

4-2004

## Felony Jury Sentencing in Practice: A Three-State study

Nancy J. King

Rosevelt L. Noble

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Criminal Law Commons](#), and the [Jurisprudence Commons](#)

---

### Recommended Citation

Nancy J. King and Rosevelt L. Noble, Felony Jury Sentencing in Practice: A Three-State study, 57 *Vanderbilt Law Review* 885 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol57/iss3/3>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Felony Jury Sentencing in Practice: A Three-State Study

*Nancy J. King\* & Rosevelt L. Noble\*\**

I.	INTRODUCTION .....	886
	A. <i>Methodological Note</i> .....	890
	B. <i>The Legal Framework in Each State</i> .....	891
II.	JURY SENTENCING AS TRIAL PENALTY: THE PROSECUTOR'S BEST FRIEND.....	895
	A. <i>Jury Sentencing—Why Prosecutors Stick by It</i> .....	895
	B. <i>The Plea Discount or Trial Penalty—Background..</i>	896
	C. <i>Jury Sentencing as a Trial Penalty in Kentucky</i> .....	898
	1. Descriptions of the Jury Sentence as Bargaining Chip for Prosecution.....	898
	2. Reasons Given for High Jury Sentences.....	899
	3. Enforcing the Discount.....	901
	4. Summary of Statistical Findings .....	907
	5. The Consequence: Prosecutorial Resistance to Change .....	908
	D. <i>Jury Sentencing as Trial Penalty in Virginia</i> .....	910
	1. Descriptions of Jury Sentencing as Trial Penalty.....	910
	2. Reasons Given for Higher Jury Sentences...	910
	3. Enforcing the Disparity .....	916
	4. Summary of Statistical Findings .....	923
	5. The Consequence: Prosecutors Protect Jury Sentencing.....	925

---

\* Lee S. & Charles A. Speir Professor of Law, Vanderbilt University, (J.D., Michigan) nancy.king@law.vanderbilt.edu. For their helpful suggestions on this paper in its earlier phases, we thank Professor Kevin Reitz, G. Thomas Munsterman, and all of the faculty who participated in workshops at Vanderbilt University, Northwestern University, the University of Illinois, Duke University, Stanford University, and the 2002 Law and Society Annual Meeting. We are particularly grateful to each of the many attorneys, judges, and professionals from Kentucky, Virginia, and Arkansas, who so generously provided the information that made this project possible. Excellent research assistance was provided by Dora Klein and Anne Marie Farmer.

\*\* Senior Lecturer, Sociology, Vanderbilt University, (Ph.D. Vanderbilt), rosevelt.l.noble@vanderbilt.edu.

E.	<i>Jury Sentencing as Trial Penalty in Arkansas</i> .....	926
1.	Descriptions of Jury Sentencing as Trial Penalty.....	926
2.	Reasons Given for High Jury Sentences for Drug Offenses .....	928
3.	Maintaining the Sentencing Differential in Drug Cases .....	932
4.	Summary of Statistical Analysis.....	939
5.	The Consequence: Prosecutors Favor Jury Sentencing .....	939
III.	JURY SENTENCING AND TRIAL JUDGES .....	940
A.	<i>Deference</i> .....	941
B.	<i>Dodge</i> .....	941
C.	<i>Docket</i> .....	944
D.	<i>The Result: Judicial Acceptance of Jury as Sentencer</i> .....	945
IV.	JURY SENTENCING AND DEFENDERS .....	946
V.	LESSONS FOR SENTENCING REFORMERS .....	949
A.	<i>Barriers to the Substitution of Judge Sentencing for Jury Sentencing</i> .....	950
B.	<i>Strengthening the Jury as Price Setter: Increasing Jury Power and Information</i> .....	953
VI.	CONCLUSION.....	962

