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How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared

Nancy J. King*

Drawing upon a recent study of felony jury sentencing in Kentucky, Virginia, and Arkansas, this essay highlights some of the similarities and differences between jury sentencing in capital cases and jury sentencing in non-capital cases. Unlike jury sentencing in capital cases, jury sentencing in non-capital cases includes functional differentials in judge and jury options for sentencing, and fewer controls on arbitrary decision-making. Jury sentencing in both contexts shares the potential for reluctance on the part of elected judges to reduce jury sentences, information gaps on the part of jurors in setting sentences, and, above all, service as a tool in negotiating settlements.

Scholarship on sentencing by juries is divided in two, like most trials in which juries sentence.[1] Capital sentencing research includes extensive study of the sentencing proceeding, the jury decision-making process, and the influence of various factors on the outcome of the sentencing decision. Relatively little attention has been devoted to jury sentencing in non-capital cases, even though each year the combined number of defendants sentenced by jury in Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia significantly exceeds the number of defendants sentenced by juries for capital crimes nationally.[2] Drawing upon a recent study of felony jury sentencing in Kentucky, Virginia, and

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[1] All jurisdictions authorizing capital punishment bifurcate the capital trial. Jury trials are bifurcated in five of the six states that authorize jury sentencing in non-capital cases. Oklahoma uses unitary jury proceedings for defendants with no prior convictions. For prior offenders, Oklahoma bifurcates jury trials. Missouri recently adopted bifurcated proceedings for first offenders, but continues to use judicial sentencing for prior offenders. *See* MO. REV. STAT. § 557.036 (2004); William C. Lhotka, *In First Trial Under New Missouri Law, Jury Urges Prison Time for Sex Offender*, ST. LOUIS POST-DISPATCH, Aug. 1, 2003, at B8.

[2] For a discussion of the number of jury sentences in non-capital cases, an estimated 4000 or more per year, see Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 887 n.4 (2004). The number of capital sentencing proceedings is much smaller. According to the Bureau of Justice Statistics, an estimated 3200 defendants nationwide were convicted of murder or non-negligent homicide (capital and non-capital combined) after jury trial in the year 2000. Only about 4% of these 3200 were sentenced to death. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS 2000 tbls. 4.1 & 4.6 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf00.pdf.

Arkansas,[3] this essay highlights some of the similarities and differences between jury sentencing in capital and jury sentencing in non-capital cases.[4]

I. WHEN DEATH IS DIFFERENT

A. *The Embrace of Arbitrary Decision-Making*

In *Furman v. Georgia*, the Supreme Court took aim at what it considered to be the impermissibly arbitrary application of capital punishment.[5] Incoherent decisions about who lives and who dies have been a target of constitutional regulation ever since. In order to decrease opportunities for discriminatory and arbitrary decision making, the Court has restricted the jury's discretion to choose death to certain types of killings, after certain types of showings. Appellate review provides an additional safeguard. In theory, these regulations lower the chances that defendants will be selected for execution for reasons other than their relative culpability.[6]

In states with non-capital sentencing by jury, courts and legislatures have been remarkably unconcerned with the arbitrary exercise of discretion in non-capital jury sentencing.[7] The total absence of guidance provided to jurors who sentence in felony cases is striking, not only because it is so inconsistent with decades of effort to control arbitrary behavior by jurors in capital cases, but also because it bucks the trend in many jurisdictions to cabin *judicial* sentencing discretion in non-capital cases through sentencing guidelines and presumptive sentencing schemes. Jury sentencing in non-capital cases, hovering in limbo

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[3] The study, involving over fifty interviews of judges and attorneys in these three states, is detailed in King & Noble, *supra* note 2. Analysis of sentencing data from these three states is detailed in Nancy J. King & Rosevelt L. Noble, Jury Sentencing in Non-Capital Cases: Comparing Severity and Variance with Judicial Sentences (unpublished manuscript, on file with author).

[4] By "jury sentencing," I refer to a procedure in which the jury recommends or selects a particular sentence after conviction. Only six states now use this procedure in non-capital cases. In the other forty-four states, District of Columbia, and the federal courts, the judge, not the jury, selects the sentence based on a finding of guilt after plea or trial. The recent decisions in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that some facts formerly found by judges during sentencing must instead be proven to a jury beyond a reasonable doubt. These decisions have not shifted from the judge to the jury the power to select a sentence; they merely require additional facts to be found prior to sentencing. *See* Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENTENCING REP. 316 (2004).

[5] 408 U.S. 238 (1972).

[6] *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976). *See generally* Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 240–42.

[7] *See, e.g.*, cases collected *infra* note 23. Commentators have been less complacent, however. *See* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 356 n.232 (2003) (collecting criticism of jury sentencing on this basis).

between capital sentencing and judicial sentencing, has managed to remain untouched.

Presently, jurors who select sentences in non-capital cases are simply asked to pick a sentence somewhere within the statutory sentencing range.[8] In Virginia, for example, a jury in a rape case must select a sentence anywhere between five years and life.[9] Aggravating and mitigating factors that might help the jury make its choice are not identified by statute, nor included in instructions or verdicts; guidelines that may guide the discretion of judges sentencing in similar cases, do not apply to juries;[10] and appellate review extends only to the grossest of errors such as sentencing outside the statutory range. In our study of three jury-sentencing states, trial judges did occasionally correct some of the worst jury excesses by reducing the jury's sentence. But this was reportedly rare in Arkansas and Kentucky, and in Virginia, reduction to the range recommended by the judicial sentencing guidelines was unusual.[11]

Not surprisingly, this lack of guidance for juries can lead to great variance in the sentences that similarly situated offenders receive after jury trial. Sentencing data from both Arkansas and Virginia showed that sentences of incarceration imposed after jury trial varied more widely than sentences of incarceration imposed after bench trial for most of the offenses compared.[12]

Sentencing guidelines for juries, instructions to jurors requiring that they find certain aggravating facts before high-end sentences can be imposed, or even more rigorous appellate review might help to standardize jury sentencing in non-capital cases.[13] But interviews with prosecutors and judges in these states suggest that

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[8] *See, e.g.*, ARK. MODEL CRIMINAL INSTRUCTIONS 2d 9102 ("You have found [ ] guilty of [ ]. [ ] is punishable by imprisonment in the Department of Correction for not less than 6 years and not more than 30 years, or by a fine not exceeding $15,000, or by both imprisonment and a fine."); ARK. MODEL CRIMINAL INSTRUCTIONS 2d 9302-VF (Verdict form: "We, the Jury, having found [ ] guilty of [ ], fix his sentence at: (A) A term of [ ] in the Arkansas Department of Correction; or (B) A fine of [ ] dollars; or (c) Both a term of [ ] in the Arkansas Department of Correction and a fine of [ ] dollars.").

