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One Court, One State, One Year: What We Don't Know About Criminal Defendants' Testimony and Why It Matters

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ONE COURT, ONE STATE, ONE YEAR: WHAT WE DON'T KNOW ABOUT CRIMINAL DEFENDANTS' TESTIMONY AND WHY IT MATTERS

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Jury trials are supposed to encourage public trust in the criminal legal system while protecting fundamental fairness for the defendant. But how can the public help ensure the fairness of criminal trials when it has no meaningful way to understand the reality of what happens every day in criminal courtrooms across the country? This Article presents findings from an original pilot study—believed to be the first and largest such study—that collected and analyzed court documents and transcripts from seventy-five state criminal trials from one court in one state in one year. It posits that the public's understanding of the significance of a criminal defendant's testimony may be distorted and questions its ability to ensure fairness of trials and trust in the legal system when the public—including judges, prosecutors, and defense attorneys—is operating in the dark.

The study found that defendants who testified had better sentencing outcomes compared to those who did not, and they were more likely to be acquitted of their most serious offense and less likely to be sentenced to incarceration. By exploring these findings, the pilot study suggests that greater access to data from state criminal trials is critical to better understanding the significance of criminal defendants' testimony on trial outcomes. What we don't know matters because misunderstanding the reality of the decision to testify undermines the right to a fair trial and trust in the criminal legal system.

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INTRODUCTION

Data about the criminal legal system has been largely unobtainable, leaving society in the dark about the reality of the system in general, and about state courts in particular. As a result, the inner workings of the U.S. legal system are largely obscure to people outside of the legal profession. Even people with critical roles inside the legal system—including lawyers, judges, defendants, victims, and jurors—may have a distorted view of how the legal system operates. This is because people make assumptions about the wider system based on their own experiences, which could be very different across states and even within states. Few people outside of the criminal legal system see a wider view of how criminal jury trials work in real time, and nobody is positioned to see the complex reality of how criminal trials work in thousands of courtrooms across the vast U.S. landscape.

What we know and what we don't know about criminal defendant testimony matters. It matters because criminal jury trials are supposed to encourage public trust in the criminal legal system while protecting fundamental fairness for the defendant. But how can the public help to ensure the fairness of criminal trials, and how can trials encourage public trust, when the public has no meaningful way to understand the reality of what really happens when a defendant decides whether to testify?

This Article explores the barriers that continue to exist when collecting and analyzing information on criminal jury trials by introducing a pilot project that took place in one court in one state in one year. Through analysis of court documents and trial transcripts for seventy-five criminal jury trials, the project begins to explore the limitations of what researchers and the public understand about criminal defendant testimony.

Part I explains how the criminal defendant's decision to testify is supposed to work and overviews the scholarly debate on the right against self-incrimination. Part II discusses the existing research in this area, including analysis of U.S. criminal trial data. After providing this wider contextual frame, Part III introduces the original pilot study that forms the basis for this Article. By explaining how the pilot project compiled and analyzed data from the Court of Common Pleas, General Division, in Franklin County, Ohio, the Article suggests that the public's understanding of how criminal defendant testimony operates may be distorted. Part IV highlights two main findings that call

into question assumptions about how criminal defendant testimony works: (1) When criminal defendants testified at trial, they were more likely to be acquitted of all charges; and (2) Even when testifying defendants were convicted, they were more likely to be acquitted of the most serious offense charged and less likely to be sentenced to incarceration. These findings suggest the need for further inquiry into the critical impact of a defendant's decision to testify. Part V explores why these preliminary findings matter.

Through careful analysis of the court documents and trial transcripts from seventy-five criminal trials, the study suggests that greater access to and analysis of existing data from state criminal trials is critical to better understand criminal defendant testimony. What we don't know matters because misunderstandings about the decision to testify undermine public trust in the criminal legal system as well as the ability to protect the defendant's right to a fair trial. The Article's analysis of the pilot study—the first study, to our knowledge, to collect and analyze so many trial transcripts from a single state courthouse in a single year—paves the way for future research. The pilot study can and should be replicated in courthouses throughout the U.S. to better understand the role of the defendant's decision to testify and how that decision impacts the likelihood of better trial and sentencing outcomes. From a greater likelihood of acquittal on all offenses, to a greater likelihood of acquittal on the most serious offense, to a greater likelihood of a sentence that did not include incarceration, the results of the pilot study show that a defendant's decision to testify may have a strong bearing on the outcome of the case.

I. THE DECISION TO TESTIFY

The Fifth Amendment to the U.S. Constitution creates a number of rights relevant to criminal and civil legal proceedings.[1] In criminal cases, the Fifth Amendment includes the constitutional safeguard that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."[2] These protections guard against forcing defendants to incriminate themselves at trial, and they also delineate the

1. U.S. CONST. amend. V.
2. *Id.*

due process protections that criminal cases are supposed to ensure before depriving a defendant of life, liberty, or property.[3]

Combined with the Sixth Amendment's right to an "impartial jury" and to the assistance of counsel in one's defense,[4] the Eighth Amendment's protection against "cruel and unusual punishments,"[5] and the Fourteenth Amendment, which makes the U.S. Constitutional protections applicable to the states,[6] the Fifth, Sixth, Eighth, and Fourteenth Amendments are the constitutional grounding for the privilege against self-incrimination and the due process protections for criminal defendants in both state and federal court.[7] With these protections in mind, Section I.A discusses how the decision to testify is supposed to work, and Section I.B frames the current scholarly debate about this decision.

A. How It's Supposed to Work

The constitutional protections of the Fifth, Sixth, Eighth, and Fourteenth Amendments, and the corresponding constitutional provisions in each state's constitution, are the starting point to understand how a criminal defendant's decision to testify is supposed to work. To more fully appreciate the factors that influence a criminal defendant's decision to testify, it is important to understand the ethical responsibilities that criminal defense attorneys must fulfill while counseling their clients through this critical decision, as well as strategic considerations.

1. Ethical Responsibilities

Each state has adopted its own rules, codified in each state's statutes, delineating the ethical responsibilities that lawyers must fulfill when helping their clients decide whether or not to testify at their criminal trials.[8] Against this backdrop of fifty different state statutes stands the American Bar Association's Model Rules of Professional Conduct

3. *Id.*

4. U.S. CONST. amend. VI.

5. U.S. CONST. amend. VIII.

6. *See, e.g.*, U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

7. U.S. CONST. amends. V–VI, VIII, XIV, § 1.

8. For example, Chapter 32 of the Iowa Code contains Iowa's Rules of Professional Conduct. Within Chapter 32, Rule 32:1.2 outlines the "scope of representation and allocation of authority between client and lawyer." IOWA R. CIV. P. 32:1.2.

(hereinafter "Model Rules").[9] First adopted by the ABA House of Delegates in 1983, the ABA routinely updates the Model Rules—adding and subtracting rules through a long rule-making process that goes through many layers of review, including a public comment period before adoption by the ABA House of Delegates.[10] Through this process, the Model Rules are exactly that: *model* rules. Some states' statutes adhere closely to the Model Rules, organizing and updating their own state professional conduct rules to track the Model Rules closely, while other states are more resistant to such close adoption.[11]

Despite the fact that the Model Rules are only guidelines and are not the actual rules of any one state,[12] they are the best resource for understanding the ethical parameters that criminal defense attorneys must follow when helping their clients decide whether to testify, starting with Model Rule 1.2.[13]

Rule 1.2 explains the scope of representation and allocation of authority between client and lawyer.[14] Lawyers must accept their client's decisions in certain situations and must only consult with their clients—while retaining final decision-making authority themselves—in other situations. Specifically, lawyers "shall abide" by their client's decisions "concerning the objectives of representation," while decisions regarding the "means by which [those objectives] are to be pursued" only require lawyers to "consult" with their clients.[15] In other words, lawyers must follow their client's decisions regarding "objectives" of the representation but must only consult with their clients regarding the "means" to achieve those objectives.

While it is not unusual for lawyers and clients to have different understandings of what constitutes an "objective" and what constitutes

9. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) cmt. 6 (AM. BAR ASS'N 2022) ("If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.").

10. *About the Model Rules*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/M8LF-Z75H].

11. *Legal Ethics and Legal Profession Research Guide*, GEO. L. LIBR., https://guides.ll.georgetown.edu/c.php?g=270948&p=8333966 [https://perma.cc/34EA-T8U7].

12. *Id.*

13. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2022).

14. *Id.*

15. *Id.*

a "means" to reach that objective, a typical example might be that the lawyer "shall abide" by the client's objective of being found "not guilty" at trial, while the lawyer need only consult with the client about how to achieve that objective. Deciding how to cross-examine the prosecution's witnesses or which, if any, witnesses to call in the defense's case-in-chief may typically fall into the means-to-reach-the-objective part of the analysis; lawyers "shall consult" with the clients about such decisions, but ultimately, lawyers make all sorts of critical strategic decisions about *how* to try the case, even if their clients vehemently object to those decisions.[16] The interaction of those strategic decisions with the lawyer's ethical responsibilities is discussed next.

2. Strategic Decisions

Among the vast array of decisions that lawyers are empowered to make when representing their clients—even if those decisions stand in direct contradiction to what their client wants to happen—criminal defendants retain the final say on only four decisions regarding their case.[17] In addition to holding the trump card on (1) deciding the "objective" of representation, criminal defendants also have the last say on whether (2) to plead guilty, (3) whether to waive their right to a jury trial and proceed with a bench trial, and (4) whether to testify.[18] Complicating these decisions is the fact that lawyers and clients make strategic calls with "subjective" assessments rather than with empirical assessment based on data. As the world increasingly relies on evidence-based decisions to make a wide array of business and policy decisions, the U.S. legal system has failed to keep up.[19]

This means that lawyers and clients make important decisions without critical information that would help them make the most well-informed decision they can make. This situation is even more complicated when the lawyer and client disagree about how to proceed. If a defense attorney advises a client not to testify at trial—indeed, even if a defense attorney tells their client in no uncertain terms that testifying is the absolute worst thing the client could do—the client can make

16. *Id.* r. 1.2 cmt. 6.

17. *Id.* r. 1.2.

18. *Id.*

19. *See generally* Holly Fernandez Lynch et al., *Overcoming Obstacles to Experiments in Legal Practice*, 367 SCIENCE 1078 (2020) ("The importance of evidence-based policy rooted in experimental methods is increasingly recognized, from the Oregon Medicaid experiment to the efforts to address global poverty that were awarded a 2019 Nobel Prize. Over the past several decades, there have been attempts to extend this scientific approach to legal systems and practice.").

that decision over their lawyer's vehement objection.[20] In practice, the mechanics of this decision are intensely difficult because of the absence of empirical information and the reliance on subjective assessments. Such decisions unfold in at least four different ways.

First, the lawyer might agree with the client's decision about whether or not to testify. Factors that lawyers and clients consider when deciding whether to testify are vast and varied.[21] They include the fact that jurors expect defendants to testify, despite their constitutional right not to do so.[22] If a defendant does not testify, jurors may infer that the defendant is guilty or hiding something. Despite this uphill battle against possible juror bias from not testifying, if a decision to testify will enable the prosecution to introduce evidence that would not otherwise be introduced (such as impeachment through prior convictions or through prior inconsistent statements), both the lawyer and client might agree that the defendant should not testify.[23] Alternatively, even if no impeachment evidence exists, a defendant may be so nervous about testifying that the lawyer and client agree that the client should not do so; they may agree that the defendant's anxiety will make the defendant appear unbelievable, and thus hurt more than help.[24]

On the flip side, despite the perils of impeachment evidence or extreme anxiety when taking the stand, the defendant and lawyer might agree that, strategically, the jury will need to hear from the defendant, and that on balance the advantages of a decision to testify outweigh the disadvantages given the specific facts of the client's case. The number of factors clients and lawyers discuss together in making this decision is boundless and extremely personal and specific

20. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2022).

21. *See generally* Harlan Protass, *Factors to Consider in Deciding Whether to Testify at Trial*, PROTASS L. (Oct. 16, 2020), https://www.protasslaw.com/factors-to-consider-in-deciding-whether-to-testify-at-trial/ [https://perma.cc/UVD4-EUPV].

22. *See, e.g.*, Mark W. Bennett, *Getting Clamorous About the Silence Penalty*, 103 IOWA L. REV. ONLINE 1, 2 (2018) (noting that as a federal judge, the author knows "firsthand from hundreds of jury selections that many prospective jurors expect an innocent defendant to testify—notwithstanding the presumption of innocence and the accused's Fifth Amendment right not to testify," and that "[p]rospective jurors candidly indicate they will hold it against an accused who does not testify precisely because, if they were in the accused's shoes, you could not keep them off the witness stand").

23. *Id.* at 4.

24. *Should a Criminal Defendant Testify at Trial*, JUST CRIM. L. (Jan. 27, 2017), https://www.justcriminallaw.com/criminal-charges-questions/2017/01/27/should-criminal-defendant-testify/ [https://perma.cc/DLF7-9EGN].

to the client.[25] For example, a client may be protecting a family member and decline to testify for fear of putting the family member at risk of prosecution; or a client may fear for their own personal safety if their testimony would implicate others in the crime for which they are charged.

