressure (23%) than were defense attorneys.¹¹³ Judges did not significantly differ from either prosecutors or defense attorneys in their impression of the defense attorney as a source of pressure.¹¹⁴

In assessing the likelihood of judicial pressure, defense attorneys rated judges as significantly more likely to exert pressure than did prosecutors and judges,¹¹⁵ who did not differ from one another. The difference between defense attorney and judicial raters on the judge as a source of pressure is particularly dramatic: while 50% of defense attorneys saw the judge as a source of pressure, only 5% of judges reported that the judge was a probable source of pressure on the defendant to plead guilty. The extent to which judicial pressure actually occurs cannot be assessed from these perceptions, but it may well be that judges are not conscious of the extent to which their well-intentioned offers of advice are perceived as pressure by defendants and their attorneys.

With respect to other sources of pressure, the defense attorneys reported a greater likelihood of pressure than did other raters. Defense attorneys rated family members as significantly more likely to exert pressure than did prosecutors or judges,¹¹⁶ who did not differ. In addition, defense attorneys rated friends as exerting significantly more pressure than did prosecutors,¹¹⁷ while the judges did not differ significantly from either of the other two groups. The potential costs of a conviction on family and friends may account for pressure from these sources, which the defense attorney would be more likely to learn about than the judge or the prosecutor.

Although the survey did not specifically ask about prosecutors, one in three defense attorneys explicitly identified the prosecutor as a source of pressure. Sentencing system features, such as sentencing guidelines, harsh sentences, and mandatory minimums, were mentioned by 6.8% of defense attorneys, 2.3% of judges, and 0.5% of prosecutors.

In criminal cases, defense attorneys present a distinctive picture of pressures on the defendant to plead guilty coming from multiple sources. Some of those sources are informal, such as family members, but the most frequently identified sources were formal: judges and attorneys. The legitimacy of pressures from those formal sources depends on whether the

113. $p < .0001$.

114. $ps \geq .13$.

115. $ps \leq .0001$.

116. $ps \leq .0001$.

117. $p = .001$.

pressures assist defendants in achieving an optimal outcome, or merely induce them to surrender their right to trial.

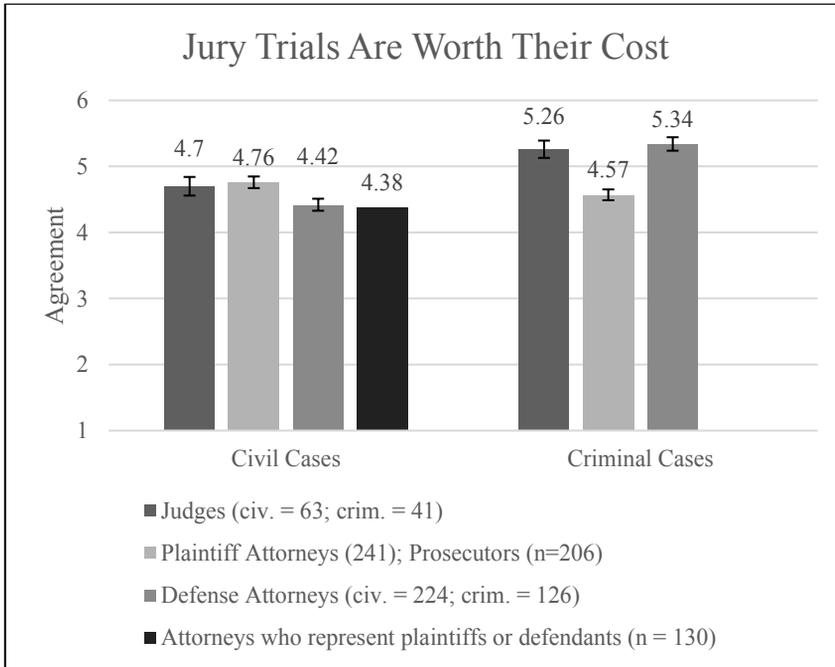
VII. ARE JURY TRIALS WORTH SAVING? (AND IF SO, WHAT NEEDS TO BE DONE?)