## I. INTRODUCTION

Today, in six states, felons convicted by juries are routinely sentenced by juries. These states form a sizeable segment of the United States, beginning with Virginia at the eastern end, and proceeding west, through Kentucky, Missouri, Arkansas, Texas, and Oklahoma, following the trail of early settlers. Juries in these jurisdictions select an appropriate sentence from within a statutory range of punishment provided to them in their instructions from the judge. The use of juries to sentence felons in these states began well over a century ago,<sup>1</sup> well before the recent United States Supreme Court decision in *Apprendi v. New Jersey*,<sup>2</sup> which has generated

---

1. These states have practiced jury sentencing from early in their history, or, as one judge put it, "since the earth cooled." See *infra* note 192. For more on the origins of felony jury sentencing in Virginia and Kentucky, see Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937 (2003).

2. 530 U.S. 466, 490 (2000).

renewed interest in the appropriate role for juries in sentencing.<sup>3</sup> Roughly 4000 juries deliver felony sentences every year.<sup>4</sup> The number of felons sentenced by juries in Texas alone exceeds the number of federal defendants convicted annually by jury, for misdemeanors or felonies, in all districts combined.<sup>5</sup>

Despite its continuing influence, jury sentencing in noncapital cases is one of the least understood procedures in contemporary American criminal justice. While scholars and commissions have repeatedly dissected other sentencing systems and jury functions, felony jury sentencing has managed to elude systematic empirical inquiry.<sup>6</sup> This Article looks beyond idealized visions of jury sentencing to examine for the first time how jury sentencing in noncapital cases actually operates in three different states—Kentucky, Virginia, and Arkansas. Dozens of interviews with prosecutors, defenders, and

---

3 The Court's latest *Apprendi*-related opinion, *Blakely v. Washington*, No. 02-1632, 2004 U.S. LEXIS 4573 (June 24, 2004), handed down as this article was going to press, promises to have a particularly widespread impact on sentencing systems nationwide. See Susan Klein & Nancy King, *Beyond Blakely* (forthcoming); Sentencing Law and Policy (collecting commentary and case law updated daily), at <http://sentencing.typepad.com> (last visited July 11, 2004). The rule in *Apprendi* and *Blakely*, however, defines only which facts must be treated essentially as elements of the offense under the Sixth Amendment; it does not speak to whether a jury or a judge must select a sentence once those facts have been admitted or proven beyond a reasonable doubt. Nevertheless, some commentators have used the *Apprendi* rule as a platform for proposing that jurors, not judges, select punishment in felony cases. See, e.g., Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314 (2003) (calling for the "reintroduction of jury sentencing" and arguing that because of "their deliberative capacity and democratic makeup, juries are better situated than other political institutions to perform the sensitive tasks of deciding between contested sentencing goals and applying the law with due regard for the individual circumstances of each offender").

4. This very rough estimate is derived by adding the 836 sentences imposed in the year 2000 in noncapital felony cases from the Kentucky, Virginia, and Arkansas data sets discussed *infra* notes 11, 70, 120 & 174, the 2647 jury sentences in noncapital felony cases reported in OFFICE OF COURT ADMIN., TEX. JUDICIAL COUNCIL, ANNUAL REPORT OF THE TEXAS JUDICIAL SYSTEM FOR FISCAL YEAR 2001 (2001), and estimating conservatively at least 300 felony jury sentences annually in Missouri and Oklahoma. OFFICE OF STATE COURT ADMIN. FOR MO. 2000 ANNUAL REPORT 125 (2000) (reporting 612 total felony jury trials); NAT'L CTR FOR STATE COURTS, STATE COURT CASELOAD TABLES, EXAMINING THE WORK OF STATE COURTS (1999) (noting Oklahoma's criminal caseload is about half that of Missouri).

5. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001 (2002) [hereinafter SOURCEBOOK], <http://www.albany.edu/sourcebook/1995/pdf/t532.pdf> (Table 5.32 shows that 2035 total defendants were convicted by jury in all United States District Courts). 2284 defendants were "convicted by jury or found guilty/insane" in United States District Courts for 2002. Bureau of Justice Statistics, Federal Justice Statistics Resource Center, at <http://fjsrc.urban.org> (last visited July 11, 2004).