When the client and lawyer agree, whether that agreement is in favor of testifying or against it, the decision usually unfolds in a routine and almost perfunctory fashion. For example, before the client testifies or does not testify at trial, the judge may make a record outside the presence of the jury to ensure that the defendant knows about the right *not* to testify (before the defendant exercises the decision to testify), or to ensure that the defendant knows about the right *to* testify (before the defendant exercises the decision not to testify).[26] The text for such admonitions is memorialized in state and federal "bench books," which are the resources that guide state and federal judges at trial.[27] Typically after the judge reads this admonition, the judge may ask the defendant more specific questions to ensure the defendant understands their right, has had sufficient time to consult with their lawyer about the decision, is satisfied with the advice their lawyer has given them, and has made the decision freely and voluntarily, without pressure or undue influence.[28]

The second way this decision could unfold is when a client chooses to testify against the strong advice of counsel. Before a client takes the stand against their lawyer's advice, the judge will excuse the jury and read the same admonitions the judge would read if the client and lawyer were in sync.[29] But when the client takes the stand against the advice of counsel, the lawyer may also decide to signal to the court that the client is testifying against advice of counsel.[30] Defense attorneys do this outside the presence of the jury, and sometimes the discussion takes place in the relative privacy of chambers rather than in open court, but when the lawyer signals to the court that the lawyer

25. S*ee generally* Protass, *supra* note 21.

26. People v. Curtis, 681 P.2d 504, 514 (Colo. 1984).

27. *See, e.g.*, *Bench Books & Cards*, NAT'L JUD. COLL., https://www.judges.org/bench-books-cards/ [https://perma.cc/SFJ5-HSBB] (providing electronic access to judges' bench books for a variety of state and federal proceedings, including a jury presentation tool kit, a science bench book, and guidelines for presiding over a capital case).

28. *The Importance of Admonitions*, FIRST LEGAL (Jan. 12, 2018), https://www.firstlegal.com/the-importance-of-admonitions/ [https://perma.cc/PB8D-V9GZ].

29. *See id.*

30. *See* D.C. BAR, ETHICS OPINION 234: DEFENSE COUNSEL'S DUTIES WHEN CLIENT INSISTS ON TESTIFYING FALSELY 2 (1993).

has advised their client *not* to testify and that the client is testifying against advice of counsel, the judge will typically slow down the proceedings and take more time to painstakingly discuss with the client whether they do in fact want to testify over advice of counsel.[31] While outside the presence of the jury, such proceedings are nonetheless transcribed by the court reporter because the transcript of what the defendant understood when the defendant chose to go against their attorney's advice and testify, and the voluntariness of that decision, will be critical to any later appeal.[32] This is because a defendant may think they are making the best decision unless and until they are convicted, and then they may argue on appeal that their lawyer should have done a better job talking them out of that decision.

The third, although more infrequent, way this decision could unfold is when a client chooses *not* to testify and their lawyer thinks they *should* testify. While exceedingly rare, the mechanics would be identical to the scenario of when a defendant testified against their lawyer's advice. Outside the presence of the jury, the judge would read the same admonitions and may ask targeted follow-up questions to ensure the defendant's decision is knowing and voluntary.[33]

A fourth way this decision could unfold is a variant of the situation when a client chooses to testify against lawyer advice. In the testifying-against-lawyer-advice scenario described above, the judge may know or may not know the specific reasons why the lawyer is strongly counseling the defendant against testifying. The lawyer may simply tell the judge that the defendant is taking the stand against their advice, or the lawyer may more specifically explain why they have advised the client not to take the stand. Whether the judge knows the precise reasons the lawyer has advised the client against testifying may, in turn, affect the specific follow-up questions the judge asks the defendant. For example, if the lawyer is advising the client not to testify because testifying will allow the prosecution to impeach the defendant with the defendant's prior convictions, and the lawyer is concerned that once the jury learns about the defendant's prior convictions

31. Judges will typically exercise greater care in handling scenarios in which defendants waive a constitutional right or are particularly vulnerable, for example, when representing themselves pro se in a capital punishment case. *See, e.g.*, FED. JUD. CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 63–73 (2013) (providing an extensive outline of questions to be asked a defendant by the judge in the process of taking a guilty plea); NAT'L JUD. COLL., PRESIDING OVER A CAPITAL CASE: A BENCHBOOK FOR JUDGES 95–98 (2020).

32. *The Importance of Admonitions*, *supra* note 28.

33. *See supra* note 31 and accompanying text.

the knowledge of those prior convictions will lead the jury to convict the defendant, the lawyer may decide to tell the judge about this concern. In such a situation, the judge may then choose to pose this question directly to the defendant to make sure the defendant knows that the jury will not hear about the defendant's prior convictions unless the defendant takes the stand.[34]

But counseling one's client against testifying for strategic reasons, such as what the testimony may allow the prosecution to introduce, stands in stark contrast to the fourth way the decision could unfold—which is when a criminal defense attorney counsels the client against testifying because the attorney believes the client will lie if they take the stand.

In this fourth kind of situation, when the lawyer believes the client will perjure themself on the stand, the lawyer has additional ethical responsibilities that affect how the scenario unfolds in court.[35] In addition to a duty to "remonstrate"—which means to attempt to talk the client out of their decision to lie before they do so—the lawyer also has a duty of candor to the court.[36] While Model Rule 3.1 states that a "lawyer for the defendant in a criminal proceeding . . . may . . . defend the proceeding as to require that every element of the case be established," such defense does not extend to suborning perjury.[37] Indeed, Model Rule 3.3(a)(3) explains that a "lawyer shall not knowingly offer evidence the lawyer knows to be false."[38]

The knowledge requirement is critical. Rule 3.3(a)(3) highlights the distinction between "testimony of a defendant in a criminal matter" and other evidence.[39] For any evidence other than the testimony of a criminal defendant, the lawyer may "refuse to offer" evidence that the lawyer "reasonably believes is false."[40] In contrast, when the criminal

34. *Can Prior Convictions Be Used in Court as Evidence?*, LAW OFFICE OF ARMANDO J. HERNANDEZ, P.A., https://www.armandohernandezlaw.com/blog/2019/may/can-prior-convictions-be-used-in-court-as-eviden/ [https://perma.cc/5JTF-KGCJ].

35. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2022).

36. *Id.* r. 3.3 cmt. 6 ("If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.").

37. *Id.* r. 3.1(b).

38. *Id.* r. 3.3(a)(3).

39. *Id.*

40. *Id.*

defendant's testimony is at issue, the lawyer may only refuse to offer such evidence when the lawyer "knows" it is false.[41]

In circumstances when the lawyer knows that their client's testimony in a criminal case would be false, the lawyer takes dramatically different actions than simply stating on the record that their client has taken the stand against the advice of counsel. Depending on the specific rules guiding attorneys' actions in such situations, the lawyer may ask the court for permission to withdraw altogether from further representation of the client because continuing to represent the client would violate their ethical responsibilities.[42] In contrast, jurisdictions such as the District of Columbia enable the criminal defense attorney to ask the court to allow the defendant to proceed in a "narrative" fashion in their direct examination.[43] This means that the criminal defendant takes the stand and says what they want to say without their attorney prompting them with any questions.[44] In this way, the criminal defense attorney fulfills their duty of candor to the court because the defense attorney is not asking questions that enable the defendant to lie; the defense attorney is not offering evidence the lawyer "knows to be false."

Understanding the four different scenarios in which a defendant decides to testify or not to testify sheds light on how the criminal defendant's constitutional rights interact with their attorney's ethical obligations to the client as well as the court. Or at least, this is how the decision is supposed to work. The next section introduces the scholarly debate surrounding this process and its efficacy.

B. The Scholarly Debate About Whether It Works

The scholarly debate about how the criminal defendant's decision to testify works in practice is largely limited to theory, simulations, and unrepresentative datasets. The limitations of the available data and the reasons it is so limited will be described more in Part II. Before proceeding to that discussion, this section sketches the basic contours of the body of scholarship.

The most robust scholarship regarding the defendant's decision to testify centers on the ethical obligations of defense attorneys when they know their client will commit perjury. Monroe Freedman's

41. *See* Nix v. Whiteside, 475 U.S. 157, 159, 167 (1986).
42. D.C. BAR, *supra* note 30, at 1.
43. *Id.*
44. *Id.* at 2.

classic 1975 article, *Perjury: The Lawyer's Trilemma*, explains that the lawyer is required to know everything about their client's case (to thoroughly investigate in order to make informed strategic decisions); to keep such information in confidence (by not disclosing attorney-client privileged information to anyone, including the court); and to concurrently reveal such information to the court (because of the ethical duty not to put forth evidence the lawyer knows to be false).[45] All three legs of this "perjury trilemma" generate friction with the defendant's constitutional rights to due process, to assistance of counsel, as well as their privilege against self-incrimination, in addition to the ethical rules delineating that the criminal defendant has the sole discretion to decide whether or not to testify.[46] While this area of the scholarship is the most deeply developed, in some ways it is the least relevant for the questions this Article examines.

The second area of scholarship in the realm of criminal defendant testimony focuses on the relationship between a defendant's prior convictions and the decision whether or not to testify.[47] Equally robust as the perjury-trilemma scholarship, this research examines the degree to which prior convictions have a negative impact on the jury's assessment of the defendant's guilt or innocence.[48]

Part of this discussion grounds itself in the evidence rules themselves. While each state has its own evidence rules, many of the states' rules closely follow, if not directly mirror, the federal rules of evidence when it comes to impeaching a defendant's character by using

45. *See* Monroe Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 1, 26 (1975).

46. *Id*. at 27; MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2022).

47. *See, e.g.*, Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 401 (2018) (collecting articles); Daniel J. Capra & Joseph Tartakovsky, *Why* Strickland *Is the Wrong Test for Violations of the Right to Testify*, 70 WASH. & LEE L. REV. 95, 95, 147, 154–155 (2013) ("We should simply speak of an independent 'right to testify,' an undisputed guarantee 'implicit' in the Due Process, Self-Incrimination, and Compulsory Process Clauses."); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 666 (1991) ("[T]he right to testify in one's own defense, although of far more recent vintage than some other rights of a criminal defendant, must now be considered as one of the most fundamental in our jurisprudence." (footnote omitted)); Raymond J. McKoski, *Prospective Perjury by a Criminal Defendant: It's All About the Lawyer*, 44 ARIZ. ST. L.J. 1575, 1642–43 (2012) (describing the right to testify as a "cherished constitutional right[]" that is "engrained in the fabric of the legal system"); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 483 (1992). *See generally* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353 (2009) (discussing a felony trial study).

48. Eisenberg & Hans, *supra* note 47, at 1361.

evidence of a criminal conviction.[49] Federal Rule of Evidence 609 explains which kinds of prior convictions can be introduced and which cannot.[50] The rule itself breaks down into five general categories. Rule 609(a) provides "general" rules that apply to "attacking a witness's character for truthfulness by evidence of a criminal conviction."[51] Under Rule 609(a)(1)(B), if the crime was punishable by death or imprisonment of more than one year, such evidence "must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant."[52] Rule 609(a)(2) then specifies that for other crimes, regardless of the punishment (i.e., even if the punishment was less than one year), "the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness admitting—a dishonest or false statement."[53]

In this way, the evidence rules regarding prior convictions recognize the inherent prejudice in using prior convictions against the criminal defendant. Even if the defendant is prejudiced, so long as the "probative value of the evidence outweighs its prejudicial effect," evidence of prior convictions must be received by the court.[54]

Just as the evidence rules recognize that prejudice to the criminal defendant is part of the equation, so does the scholarship explore the degree to which the jury's knowledge of prior convictions prejudices the criminal defendant.[55] For example, scholars have explored whether jurors are able to compartmentalize their knowledge of a defendant's prior convictions to discern the defendant's credibility alone, without improperly inferring that the defendant's record of prior bad conduct is reason to infer that the defendant has again broken the law.[56]

In one such study, Jeffrey Bellin conducted a four-hundred-person mock jury simulation to compare the likelihood of conviction in trials where the defendant did not testify to trials where the defendant's prior convictions were introduced.[57] The basis for the mock trial was

49. James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 589–90 (1985).
50. *See* FED. R. EVID. 609.
51. *Id.*
52. *Id.* 609(a)(1)(B).
53. *Id.* 609(a)(2).
54. *Id.* 609(a)(1)(B).
55. Eisenberg & Hans, *supra* note 47, at 1361.
56. *See id.* at 1357.
57. Bellin, *supra* note 47, at 410.

that a single defendant was arrested for breaking into a store and stealing jewelry.[58] Participants were randomly presented with different case scenarios where the defendant did and did not testify, and where the jury heard or did not hear evidence of prior convictions.[59] The study concluded that the "penalty criminal defendants suffer when they refuse to testify is substantial, rivaling the more widely-recognized damage done to a defendant's trial prospects by the introduction of a criminal record."[60] In addition to this conclusion, the author also observes that "these two penalties work in tandem, creating a 'parallel penalty' effect that systemically diminishes the prospects of acquittal and incentivizes guilty pleas."[61] The important aspects of Bellin's study are the novel simulation itself and the thorough review of prior scholarship in this area, which all point toward the same conclusion: criminal defendants with prior convictions may choose not to testify or to plead guilty rather than risk the knowledge of prior convictions negatively impacting the jury's assessment of their guilt or innocence.