Through their answers to the survey questions, judges and attorneys made it clear that they viewed other case resolution procedures as more predictable, faster, and more cost-effective than jury trials. However, they also said that jury trials excel in terms of fairness and that they personally prefer jury trials to alternatives. Indeed, the reports in the survey responses from judges and attorneys on the reasons that led to their last jury trial indicate that the parties turned to juries in those trials to resolve precisely the types of conflicts that demand the judgment of a third-party neutral decision-maker that has the level of legitimacy commanded by a jury. Examples of these reasons included: “There was a fundamental difference on how the parties viewed the significance of the undisputed facts,” “Defendant physician believed that he had done nothing wrong and felt settlement was the wrong thing to do,” and, “My client was innocent of the charges.” Thus, there are trade-offs to consider in evaluating how much effort is worth investing in resisting the disappearance of jury trials.

Accordingly, the survey asked respondents to indicate the extent to which they agreed or disagreed with the following statement: “Jury trials are worth the costs associated with them.” Using a 6-point scale, where 3.5 was the midpoint, the result was clear: every group of respondents, whether judges or attorneys, whether trying criminal or civil cases, and whether representing plaintiffs, the government, or defendants, on average viewed jury trials as worth the costs associated with them. Figure 17 shows the extent of agreement for each respondent group.

Figure 17. Agreement/Disagreement that Jury Trials Are Worth the Costs Associated with Them

(1 = "strongly disagree," 2 = "disagree," 3 = "somewhat disagree," 4 = "somewhat agree," 5 = "agree," 6 = "strongly agree")



Note. Error bars denote standard errors

Respondents did differ in how valuable they perceived jury trials to be.¹¹⁸ Plaintiff attorneys tended to be more favorable toward jury trials than attorneys who sometimes or always represented defendants.¹¹⁹ Moreover, in criminal cases, judges and defense attorneys were more favorable toward jury trials than prosecutors.¹²⁰ The striking finding, however, is that 79.1% of civil respondents and 87.7% of criminal respondents expressed agreement that jury trials were worth the costs associated with them.

The survey results also suggest that a number of features of the modern legal system deter litigants and their attorneys from taking their cases to

118. For civil cases, $F = 3.52, p < .02$; for criminal cases, $F = 26.40, p < .001$.

119. Versus defense attorneys, $p < .007$; versus attorneys who represent both sides, $p < .02$.

120. $ps < .001$.

trial before a jury. If jury trials are indeed worth protecting, steps need to be taken to eliminate or modify the features responsible for the recent drop in jury trials. Several key sets of features stand out. The first, on the civil side, are damage caps and mandatory binding arbitration. Damage caps undermine the willingness of attorneys to accept cases, and they encourage settlement to avoid the costs of trial. Mandatory binding arbitration cuts off court access even more directly. To the extent that eliminating these features is not a practical possibility, courts and legislatures could at least raise the level of existing caps and move toward making arbitration voluntary rather than binding.

In criminal cases, a second set of features discourages defendants from exercising their right to a jury trial. Mandatory minimum sentences and sentencing guidelines that incorporate severe presumptive sentences and include coercive incentives to plead guilty strengthen prosecutors' bargaining power as defendants and their attorneys contemplate the prospect of going to trial. Sentencing guidelines were originally introduced to reduce unwarranted disparity in sentencing. However, their effect in some instances has been to ratchet up penalties and increase the defendant's incentive to waive the right to a trial. The elimination of mandatory minimum sentences and a review of the severity of sentencing guidelines with an eye toward lowering the range of sentences, whether mandatory or advisory, would reduce the leverage that prosecutors currently have to extract guilty pleas and deter defendants from seeking trials.

The survey results also suggest that, however unintentionally, judges in both civil and criminal cases are perceived as a substantial source of pressure on litigants, inducing them to settle or plead guilty rather than to go to trial. One explanation for this push from judges may be their strong perception, revealed in the survey, that litigants generally prefer to settle rather than go to trial.¹²¹ It is worth testing the accuracy of this perception. If it is accurate, then there is an argument that judges are simply assisting litigants in obtaining what they want. Further, it may be that active judicial participation in criminal cases acts as an important check on prosecutorial power in plea negotiations. Nonetheless, in addition to lacking the transparency of a trial, pressures to produce a plea may impose significant costs, particularly on innocent defendants,¹²² and in effect deny all litigants the fairness of having their day in court.