6. Existing empirical studies of jury sentencing are limited to single localities or offenses, or examine sentencing data generated under now obsolete sentencing law. For a review, see Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Non-Capital Cases: Comparing Severity and Variance with Judicial Sentences in Three States* (2003) (unpublished manuscript, on file with authors).

judges, as well as an analysis of state sentencing data, reveal that this neglected corner of state criminal justice provides a unique window through which one can observe some of the most fundamental forces operating in criminal adjudication today.

It turns out that jury sentencing in practice looks very little like jury sentencing in theory. According to its academic advocates, jury sentencing could perform a very special function—the jury's sentence could reflect the community's view of punishment, a view that may be different from that of a professional judge. Theoretically, jury sentences would take into account the full range of penalties authorized by the legislature and mirror community norms concerning retribution, deterrence, incapacitation, and rehabilitation.<sup>7</sup> Bargaining in the shadow of the expected jury sentence, a prosecutor could resort to the jury if judges were not punishing offenders severely enough, and a defendant could resort to the jury if judicial sentences exceeded community standards. Jury sentences, not those set by professionals, would then serve as the default price for crime in each community.

This sort of price setting, however attractive on paper, does not seem to be the primary role currently played by jury sentencing in the three states studied. In order to serve as a reliable “community-based barometer”<sup>8</sup> of punishment, the jury needs both the same information that judges receive and the power to impose the full range of sentencing options authorized by the legislature, whenever the prosecutor or the defendant prefers the jury's judgment to that of a judge. State law in each of these three states deprives the jury of either full information or power, to varying degrees. In Kentucky, jury sentencing is available upon demand to both prosecution and defense and does appear to set the going rate, but the law drastically truncates the jury's information and options. In Virginia, the jury lacks both information and power. The jury's ability to set the default

---

7. See Hoffman, *supra* note 3; Iontcheva, *supra* note 3, at 314 (calling for the “reintroduction of jury sentencing” and arguing that because of “their deliberative capacity and democratic makeup, juries are better situated than other political institutions to perform the sensitive tasks of deciding between contested sentencing goals and applying the law with due regard for the individual circumstances of each offender”); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again?)*, 108 YALE L.J. 1775, 1777-82 (1999) (arguing that jury sentencing may be “a more direct and more effective mechanism for expressing the recent populist and retributive trends in criminal punishment”); see also Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1375-76 (1999) (jurors “have better access to relevant information (such as current community views on punishment) than do sentencing judges,” and are “well-suited for decisions that are difficult to articulate through general principles”).

8. This phrase was used by an Arkansas prosecutor to describe jury sentencing. See *infra* text accompanying note 32.

punishment for crime in Virginia is undercut by judicial sentencing guidelines combined with unfettered defense access to lower guidelines sentences. Arkansas juries fix the default sentence as do juries in Kentucky, but Arkansas juries remain blindfolded to key sentencing information. Jury sentencing in these states is not a systematic check on sentencing policy set by prosecutors, judges, or sentencing commissioners. Rather, it serves at best as an occasional shield, and at worst as a smoke screen that helps to hide routine sentencing practice from public view.

The interviews reveal that jury sentencing is regarded by those who use it as a device that performs several different, but extremely important, functions within each state's criminal justice system. Judges and attorneys reported that apprehension about a severe sentence by a jury deters defendants from insisting on trial by jury, funneling defendants to guilty pleas, or, in Virginia, to pleas and bench trials. In Arkansas and Kentucky, support for jury sentencing is linked to the selection of trial judges by popular election. Sentencing by juries allows trial judges to avoid taking political heat for the punishment of offenders. It also provides some assurance to the public that those who may owe allegiance to campaign contributors or the politically powerful are not selecting sentences. In sum, jury sentencing may be appreciated for its democratic appearance, but its vitality may depend instead on its perceived utility in streamlining case disposition and in protecting judges and legislators from electoral accountability.