A number of scholars and practitioners wrote responses to Bellin's study. In one such article, the Honorable Mark W. Bennett commented on Bellin's work based on Bennett's own experience presiding as a federal judge over hundreds of criminal trials.[62] In addition to confirming Bellin's conclusion that jurors usually penalize defendants for not testifying by inferring guilt from their silence, Bennett claims it is more problematic when the jury hears impeachment evidence, since the jurors are "more likely to convict if the accused testifies and jurors are aware of the accused's criminal records."[63] In this way, Bennett supports the study's finding that jurors routinely and impermissibly use impeachment evidence as propensity evidence that the defendant committed the crimes charged.

The third area of scholarship takes the form of more litigation-oriented strategy. From litigation manuals to continuing legal education presentations, this area focuses on how to prepare one's client to testify and to endure cross-examination. Through a hands-on, practice-based approach, this scholarship teaches criminal defense attorneys the nuts and bolts of preparing their client to testify, largely leaning

58. *Id.*
59. *Id.* at 412.
60. *Id.* at 395.
61. *Id.*
62. Bennett, *supra* note 22, at 2.
63. *Id.* at 4.

into a deep understanding of evidence rules in order to keep evidence of prior convictions out of the trial as best as possible—due to the jurors' use of prior convictions to assess the defendant's guilt in the current case rather than its restricted, permissible use to determine the credibility of the defendant's testimony.[64]

These three areas of scholarship point to a well-developed literature in some respects, but they also underscore the depth and breadth of what we don't know about how defendants make the decision to testify, and what ramifications that decision has in real trials in real courtrooms throughout the country. The next part explores this blind spot further, explaining the limitations of current data regarding criminal jury trials.

II. WHAT WE (THINK WE) KNOW ABOUT CRIMINAL JURY TRIALS

Because trial courts exist at both the federal and state level, the U.S. criminal legal system is a complex patchwork of state and federal jurisdictions. Each state has a different system for managing criminal trials, and each state system drills down into smaller jurisdictions within the state, such as county, city, and municipal courts.[65] Even when a state system has a single statewide electronic filing system for its state courts, it is not unusual for different counties, cities, and municipalities within a state to manage each of their courts differently.[66] Adding to the data collection confusion is the fact that the federal system operates as another system unto itself, with its own electronic database and way of collecting and storing data.[67]

This part explains the limited access to data from criminal trials across the fifty states and the federal system and how it hampers the ability to understand what is really happening in criminal jury trials across the country. The inability to access basic data is exemplified by the lack of ready answers to seemingly easy questions, such as how many jury trials took place in a given state in a year, what their verdicts and/or sentencing outcomes were, and whether a defendant testified at the trial. To understand the barriers to answering those kinds of

64. Bellin, *supra* note 47, at 403.

65. *The U.S. Court System, Explained*, DEMOCRACY DOCKET, https://www.democracydocket.com/analysis/the-u-s-court-system-explained/ [https://perma.cc/T2QX-XDSS].

66. *See, e.g.*, Alexandra Natapoff, *Criminal Municipal Courts,* 134 HARV. L. REV. 964, 968 (2021).

67. *FAQs: Case Management / Electronic Case Files (CM/ECF)*, U.S. CTS., https://www.uscourts.gov/court-records/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf [https://perma.cc/MTV8-NHHY].

questions in a systemic way across the state and federal governments, this section provides a brief overview of the types of criminal trial courts in the United States and the limited ability to gather data from those courts.

A. U.S. Criminal Trial Data

It's important to understand what is known and what is not known about the organization and operations of criminal trial courts within the U.S. The first division is between state and federal criminal trial courts. Then, within the category of state criminal trial courts, the next division separates trial courts into two additional subcategories: courts of limited jurisdiction and courts of general jurisdiction.[68]

The federal court system has ninety-four district courts that can hear criminal cases at the trial level, with ninety of these courts located in the fifty states and the remaining four courts located in U.S. territories.[69] Federal district courts have jurisdiction over violations of federal criminal statutes.[70] At the state level, the exact number of criminal state trial courts in the U.S. is currently unknown. To our knowledge, the last comprehensive report documenting the basic organization of U.S. state criminal courts took place in 2011.[71] At that time, forty-six states had courts of both limited and general jurisdiction, while four states and the District of Columbia had eliminated limited jurisdiction courts entirely.[72] At the state level, limited jurisdiction courts typically hear less serious criminal offenses, such as misdemeanor cases. In some states, these courts also hold the first hearing for felony cases.[73] In contrast, general jurisdiction courts typically hear more serious criminal cases—often felony cases.[74] The diffuse structure of the state criminal court system complicates the ability to precisely count the total number of state courts in the U.S. In 2022, there were at least 2,208 state general jurisdiction criminal trial courts in the United

68. Natapoff, *supra* note 66, at 966, 978.

69. *Court Role and Structure*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/G6T6-97KB].

70. *See, e.g.*, U.S. CONST. art. III, §§ 1–2.

71. RON MALEGA & THOMAS H. COHEN, U.S. DEP'T OF JUST., STATE COURT ORGANIZATION, 2011, at 1 (2013), https://bjs.ojp.gov/content/pub/pdf/sco11.pdf [https://perma.cc/NHH6-HJ6T].

72. *Id.* at 3.

73. MALEGA & COHEN, *supra* note 71, at 2.

74. *Id.*

States.[75] However, this number does not take into account limited jurisdiction courts, and thus is an underestimate of the number of state criminal trial courts.

In addition to having far more state trial courts than federal trial courts throughout the United States, there are also more criminal cases filed every year in state courts than in federal courts. Here again, because no centralized system exists to track state criminal cases, statistics on the exact number of state criminal cases are difficult to obtain, but some progress has been made.

One such example is the Court Statistics Project (CSP), which has attempted the most comprehensive synthesis of state court filings across the United States to date.[76] In the calendar year 2020, CSP collected data from forty-one states and reported the filing of 12,925,605 criminal cases across those states.[77] That number helps to shed light on the stark difference between criminal filings in state and federal courts. For comparison with the 12,925,605 criminal cases filed across those forty-one states, consider the best federal court comparison: in the ninety-four federal district courts (including the four outside of the fifty states), from the time period beginning March 31, 2020, and ending March 31, 2021, a total of 64,999 criminal cases were filed—which is at least 12,860,606 *more* cases filed in state courts than in federal courts.[78] Although the state analysis time period is January to December and the federal analysis is March to March, the data still highlights a stark disparity in caseloads. Federal criminal cases accounted for less than 0.5 percent of all criminal cases filed, even when excluding criminal cases filed in nine states.[79]

Figure 1 depicts the magnitude of this difference. The volume of the red sphere represents the federal caseload, and the volume of the blue sphere represents the state caseload. The state caseload dwarfs the federal caseload.

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75. General Jurisdiction Courts Data Spreadsheet (Oct. 21, 2023) (unpublished dataset) (on file with authors).

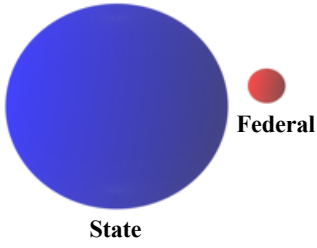
76. *CSP STAT Criminal*, CT. STAT. PROJECT (Oct. 9, 2023), https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal [https://perma.cc/W6RK-WN6Z?type=image].

77. *See id.*

78. *See Federal Judicial Caseload Statistics 2018*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 [https://perma.cc/S8FT-V74Z].

79. *See id.*; CT. STAT. PROJECT *supra* note 76. The following states did not have data included: Washington, Oregon, North Dakota, South Dakota, Oklahoma, Kansas, Mississippi, Tennessee Virginia, and South Carolina.

Figure 1: Caseload Difference Between State and Federal Criminal Courts[80]



The figure above illustrates the stark difference between caseloads in federal and state courts. Relatedly, the kinds of criminal offenses that are filed in federal and state courts are also different. For example, 26 percent of the federal criminal cases filed between March 31, 2020, and March 31, 2021, were immigration offenses.[81] The other federal criminal filings were divided as follows: 33 percent drug cases (broken down into 2 percent of drug cases involving marijuana and 31 percent involving all other drugs); 18 percent firearms and explosives; 8 percent fraud; 5 percent sex offenses; 4 percent violent offense; and 1 percent larceny and theft.[82]

The kinds of criminal offenses tried in federal court differ from the kinds tried in state courts. For example, criminal immigration matters are exclusively within the jurisdiction of federal courts, so there will never be any state criminal trials of immigration offenses.[83] To more fully explore the potential differences between federal and state jurisdictions, we consider the dataset from the pilot study discussed in the Article.[84] There were a total of ninety-nine trials considered in this

80. Figure 1 provides a visualization of the caseload difference between state and federal criminal courts. The volume of the blue sphere represents the number of state criminal cases filed in forty-one states during the calendar year 2020, and the volume of the red sphere represents the number of federal criminal cases filed between March 31, 2020, and March 31, 2021.

81. UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE 1 (2021), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2021.pdf [https://perma.cc/6S3P-TG93].

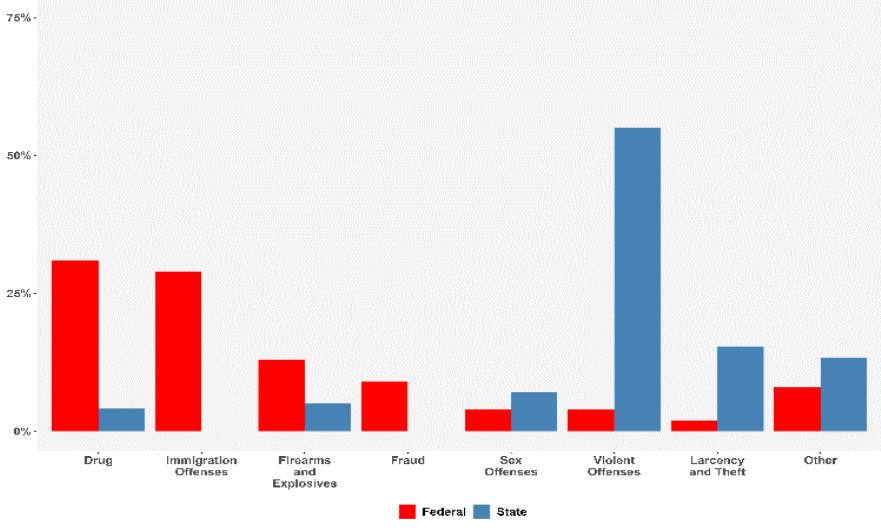
82. *Id.* The remaining 5 percent of federal cases included groupings of "forgery and counterfeiting," "justice system offenses," "regulatory offenses," and other criminal offenses.

83. U.S. CONST. art. 1, § 8, cl. 4.

84. *See infra* Part III.

study.[85] The database for this pilot study includes no immigration cases and contains a higher percentage of violent offenses (55 percent) and larceny/thefts (15 percent) than the kinds of cases filed in federal court.[86] In Figure 2, we visualize just how different the relative frequencies for the kinds of cases can be. In this plot, the color indicates which jurisdiction the bar represents, and the height of the bar represents the percentage of cases that fell into the given category. For example, approximately 55 percent of the Ohio criminal cases were violent offenses and approximately 4 percent of the federal criminal cases were violent offenses.[87]

Figure 2: Relative Frequencies of Types of Criminal Cases[88]



To probe more into the importance of assembling databases of criminal cases, the next section explores the strengths and limitations of existing databases of criminal trial data.

85. For the Ohio state criminal cases, the unit of study here is a filed case. For cases filed in the Court of Common Pleas, General Jurisdiction in Franklin County, Ohio, during the calendar year of 2018, we tracked the ninety-nine filed cases that went to trial by November of 2022. Some of these filed cases were eventually merged for trial. Although the methodology is not entirely clear, it seems likely that summaries of federal court cases use unique case filings as the unit of study, so we did not group merged cases together in Figure 2. *See infra* Part III; *infra* Figure 2.

86. *See infra* Part III.

87. *See infra* Part III; *infra* Figure 2.

88. Figure 2 displays the relative frequencies of types of criminal cases filed in federal courts for cases filed between March 31, 2017, and March 31, 2018, and those filed in the Court of Common Pleas, General Jurisdiction in Franklin County, Ohio, for ninety-nine criminal cases filed in the calendar year of 2018.

B. Existing Databases of Criminal Trial Data

The U.S. legal system has failed to keep up with the kinds of evidence-based decisions other sectors routinely make. This is due, in part, to the lack of usable data about criminal cases.[89] The lack of transparency in the criminal legal system, in particular, is drawing increasing attention from researchers.[90]

For example, an organization called "Measures for Justice" is devoted to making accurate criminal justice data available for use in driving evidence-based reform of the criminal legal system. Since 2011, Measures for Justice has documented the limitations of such data. For example, it has illustrated how difficult it is to answer the simplest of questions: How many people were charged with a crime in a given county?[91] Measures for Justice and other organizations, such as the Criminal Justice Administrative Records System (CJARS), have been working to collect and share data about criminal case *outcomes*.[92] Thanks in large part to their efforts, the collection and analysis of such data will help to shed light on trends in the criminal legal system.

At the same time, as important as these efforts are, neither effort sheds light on what occurs *during* trial. Thus, these efforts can potentially identify problematic trends in the criminal trial outcomes but give no insight into why or how these trends came about. The difficulties encountered in accessing data about criminal cases are compounded once researchers begin to ask what happened at trial.