[9] *See* VA. MODEL JURY INSTRUCTIONS: CRIM. No. P44-100 ("You have found the defendant guilty of the felony of rape. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at confinement in the penitentiary for life or for a specific term, but not less than five (5) years."); *see also* VA. MODEL JURY INSTRUCTIONS: CRIM. No. P22.200 (instructing jury to select sentence for distribution offense of "not less than five (5) years nor more than forty (40) years and a fine of a specific amount, but not more than $500,000.00"); OKLA. UNIF. JURY INSTRUCTIONS: CRIM § 10-13 ("If you find the defendant guilty, you shall then determine the proper punishment. The crime of [Crime Charged] is punishable by [State Range of Punishment]. When you have decided on the proper punishment, you shall fill in the appropriate space on the Verdict Form . . . and return the verdict to the Court.").

[10] King & Noble, *supra* note 2, at 913–14, 930 nn.95 & 138.

[11] *See infra* text accompanying notes 48–51.

[12] King & Noble, *supra* note 3, at 18, 21, and 28.

[13] *See* Iontcheva, *supra* note 7, at 359 (proposing sentencing standards such as narrower statutory ranges or sentencing guidelines that would enhance the coherence of jury sentencing decisions).

attempts to increase the consistency of jury sentences in non-capital cases would not be welcome.[14] One concern is cost: adding complexity to the jury sentencing procedure would demand resources that strapped criminal justice systems are not inclined to spend. An equally forbidding barrier is the anticipated effect of increasing the consistency of jury sentencing on plea bargaining. An increase in the predictability of jury sentences would reduce the risk of an unusually high jury sentence after jury trial, removing what interviewees considered to be a key reason that defendants chose to waive the expensive jury trial process. Unfettered jury discretion allows prosecutors to credibly claim that jury sentences are unpredictable, as compared to sentences after bench trial, and certainly as compared to a sentence after a plea bargain that includes a recommendation of sentence. When combined with the prosecutor's refusal to allow defendants to opt for judicial sentencing after jury trial, and the judge's refusal to reduce the sentences that juries choose,[15] the wild-card aspect of jury sentencing helps to funnel defendants to guilty pleas and bench trials. Prosecutors, judges, and legislators have few reasons to disturb this set-up, which helps them dispose of cases quickly and cheaply. For criminal justice insiders, the unpredictability of jury sentencing is a blessing, not a curse; the more freakish, the better.

As just one example of the comparative lack of concern about whether similarly situated defendants receive roughly equivalent sentences from non-capital juries, consider the use of victim impact evidence. In capital sentencing, victim impact evidence has been extremely controversial, generating dozens of studies and an about face on the issue by the Supreme Court in the space of a few years.[16] Victim evidence in capital cases, critics fear, may contribute to arbitrary sentencing by juries by increasing jurors' perceptions of victim admirability and crime seriousness, while reducing the effect of mitigating evidence on jurors'

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[14] Proposals to instruct juries about sentencing guidelines ranges were not adopted in both Arkansas and Virginia. *See* King & Noble, *supra* note 2, at 955 n.223.

[15] Prosecutors and judges almost never consent to judicial sentencing after a jury trial—although in some places in Kentucky, prosecutors will agree to bypass jury sentencing so long as the defendant waives his right to appellate and post-conviction review of conviction and sentence. *See* King & Noble, *supra* note 2, at 904 n.61 (quoting judge who explained that judges approve of this sort of deal, remarking "It's part selfish, from my standpoint, better than the possibility that they're going to come back with an appeal.").

[16] *See* Jean M. Callihan, *Victim Impact Statements in Capital Trials: A Selected Bibliography*, 88 CORNELL L. REV. 569 (2003) (collecting authority); Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306 (2003) (summarizing studies). The Supreme Court originally held that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence relating to a victim's personal characteristics and the emotional impact of the crime on a victim's family. *See* Booth v. Maryland, 482 U.S. 496 (1987); South Carolina v. Gathers, 490 U.S. 805 (1989). Both cases were overruled in *Payne v. Tennessee*, 501 U.S. 808 (1991).

decisions.[17] It may also pose a risk of exacerbating the race-of-victim effects found in several studies of death sentences.[18]

If victim impact testimony is suspect in capital cases because of its effect on the sentencing decisions that juries make, one would think similar alarm would be raised when juries who set non-capital sentences consider victim evidence.[19] Nevertheless, in the few reported decisions that have addressed challenges to a jury's consideration of victim evidence in non-capital sentencing, courts have dismissed such claims out of hand.[20] By the mid-1990s, when bifurcation made it possible for juries in Arkansas and Virginia to hear victim evidence relevant to sentence but not guilt,[21] the use of victim evidence by judges when sentencing defendants who had waived jury trial had already become routine.[22]

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[17] *See generally* Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419 (2003).

[18] *See* John H. Blume, *Victims and the Death Penalty: Inside and Outside the Courtroom; Ten Years of* Payne*: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 279 (2003).

[19] Indeed, what limited empirical evidence exists examining the effect of victim evidence on non-capital sentencing decisions suggests that exposure to victim evidence does lead to longer sentences. *See* Nadler & Rose, *supra* note 17, at 431 (stating that "[e]xperimental studies on the use and effect of victim impact statements in non-capital cases are rare," and summarizing two mock jury studies that did find an effect); *id.* at 432 n.77 (noting conflicting results of two archival studies examining the effect of victim statements on sentence outcomes); *id.* at 436, 452 (reporting results of authors' own experimental research finding that laypersons are significantly more punitive when selecting sentences in burglary or robbery cases when the victim suffers more than mild emotional harm, and concluding "[t]he dangers identified in this Article regarding the undue influence of victim impact statements on punishment judgments counsel against their use in criminal trials."); Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .*, 3 INT'L REV. VICTIMOLOGY 17, 21 (1994); Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. Q. 453, 464 (1994).

[20] *See* Freyer v. State, 68 S.W.3d 628 (Tex. Crim. App. 2002) (upholding use of victim recommendation of sentence in pre-sentencing investigation report (PSI), distinguishing the Supreme Court's decision in *Booth v. Maryland*, 482 U.S. 496 (1987), reasoning that death is a punishment different from all other sanctions, and that statements in *Booth* were not made by the actual victim of the crime but by family members who did not observe the crime); Mendiola v. State, 924 S.W.2d 157 (Tex. Crim. App. 1995); Stavinoha v. State, 808 S.W.2d 76 (Tex. Crim. App. 1991) (upholding statement concerning impact of sexual assault on victim and mother, stating and quoting "[u]nless we are to hold that retribution is not a permissible component of a jury's otherwise unfettered discretion to assess whatever punishment it sees fit given the circumstances of the offender and the offense, we must conclude this jury was entitled to hear and consider [the victim's] testimony to inform that discretion."); Killebrew v. State, 746 S.W.2d 245 (Tex. Crim. App. 1987).

[21] *See* VA. CODE ANN. § 19.2-295.3 (1998) (victim impact testimony admissible in the sentencing phase of non-capital jury trials); ARK. CODE ANN. § 16-90-1112 (1997) (same); *see also* Walker v. Commonwealth, 486 S.E.2d 126 (Va. App. 1997) (Annunziata, J., concurring) (victim evidence admissible under § 19.2-295.1 (1995), enacted prior to § 19.2-295.3, as evidence "relevant" for the jury's consideration during the sentencing phase of a bifurcated felony trial, a term interpreted in light of the principles developed in the context of capital murder trials).