This first hard look at jury sentencing in context reveals that it is neither a one-size-fits-all cure for sentencing excesses, nor an obscure and curious appendage of an earlier age. Rather, jury sentencing is viewed by these criminal justice insiders as a critical component of modern sentencing policy, serving quite handily their most fundamental fiscal and political goals. These findings have obvious implications for proposals to reform sentencing policy, whether those proposals would replace jury sentencing with judicial sentencing or strengthen the price-setting power of sentencing juries. Proposals for sentencing reform that threaten to reduce the leverage of prosecutors in obtaining settlements or that expose elected judges to more intense political scrutiny are particularly vulnerable to attack.

This study also has broader relevance for criminal justice policy generally. Jury sentencing itself may be unusual, but the way in which it is implemented is not. Offering opportunities for efficiency and political advantage that attorneys and judges have willingly seized, jury sentencing in practice provides a remarkable illustration of how the powerful forces shaping criminal justice policy leave no

"right" untouched. The research reported here is a reminder to reformers that, when it comes to criminal procedure, "formal descriptions do not adequately represent actual practices."<sup>9</sup>

### A. Methodological Note

A brief summary of the methodology used to gather the information reported here is appropriate at this point. This Article presents the findings from fifty-three informal telephone interviews of judges, prosecutors, and defenders from Arkansas, Kentucky, and Virginia. In each of the three states, a minimum of five prosecutors, five defenders, and five trial judges were interviewed. Interviewees included a mix of professionals from urban and rural jurisdictions. The interviews were journalistic in nature, and pursued, as time allowed, the same core group of open-ended questions. Illustrative comments from the interviews are reproduced in the text below, with additional illustrations collected in the notes.<sup>10</sup>

---

9. MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 194 (1983).

10. Additional information about this qualitative study is included here. The responses do not represent a random sampling of practitioners and judges. From a variety of personal contacts in each state (practicing alumni, fellow professors, jury researchers, court personnel, and judges), Professor King obtained names of people in each state who would be knowledgeable about jury sentencing and willing to discuss it. Unless time did not permit it, she also solicited from interviewees themselves additional names of others around the state to contact. Interviews varied depending upon the time each interviewee had available. Most of them lasted about 25-40 minutes. After explaining the purpose of the research and the terms under which comments would be used, each interviewee was asked a similar set of open-ended questions. Informal interviews were selected rather than more formal survey techniques primarily because the format allowed for follow-up on comments, for clarification or explanation when needed. Second, the informative stories and examples these judges and attorneys offered candidly on the telephone were less likely to be forthcoming in response to a written instrument. See, e.g., PETER F. NARDULLI ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS 61-65 (1988) (describing somewhat similar interview methodology). Professor Alschuler's classic series on plea bargaining also included open-ended interview methodology. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181 (1975) (describing interviews as resembling "legal journalism" more than a scientific survey).

A summary of each interview was typed from hand-written notes of the conversation immediately after the interview. The typed summary of the interview was mailed to the interviewee, with a permission form to sign and return, requesting that the interviewee edit the summary as needed for accuracy, and either deny or grant permission to quote from the summary, with attribution only by role (judge, defense, prosecutor) and type of jurisdiction (primarily urban, primarily rural). A total of 53 interviews were conducted. One person expressly declined permission, 12 never returned their permission forms. Quotes from these 13 interviews, although generally consistent with the responses from the same state, are not referenced. The remaining interviewees agreed to allow quotation from their interview summaries. About 1/4 of the interviewees edited slightly their summaries before returning them, correcting a few words or phrases. To protect anonymity, all interviewees are referred to as male in the article, although several were female. Each quote is accompanied by a code indicating the state, role, and type of

Also referenced briefly in this Article are findings from a statistical study, presented in detail in a separate article,<sup>11</sup> that examines sentencing data provided by court, corrections, or sentencing officials in Kentucky, Virginia, and Arkansas. The analysis investigated whether sentences imposed after jury trial exceeded the sentences that judges imposed in like cases resolved by plea or bench trial, whether jury sentences were more varied than judicial sentences in like cases, and the extent of judicial modification of jury sentences.