121. See *supra* text accompanying note 31; see also *supra* Table 1.

122. See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); see also Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013) (reviewing the

The survey did produce some evidence that judicial pressure can be avoided or at least reduced. Sixteen states prohibit judicial involvement in the plea-bargaining process.¹²³ The survey results allowed a comparison of the evaluation of judicial pressure by respondents from states with and without such a judicial prohibition. For criminal defense attorneys, the difference was dramatic: the 25% reporting judicial pressure in prohibiting states rose significantly to 59.8% in non-prohibiting states.¹²⁴

The favorable responses of the survey respondents to the fairness and desirability of jury trials, and the conclusion from all groups of legal professionals that jury trials are worth the costs they impose, suggest that measures should be taken to reverse the recent downward spiral in the prevalence of jury trials. The responses from the survey point to the potential changes that are needed, including eliminating or raising the level of damage caps, jettisoning mandatory arbitration, reforming sentencing guidelines, and abolishing mandatory minimums. More information is needed about the nature and effects of judicial participation as well as the actual preferences of litigants, but the judicial role too may call for adjustment.

CONCLUSION

The results from this survey reveal substantial goodwill toward jury trials from judges and attorneys, yet jury trial rates have plummeted. If efforts are not made to reverse this trend, then the question becomes: What are we losing? Not only are defendants in criminal cases and parties in civil cases losing their day in court, with its procedural protections and access to the decisions of disinterested citizens, but a system with fewer trials provides less citizen feedback on the justice system. The American jury trial provides crucial guidance through its effect on cases that do not end up before a jury. For example, reporters of jury verdicts have traditionally supplied attorneys in civil cases with a wealth of information on past jury verdicts, informing them about “going rates” in the attempt to reach settlements. Prosecutors consider what a jury would do in evaluating

literature and reporting on an experiment, finding that a majority of innocent student-participants admitted to cheating in order to avoid academic consequences); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1062–63 (1984) (describing how adversarial testing helps to protect individual and community freedoms from abuses of government power).

123. Tina M. Zottoli et al., *State of the States: A survey of statutory law, regulations and court rules pertaining to guilty pleas across the United States*, 37 BEHAV. SCIS. & L. 388 (2019).

124. $\chi^2 = 13.50$, $p < .001$ ($n=132$).

whether to prosecute a case and what incentive to offer for a plea.¹²⁵ With fewer jury trials, the strength of the signal sent by jury verdicts is weaker and thus less reliable due to fewer data points. The question that remains in the wake of this loss is what evidence attorneys and parties will reasonably use to assess what the likely outcome would be if the case went before a jury. Although assumptions about what a jury would do will persist as a crucial reference point for settlements and plea bargains, attorneys and the public will be right to wonder whether the assumptions can be trusted. The problem is that with less feedback from real jury trials, distorted expectations are likely to proliferate.

Finally, if fewer citizens have the opportunity to participate as jurors, this reduction threatens the values of a deliberative democracy, including the educative benefits that Tocqueville recognized¹²⁶ and the stimulus toward civil engagement and political participation that Gastil and his colleagues recently demonstrated.¹²⁷ It is ironic that the decline in jury trials in the United States has been occurring at the same time that several other countries have moved toward implementing jury trials and other forms of lay participation in trials as a way to increase the legitimacy of their legal systems.¹²⁸

125. Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071 (2019).

126. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., 2002) (1835).

127. JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 37 (2010) (indicating that prior jurors showed an increased likelihood of voting).

128. JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE 25, 47, 69, 88, 107 (Sanja Kutnjak Ivkovich, Shari Seidman Diamond, Valerie P. Hans & Nancy S. Marder eds.) (forthcoming Nov. 2020) (discussing, respectively, Argentina, Japan, South Korea, and Spain).