[22] By 1987, forty-eight states authorized victim participation in sentencing. *See* Maureen McLeod, *An Examination of the Victim's Role at Sentencing: Results of a Survey of Probation Administrators*, 71 JUDICATURE 162 (1987); *see also* Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25

Juries in non-capital cases face wide-open choices that seem to allow even more room for arbitrary, even discriminatory, decision-making than is available in the choice between life and death. Yet unfettered sentencing discretion by juries in non-capital cases has resisted constitutional attack. Jury sentences short of death lack the finality that triggers the Eighth Amendment's requirements for guiding jury discretion.[23] Moreover, as noted before, there is a strong incentive on the part of criminal justice insiders to leave juries guessing in non-capital cases and reject efforts to make jury sentencing more consistent or predictable. The contrast between this affirmative embrace of inconsistency in non-capital jury sentencing and the condemnation of the same in capital sentencing is one of the most striking examples of the difference that death makes.

B. *Freezing the Price of Jury Trial*

Another interesting difference between the two jury-sentencing systems involves disparity in the sentencing options that are available to a jury, compared to the sentencing options available to a judge who sentences after a defendant waives a jury trial. In capital cases, a defendant who asserts his right to a jury trial may still ask the jury in the sentencing phase to select from the entire range of options open to the judge who would have selected a sentence had the defendant waived a jury trial. There are no options for leniency or mitigating factors that only a judge, and not a jury, can consider when sentencing in a capital case.

Non-capital sentencing is a different story. A defendant who goes to trial before a jury must be sentenced by a jury, absent the prosecutor's consent to judicial sentencing. For many offenses examined in Arkansas and Virginia, jury-tried defendants received higher sentences, on average, than defendants who waived a jury and went to trial before a judge, even controlling for several factors most commonly associated with sentence severity such as prior record, additional

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NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 81–90 (1999) (collecting research on usage and effect of victim information, concluding research is inconclusive on if and how victim input changes sentencing outcomes and that "there has been virtually universal adoption . . . of some means through which victims can provide input at sentencing.").

[23] *See, e.g.*, Torres v. United States, 140 F.3d 392, 397 (2d Cir. 1998) (rejecting constitutional challenge to jury discretion to choose sentence, without guidance, for "any term of years up to life" for murder); Britton v. Rogers, 631 F.2d 572, 578–81 (8th Cir. 1980) (rejecting defense claim and trial court conclusion that life sentence by jury violated the constitutional mandate of guided discretion, stating that "the kernel of our reluctance to extend the rule of guided discretion" to non-capital cases is that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); Vines v. Muncy, 553 F.2d 342 (4th Cir. 1977) (stating "when a state, such as Virginia, concludes that unrestricted jury sentencing . . . is preferable, . . . nothing in the Due Process Clause of the Fourteenth Amendment intrudes upon that choice.") (citations omitted). As a New York Court recently explained, reviewing its first capital case in twenty years, "[b]y its very nature a capital case requires the most meticulous and thoughtful attention. A mistake discovered years later may not be correctable." People v. Harris, 749 N.Y.S.2d 766, 773 (2002).

counts of conviction, urban or rural location, and gender of the defendant.[24] Interviews suggested that the comparative leniency of judicial sentences was not simply the result of a systematic effort by judges and prosecutors to exercise discretion in a way that preserves a sentence discount by encouraging defendants to waive a jury (although that was reported as one explanation for judicial reluctance to reduce jury sentences).[25] Higher sentences after jury trial were also facilitated by state law providing the jury with fewer options for leniency in sentencing than judges enjoy.[26] Specifically, in all three of the states examined, juries were instructed that they must impose the minimum statutory incarceration term for the offense, but judges, by suspending or probating all or part of that minimum term, regularly imposed sentences after plea and bench trial that fell well *below* that statutory minimum sentence.

In Kentucky, for example, judges probate and suspend minimum sentence terms regularly after guilty plea, but reportedly rarely use this power to reduce a minimum sentence imposed by a jury after jury trial.[27] In Virginia, judicial sentencing guidelines recommend incarceration terms for several offenses that are far lower than the statutory minimum sentence. A first-time drug distributor, for example, may receive nine months' incarceration under the guidelines from a judge after bench trial or guilty plea, but the *minimum* sentence that a jury could impose is *sixty* months.[28] When combined with a reluctance by Virginia trial judges to reduce jury sentences to guidelines' levels, the sentencing discount for waiving a jury can be significant. After controlling for other variables that could affect sentence length, our preliminary statistical analysis showed that the choice of jury trial over bench trial for many offenses in Virginia meant several additional months behind bars. Of the three states, only in Arkansas may jurors be told that they could recommend probation, but this instruction is entirely in the discretion of the judge to give or withhold,[29] and Arkansas judges, as in Kentucky, are not inclined to suspend or probate sentences imposed by a jury.[30]

In the death-sentencing context, if defendants who elected jury trial were essentially denied a more lenient sentencing option authorized for defendants who waive jury trial, the sentencing scheme would at the very least raise constitutional

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[24] *See* King & Noble, *supra* note 2, at 908, 923–24.

[25] *See id.* at 910–11 nn.82–84.

[26] *See* King & Noble, *supra* note 2, at 900 n.54, 911–12 n.87, 931–32 nn.145–49.

[27] *See id.* at 901–02.

[28] *See id.* at 911–12.

[29] *See* ARK. MODEL CRIMINAL INSTRUCTIONS 2d 9111 (Optional instruction reading "[defendant] may also contend that he should receive [the alternative sentence of ___]. You may recommend that he receive [this] alternative sentence, but you are advised that your recommendation will not be binding on the court."); Hill v. State, 887 S.W.2d 75 (Ark. 1994). In Texas, unlike in the other jury sentencing states, statute mandates that judges follow the jurors' recommendation of probation, but the judge decides the conditions and length of the term of community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon 2003).

doubts.[31] But in the non-capital context, this institutionalized disparity is business as usual. The Fourth Circuit upheld an earlier version of Virginia's two-track sentencing system, finding that judges after plea or bench trial were not *required* by state law to impose sentences that are lower than the sentences juries select in jury trials. No law, the court reasoned, prevented judges from using suspension of sentence or probation to reduce jury sentences if they choose, or from sentencing after a bench trial as harshly as a jury must after a jury trial.[32] Our research suggests that although no law requires judges to preserve the disparity created by the absence of jury authority to probate or suspend sentences, they preserve it nevertheless. Not only are judges reluctant to reduce jury sentences,[33] but they have no incentive to raise sentences after plea or bench trial to jury sentencing levels. Virginia trial judges, who must be re-elected by the legislature in order to stay on the bench, generally comply with the legislature's sentencing guidelines that call for them to impose sentences in plea and bench trial cases that are far below the statutory minimum sentences that juries return. A judge will avoid departing upward from the guidelines too often, interviewees suggested, so as to avoid acquiring a reputation as a judge who undermines the fiscal goals that the guidelines are designed to reach.[34] In Kentucky, judges reportedly exercise little independent sentencing authority at all. They do not conduct felony bench trials,[35] they invariably endorse the prosecutor's recommendation after a guilty plea,[36] and they accept without modification sentences chosen by jurors after jury trial.[37]

The failure to provide jurors with the same sentencing options that judges have may simply be the result of an effort to expand the alternatives to incarceration available under state law, while recognizing the limited capacity of jurors to make complicated decisions about probation conditions and treatment programs. These sorts of decisions rely on sentencing experience jurors lack,[38] as well as detailed information available in presentence reports prepared weeks after

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[30] *See* King & Noble, *supra* note 2, at 933.