To better understand the lack of existing datasets available to analyze when asking basic questions about what happens during trial, consider the questions this pilot study seeks to explore. Instead of focusing on one court in one state in one year (and indeed, on one county within the one state), consider the difficulties of applying the pilot study's research questions to the entire state of Ohio: How many total criminal cases were filed in Ohio in 2018, how many of those cases went to trial, how often did defendants testify at those trials, what is

89. Stephen Handelman, *Lack of Data: Missing Link in Justice Reform,* CRIME REP. (June 5, 2020), https://thecrimereport.org/2020/06/05/the-missing-link-in-justice-reform/ [https://perma.cc/43LK-M92H].

90. *See, e.g.*, LaDoris Cordell, *Transparency in the Administration of Justice*, SANTA CLARA UNIV.: MARKKULA CTR. FOR APPLIED ETHICS (Oct. 22, 2015), https://www.scu.edu/government-ethics/resources/transparency-in-the-administration-of-justice/ [https://perma.cc/LYH9-C45V].

91. *See* MEASURES FOR JUST., 2022 IMPACT REPORT 4, 16 (2022), https://measuresforjustice.org/about/annual-report [https://perma.cc/S84H-WUGQ].

92. Keith Finlay et al., *The Criminal Justice Administrative Records System: A Next-Generation Research Data Platform*, 9 SCI. DATA 562 (2022).

known about those defendants (including their gender and prior convictions), and what was the verdict and/or sentence of each case? To answer these questions, we would need simultaneous access to a criminal case docket (where we could identify cases that went to trial and which include jury trials as well as bench trials, in addition to verdict and sentencing outcomes). We would also need access to trial transcripts for every trial in Ohio, which we would use to analyze—among other information—whether a defendant testified at trial. No such database exists in Ohio or in any U.S. state. Without access to such data, it is impossible to answer these questions on a state-wide level, let alone across the nation.

To further understand the difficulties of exploring these research questions in the context of needing simultaneous access to trial transcripts and a criminal case docket, consider the differences between exploring these research questions in federal criminal court and in state court.

1. Federal Criminal Courts

The most robust collection of federal criminal trial materials is the Public Access to Court Electronic Records (PACER). This system was established by the Judicial Conference in 1988 as a way to improve public access to court information.[93] For modern criminal cases, PACER in combination with the adoption of the Case Management/Electronic Case Files (CM/ECF) system in the early 2000's ensures that most documents (including transcripts) not subject to protective action are available in digital form.[94] Theoretically, all dockets and associated transcripts for federal criminal cases are available on this system.[95] Practically, these materials are difficult to access for answering research questions like ours—both because the system is difficult to navigate and because the pricing structure on PACER can be cost-prohibitive.[96]

93. *About Us*, PUB. ACCESS TO CT. ELEC. RECS., https://pacer.uscourts.gov/about-us [https://perma.cc/A7YB-S2JT].

94. At the time of writing, federal courts have been migrating to the NextGEN CM/ECF system. *FAQs: Case Management / Electronic Case Files (CM/ECF)*, *supra* note 67; *see Get Ready for NextGen CM/ECF*, PUB. ACCESS TO CT. ELEC. RECS., https://pacer.uscourts.gov/file-case/get-ready-nextgen-cmecf [https://perma.cc/TR5G-FHMB].

95. *FAQs: Case Management / Electronic Case Files (CM/ECF)supra* note 67.

96. *PACER Pricing: How Fees Work,* PUB. ACCESS TO CT. ELEC. RECS., https://pacer.uscourts.gov/pacer-pricing-how-fees-work [https://perma.cc/HP7N-SW9R].

For example, even if a search on PACER allows a researcher to obtain a list of cases *filed* in a single court in a single federal district, that researcher would then need to identify the cases that went to trial, and PACER currently allows no way to filter this information.[97] Instead, this data would need to be gleaned from the docket. This is where PACER's pricing scheme becomes cost prohibitive,[98] and the pricing is even more expensive for accessing transcripts.[99]

The bottom-line is that even if researchers wade through the administrative and financial barriers, PACER is limited to federal cases, and federal criminal cases compose just a fraction of the total criminal cases filed each year.[100] Once researchers depart from PACER, the ability to undertake a scientific approach to data collection in state criminal cases becomes implausible, as explained more below.

2. State Criminal Courts

The most comprehensive collections of state dockets and transcripts currently exist in three dominant commercial databases: LexisNexis, Westlaw, and Bloomberg. While some private databases are available, these databases tend to have collections of trial materials

97. *Id.*

98. *See* Kori Khan & Emily Hughes, Public In Theory, Inaccessible in Practice: Data on the United States Criminal Legal System (Dec. 19, 2023) (unpublished manuscript) (on file with authors) (explaining PACER's pricing structure in more depth). For example, to access the docket using PACER, a user is charged ten cents per page, up to three dollars per docket. *Id.*; *see PACER Pricing: How Fees Work*, *supra* note 96. At the moment, the only way to limit the length of the docket accessed is with dates (requiring information about the processing of each case). Practically speaking, in a jurisdiction like the United States District Court for the Western District of Texas, simply identifying the cases that went to trial could cost over $20,000. We note that any other document related to the case (i.e., verdict forms or sentencing orders) follows the same pricing scheme, with a separate three dollars maximum operating per document (rather than per case).

99. *See* Khan & Hughes, *supra* note 98, at 98 (explaining that transcripts can cost as much as $3.25 a page, with no maximum upper limit). While PACER's fee structure is a major impediment to obtaining usable data, it is also true that PACER offers a fee waiver for academic researchers. In order to qualify for that fee waiver, however, the academic researcher must agree that materials received will "not be transferred" and "will not be redistributed via the Internet." Such constraints can make research projects prohibitive because grant or other funding organizations—or simply best practices among peer-reviewed academics—require making databases available to other researchers so that they can cross-check the published research by doing the same research themselves and seeing if they obtain the same result. In addition to verifying research results, funding organizations often require the availability of databases—after a restricted period of time for the first researchers to use the data themselves to conduct new research and publish those findings, before others have access to the database to conduct other studies and publish their own work. None of this is possible given PACER's restriction on researchers transferring data or redistributing it via the internet. Additionally, not all academic projects will be approved for a fee waiver.

100. *Pricing: How Fees Work*, *supra* note 96.

that are highly unrepresentative of a typical state trial.[101] All three resources advertise having an extensive set of dockets and court materials for both state and federal jurisdictions. While Bloomberg, at least anecdotally, has the most robust collection of docket sheets, the three databases suffer from the same set of limitations when it comes to answering this Article's research questions. Because the research limitations present in Westlaw are similar in nature to the limitations present in LexisNexis and Bloomberg, we focus our discussion on Westlaw.

Westlaw has limited access to state criminal dockets. For example, Westlaw only advertises docket access to twenty-five of the eighty-eight Court of Common Pleas courts in the state of Ohio.[102] In addition to having exceptionally limited access to state criminal dockets, another constraint of Westlaw is that access to criminal dockets and access to trial transcript materials are separate "tools"[103]—so searches do not conveniently track connections between trial transcripts already existing in Westlaw's transcript database and case outcomes. Another impediment is that Westlaw primarily relies on PACER to obtain trial transcripts, and PACER is limited to federal trial transcripts, which means Westlaw is similarly limited.[104]

That said, if a consumer using Westlaw wishes to obtain a state court transcript, the consumer can request it.[105] While that sounds good in theory, because Westlaw does not provide a comprehensive means by which to see how many cases were filed (with or without

101. *See The National Registry of Exonerations*, MICH. STATE UNIV. COLL. LAW, https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/FDA7-GAE3] (explaining that the National Registry of Exonerations collects trial transcripts, when possible, of cases for which it is known a wrongful conviction took place); *Court Citations*, ASS'N FOR FIREARM & TOOLMARK EXAM'RS, https://afte.org/resources/swggun-ark/court-citations [https://perma.cc/9GPC-2ZLB] (explaining that the Association for Firearm and Toolmark Examiners also collect transcripts for cases in which their members testified). These private collections are unrepresentative of a typical criminal case and the collectors typically restrict access to other researchers who agree not to share the transcripts.

102. *See Dockets and Court Wire Coverage*, THOMSON REUTERS, https://legal.thomsonreuters.com/en/products/westlaw/dockets-coverage [https://perma.cc/424N-QG5P]. Note the fact that Westlaw advertises access to the dockets for a court does not mean that coverage is complete. *See* Khan & Hughes, *supra* note 98, at 98 (explaining that cases existing in our pilot database are missing from Westlaw's collection of dockets in the Court of Common Pleas, Franklin County, Ohio).

103. *Dockets*, THOMSON REUTERS, https://legal.thomsonreuters.com/en/products/westlaw/dockets [https://perma.cc/ES8D-RLQ4]; *Pleadings, Motions, and Memoranda*, THOMSON REUTERS, https://legal.thomsonreuters.com/en/products/westlaw/pleadings-motions-memoranda [https://perma.cc/7RQ8-QYS6].

104. *See* SIMON A. COLE ET AL., ASSESSING THE FEASIBILITY OF BUILDING A DATABASE OF TRIAL TRANSCRIPTS CONTAINING SCIENTIFIC TESTIMONY 9 (on file with authors).

105. *Court Express*, THOMSON REUTERS, https://legal.thomsonreuters.com/en/products/court-express [https://perma.cc/Z5E2-AWPC].

transcripts) for a given jurisdiction,[106] the person requesting a transcript must know a case exists to request it.[107] In practice, this means transcripts are typically requested for cases that drew media attention, for cases that were the subject of an appeal, or for cases which presented novel legal questions.[108] In other words, most cases that result in acquittals will not have transcripts available in Westlaw. Compounding these difficulties is the fact the limited number of state trial transcripts in Westlaw may have significant portions of the trial transcript missing.[109] In short, it is not possible to use LexisNexis, Westlaw, or Bloomberg to access a robust set of state trial transcripts to answer research questions like those we pose in this Article.

Just as it is not possible to use national online search engines to obtain the kind of data needed to develop empirical assessments of state cases, so too is it not possible to use statewide or local criminal dockets to obtain that information.

The criminal docket is the hub of the case because it is where the clerks of court record what happens.[110] From the moment of arrest through dismissal or sentencing, the criminal docket tracks each step in a case.[111] Lawyers use online criminal dockets as the logistical workhorse for their cases. After most state courthouses moved to electronic filing in the last decade, the online criminal docket became an unexpected lifeline to keep the legal system moving after courts closed their physical doors during the pandemic.[112]

When legal practitioners think of a criminal docket, they think of an online database that provides information about their cases. Dockets are where lawyers check pending court dates, submit information related to their cases (such as motions and briefs), receive and read information the opposing party submits, and read court rulings.[113] In

106. *Dockets*, *supra* note 103.

107. COLE ET AL., *supra* note 104, at 3.

108. *Id.* at 7.

109. *See* Khan & Hughes, *supra* note 98, at 15–16 (gathering an arbitrary collection of one hundred "full" transcripts from Westlaw Edge, examining the completeness of expert testimony within the one hundred transcripts, and discovering that only thirteen of the one hundred transcripts had fewer than thirty pages missing from a single expert witness's testimony).

110. *Docket*, BLACK'S L. DICTIONARY (11th ed. 2019).

111. *Id.*

112. *See How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, PEW CHARITABLE TRS. (Dec. 1, 2021), https://www.pewtrusts.org/-/media/assets/2021/11/clsm-court-tech-methodological-appendix.pdf [https://perma.cc/R5VP-CHRT].

113. *Dockets and Court Filings*, LIBR. CONG., https://guides.loc.gov/case-law/dockets-court-filings [https://perma.cc/C7W7-VPKW].

these ways, the criminal docket helps lawyers check and maintain information related to the status of their cases.

In addition to using the docket to search for information about their client's cases, lawyers sometimes search the criminal docket for information about somebody else—especially if such information will help them represent their own client. To understand this strategy, consider a lawyer who is representing a criminal defendant charged with assault. The lawyer might use the criminal docket to search for information related to a witness, victim, or co-defendant who will testify against the lawyer's client. If a lawyer sees that a witness has several convictions for theft, for example, the lawyer can use that information to cross-examine the witness to challenge the truth of the witness's statement. Unless lawyers are searching the criminal docket for information related to something they need for their own clients, lawyers seldom use the criminal docket simply to check other lawyer's cases.

In these ways, the criminal docket is a useful repository of information for lawyers. At the same time, the criminal docket is much more than an online calendaring and file system. The criminal docket contains robust, detailed data revealing confidential and wide-ranging information—from sworn affidavits with classified information about the identities of confidential informants, to trial transcripts, to home addresses, birth dates, and social security numbers.[114] Because of the vast amount of information the criminal docket contains, access to its full breadth of information differs depending on whether somebody is a lawyer or a member of the general public—and even lawyers do not necessarily have access to all details about other lawyers' cases.[115] For example, before uploading a document with confidential information (such as a social security number), lawyers must generally redact that information from the document so that it is not accessible to others through the database.[116] Failure to do so can result in serious ethical ramifications for the lawyer, maybe even causing them to lose their license to practice law.[117] Such documents may be posted in a redacted form or the ability to view them may be restricted altogether—the equivalent of sealing a document from public view or from the view of anybody other than those the court specifically authorizes.

114. *FAQs: Case Management / Electronic Case Files (CM/ECF*), *supra* note 67.
115. *Id.*
116. *Id.*
117. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2022).