This qualitative study, along with the accompanying quantitative analysis of sentencing data, is more comprehensive than any existing research into noncapital jury sentencing. It provides the first empirical look at contemporary jury sentencing in more than one jurisdiction, as well as a platform for future research. Two important caveats concerning the findings must be kept in mind, however. Despite the wealth of information these interviews generated, and the effort to query professionals from different areas of each state, other practitioners and judges from these states may have had different experiences or views to share on the subject of felony jury sentencing. The number of interviewees from each state is fairly small and criminal practice norms are notoriously local. Most of all, the reader should remember that this study examines only half of the states that presently use felony jury sentencing. Given the variations in legal regulation of jury sentencing from state to state, inquiry into the remaining jury sentencing jurisdictions—Texas, Missouri, and Oklahoma—is bound to turn up even more surprises.

### *B. The Legal Framework in Each State*

Variation in state regulation of jury sentencing is easily underestimated. In the context of capital sentencing, the Supreme Court's Eighth Amendment rulings have provided a loose unifying force, but even this limited constitutional regulation is not applicable in jury sentencing in noncapital cases. Jury sentencing states differ as to whether or not trial is bifurcated into guilt and punishment phases; whether or not the prosecutor can veto a defendant's choice to be sentenced by a judge instead of jury; whether or not judicial sentencing is bounded by sentencing guidelines; which felony offenses and offenders may be sentenced by juries; which sentencing options are available to jurors; whether or not the sentences that juries

---

jurisdiction of the source quoted. For example, KY-J2-U signifies a judge from an urban jurisdiction in Kentucky, and AR-D3-R, a defense attorney from a primarily rural jurisdiction in Arkansas.

11. See King & Noble, *supra* note 6.



impose are subject to parole; and what information jurors are permitted to learn about punishment options, the offense, and the offender. Each state's jury sentencing law and practice has developed its own individual characteristics, shaped by the unique legal and political skeleton that supports it.

The three states examined here, however, have some important rules in common. Each state bifurcates the jury trial into two phases—guilt determination and sentencing. Kentucky opted to separate guilt and sentencing proceedings for all felonies in 1986,<sup>12</sup> while Virginia and Arkansas did so in the mid-1990s.<sup>13</sup> One of the primary reasons for bifurcation in each state was to allow prosecutors to introduce information about the defendant's criminal history at the sentencing phase after the guilt-innocence decision had been made.<sup>14</sup> Defendants, too, may introduce evidence at the sentencing phase to support leniency.<sup>15</sup> In each of the three states, sentencing juries select a specific term of imprisonment within broad statutory ranges.<sup>16</sup> The trial judge in all three states is authorized to reduce the jury's sentence, but not to raise it, except to comply with mandatory minimum sentencing statutes.<sup>17</sup>

Of the three states, Kentucky's sentencing system has been least affected by the revolutionary sentencing reforms of the past

---

12. Misdemeanor jury trials remain unitary proceedings, except in DUI cases. *See Dedic v. Commonwealth*, 920 S.W.2d 878 (Ky. 1996); *Newton v. Commonwealth*, 760 S.W.2d 100 (Ky. App. 1988).