[31] For a thorough discussion of this subject, see Joseph L. Hoffmann et al., *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313 (2001).

[32] *See* Vines v. Muncy, 553 F.2d 342 (4th Cir. 1977) (finding no constitutional violation when trial judge required by law to secure a probation report before determining whether to suspend or place on probation the accused, except after jury trial).

[33] *See infra* text accompanying notes 49, 84.

[34] *See* King & Noble, *supra* note 2, at 916–17.

[35] *See id.* at 905 nn.63–64.

[36] *See id.* at 906 n.69.

[37] *See id.* at 901.

[38] *See* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 1005 (2003) (concluding it is reasonable to keep probation decisions with judges: "Perhaps the experience judges acquire over the years—seeing both the fruits and failures of their willingness to take a chance on a defendant—makes them better at the probation decision . . . a judge, through sheer experience, is undoubtedly in a better position than most jurors to craft appropriate (and available) probation conditions.").

the adjudication of guilt. Nevertheless, the consequence for a defendant facing jury sentencing in a non-capital case is a two-tiered system, reinforced by state law, in which the minimum sentence for an offense essentially depends upon whether or not he gives up the right to a jury trial.

C. *The Salience of Race*

Another difference between capital and non-capital jury sentencing is more hypothetical, but worth discussing nonetheless—race may play less of a role in non-capital sentencing than it does in capital sentencing. The inquiry into the effect of race on contemporary capital sentencing has been ongoing and extensive. There is considerable support for the claim that those who kill white victims are more likely to receive a death sentence than similarly situated murderers who kill non-white victims, although several studies suggest that the race of either the defendant or the victim may carry less significance for the jury's sentencing decision than it does for the prosecutor's charging and bargaining decisions.[39]

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[39] *See* U.S. GEN. ACCT. OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990); DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 254–67 (1990); David V. Baker, *The Role of Profiling in American Society: Criminal Profiling: Purposeful Discrimination in Capital Sentencing*, 5 J.L. & SOC. CHALLENGES 189, 209–10 (2003) (citing Jon Sorensen & Donald H. Wallace, *Prosecutorial Discretion in Seeking Death: An Analysis of Racial Disparity in the Pretrial Stage of Case Processing in a Midwestern County*, 16 JUST. Q. 559 (1999)); David C. Baldus et al., *The Nebraska Death Penalty Study, An Interdisciplinary Symposium: Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486 (2002) [hereinafter Baldus et al., *The Nebraska Death Penalty Study*]; David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638 (1998); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001) (compiling information on race composition of death sentencing juries and effects on sentencing decisions); Samuel R. Gross, *Race, Peremptories, and Capital Jury Deliberations*, 3 U. PA. J. CONST. L. 283 (2001); Raymond Paternoster & Robert Brame, *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction* (Jan. 7, 1999), *available at* http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf (last visited Jan. 7, 2003); *see also* JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION OF THE VIRGINIA GENERAL ASSEMBLY, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT (Comm'n Draft Dec. 10, 2001) (finding that location, more than any other factor, is most strongly associated with the decision by prosecutors to seek the death penalty and finding no significant race effects at any stage); Joseph R. McCarthy, Note, *Implication of County Violence in New Jersey Capital Murder Cases: Arbitrary Decision-Making by County Prosecutors*, 19 N.Y.L. SCH. J. HUM. RTS. 969 (2003) (discussing the finding of disparity between county prosecutors in DAVID S. BAIME, SPECIAL MASTER, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2000–2001 TERM (JUNE 1, 2002)).

[40] For a collection of studies, see Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 208 (2001); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again?)*, 108 YALE L.J. 1775, 1799 n.108 (1999); Laura T. Sweeney & Chis Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of*

Studies examining the effect of race on non-capital jury sentencing have reached conflicting results,[40] and recent research suggests that the impact of defendant race on sentence length is muted rather than amplified when an offense involves racial issues.[41] Our preliminary analysis of existing sentencing data from Arkansas and Virginia was able to test whether the race of the defendant was correlated with longer sentences of incarceration for a number of specific offenses, although the data lacked some variables common to the more sophisticated race-effect studies in capital cases. Defendant race was significantly associated with sentence length for only three of ten offenses examined from Virginia, and none of the nine offenses examined in Arkansas.[42]

It is certainly possible that additional research could reveal patterns in non-capital jury sentencing that resemble those found in capital sentencing. But even so, there is reason to doubt that the potential for racial discrimination in jury sentencing will ever garner the same sort of attention in non-capital cases that it has in capital cases.[43] Not only are race effects on sentencing very difficult to identify or prove, but prosecutorial discretion in disposing of routine felony cases is particularly resistant to regulation.

II. SIMILARITIES

A. *Election Effects on Judicial Modification of Jury Sentences*

One interesting feature that both types of jury sentencing seem to share is the way elected judges manage jury sentences so as to avoid appearing "soft on crime." Capital sentencing researchers have long posited that the prospect of an upcoming election prompts judges to take a more severe stance in criminal cases, thus leading to more frequent decisions to override a jury's choice of life over

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Experimental Studies, 10 BEHAV. SCI. & L. 179 (1992); *see also* Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133 (1979) (discussing mock jury study using culpability score that incorporated both guilt and punishment and finding significant race-of-defendant effects); Howard C. Daudistel et al., *Effects of Defendant Ethnicity on Juries' Dispositions of Felony Cases*, 29 J. APPLIED SOC. PSYCHOL. 317 (1999); Dolores A. Perez et al., *Ethnicity of Defendants and Jurors and Influences on Jury Decisions*, 23 J. APPLIED SOC. PSYCHOL. 1249 (1993) (discussing mock jury study involving robbery and finding no significant effect of defendant ethnicity on type or length of sentence but finding effect for juror ethnicity).

[41] *See* Sommers & Ellsworth, *supra* note 40.

[42] *See* King & Noble, *supra* note 3, at 44.

[43] Consider Kentucky, which was concerned enough about race discrimination in capital cases to become the only jurisdiction in the nation to enact a statute allowing capital defendants to challenge death sentences on the ground of racial discrimination supported by statistical rather than individualized proof. *See* Adam Liptak, *Suspension of Executions Is Urged for Pennsylvania*, N.Y. TIMES, Mar. 5, 2003, at A16; KY. REV. STAT. ANN. § 532.300 (Michie 2002). Yet this same state has shown no inclination to impose even the most rudimentary limits on the discretion of prosecutors and juries to select sentences in non-capital cases.

death and impose the death penalty.[44] Other studies have compared sentences of judges elected in partisan elections to sentences imposed by other judges,[45] have examined whether sentencing decisions change closer to election,[46] or have gauged the extent to which judges and attorneys believe that campaigns influence judicial decisions.[47] Interviews of judges and attorneys from Arkansas, Kentucky, and Virginia suggest that there may be similar forces influencing judicial modification of jury sentences in the non-capital context as well.