While lawyers, judges, law clerks, and court reporters are some of the primary users of the criminal docket, the public also uses it in important ways. Criminal defendants may check the docket to follow their own cases, and witnesses and victims may check the docket to follow the progress of a case. The docket is a key place to double-check when a person has to appear in court next, and if that court date changes, the docket records the new date.

The criminal docket is thus a critical source of information about criminal cases. Parties input information about their cases and check for information that the judge and the opposing party inputs. The criminal docket also preserves the legal record for use in the criminal legal system.[118] At the same time, to researchers interested in an evidence-based approach to the criminal legal system, the docket system offers a means by which to begin assessing the trends in the legal system.[119] That is part of—but not the full reason—why the ability to access the criminal court docket is so important to research. With this understanding of the current limitations of federal and state databases in mind, and with a better understanding of the importance of criminal dockets and trial transcripts, Part III explains the design of the pilot study in Franklin County, Ohio.

III. THE PILOT STUDY IN FRANKLIN COUNTY, OHIO

A. Compiling the Data

Our pilot study collected data from a state court of general jurisdiction in Ohio. This choice was made because jurisdictions in Ohio have some of the most robust online docket systems available.[120] Some background on the court system in Ohio is necessary to understand the context for the trials in our pilot study.

In Ohio, there are trial courts of both limited jurisdiction and general jurisdiction for criminal cases.[121] In each of the eighty-eight counties, there is a Municipal Court and a Court of Common Pleas, General Division.[122] The first court is a limited jurisdiction court, which typically handles misdemeanor cases and the initial hearings for felony

118. *See Docket*, *supra* note 110.

119. *Dockets and Court Filings*, *supra* note 113.

120. *See Dockets and Court Wire Coverage*, *supra* note 102.

121. *Judicial System Structure*, SUP. CT. OHIO & OHIO JUD. SYS., https://www.supremecourt.ohio.gov/courts/judicial-system/judicial-system-structure/ [https://perma.cc/QV2S-LGV3].

122. *See* OHIO CONST. art. IV, §§ 1, 4; *see also Judicial System Structure*, *supra* note 121.

courts, while the second is a general jurisdiction court that handles felony cases.[123] Because Ohio law treats offenses that would otherwise be considered criminal as civil offenses when the offender is a minor at the time of the offense, juvenile cases are typically handled outside of the two criminal courts in the Court of Common Pleas, Juvenile Division.[124] The exception for this is when juvenile offenders are bound over to the Court of Common Pleas, General Division.[125]

Our data was collected from the Court of Common Pleas, General Division, in Franklin County, Ohio. This is the most populous county in Ohio, and it includes the majority of the state capital of Columbus.[126] In the last two decades, this county has consistently had one of the highest criminal caseloads in the state of Ohio.[127] The Court of Common Pleas, General Division, has an online record system for dockets.[128] Similar to many online docket systems, however, the queries are limited to docket numbers or defendant names.[129] This means that the system assumes the user already knows the case the user seeks to view.

In February 2021, we submitted a public records request for all cases filed in the Court of Common Pleas, General Division, of Franklin County during the 2018 calendar year. In response to our request, we received a list of 6,282 criminal cases and their associated docket numbers. From May to August 2021, we manually reviewed the dockets of all 6,282 cases to identify which of these cases had gone to trial. In November 2022, we then reviewed the cases pending as of August 2021.

Table 1 summarizes the results of this effort. We identified ninety-eight cases that went to trial and another 150 cases that were still pending as of November 2022. The ninety-eight cases became the basis of our study.

123. *Judicial System Structure*, *supra* note 121.

124. *Id.*

125. OHIO REV. CODE § 2152.12 (2023).

126. *See* U.S. CENSUS BUREAU, COUNTY POPULATION TOTALS: 2010–2020 (Oct. 8, 2021), https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates/2020-evaluation-estimates/2010s-counties-total.html [https://perma.cc/QXZ4-4HRX].

127. *See* STATE OF OHIO COURTS OF COMMON PLEAS, GENERAL DIVISION: CASELOAD AND PERFORMANCE MEASURES, https://analytics.das.ohio.gov/t/SCPUB/views/FormA-judge-state-PROD/CaseloadandPerformance [https://perma.cc/7XA9-9E7X].

128. *Case Information Online Research Options*, FRANKLIN CNTY. CLERK CTS., https://fcdcfcjs.co.franklin.oh.us/CaseInformationOnline/acceptDisclaimer?12bgdji2b4hi4c [https://perma.cc/XBX4-47Z4].

129. *Id.*

Table 1: Outcomes for Criminal Cases Filed in the Court of Common Pleas, General Division, in Franklin County, Ohio[130]

Outcome	**Count**
Docket Unavailable	45
Case Closed Without Trial	5725
Trial	98
Case Inactive	264
Case Open Without Resolution	150

For all ninety-eight cases, we obtained the initial offenses, trial outcomes, sentencing details, and some basic demographics of the defendants. In the ninety-eight cases there were only ninety-six unique defendants; two defendants each had two cases initially filed against them in 2018, which were subsequently combined for trial. Additionally, after we began reviewing transcripts, we discovered another defendant who had not initially appeared on the docket list. In this Article, we consider our sample as consisting of the ninety-seven unique defendants who went to trial from this point forward.[131]

We collected information about prior convictions for all ninety-seven defendants. While information about prior convictions was limited to convictions that took place in Franklin County, Ohio,[132] we explored the role of prior convictions in several ways. First, we explored prior convictions by simply identifying whether or not the defendant had any type of prior criminal conviction (Yes/No).

The second way we explored prior convictions was to consider whether or not a defendant had been convicted of crimes that could theoretically be used to impeach the defendant. Under Rule 609 of the Ohio Rules of Evidence, a defendant may be impeached by a prior conviction punishable by over a year of imprisonment, provided the defendant's sentence for the offense concluded within the last ten

130. Table 1 lists outcomes for the 6,282 criminal cases filed in the Court of Common Pleas, General Division, in Franklin County, Ohio, in 2018, with data updated as of November 2022.

131. In other words, the unit of study for all subsequent analyses is the unique combination of defendant and trial. Importantly, co-defendants in a joint trial are treated as separate observations.

132. This information was found by obtaining all previous records matching a defendant's first name, last name, and date of birth in the Court of Common Pleas, General Jurisdiction, in Franklin County, Ohio. Because this approach misses prior convictions that occurred in other jurisdictions, even within Franklin County, Ohio, it highlights the importance of assembling statewide and national databases so that complete access to such information is possible. There were two defendants for whom we could not identify birthdates, and therefore we could not identify prior convictions.

years.[133] Because data for the prior convictions was difficult to analyze and sentences for these offenses were often not ascertainable, it was hard to accurately determine whether a given offense could have put a defendant in jeopardy of impeachment. As a rough approximation for this possibility, for each defendant, we first determined whether each prior conviction occurred within ten years of the defendant's 2018 criminal case.[134] If so, the next step was to assess whether the prior conviction had resulted in a felony conviction.[135] If these two conditions were met, we considered the case as having resulted in a conviction that the prosecutor could theoretically use to impeach the defendant. In the dataset, we then tracked whether a defendant had previously been convicted of a "felony prior" (Yes/No).

The third and final way we considered prior convictions was by determining whether the prior offense involved a conviction associated with dishonesty. We again summarized this by tracking whether a defendant had previously been convicted of any "dishonesty prior."

As a novel aspect of our study, we also obtained trial transcripts for seventy-five of the trials. Some of the seventy-five defendants were co-defendants tried together, and therefore we only needed to collect seventy unique trial transcripts to complete our analysis. We gathered these transcripts with the goal of obtaining as representative a sample as possible while simultaneously ensuring we could compare cases with acquittals to cases with convictions. The seventy-five trials were associated with seventy unique trial transcripts, including all forty-five trials that had been appealed by November 2022 and/or were the subject of media attention.[136] We refer to these trials as a "convenience sample."

The remaining trial transcripts were purchased. These trials were selected via a sampling scheme that categorized each trial based on case outcome (acquittal versus conviction) and the degree of the most

133. OHIO R. EVID. 609.

134. The dockets typically include only the date a case was filed. Therefore, we compared the date the case was filed in the 2018 criminal case to the date a prior case that resulted in a conviction was originally filed.

135. Most, but not all, felony charges in Ohio are punishable by more than one year of imprisonment. In particular, many fifth-degree felonies are not punishable by more than one year imprisonment, but some can be. OHIO REV. CODE § 2929.14(A)(5) (2023). We included all felonies as being eligible for impeachment.

136. In Franklin County, digital copies of transcripts that have already been requested can be obtained for no charge, while transcripts that have not been requested cost $4.75 per page. *Transcripts*, FRANKLIN CNTY., OHIO: CT. COMMON PLEAS, https://www.fccourts.org/182/Transcripts [https://perma.cc/2KBY-BYXX].

severe offense.[137] The sampling scheme was designed to help ensure our sample was more representative of the full ninety-seven trials than the initial convenience sample. For example, we selected cases with no convictions more frequently to adjust for the fact that none of these cases were in the trials which had been appealed or subject to media attention. In total, we obtained transcripts for twenty-one of the potential twenty-eight trials that resulted in no convictions. This sampling scheme gave us a reasonably representative sample of the types of cases that resulted in trials. Importantly, we were able to use the trial transcripts to determine whether or not a defendant testified at trial. The next section explores some characteristics of our sample as well as the full ninety-seven trials in more detail.

B. Analyzing the Data

At the case level, we categorized each of the trials by the most severe offense charged at indictment. In Figure 3, the left-hand plot illustrates the number of each type of case for the full ninety-seven trials.[138] The right-hand plot illustrates the number of each type of case for the seventy-five trials included in our study.[139] Our sample is disproportionately missing cases categorized as either assaults or other, but otherwise, the two distributions look fairly similar. These differences may be explained in part by the fact that assaults and other cases had, respectively, the second- and third-highest rates of no convictions. Because cases with no convictions were unlikely to be appealed, we were less likely to collect these cases without having to purchase the transcripts.

137. The sampling scheme was not a random sample. There were obstacles to adopting a traditional sampling scheme, including one without replacement. See Khan & Hughes, *supra* note 98, at 13–15, 19–21 for more details. Instead, transcripts were randomly selected (with replacement) in groups of approximately ten at a time.

138. *See infra* Figure 3.

139. *Id.*

Figure 3(a): Full Sample of Ninety-Seven Trials

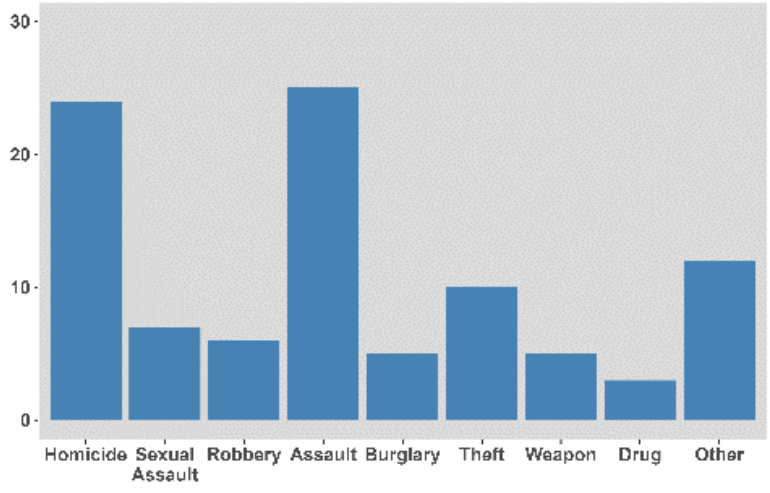


Figure 3(b): Study Sample of Seventy-Five Trials

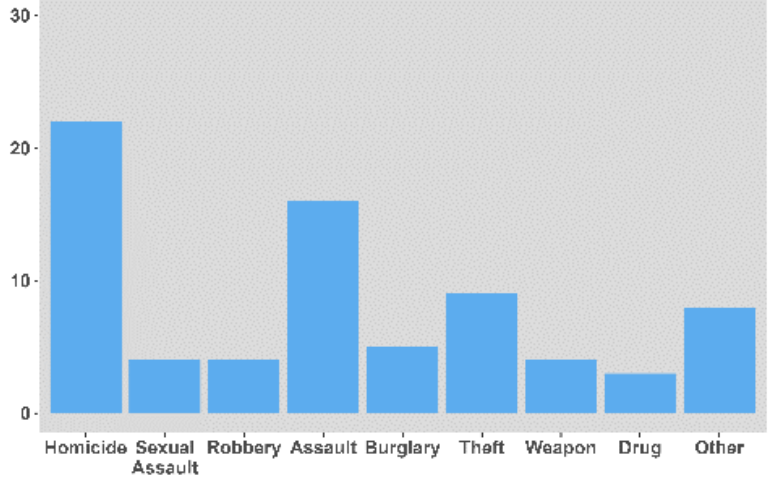


Table 2 distinguishes some of the case level and defendant characteristics further. The distribution of gender was roughly equivalent for the full ninety-seven trials and the subset of seventy-five cases, with male defendants accounting for approximately 90 percent of the defendants.[140] Our sample of seventy-five cases had a similar

140. There was one corporate defendant. This defendant was included in our sample as well and not assigned a gender. See *infra* Table 2.

proportion of cases that ended with no convictions (28 percent) to the proportion observed in the full ninety-seven trials (29 percent).[141]

Finally, it appears that the patterns of prior and felony convictions are roughly similar. Recall that "priors" is a binary variable that simply indicates whether a defendant has been convicted of any previous criminal offense, and "felony priors" is a binary variable that indicates whether a defendant had been convicted of a felony in the last ten years at the time of his/her 2018 case.[142] The proportion of defendants with either of these types of priors was almost exactly the same for our sample and for the full ninety-seven trials. Dishonesty priors were slightly underrepresented in our sample (21 percent) compared to their presence in the full ninety-seven cases (27 percent).