13. ARK. CODE ANN. § 16-90-803 to -804 (Michie Supp. 2003); VA. CODE ANN. § 19.2-295.1 (Michie 2000).

14. *See Gary Taylor, Jury Sentencing: A Last Stand in Six States*, NAT'L L.J., Jan. 19, 1987 (relating efforts of Louisville's prosecutor to secure law allowing prosecutors to inform jurors about parole eligibility in order to facilitate the imposition of longer sentences); *see also Byrd v. Commonwealth*, 517 S.E.2d 243 (Va. Ct. App. 1999) (bifurcation was adopted so that the state could introduce prior conviction records for sentencing while avoiding the risk of prejudice caused by presenting this information in the guilt phase).

15. *E.g.*, KY. REV. STAT. ANN. § 532.055(2)(a) (Michie 1999); *Commonwealth v. Shifflett*, 510 S.E.2d 232 (Va. 1999) (in assessing what mitigating evidence should be admissible in noncapital sentencing proceedings, trial courts should be guided by the rules of admissibility in capital proceedings).

16. Statutory ranges in Kentucky include class A, 20-50 years; class B, 10-20 years; class C, 5-10 years; class D, 1-5 years. KY. REV. STAT. ANN. § 532.060. Broad statutory sentencing ranges are found in VA. CODE ANN. § 18.2-10 (c), (d) (Michie 1996). Individual crimes may carry even broader ranges. For example, rape is punishable by any sentence five years to life. VA. CODE ANN. § 18.2-61C. In Arkansas, ranges are similar to those in Kentucky: class Y, 10 to 40 years or life; class B, 6-30 years; class B, 5-20 years; class C, 3-10 years; class, D 0-6 years. ARK. CODE ANN. § 5-4-401(a) (Michie 1997).

17. *E.g.*, KY. REV. STAT. ANN. § 532.070(1); *Commonwealth v. Young*, 25 S.W.3d 66 (Ky. 2000); ARK. CODE ANN. § 16-90-107(e) (Michie Supp. 2003). A judge may impose a greater term if the jury's sentence is less than the minimum mandated by statute. *See Neace v. Commonwealth*, 978 S.W.2d 319 (Ky. 1998) (judge could impose a sentence of 20 years for sodomy when jury sentence was 5 years; class A felony required minimum sentence of 20 years).

several decades. There are no sentencing guidelines, and most felony offenses require service of 20 percent of the term imposed before eligibility for parole.<sup>18</sup> The prosecution may present information during the sentencing phase that allows the jury to calculate when the defendant would become eligible for parole, but the defense may not introduce statistics concerning how many offenders are actually released after they become eligible.<sup>19</sup> Trial judges in Kentucky are elected every eight years.<sup>20</sup>

Virginia abolished parole<sup>21</sup> and adopted voluntary judicial sentencing guidelines in 1995,<sup>22</sup> calibrating the recommended new sentence ranges for many offenses so that they replicated actual time served under the former parole system.<sup>23</sup> The guidelines ranges governing judicial sentencing are not revealed to the jury and are much narrower than the statutory ranges from which juries choose sentences. Trial judges in Virginia are not elected by the public, but are reappointed by the legislature, a process known as "reelection."<sup>24</sup>

Arkansas adopted voluntary sentencing guidelines for judges when it bifurcated felony jury trials in the mid-1990s.<sup>25</sup> However, Arkansas retained parole. Prisoners must serve at least one-third of their sentence if convicted of less serious felonies, and at least half of their sentence for more serious crimes, with good time reducing that required stay by up to half.<sup>26</sup> As in Kentucky, prosecutors at

---

18. Persistent violent offenders serve at least 50 percent of their sentence before parole eligibility. A handful of very serious offenses require service of 85 percent of the sentence imposed. KY. REV. STAT. ANN. § 439.340 – 3402; 501 KY. ADMIN. REGS. 1:030 § 3(a).

19. See *Abbott v. Commonwealth*, 822 S.W.2d 417 (Ky. 1992); see also *Young v. Commonwealth*, 129 S.W.2d 343 (Ky. 2004). Courts have also allowed prosecutors to admit evidence about good-time credits. See, e.g., *Cornelison v. Commonwealth*, 990 S.W.2d 570 (Ky. 1999).