None of the six states authorizing jury sentencing allow judges to increase the sentence that a jury selects. However, interviews with judges and attorneys in Kentucky, Virginia, and Arkansas did explore the *reduction* of jury sentences by judges, and state-wide data on modification was available from Virginia. In Kentucky and Arkansas, where judges faced popular election regularly, interviewees reported that judicial reduction of a jury's sentence was very unusual.[48] One reason that judges reportedly were reluctant to bring down jury sentences was concern about lessening the incentive to waive jury trial.[49] Another stated reason is judicial apprehension about negative electoral fallout: judges anticipate that reduction of a jury's sentence would be resented by the jurors and their friends and family members, all voters in the next election.[50] "Judges never

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[44] Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 779, 793–96 (1995) (noting that in Alabama, trial judges have used their power to override to impose death forty-seven times, compared to five instances of vetoing death; in Florida, the ratio was one hundred thirty-four to fifty-one; in Indiana, eight to four; and in Delaware, where judges are not elected, it is zero to seven); Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1022 (1999).

[45] *See, e.g.*, John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999) (comparing the propensities of partisan-elected appellate judges with other appellate judges to uphold death sentences).

[46] Richard R. W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 638 (2002) (concluding that defendants in capital cases sentenced by judges in Chicago from 1870 to 1930 were 15% more likely to receive the death penalty in a judicial election year); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 495–97 (1995) (finding state court judges more likely to uphold death sentences in the last two years of their term); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004); *cf.* Jeffery D. Kubik & John R. Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Executions*, 46 J.L. & ECON. 1 (2003) (finding that states are 25% more likely to conduct executions in gubernatorial election years than in other years, that the total number of executions performed is higher in election years, and that the relationship between elections and executions is strongest in the South).

[47] *See* King & Noble, *supra* note 2, at 942 (collecting authority); *see also Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 270–73 (1994) (judges describing criticism they faced during elections based on their decisions in capital cases).

[48] *See* King & Noble, *supra* note 2, at 902, 918–19, 933–34.

[49] *See id.* at 960; *see also id.* at 911 n.83.

[50] *See id.* at 945.

bring jury sentences down. These judges are elected," summed up one Kentucky attorney.[51]

In Virginia, judges retain their seat after a vote of the legislature, not the public. Interviewees from Virginia reported that "reelection" by the legislature encouraged judges not to strive for the appearance of being tough on crime, but for the reputation of complying with the state's sentencing guidelines, carefully calibrated to meet state fiscal goals. Not surprisingly, considering that the guidelines sentences for many crimes fell far below the statutory ranges given to juries, juries in Virginia returned sentences that were on average often far above the guidelines range. In contrast to the other two states, judges in Virginia did reduce jury sentences somewhat, in approximately one of four cases, though rarely down to guidelines ranges. That judges in Virginia could reduce jury sentences without political fallout contrasts starkly with the hands-off approach reported in Kentucky and Arkansas.

Some have posited that reforming the process of selecting judges and eliminating judicial elections could produce more lenient sentences in capital cases.[52] Judging from our preliminary findings, the method of selecting trial judges may be influencing the administration of sentencing in non-capital cases as well, with the prospect of elections contributing to judicial reluctance to exercise leniency.[53]

B. *Information Gaps: Release Probabilities, Sentencing Norms, and Post-Sentence Modification*

A second common issue for jury sentencing in both contexts is the potential for the jury's relatively meager knowledge about sentencing to lead it to impose more severe sentences than judges. The Ninth Circuit recently observed that juries in death cases should be more accurate (and supposedly impose fewer death sentences) than judges, in part because judges have more prejudicial information than the jury does.[54] But the additional information a judge possesses in the sentencing context may actually have the opposite effect on sentence severity. With superior sentencing experience, a judge may have less apprehension about early parole release, less expectation that a sentence might be reduced, a better idea of what an average sentence is, and sometimes even more mitigating information

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[51] *Id.* at 901 n.56.

[52] *See* Liptak, *supra* note 43.

[53] A recent study testing the correlation between the time remaining before election and non-capital sentencing behavior for trial court judges in Pennsylvania found that some judges become significantly more punitive the closer they are to standing for retention. *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004).

[54] Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003) (holding that the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), applies retroactively), *rev'd sub. nom.*, Schriro v. Summerlin, 124 S. Ct. 2519 (2004).

about the offender than the jury has. That is, additional information may in fact prompt the judge's assessment of a just sentence to be less severe than that of a jury.

Capital case research has found that jurors often believe a defendant will be released sooner than he actually would be.[55] Jurors may doubt that life without parole really means that parole is unavailable.[56] And even though the Ninth Circuit has suggested that a judge's cumulative exposure to capital cases would make the judge more likely to impose a death sentence than a jury,[57] the effect of sentencing experience may be just the opposite. Judges who have more exposure to a range of murderers may save the worst sentences for those defendants they recognize are the worst offenders; a juror sentencing for the very first time likely views each offender as the worst criminal she's ever seen.[58] Experienced judges may also have a more accurate picture of offender dangerousness.[59] Juries may

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[55] *See, e.g.*, William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999); Stephen P. Garvey & Paul Marcus, *Virginia's Capital Jurors*, 44 WM. & MARY L. REV. 2063 (2003); C. Lindsey Morrill, Note, *Informing Capital Juries About Parole: The Effect on Life or Death Decisions*, 90 KY. L.J. 465, 469–70 (2002).

[56] *See* Littlejohn v. State, 85 P.3d 287 (Okla. Crim. App. 2004). Noting "case after case" in which a properly instructed jury:

> sends out a note, asking in some form or fashion whether the offender will be parole eligible if sentenced to life imprisonment without the possibility of parole. We are concerned the jury's question here illustrates a recurring misconception within Oklahoma juries regarding the effective application of a life imprisonment without the possibility of parole sentence, which in turn casts at least some doubt on our premise that the punishment options are self-explanatory. The situation we face in Oklahoma is that a fair number of jurors do not comprehend the plain meaning of the life imprisonment without the possibility of parole sentencing option and question whether the offender is truly parole ineligible.

Id. at 293.

[57] *See Summerlin*, 341 F.3d at 1114:

> These assessments may be influenced by the possible acclimation of the judge to the capital sentencing process. Most jurors in capital cases will never sit on another case in which the death penalty is sought. Judges, by contrast, confront death penalty cases on a regular and sometimes routine basis in Arizona . . . . A reasonable inference from the habituation brought about by imposing capital punishment under near rote conditions is that a judge may be less likely to reflect the current conscience of the community and more likely to consider imposing a death penalty as just another criminal sentence.

Id.

[58] *See, e.g.*, Proffitt v. Florida, 428 U.S. 242, 252 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.").

[59] Studies have found that the incidents of assault by death row inmates is comparable to assaults among life-sentenced murderers and rapists. *See* Mark D. Cunningham & Mark P. Vigen,

also overestimate the extent to which their sentencing decisions will be modified or corrected, a concern of capital sentencing critics who fear jurors take too little responsibility for their decisions.[60] A trial judge's anticipation of appellate review of capital sentencing may also provide an incentive to curb sentencing excesses, an incentive jurors are unlikely to share.[61] The point is not that judges will always be more lenient sentencers than jurors in capital cases, but that there are reasons to believe that they could be, particularly in jurisdictions with less powerful political forces prompting judges to sentence harshly.