Table 2: Defendant and Case Characteristics[143]

Characteristic	75 trials (sample)		97 trials	
	n	%	*n*	%
Gender				
Female	8	10.6	11	11.3
Male	66	88.0	85	87.6
Convictions at Trial				
None	21	28.0	28	28.9
At least one	54	72.0	69	71.1
Death Penalty	3	4.0	3	3.1
Defendant Testified	28	37.3		
Priors				
No	45	60.0	57	58.8
Yes	30	40.0	40	41.2
Felony Priors				
No	53	70.7	68	70.1
Yes	22	29.3	29	29.1
Dishonesty Priors				
No	59	78.7	71	73.2
Yes	16	21.3	26	26.8

141. *Id.*

142. *See* discussion *supra* Section III.A.

143. Table 2 displays information regarding defendant and case characteristics for both the study sample of the seventy-five trials and the full dataset of ninety-seven trials. The *n* columns provide the number of defendants/cases with the corresponding characteristic, and the % columns provide the proportion of defendants/cases with the characteristic within the respective category.

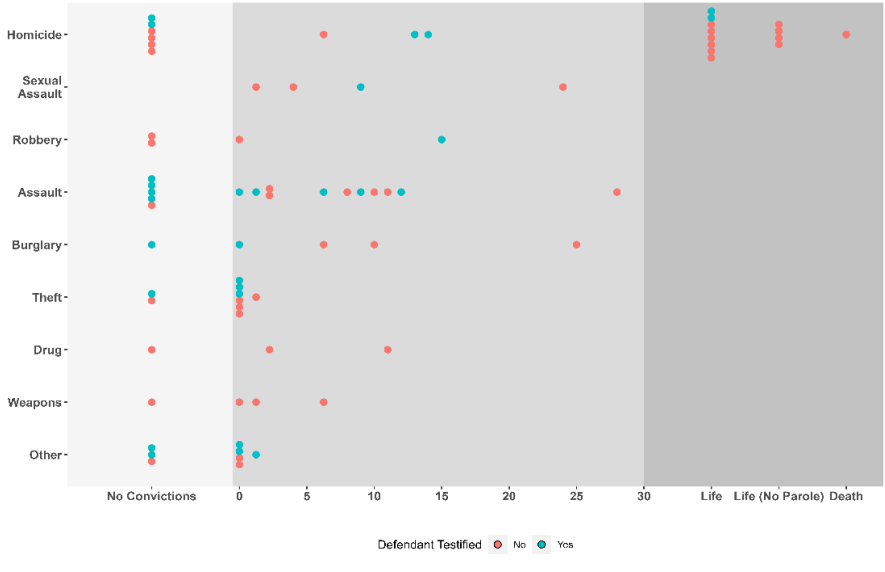
IV. WHAT THE PILOT STUDY REVEALS ABOUT THE IMPORTANCE OF CRIMINAL DEFENDANTS' TESTIMONY

The significance of the pilot study is that it allows an in-depth analysis of one point in time in one jurisdiction: one court in one state in one year. Analyzing the findings from this singular time frame enables a more nuanced understanding of a defendant's decision to testify. More specifically, the data helps to glean a better understanding of how the decision to testify may be associated with better verdicts and better sentencing outcomes. The sections that follow explore these findings in more detail.

A. Defendants Who Testified Were More Likely to Be Found Not Guilty

The basis for the current study is the seventy-five cases with complete court documents and transcripts. In total, twenty-eight (37 percent) of the seventy-five defendants testified at trial. Notably, all seven female defendants chose to testify.

Figure 4: Trial Outcomes[144]



144. Figure 4 displays trial outcomes, with each dot representing a defendant. The y-axis of the plot denotes the category of the most serious offense the defendant was charged with, and the x-axis denotes the outcome of the trial. The color denotes whether a defendant testified (blue) or did not testify (red) at trial.

This study found that the decision to testify had a complex but important relationship with trial and sentencing outcomes. The next sections explore these patterns in more detail. For the moment, Figure 4 offers a visualization of some of the complexities of this relationship.

In Figure 4, each defendant is represented by a dot. The color of the dot depends on whether the defendant testified (blue) or did not testify (red). The most serious offense the defendant was charged with is displayed on the y-axis, while the x-axis tracks the outcome of the trial. The leftmost column (lightest gray) denotes the twenty cases that resulted in acquittals or no convictions. For example, there were two robbery cases that resulted in acquittals for the defendants, and neither of those defendants testified, so they are represented by red dots. On the other hand, there were six homicides that resulted in acquittals for the defendants, and two of these defendants testified at trial, as represented by four red and two blue dots, respectively. The center column (gray) includes cases in which the defendant was convicted but sentenced to some term less than life in prison. For this column, the tick-marks on the x-axis are the number of years that a defendant was sentenced to jail. Note that fourteen defendants were sentenced with no jail time.[145] Finally, the rightmost column (darkest gray) denotes the cases in which the defendant was convicted and sentenced to life, life without the possibility of parole, or death.

This study found that trials in which a defendant testified had a stronger likelihood of resulting in a not guilty verdict. We can see evidence of this in the leftmost panel of Figure 4, where trials in which a defendant testified (blue dots) are disproportionately represented. Moreover, even when trials ended in a conviction, the study found that trials in which the defendant had testified had a stronger likelihood of resulting in no imprisonment than trials in which a defendant did not testify.

We begin by exploring whether a defendant's choice to testify at trial is associated with the probability that a defendant will be acquitted of all charges. The fact that twenty-eight of ninety-seven criminal trials—or 29 percent of the criminal cases that went to trial—resulted in no convictions may be surprising because it runs counter to the common understanding that most criminal cases end in a finding of

145. This includes the single corporate defendant, who will be removed from some of the following analyses.

guilt.[146] What researchers believe happens when a case goes to trial is the following: most trials result in guilty verdicts, and if a jury does convict the defendant for the highest charge the prosecution is seeking, juries are more prone to rendering compromise verdicts than finding a defendant not guilty.[147] This means that jury verdicts are more likely to land somewhere between what the prosecution charges and an across-the-board acquittal.[148] For example, rather than finding a defendant guilty of first-degree murder, a jury might render a verdict of second-degree murder, possibly reflecting a compromise verdict between the jurors who thought that first degree was appropriate and those who advocated for something less than second degree.[149] Against this common understanding of how criminal trials work, the fact that twenty-eight of the ninety-seven cases in the dataset resulted in findings of no conviction was unexpected. To better understand this result, we drilled further into the data to see what, if any, commonalities stretched across the cases resulting in no conviction.

A criminal trial that results in a verdict of not guilty ends the case.[150] Significantly, since neither the state nor the defendant can appeal an acquittal, the end of the case also means that the court reporter is not asked to produce a trial transcript.[151] As a result, the dearth of trial transcripts in cases resulting in not guilty verdicts adds to the relative dearth of information about not guilty verdicts. Notwithstanding

146. Most criminal cases result in plea deals. Indeed, a recent study estimated that of all criminal cases filed as a whole—not just cases that proceed to trial—on average, 94 percent of state-level felony convictions and 97 percent of federal convictions result in plea bargains. Gaby Del Valle, *Most Criminal Cases End in Plea Bargains, Not Trials*, OUTLINE (Aug. 7, 2017, 3:05 PM), https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials [https://perma.cc/Y5B5-7YGF]. The fact that such a high percentage of cases result in plea bargains is well-known in the criminal legal system. However, it is less clear whether the trends seen in cases that end with plea deals are also seen in cases that go to trial.

147. *See, e.g.*, Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1567 (2011) (explaining that "[t]he suggestion that jurors compromise is not new" and that it is "supported by empirical evidence, well-accepted by courts and commentators, and unsurprising given the pressure jurors feel to reach agreement and the different individual views they likely hold").

148. *See id.* at 1589–90.

149. *See id.* at 1586–87.

150. U.S. CONST. amend. V; United States v. Mackins, 32 F.3d 134, 137 (4th Cir. 1994); 18 U.S.C. § 3731.

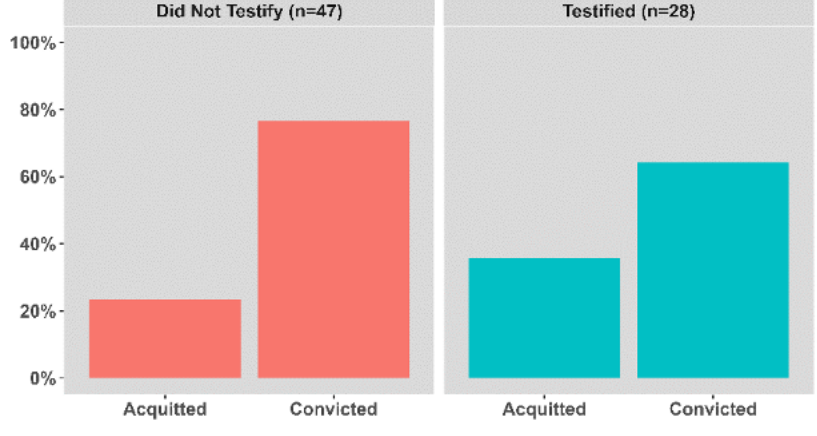
151. While prosecutors can appeal a case that results in a "not guilty" verdict in order to appeal something that may be instructive for other cases down the line—such as the proper jury instruction to be given in a certain kind of case, if the prosecutor believes the wrong jury instruction was given in a case resulting in a not guilty verdict—that appeal does not affect the verdict for the person who was found not guilty, and such appeals are exceedingly rare. BD. OF CT. REPORTING, JUD. COUNCIL OF GA., OPINIONS (2020), https://georgiacourts.gov/wp-content/uploads/2020/01/JC-BCR-Opinions-01.29.2020.pdf [https://perma.cc/URL9-68X2].

the fact that no trial transcripts had been filed for the twenty-eight not guilty cases in the dataset, we did order trial transcripts for twenty-one of those twenty-eight cases.

The ability to analyze trial transcripts from most of the not guilty cases (twenty-one of the twenty-eight) helped to reveal additional information. Recall Table 2, where twenty-one of seventy-five cases resulted in acquittals of all charges. If we restrict our attention to these twenty-one cases, ten (47.6 percent) of the defendants chose to testify. In the fifty-four cases resulting in at least one conviction, however, only 33 percent of the defendants chose to testify.

Figure 5 visualizes the distribution of case outcomes conditioned on a defendant's choice to testify. In this bar chart, we consider all defendants who did not testify (left-panel) and defendants whose chose to testify (right-panel). Within each panel, the x-axis denotes whether a defendant was convicted or not, and the height of the bar represents the percentage of defendants belonging to the respective category (acquitted versus convicted).

Figure 5: Frequency of Case Outcome by Defendant Testimony[152]



The patterns in the data suggest there might be a relationship between case outcomes (all acquittals versus at least one conviction) and a defendant's choice to testify. However, before delving into this relationship further, it is also important to consider the relationship

152. Figure 5 presents a bar chart detailing case outcomes by defendant testimony. The left panel shows the proportion of defendants who were acquitted and the proportion of defendants who were convicted in cases where the defendant did not testify. The right panel repeats this illustration for defendants who did testify.

between prior convictions and a defendant's decision to testify. After all, if all defendants with priors chose not to testify, it would be impossible to determine whether the prior convictions or the testimony behavior was associated with the case outcome.

For the twenty-two defendants with a felony prior, seven (31.8 percent) decided to testify at trial. For the fifty-three defendants without a felony prior, twenty-one (39.6 percent) decided to testify. Thus, defendants with a felony prior were only slightly less likely to testify than defendants without a felony prior. On the other hand, defendants with a dishonesty prior were much less likely to testify than those without such a prior. For the sixteen defendants with such a prior, only four (25 percent) chose to testify, while for the fifty-nine defendants without a dishonesty prior, twenty-four (41 percent) chose to testify.

Data can shed light on the relationship between defendant testimony and case outcome while controlling for the presence of prior felony convictions. To do so, we utilize a logistic regression model.[153] More specifically, we let $p_i, i = 1, \ldots, 75$ represent the probability that the ith defendant was acquitted of all charges. We relate this probability to whether a defendant testified and whether a defendant had a prior conviction with Equation 1.

Equation 1: Logistic Regression Model

$$\log\left(\frac{p_i}{1-p_i}\right) = \beta_0 + \beta_1 \mathrm{DT}_i + \beta_2 \mathrm{FP}_i$$

DT indicates a defendant testified and FP indicates the defendant had a prior felony conviction.[154] The parameters β_0, β_1, and β_2 are unknown regression coefficients that we estimate by fitting this model to our data.

Note that the regression coefficients β_1 and β_2 have an intuitively appealing interpretation. More specifically, if we hold the presence (or absence) of a felony prior conviction constant, then $\exp(\beta_1)$ is the odds of being acquitted for a defendant who testified divided by the odds of being acquitted for a defendant who did not testify. This ratio

153. *See, e.g.*, PETER MCCULLAGH & JOHN A. NELDER, GENERALIZED LINEAR MODELS 21–44, 98–135 (2nd ed. 1989).