20. For up-to-date information on judicial selection in all states, visit <http://www.ajs.org/js>.

21. These reforms were a response to truth-in-sentencing funding incentives offered by the federal government. See BRIAN J. OSTROM ET AL., *SENTENCING DIGEST: EXAMINING CURRENT SENTENCING ISSUES AND POLICIES 15-19* (1998) ("In 1994, Congress enacted legislation authorizing funding of the *Violent Offender Incarceration and Truth in Sentencing Incentive Grants*" under which states were eligible to receive funds if they could demonstrate that violent offenders would serve at least 85 percent of their imposed sentences); NAT'L INST. OF CORRECTIONS, *STATE LEGISLATIVE ACTIONS ON TRUTH IN SENTENCING: A REVIEW OF LAW AND LEGISLATION IN THE CONTEXT OF THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994* (1995).

22. VA. CODE ANN. § 53.1-165.1 (Michie 1994).

23. VA. CODE ANN. § 19.2-295.1 (Michie 1994).

24. See *supra* note 20.

25. See ARK. CODE ANN. § 16-90-803 to -804; Stephanie Gardner Holder, *Survey: Criminal Procedure*, 16 U. ARK. LITTLE ROCK L.J. 99 (1994).

26. In 1995, the state required those convicted of certain serious crimes to serve at least 70 percent of their sentence. This information, like other parole eligibility information, may be presented to the jury. See *infra* note 132.

sentencing may present witnesses to testify as to parole eligibility (termed "transfer" eligibility in Arkansas), but defense attorneys may not present statistical evidence of actual parole release.<sup>27</sup> In Arkansas alone, the judge may choose to instruct the jury that it may include in its verdict a recommendation that the judge suspend or probate the defendant's sentence,<sup>28</sup> a recommendation that the judge may accept or reject.<sup>29</sup> Also, Arkansas law allows jury sentencing after plea or bench trial, but this practice was reported in the interviews to be extremely rare.<sup>30</sup> Arkansas Circuit judges are elected by the public to six-year terms.<sup>31</sup>

The text that follows presents patterns that emerged from the interviews despite this legal diversity. Part II details what seems to be a very important feature of jury sentencing for prosecutors—its use as a deterrent to jury trial. This discussion of jury sentencing as a trial penalty is divided into four subsections: a general introduction, then a discussion of each of the three states. Part III of the Article focuses on judges and the advantages they reportedly derive from jury sentencing. Defender views are presented in Part IV, including reports of jury sentencing as a protection from judicial and prosecutorial overreaching. The Article concludes with a discussion of implications for sentencing policy.

---

27. *Clark v. State*, 944 S.W.2d 533 (Ark. 1997).

28. ARK. CODE ANN. § 16-97-101(4) (providing that the trial court may, in its discretion, instruct the jury that counsel may argue as to alternative sentences for which the defendant may qualify and that the jury may, in its discretion, make a recommendation regarding an alternative sentence which shall not be binding on the trial court); ARK. MODEL JURY INSTRUCTIONS, CRIMINAL § 9111 (2d ed. 1994); *see also* *Rodgers v. State*, 71 S.W.3d 579, 581 (Ark. 2002) (noting that jury may recommend an alternative sentence such as suspension or probation); *Brown v. State*, 65 S.W.3d 394 (Ark. 2001) (jury recommended suspension of 10-year minimum sentence). *Compare* ARK. CODE ANN. § 5-4-301(a)(2) (Michie 1997) (court shall not suspend imposition of sentence or place a defendant on probation if it is determined pursuant to § 5-4-502 that the defendant has previously been convicted of two or more felonies).

29. *Higgins v. State*, 936 S.W.2d 740, 743 (Ark. 1996).