Some of these factors may be partially responsible for the interesting developments in Arizona as the state has shifted to jury sentencing in capital cases following the Supreme Court's decision in *Ring v. Arizona*.[62] According to one report, prosecutors are seeking the death penalty in the same sorts of cases, but the rate at which juries are imposing death sentences is strikingly high compared to the rate at which judges formerly had imposed death sentences.[63] To be sure, some defense attorneys in the state have attributed this loss record to lack of training in presenting capital cases to juries. But at least one has suggested that trial judges tended to be more lenient in these cases than juries seem to be, due in part to judges' greater exposure to capital cases.[64] Importantly, Arizona trial judges in the two largest counties are selected by merit and face only retention elections, suggesting that the influence of politics on judicial sentencing decisions may be more muted in that state than it is in other jurisdictions.[65]

Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature, 20 BEHAV. SCI. & L. 191 (2002).

[60] *See, e.g.*, Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79 (2002) (collecting authority).

[61] In a recent study of judicial death sentencing in Nebraska, single trial judges imposed death less frequently than three judge panels, even though the panels required unanimity, due perhaps to the judge's anticipation that panel decisions are extended more deference on appeal than a solo judge's decision. *See* Baldus et al., *The Nebraska Death Penalty Study*, *supra* note 39, at 506–08 nn.49–52.

[62] 536 U.S. 584 (2002). *Ring* held that because Arizona does not authorize the imposition of the death sentence following a conviction for first-degree murder, unless there is a finding that certain aggravating facts exist, the Sixth Amendment requires those aggravating facts to be determined by a jury beyond a reasonable doubt.

[63] Jim Walsh, *Jurors Dish Out Death in Arizona; Sentencing Rate Up Since Judges Lost Say*, ARIZ. REPUBLIC, Nov. 12, 2003, at 1A (noting that seven out of eight Maricopa County defendants sentenced by juries rather than judges have received the death penalty, as have ten of fourteen statewide; before *Ring*, statewide, judges issued death sentences in twenty-nine out of one hundred forty-three cases).

[64] *Id.* ("Paul McMurdie, division chief of the county attorney's appeals and research unit, said most prosecutors believed the judiciary was biased against the death penalty before the law was revised. Attorneys said there may be a major difference in perspective between judges and jurors. 'Judges see murder cases all the time. They can compare one case to another. For jurors, it's the worst case they've seen in their lives,' he said.").

[65] *See* American Judicature Society, *Judicial Selection in the States: Arizona Judicial Selection*, *at* http://www.ajs.org/js/AZ_methods.htm; William K. Hall & Larry T. Aspin, *What*

Our interviews of judges and attorneys in jury sentencing states suggested the information disparities between judges and jurors may play a similar role in non-capital sentencing. Judges know more about release probabilities than juries do in both capital and non-capital cases. In the non-capital setting, Missouri and Oklahoma jurors do not learn if or when the defendant they sentence would be subject to parole.[66] Although parole was abolished in Virginia in 1995, jurors who asked whether their sentences would be subject to parole were kept in the dark for five years until the Virginia Supreme Court required judges to instruct jurors that parole was no longer available, if the defendant asks for this instruction. Jurors in Texas, Kentucky, and Arkansas typically receive only basic information about parole eligibility.[67] Several interviewees in our study suspected that jurors in Kentucky and Arkansas inaccurately equated parole eligibility with parole release when selecting sentences.[68] In addition, jurors in non-capital cases are often left to speculate about the extent of credit for good-time, the likelihood of concurrent rather than consecutive sentencing, or the probability of modification of the sentence they select, either by the trial judge or on appeal,[69] all of which could lead them to impose longer sentences than they would choose if they knew what judges know.

As for the jurors' relative lack of sentencing experience, several (although not all) of those interviewed thought inexperience leads jurors to impose higher sentences than judges.[70] Jurors exposed to violent crime for the first time, some

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Twenty Years of Judicial Retention Elections Have Told Us, 70 JUDICATURE 340 (1987) (noting very low negative votes in retention elections for trial courts in Arizona).

[66] *See* Sanders v. State, 60 P.3d 1048, 1051 (Okla. Crim. App. 2002) (holding that defendant had no entitlement to instruction informing jury he must serve at least 85% of his sentence before becoming eligible for release); State v. Massey, 60 S.W.3d 625, 628–29 (Mo. App. 2001) (noting that it is not error to refuse to inform the jury of parole, probation, suspended sentences or other forms of judicial clemency because such issues were extraneous to the jury's consideration of guilt and punishment, and that "[d]eparture from this rule would create potentially unworkable situations where eligibility or the timing of parole release is not so certain").

[67] *See* King & Noble, *supra* note 2, at 885. For a thorough discussion and history of the statute requiring jury instruction on parole in Texas, see *Luquis v. State*, 72 S.W.3d 355 (Tex. Crim. App. 2002); TEX. CODE CRIM. PROC. ANN art. 37.07, 4(a)–(d) (Vernon Supp. 2003).

[68] *See* King & Noble, *supra* note 2, at 899, 928.

[69] *See id.* at 899–900 nn.49–51 (discussing effects of lack of information for Kentucky jurors); *id.* at 914–16 nn.95–105 (same, for Virginia); *id.* at 928–29 nn.133–40 (same, for Arkansas); *see also* May v. Commonwealth, No. 0140-01-2, 2002 Va. App. LEXIS 398 (Va. App. July 23, 2002) (noting jury should not be instructed on the possibility of early release based on earned good behavior credits, the possibility that the trial judge could run the sentences concurrently, or the court's ability to modify jury sentence, because this information could cause the jury to speculate about what action would be taken and taint the sentencing process).

[70] *See* King & Noble, *supra* note 2, at 930–32; *cf.* Richard C. Dillehay & Michael T. Nietzel, *Juror Experience and Jury Verdicts*, 9 LAW & HUM. BEHAV. 179 (1985) (finding the more experienced jurors there are on a jury, the more likely the jury is to convict).

thought, may react with more shock and emotion than judges.[71] In Arkansas and Virginia, where judges but not jurors have access to sentencing guidelines, interviewees reported that jurors had no comprehension that the "going rate" for a given offense was often much lower than the statutory range jurors were given, and interviewees mentioned this as a reason for high jury sentences.[72]

C. *Plea Bargaining's Influence*

A final common denominator of jury sentencing in both capital and non-capital cases is the extent to which jury sentencing is invoked not to determine the actual sentence, but instead to prompt a negotiated settlement or sentence recommendation, subsequently endorsed by the judge. Whether the defendant faces death or prison time, the prospect of a severe sentence by jury generally is regarded as a bargaining chip in the prosecutor's pocket.