154. We also fit a model with an interaction term between defendant testimony and felony priors; however, the model presented here fit the data better according to several model selection criteria.

is called the odds ratio (OR), and an interpretation in context is explained in more detail below.[155]

We fit Equation 1 to our data using the glm() function in the R stats package.[156] The results of this analysis are summarized in Table 3. This model suggests that neither a defendant's choice to testify nor the presence of a prior conviction has a statistically significant relationship with the probability of acquittal.

We do not fit a formal model to account for the impact of a prior conviction involving an element of dishonestly. This is because only four defendants with such a prior conviction chose to testify, and all of them were convicted.

Table 3: Logistic Regression for Probability of Acquittal[157]

Fixed Effects	OR	90% CI		*p*
		LB	*UB*	
Model 1				
Intercept	0.30	0.16	0.58	.002
Defendant Testified	1.81	0.76	4.31	.26
Felony Prior	1.00	.391	2.56	.995

We take a moment to emphasize the limitations of the model we have used here. The logistic regression model used in Equation 1 assumes that the probability of acquittal will be the same for defendants who have the same covariates. In other words, this form of model assumes that a defendant who testified, had five prior dishonesty convictions, and was charged with seven offenses has the same probability of acquittal as a defendant who testified, had one prior dishonesty conviction, and was charged with only one offense. Ideally, our model would account, in some way, for the offenses a defendant had been charged with. We were unable to fit such a model, here, however, because of the small dataset.

In our sample, defendants who testified were more likely than those who did not testify to be acquitted of all charges. However, there is not strong evidence that this relationship is "statistically

155. Magdalena Szumilas, *Explaining Odds Ratios*, 19 J. CANADIAN ACAD. CHILD & ADOLESCENT PSYCHIATRY 227 (2010).

156. R is a language and environment for statistical computing and graphics. R PROJECT FOR STAT. COMPUTING, https://www.r-project.org/ [https://perma.cc/L9XA-YPMS].

157. Table 3 summarizes the results of applying our logistic regression model for probability of acquittal. The odds ratios (OR) are reported along with a 90 percent confidence interval and associated p-value. Note the OR is expβ for the regression coefficients (β's) defined in Equation 1.

significant." As the next section explains further, the potential association between the probability of acquittal and defendants testifying is only half of the story. Even when defendants were found guilty, the data suggests that defendants who testified were more likely to avoid jail time as compared to defendants who did not testify. But when defendants did receive jail time, defendants who testified tended to receive slightly higher sentences. These findings are explained next.

B. If Convicted, Defendants Who Testified Were More Likely to Be Acquitted of the Most Serious Offense, and They Were Less Likely to Be Sentenced to Incarceration

This section shifts focus to defendants who were convicted of at least one offense. We first consider defendants who were convicted but who did not receive a life sentence (or the death penalty). In other words, we focus on the forty-one defendants represented in the middle panel of Figure 4.[158] For a fixed category of case (e.g., homicide, assaults, etc.), defendants who chose not to testify almost always ended up with the most severe sentencing outcome. The one exception to this was for robberies, where the defendant who testified was sentenced more harshly relative to those who did not testify.[159] We now seek to explore whether there is a relationship between sentencing outcomes and the defendant's choice to testify for these forty-one defendants.

As a threshold matter, sentencing decisions are governed, in part, by statute.[160] As the severity of the offense increases, the length of the potential sentence also increases. In our dataset, all defendants were originally charged with at least one felony. In Ohio, felonies are rated from fifth-degree (F5, least severe) to first-degree (F1, second-most severe).[161] Unclassified offenses (FX), including aggravated murder, are the most severe offenses in our dataset.[162] It is important to assess the relative frequencies of distributions for the severity of offenses for

158. *See supra* Section IV.A, Figure 4.

159. Recall that our categories of offenses are based on the most severe offense at indictment. Most defendants were charged with multiple offenses. For the robbery category, the defendant who testified was charged with (among other offenses) aggravated burglary and weapons offenses in addition to the robbery charges. The other three defendants in this category were only charged with robbery offenses.

160. *Sentencing Procedures*, U.S. SENTENCING COMM'N, https://www.ussc.gov/s [https://perma.cc/V8BM-WTDW].

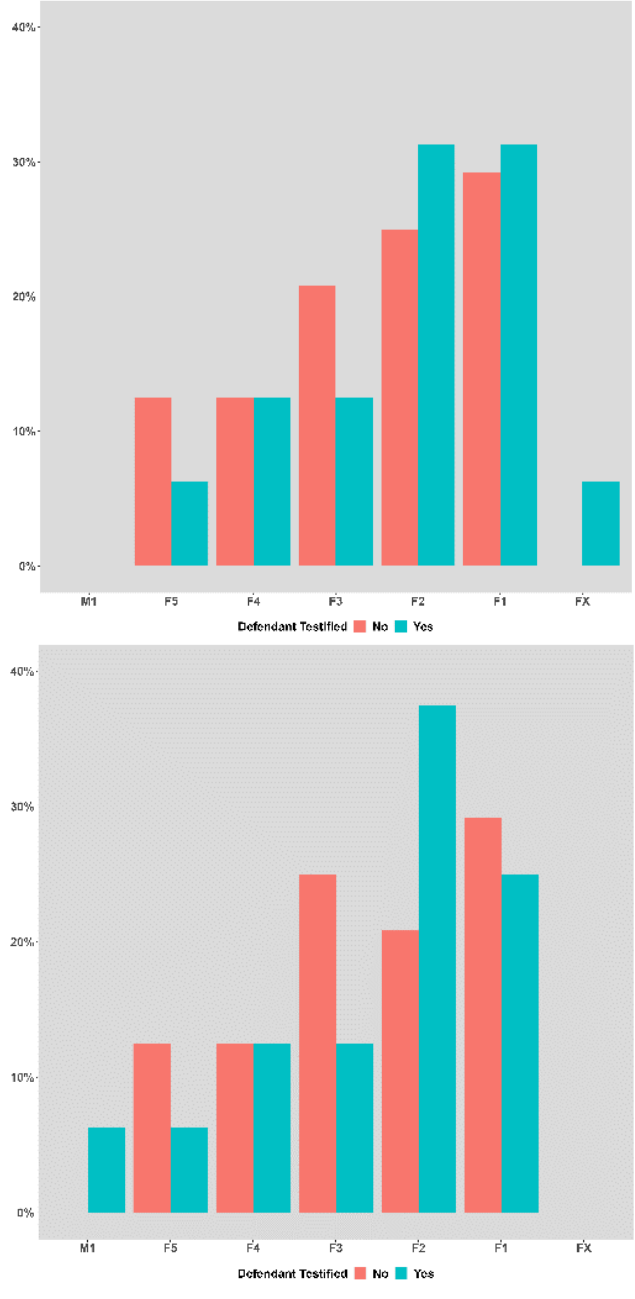
161. *See* OHIO REV. CODE § 2929.14 (2023); OHIO CRIM. SENTENCING COMM'N, FELONY SENTENCING REFERENCE GUIDE 9–12 (2024).

162. *See* OHIO CRIM. SENTENCING COMM'N, *supra* note 161, at 9–12.

the two groups of defendants (those who testified and those who did not) both at the indictment and after conviction.

For example, if defendants who testify also tend to be charged with less severe offenses, then it is less clear that the testimony itself is acting to reduce the imposed sentence. To investigate these distributions, we identified the most severe offense for each defendant at two points: (1) at indictment and (2) at conviction. Figure 6 visualizes these distributions. The left-hand panel depicts the distribution of the most severe offense at the indictment. The x-axis denotes the most serious offense a defendant was charged with. The color of the bars indicates whether it represents the group of defendants who testified (blue) or did not testify (red). At a fixed point on the x-axis (e.g., F1), the height of the bar represents the percentage of defendants in a given category (testified versus did not testify) whose most serious offense charged belonged to that offense. For example, approximately 30 percent of defendants who testified had a first-degree felony as their most serious offense. The right-hand panel repeats this illustration for the most severe offenses for which defendants were ultimately convicted.

Figure 6: Distribution of Most Severe Offenses[163]



163. Figure 6 displays the distribution of most severe offenses at (a) indictment and (b) conviction for the forty non-corporate defendants who were convicted of at least one offense and received a sentence less severe than life in prison.

Figure 6 shows several interesting patterns. First, it appears that defendants who testified tended to be initially charged with more serious offenses. While this remains true for convicted offenses, a comparison of the left- and right-hand distributions suggests that defendants who testified were more likely to be convicted of a less severe offense than the offense for which they were initially charged. This can be seen most prominently through the reduction in first-degree felonies from indictment to conviction for defendants who testified, as compared to the relative proportions of first-degree felonies among defendants who did not testify.

The data revealed that only five of the forty non-corporate defendants were acquitted of their most severe offense. Four of these defendants were defendants who testified. In other words, approximately 25 percent of defendants who testified were acquitted of their most severe offense, while only 3.7 percent of defendants who did not testify were acquitted of their most serious offense.[164]

Having ruled out some obvious reasons for sentencing differences, we now proceed to assess the relationship between a defendant's decision to testify and the sentencing outcome. The sentencing outcomes were complex and highly variable. Thirteen (33 percent) of the forty non-corporate defendants received no jail time. For the remaining twenty-seven non-corporate defendants, the range of potential sentences varied from one to twenty-eight years. The mean number of years was 8.5 and the standard deviation was 7.5 years. Ideally, we would like to implement a statistical model to formally assess whether a defendant's testimony impacts sentencing outcomes. However, the complexity of the data would require a similarly complex model. For example, to account for the number of defendants who were sentenced to no jail time and the variability in the non-zero jail times, we might consider utilizing a hurdle negative binomial model to formally assess the relationship between sentencing outcomes and defendant testimony.[165] This model would allow us to simultaneously,

164. *See infra* Section IV.B, Figure 7 (left-hand panel of Figure 7).

165. The hurdle model considered here was originally proposed by John Mullahy, *Specification and Testing of Some Modified Count Data Models*, 33 J. ECONOMETRICS 341, 341–65 (1986); *see also* A. COLIN CAMERON & PRAVIN K. TRIVEDI, REGRESSION ANALYSIS OF COUNT DATA 136–39 (2d ed. 2013); A. COLIN CAMERON & PRAVIN K. TRIVEDI, MICROECONOMETRICS: METHODS AND APPLICATIONS 680–81 (2005) (overviewing the topic). We believe the use of this model in settings like this is appropriate because there were numerous zeros and evidence of over-dispersion in the non-zero observations. *See, e.g.*, Achim Zeileis et al., *Regression Models for Count Data in R*, J. STAT. SOFTWARE, July 2008, at 1, 1–25 (2008).

but separately, model two different parameters of interest: (1) the probability of receiving no jail time; and (2) the expected length of jail time, given there was any jail time. However, the small dataset made it difficult to reliably use such as model without overfitting. Considering this limitation, we adopted a descriptive approach that followed the logic of the more formal hurdle model.

Specifically, we first investigated the role that a defendant's testimony could have in the likelihood of obtaining a sentence of no jail time. We found evidence that defendants who testified tended to receive no jail time more often than defendants who did not testify.[166] In our datasets, the odds of a defendant who testified getting no jail time was 2.3 times higher than the odds that a defendant who did not testify received no jail time.[167]

When exploring this relationship, it is again important to account for other factors that could impact the likelihood a defendant will be sentenced to no jail time. In Ohio, there is a presumption in favor of jail time for first, second, and certain categories of third-degree felonies.[168] On the other hand, lesser offenses do not carry a presumption of jail time.[169] We therefore considered a defendant as either being convicted of an offense with a presumption of jail time (henceforth, "Presumption of Jail") or with no presumption of jail time ("No Presumption of Jail"). An analysis of data within the Presumption of Jail group, as contrasted with the No Presumption of Jail group, indicates that the relationship between the decision to testify and the higher chance of receiving no jail time cannot be explained by the offenses for which the defendants were convicted. Similarly, this analysis indicates that the relationship between the decision to testify and the higher chance of receiving no jail time cannot be explained by the absence of felony priors.

To see this, let us restrict our attention to the thirteen non-corporate defendants who received no jail time (seven of whom testified and six of whom did not testify).

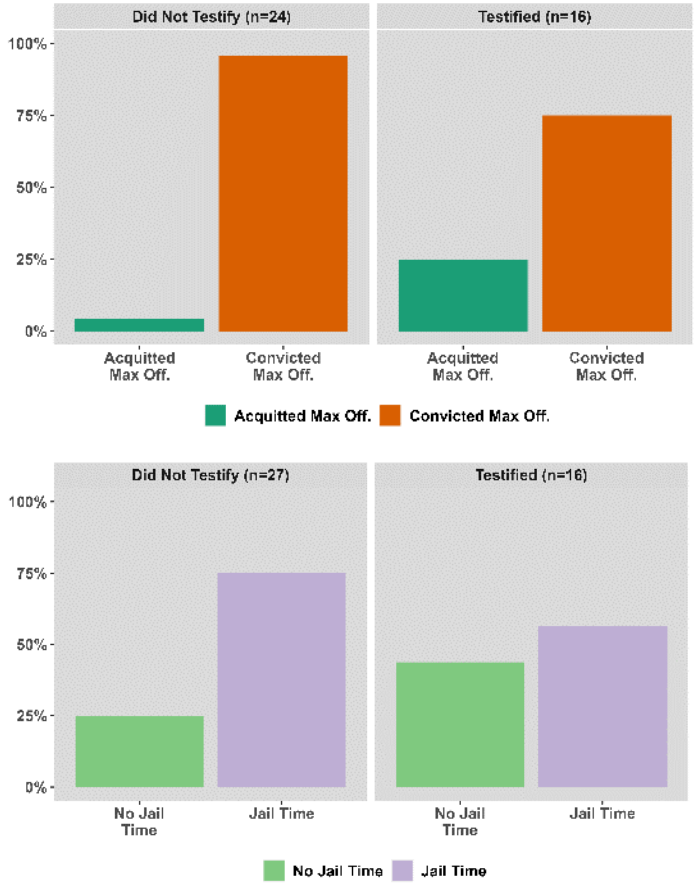
166. *See infra* Section IV.B, Figure 7 (right-hand panel of Figure 7).