Few bargaining chips are as powerful as the risk of execution, and the prosecutor's threat to seek a death sentence if the defendant does not cooperate is an American tradition.[73] When a defendant facing a capital offense submits himself to the sentencing discretion of the judge, that judge is unlikely to reject the prosecutor's negotiated charge or sentence and risk the costly jury trial and appeal opportunities that were waived in return.[74] The incentives for prosecutors, judges, and legislators to secure plea bargains in what otherwise would be capital trials are strong. Saved are the sometimes crippling costs of trial itself,[75] heftier due to more

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[71] As summed up by one Virginia judge: "The jury doesn't have the same experience or information . . . that the judge has in the presentence report. Might be good for the defendant that they don't, since a lot of it hurts more than it helps. Juries don't have the perspective that judges do, haven't seen the cases." King & Noble, *supra* note 2, at 914 n.96.

[72] For example, one judge from Virginia noted "I know what the guidelines recommendation is, they don't. I know of mitigating evidence that they may not have . . . . I may have certain aggravating facts about the defendant, about his prior record, that the jury did not hear." *Id.* at 914 n.95.

[73] *See* Brady v. United States, 397 U.S. 742 (1970); North Carolina v. Alford, 400 U.S. 25, 31 (1970) ("That [Alford] would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage."); Hoffmann et al., *supra* note 31, at 2316 (noting that plea bargaining in the shadow of death is "the virtually universal day-to-day practice in every other American death-penalty jurisdiction" speaking of New York).

[74] Appeal is mandatory in several death sentencing states and cannot be waived by agreement. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2002 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp02.pdf.

[75] In their analysis of Nebraska capital cases, Professor Baldus and his co-authors did not find that charging decision's were obviously related to resources, but observed:

> However, it is widely perceived in Nebraska that the overall resources of smaller counties, which affect their ability to compensate defense counsel for indigent offenders and pay jurors, affect prosecutorial decisionmaking. Specifically, these concerns are believed to create an incentive for prosecutors in smaller counties to negotiate pleas and

elaborate jury selection, a bifurcated proceeding, special instructions, and, in some jurisdictions, the provision of special counsel. A plea also saves the costs of appellate and post-conviction review that follow trial, because a defendant who admits guilt has far fewer issues he can raise to attack his conviction or sentence. Avoiding these costs may be well worth the sometimes negative reaction by a victim or the public to deal-making in capital cases. Moreover, where a negotiated settlement has been rejected by the defense, a judge's reluctance to reduce a death sentence imposed by a jury may also be influenced by the judge's reluctance to undermine the bargaining process.

The extent of these influences on sentencing in the capital setting has not been established, and more research will undoubtedly be conducted into bargaining in capital cases, especially given the frequency with which these cases are resolved by an agreement to plead guilty in exchange for the government's promise not to pursue the death penalty.[76] Some studies suggest that the greatest inconsistency in

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waive the death penalty in cases that would be likely to advance to a penalty trial in major urban counties.

Baldus et al., *The Nebraska Death Penalty Study*, *supra* note 39, at 503 n.368; *see also* Ashley Rupp, Note, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735 (2003) (arguing that prosecutors take into account budgets when making their decisions about whether to bring death penalty proceedings and that this is arbitrary and thus a violation of due process); Keith Ervin, *Ridgway's Plea Frees up $6 Million for County*, SEATTLE TIMES, Nov. 15, 2003, at B2. For a collection of anecdotal evidence from several communities around the country of the financial burden of conducting capital trials, see Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty* (1994), *at* http://deathpenaltyinfo.org /article.php?scid=45&did=385; Vic Ryckaert, *Deputy's Father Ok'd Deal for Killer; Life Without Parole Better than Years of Death Penalty Appeals, Slain Officer's Dad Says*, INDIANAPOLIS STAR, Feb. 23, 2003, at 1B (quoting prosecutor as stating, "From a practical standpoint, whenever you make a sentence as expensive and burdensome as they have the death penalty—and when you increase the chances of reversals down the road—you're always going to have less being filed," and noting that the hiring of two qualified defense attorneys significantly increased the costs of a death penalty trial); Jeff Scullin, *Death Penalty: Is the Price of Justice Too High? States Wonder if the Extreme Punishment is Worth the Cost*, THE LEDGER (Lakeland, FL), Dec. 14, 2003, at A1 (noting that all first-degree murder cases closed between January 2002 and June 30, 2003 were resolved by plea bargains, but still, because they were capital cases, cost more than non-capital cases, and that the prosecution of three men charged with killing James Byrd, Jr. "forced a 6.7% increase in property taxes").

[76] The 2001 report on the federal death penalty reported that of the defendants who could have faced the death penalty, nearly three in four White defendants, 81% of Black defendants, and 86% of Hispanic defendants were the beneficiaries of the prosecutor's decision not to seek the death sentence, many of them in express plea bargains, an unknown number as part of pre-charge deals. *See* U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (June 6, 2001), *available at* http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm. For the figures in New York, see Hoffmann et al., *supra* note 31, at 2359 nn.292–97 (reporting bargaining statistics in potential death cases); *see also* John Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW. & PSYCHOL. REV. 55, 71 n.310 (2003) (noting his experience that capital defendants "have usually been offered plea bargains with penalties less than the death penalty, in exchange for a guilty plea and a waiver of their right to appeal. They typically are offered a plea bargain before or during the

the assessment of punishment takes place at the charging and bargaining stages of capital case, not at the sentencing phase itself.[77] Even serial killers, considered by many to deserve more severe punishment than other murderers, trade their right to contest guilt for a guarantee from the state that it will not seek the death penalty.[78]

On the other hand, there are reasons to suspect that bargaining has less of an influence in the administration of capital sentencing than it does in non-capital sentencing. Unlike the non-capital context, where sentence bargaining is well-accepted, some prosecutors may consider it inappropriate to extend the option of a life sentence to a person accused of first-degree murder.[79] The prospect of

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trial and they eventually agree to the plea bargain."); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS 2000, tbl. 4.6 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf00.pdf (noting that 4% of murderers convicted by jury received the death penalty, while only 1% of those convicted by guilty plea and those convicted by bench trial did). In Nebraska, in more than half of 185 death-eligible murders (ninety-six), the state waived the death penalty either unilaterally or by way of plea bargain, before or after charges were initially filed. Six were second-degree murder cases "likely" filed pursuant to a pre-indictment plea agreement. Deals took the form of pre-indictment agreements, plea bargains exchanging a guilty plea for the waiver of death penalty, waiver of death penalty executed after trial or plea, or a plea exchanged for the prosecutor's promise to make no argument in favor of death sentence or present no aggravating evidence. Only 12% of defendants who pleaded guilty received a death sentence (two of seventeen), compared to 37% of those who went to trial (twenty-seven of seventy-two). *See* Baldus et al., *The Nebraska Death Penalty Study*, *supra* note 39.

[77] Prosecutorial decisions in death eligible cases have been the subject of studies completed in Maryland in January 2003, New Jersey in 2001, Nebraska in 2001, and Virginia in 2001. *See* Baldus et al., *The Nebraska Death Penalty Study*, *supra* note 39, at 501 n.14, 593 n.246 (finding the principle source of race effects is the prosecutorial decision to seek or waive the death penalty in death-eligible cases; prosecutors in urban county advance death eligible cases to trial twice as often as those in rural counties); *see also* Statement of David C. Baldus to Senator Russell D. Feingold (June 11, 2001), *available at* http://deathpenaltyinfo.org /article.php?scid=18&did=252.