167. Recall we have dropped the corporate defendant from this numerical summary. In other words, we calculate the odds here after dropping one defendant from the dataset. This defendant was a corporate defendant who did not receive any jail time. In total, thirteen of the forty convicted non-corporate defendants received no jail time and seven of these defendants had chosen to testify.

168. OHIO REV. CODE § 2929.13(D) (2023). Note that in our dataset, none of the third-degree felonies were included in offenses with a presumption of jail time.

169. *Id.* § 2929.13(B)(1)(a)(i)–(iv), (C) (2023). Note that we only had one defendant whose most severe convicted offense was for a misdemeanor.

Figure 7: Conviction Patterns and Jail Time by Testimony



Three (43 percent) of the defendants who testified were convicted of an offense with a presumption of jail time. On the other hand, one defendant who chose not to testify was convicted of an offense with a presumption of jail time. The fact that defendants who testified were more likely to receive no jail time despite having higher rates of convictions associated with a presumption of jail time lends more support to the notion that defendant testimony is associated with the probability of receiving no jail time. On a similar note, the presence of a felony prior conviction was similar for both defendants who testified and those who did not testify. There were two defendants in the dataset who had been convicted of at least one offense that could be

categorized as a felony and an offense involving an element of dishonesty. One of these defendants testified and the other did not.

The data provide evidence that defendants who testified were more likely to receive no jail time. We now look at what happens among defendants who do receive jail time and are sentenced to less than life. This group contains twenty-seven defendants: nine of whom testified and eighteen of whom did not testify. Here, the relationship between defendant testimony and sentencing when jail time occurs is less clear, in part because of the small sample sizes. For example, the median sentence length was 9 years for defendants who testified and 6.2 years for those who did not testify. However, the defendants with the three longest sentences (twenty-four, twenty-five, and twenty-eight years, respectively) had not testified, and the maximum sentence length for a defendant who had testified was fifteen years.

Unlike before, it also appeared that other factors could be explaining the differences in sentencing lengths. For example, all but two of the defendants who testified were convicted of a first- or second-degree felony, while only eleven (41 percent) of the defendants who did not testify were convicted of a first- or second-degree felony. Thus, it is impossible to fully tease out whether the impact of a defendant's choice to testify or the role of more severe offenses is driving the differences in sentencing lengths. However, we note that when we restrict our attention to the eighteen defendants (seven of whom testified and eleven of whom did not testify) who were convicted of a first- or second-degree felony, the median sentence length for defendants who testified was still two years higher than the median sentence length for defendants who did not testify. Thus, the data shows some evidence that most defendants who testified and were convicted of jail time were worse off than most defendants who did not testify. We emphasize again, though, that the three worst sentences were received by defendants who did not testify.

Up until this point, we have focused on defendants who were convicted but who were not sentenced to life (or the death penalty). To conclude our discussion, we turn our attention briefly to defendants who received a sentence of life, life without the possibility of parole, or the death penalty.[170] Only thirteen of the original seventy-five were sentenced to one of these penalties. We note that only two of these

170. There were only three capital cases. None of these defendants testified, and only one was sentenced to death.

defendants testified. These two defendants both received life with the possibility of parole, while only defendants who did not testify received sentences of life without the possibility of parole or the death penalty. However, there were other factors that could explain the differences here. First, the defendants who testified had no prior felony convictions, while four (36.3 percent) of the defendants who did not testify had such prior convictions. Additionally, there were three capital cases among the defendants who did not testify, but none among those who did testify. Thus, we could not find evidence (one way or the other) that a defendant's choice to testify would impact the sentencing decisions for these cases.

V. WHY IT MATTERS

The data from this pilot study shows why it is important to know more about how criminal defendants' testimony affects their trial and sentencing outcomes. Defendants who testified were more likely to be acquitted on all charges than defendants who did not testify. Further, even when defendants who testified were convicted, they were more likely to avoid jail time than defendants who did not testify. Importantly, this remained true even when the defendants who testified were convicted of more severe offenses than the defendants who did not testify. When defendants were convicted and sentenced to jail time, the data showed that, at worst, if a defendant testified, their median sentencing outcomes were about two years longer than the median sentencing outcomes of defendants who did not testify. Additionally, defendants who did not testify faced the most extreme sentencing lengths.

The data also showed that defendants who testified had a better chance of being acquitted of the highest level of offense charged. As a result of being convicted of a lesser included offense rather than the highest charged offense, the lower-level conviction improved their average sentencing outcomes, since the lesser included offense minimized their sentencing exposure. In sum: most testifying defendants had better trial and sentencing outcomes, and the existence of prior convictions may have impeded their ability to testify.

A. Most Testifying Defendants Had Better Trial and Sentencing Outcomes

The first surprising finding was that defendants who testified tended to have a higher rate of acquittals. This finding runs counter to the common narrative that testifying hurts defendants more than it helps them.[171] It is a significant finding by itself, and it is also important because shining a spotlight on this single sliver of time—in one court in one state in one year—underscores some of what researchers, court insiders, and lay people do not know (but may think they know) about how defendant testimony really works at criminal trials.

At one extreme, the data could be an anomaly that happened to capture an unusual group of cases. It may be that looking at the next year's cases in the same court, or that looking at several years' worth of cases in the same court, would yield different results. The difficulty is that it is currently impossible to conduct such a comparison because access to this data is not readily accessible. To do such a comparison, even within the same state for the same court for a different year, it would take the same people power, resources, and time that it took to compile this pilot study dataset. And even then, it may not be possible.

Further complicating these limitations is the fact that more comprehensive assembly of and access to statewide databases is needed to understand what is happening with defendant testimony across the United States. More comprehensive databases are needed to understand whether and how findings differ within counties within a single state—as well as across states. Moreover, it's not just access to existing databases that is needed: it is the ability to assemble databases that do not currently exist, and that would need to include both court dockets and trial transcripts. Only with access to such depth and breadth of information can researchers begin to analyze how the data in this pilot study compares across the state of Ohio and across other states, temporally as well as geographically.

171. *See, e.g.*, Robert Dieter, *The Defendant's Decision Not to Testify*, 19 COLO. LAW. 1589 (1990) (stating that "many, if not most, defendants . . . choose to remain silent and do not testify" and explaining reasons for that decision); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005).

B. The Possibility of Impeachment with Prior Convictions May Severely Impede the Ability of Defendants to Testify

Drilling into the comparison of testifying and non-testifying defendants yields a second important observation regarding the impact of prior convictions: defendants who had a prior conviction of dishonesty were much less likely to testify than those who did not have such prior convictions. Further, when they did testify, they were always convicted in this dataset.

The finding that defendants who testified were less likely to have prior crimes of dishonesty is clear. What is not clear is whether the defendants who did not testify made that decision because they feared impeachment. This question underscores the need to develop more statewide databases to understand the significance of the data and whether it is representative of what happens nationally.

But analyzing this data is also complicated because defendants who testified had other prior convictions, and those prior convictions could be used to impeach them. In this way, the data could indicate that crimes of dishonesty deter defendants from testifying more than other prior convictions do—even when other prior convictions were eligible to be used to impeach them.

This finding may show that not all prior convictions are considered equal. In other words, the data may indicate that not all prior convictions are grouped into the same "don't-testify" bucket: prior convictions for dishonesty may be "showstoppers" when making the decision to testify, while prior convictions for all other crimes may be less significant. But probing this question is again elusive. Is the fact that no defendants who testified had prior convictions for dishonesty a result of their lawyers strongly counseling them not to testify, thinking such information would negatively impact the jury and/or the judge's ultimate decision? And if so, do the results of this pilot study call that advice into question, given that defendants who testified (with or without felony prior convictions) were more likely to be acquitted than defendants who did not testify?

Consider different reasons why lawyers may advise their clients not to testify. First, defendants and/or their lawyers may (correctly) assume that such prior convictions will hurt them; or, second, defendants and/or their lawyers may (wrongly) assume that prior convictions for dishonesty will hurt them. If the assumption is true that prior crimes for dishonesty *do* hurt criminal defendants, then criminal

defendants with prior convictions for dishonesty experience a more prejudicial effect on their trial outcomes than do criminal defendants with other prior convictions.

At the same time, consider the opposite proposition: what if the assumption is *not* true that prior convictions for dishonesty hurt criminal defendants? If that assumption is not true, but criminal defendants with prior convictions for dishonesty mistakenly believe it is true, then criminal defense lawyers need to know what the data actually means. Only by understanding the data, instead of applying gut intuitions, will criminal defense lawyers and their clients make more informed decisions about whether to testify. Data is needed to understand what really happens when defendants with prior convictions—including prior convictions for dishonesty—testify.

This is important because the pilot study data suggests that defendants who testify are more likely to be acquitted of all offenses, and that even if they are convicted of an offense, they are more likely to be convicted of a lesser included offense rather than the highest offense for which they were charged. Either result—across-the-board-acquittals or an acquittal for the highest charged offense (and a conviction for a lesser included offense)—has a direct impact on the defendant's sentence. Across-the-board acquittals result in freedom, while convictions for a lesser included offense shorten the possible length of incarceration. They also carry a greater chance of resulting in no incarceration.

CONCLUSION

The findings in this pilot study underscore how common assumptions about criminal defendants' testimony may be distorted. This data from one court in one state in one year shows that the trials of the defendants who testified were more likely to result in better outcomes than the trials of the defendants who did not testify. As compared to defendants who did not testify, defendants who testified had better sentencing outcomes: for defendants who testified and were convicted, their odds of receiving a sentence that included no jail time was 2.3 times higher than the odds of defendants who did not testify. An additional finding (although not statistically significant) was that defendants who testified were more likely to be acquitted of all charges.

Importantly, there is evidence of an association between defendants' testimony and trial outcomes, but there is no evidence of a causal

relationship (i.e., that defendants' testimony causes better outcomes). In fact, there are no statistically significant associational relationships in our analyses. This is not particularly surprising, given the small sample size of our pilot study. However, it does point out that while, on average, lawyers may be good at identifying when testimony may benefit a defendant, there is room for improvement in making these strategic decisions. Ideally, a decision to testify *would* improve outcomes for defendants so that the associational relationship between testifying and trial outcomes is statistically significant.

More broadly, this pilot project points out the importance of empirically exploring trends in criminal trials. Too often, anecdotal evidence drives strategic decisions by lawyers, procedural decisions by judges, and the reform of evidence and criminal procedure rules. This pilot study design can be replicated in other jurisdictions across the country, so researchers can compile and analyze meaningful data to better understand how criminal trials really work. As opposed to anecdotal experiences that each actor in the criminal legal system sees from their singular vantage point, more systemic data analysis is needed to understand whether defendants' constitutional rights are protected effectively.

The findings in our pilot study do not mean that defendants in other jurisdictions experience the same "testifying bump." However, suppose for a moment this pilot study was replicated across time and different jurisdictions. Let us suppose that in this larger study we found that a criminal defendant who testifies at their trial is advantaged by having a greater likelihood of being acquitted (or of being convicted for a lesser included offense) than defendants who did not testify. Or relatedly, that we found evidence that the concern regarding impeachment through prior convictions for dishonesty may influence defendants to disproportionately forgo their right to testify—thereby thwarting their likelihood of acquittal or of conviction to a lesser included offense. If such imbalances exist across time and different jurisdictions, it may call for a reexamination of the rules of evidence, especially those that influence pivotal strategic decisions, such as whether a defendant will testify.

And yet, at the moment, it is impossible to readily compare the results of this pilot study with other jurisdictions in the same state or across the United States—and therein lies the problem. The criminal legal system needs more transparency through data access and accountability in recognition of the role of jury trials in encouraging

public trust in the criminal legal system while protecting fundamental fairness for the defendant. The results of this pilot study call for more data and research to better understand the reality of how that promise of fairness works. By exploring these findings, the pilot study suggests that greater access to and analysis of data from state criminal trials is critical to understand the significance of criminal defendant testimony.

What we don't know matters because misunderstanding the reality of the decision to testify undermines public trust in the criminal legal system. It also undermines the ability to protect the defendant's right to a fair trial. Neither the actors within the criminal legal system nor the public at large understand what happens in every day criminal trials across the country. This pilot study is but one step to ensure the fairness of criminal trials through meaningful data analysis.[172]

172. The findings discussed in this Article are the first reported findings from this pilot study. Additional discussion of other results—including the examination of prior convictions, trial testimony, and the impact of impeachment—are forthcoming.