[78] *See* Debera Carlton Harrell, *Opponents of the Death Penalty Speak out; They Want to Increase Awareness of Wrongful Convictions*, SEATTLE POST-INTELLIGENCER, Feb. 4, 2004, at B2:

> Ridgway was sentenced to 48 consecutive life terms for each of the 48 women he murdered, rather than the death penalty. King County Prosecutor Norm Maleng decided not to seek the death penalty to secure from Ridgway the identities of his victims and the whereabouts of their remains, and to give closure to victim' families. Largely in response to the Ridgway case, some state lawmakers are seeking to strengthen the death penalty by prohibiting plea bargains in "multiple capital murder cases." House Bill 2315 states, "The Legislature finds that plea bargains in multiple capital murder cases are not appropriate and deny justice to the victims, their families and friends and the community at large."

Id. at B2; *see also* Tomas Alex Tizon, *Green River Killer Given Life Sentence*, L.A. TIMES, Dec. 19, 2003, at A25 ("Ridgway has more murders on his record than any serial killer in U.S. history.").

[79] *See, e.g.*, Alex Roth, *Dumanis Weighs Life-or-Death Decisions; District Attorney Considers Plea Bargains in Capital Cases*, SAN DIEGO UNION-TRIBUNE, June 9, 2003, at B1 (noting that many DA's around the state will not allow plea bargaining once they have decided a defendant deserves the death penalty, but that the new San Diego prosecutor says she is willing to negotiate a lesser sentence if the defendant decides to plead guilty; also quoting other attorneys from around the state noting that plea bargaining in capital cases is not followed because it is seen as "too big a hammer").

proportionality review, too, may also play a role in limiting plea bargaining in capital cases, a feature not present in non-capital cases.[80] Also, in jurisdictions where capital cases are infrequent, there is less of a need to create a credible discount for jury waiver in future cases.[81] Even so, proposals to get rid of the death penalty have prompted prosecutors and legislators to object, "But we'll lose our leverage!"[82]

In the non-capital context, there is little doubt that the administration and even preservation of jury sentencing is driven by concerns about plea bargaining. Sentences after plea-based convictions were even more variable than jury sentences for some offenses, a pattern that would be consistent with bargaining.[83] Judges admitted that the importance of preserving defense incentives to waive a jury made them reluctant to reduce sentences selected by juries to levels closer to those a defendant would receive had he waived jury trial. "It's a judicial management thing," one judge candidly explained when asked why judges do not reduce jury sentences, "to encourage plea bargaining."[84] The risk of a severe jury sentence is perceived by defendants to be so daunting, that prosecutors in at least one urban jurisdiction in Kentucky are able to use the threat of a jury sentence to negotiate settlements after guilty verdicts, settlements in which the defendant gives up his right to challenge his conviction or sentence on appeal in exchange for the prosecutor's sentencing recommendation and consent to waive jury sentencing.[85]

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[80] *See* McCarthy, *supra* note 39, at 990 n.134 (noting one prosecutor admitted that he believed not seeking the death penalty in a certain case would set a precedent against securing the death penalty in other highly aggravated future cases).

[81] *See* Klein & Steiker, *supra* note 6, at 266 (noting that "capital trials remain relatively rare events, such that individual state judges are unlikely to encounter sufficient numbers of decisions to develop an internal consistency").

[82] *See, e.g.*, Benjamin Weiser, *Ashcroft's Death Penalty Edict Could Backfire in New York, Lawyers Say*, N.Y. TIMES, Feb. 9, 2003, at A39 (quoting former prosecutor as stating, "The problem is, if you can't bargain away death, you will never get a plea"); Ray Carter, *Life vs. Death: Which Costs Oklahoma More*, J. REC. LEGIS. REP., Oct. 17, 2003 (noting that some predict that a repeal of the death penalty would mean: "[A]n increase in the number of cases going to court since many offenders today agree to plea bargains to avoid the chance of a death sentence . . . . [T]he threat of a death sentence gives prosecutors leverage to get convicts to agree to life without parole without the cost of going to trial . . . . But if life without parole is the worst possible sentence allowed, he predicted many offenders would take their chances in court.") (quoting Oklahoma Rep. John Smaligo, R-Owasso).

[83] *See* King & Noble, *supra* note 3, at 42–43.

[84] *See* King & Noble, *supra* note 2, at 901 n.57, 910 n.80; *see also* Runyon v. Commonwealth, 513 S.E.2d 872 (Va. App. 1999) (rejecting defense claim that trial court abused its discretion by not reducing twelve month jury sentence for drug offense to guidelines level (probation and no incarceration) after jury trial, despite judges comments: "Counsel are aware this Court did not try the defendant. She put her fate in the hands of a jury of her peers . . . . If the defendant wished the sentencing Court and wished the sentencing authority here to know what else was available, then perhaps she should have put her faith in the hands of the Court.").

[85] Defendants have no right to waive jury sentencing without the consent of the prosecution in non-capital sentencing. A similar rule exists in death sentencing jurisdictions as well. *See, e.g.*,

Just as some have worried that abolition of the death penalty would lead to more trials, the importance of high and variable jury sentences for encouraging jury waivers was also noted by those interviewed in Virginia, Kentucky, and Arkansas as a major roadblock in the way of abandoning jury sentencing.[86]

In both capital and non-capital cases, the incentives for prosecutors and judges to obtain from defendants waivers of expensive trial, appellate, and post-conviction processes are likely to increase, not decrease. Our preliminary glimpse into jury sentencing practice in non-capital cases suggests that much could be learned about capital sentencing, too, by an even closer examination of the charging and bargaining process in capital cases.

III. CONCLUSION

Jury sentencing in non-capital cases appears to share several features of death sentencing by jury that capital punishment critics have long condemned. Inconsistency in the sentences that juries select, misunderstandings by jurors about parole release and sentencing norms, the influence of electoral prospects on judicial modification of jury sentences, and use of jury sentencing as leverage in charge and sentence bargaining by prosecutors are common to jury sentencing in both contexts.

Two differences stand out. First, in non-capital cases, state judges, prosecutors, and legislators have particularly powerful incentives to structure state law and practice so that jury sentencing will continue to serve as a reliable deterrent to jury trial. Although modifications in the disposition of capital cases can be expensive, they probably would not have the same sort of systemic impact on a state's criminal justice budget that even tiny changes in routine felony disposition might. Second, the unique finality of the penalty of death has allowed courts to limit the constitutional regulation of jury sentencing to death cases, leaving non-death sentencing processes almost entirely to the discretion of the states. Both of these differences suggest that jury sentencing in non-capital cases will remain relatively unguided and unchanged for some time to come, regardless of ongoing efforts to fine-tune capital punishment.

People v. Cahill, 777 N.Y.S.2d 332 (N.Y. App. 2003) (rejecting defendant's claim that he had a right to waive jury trial in a case in which the prosecutor sought the death penalty).

[86] King & Noble, *supra* note 2, at 944.