30. ARK. CODE ANN. § 16-97-101(6); *see, e.g.*, Rodney Bowers, *NLR Girl, 17, Gets 12 Years in Stabbing of Benton Teen*, ARK. DEMOCRAT GAZETTE, July 7, 2000, at B1 (noting that defendant's sentencing by a jury after guilty plea was "an unusual procedure in Arkansas" and that "[n]ormally, a defendant either allows a jury to determine guilt or innocence before it recommends a sentence to the judge, or he pleads to a judge who sets a sentence, often at the recommendation of the prosecuting attorney"); AR-P5-R (reporting that a jury has sentenced after a guilty plea only "twice since 1987").

31. *See supra* note 20.

## II. JURY SENTENCING AS TRIAL PENALTY: THE PROSECUTOR'S BEST FRIEND

### A. Jury Sentencing—Why Prosecutors Stick by It

Prosecutors in all three states are big fans of jury sentencing. They volunteered a number of reasons for this preference. Many expressed respect for jury sentencing as an important vehicle for communicating community views on crime and punishment. One said, "it is a wonderful mechanism of democracy. Having a community-based barometer, I think it's appropriate."<sup>32</sup> A Virginia prosecutor explained: "It allows you to get a read on what a case is worth. . . . You try three cases to a jury of burglary with no priors and you get fifteen years each time, then you've got a good idea of what future cases are worth."<sup>33</sup> In Kentucky, prosecutors preferred that sentencing discretion rested with the jury rather than with elected judges, whom they feared would abuse sentencing power.<sup>34</sup>

The most ringing endorsement prosecutors gave jury sentencing, however, was as a tool to encourage defendants to waive jury trial. Jury sentences following jury trial often exceeded sentences after plea, they explained, giving prosecutors leverage in bargaining. "Let me be candid," remarked a Commonwealth's Attorney from Virginia, "there is another reason I prefer jury over judge sentencing—it forces pleas. Those higher sentences from a jury tend

---

32. AR-P1-U; *see also* KY-P2-U ("The community gets to reflect in their sentences a sense of what the public thinks."); VA-P1-U ("Because the important thing is to hear from the community, to hear what they have to say about a crime . . . when they do sentence, it is a better reflection of community judgment. People in the criminal justice system for a long time frequently get inured to crime, they think, 'Aw, it's just another car broken into, give him a suspended sentence.' But to the guy whose car was broken into, it's a serious matter, to him and his neighbor, there may be a plague of these in their neighborhood. To allow the jury to sentence gives the community a greater say.")

33. VA-P5-R; *see also* VA-P4-R ("It is an opportunity to have regular people express what they think is justice in a given case.")

34. *See, e.g.*, KY-P5-R ("I'm not in favor of judicial sentencing. . . . Get a bad jury and you get rid of it in 90 days. A bad judge and you're stuck for 8 years. Second, because judges are elected—judicial sentencing has the potential to put judges in a position where they have to make difficult decisions. I'd just as soon they not have to do that. Third, you've heard familiarity breeds contempt? Well I'd modify that a bit, familiarity breeds conformity. Judges spend too much time around the system. I like the jury, it is probably shocked at stuff that should be shocking, and cluck their tongues at stuff that isn't that bad. Those of us in the system develop so much tolerance. Q: What's wrong with tolerance? A: The sentences go down. The juries bring this community attitude, it's what we're supposed to do.")

to concentrate a defendant's attention."<sup>35</sup> "[J]uries will really lay it on somebody who deserves it," reported an Arkansas prosecutor,

I think the fear of having those twelve people do that to 'em, it moves a lot of cases. . . . [O]ur system would suffer total gridlock without jury sentencing . . . because every defendant would exhaust every delay even more, cases wouldn't move as quickly. If they're going to be no worse off, they wouldn't make an effort to resolve the case.<sup>36</sup>

The discussion below examines why jury sentencing may serve as a deterrent to jury trial in each of the three states.

### B. *The Plea Discount or Trial Penalty—Background*

The difference between the sentence imposed after a jury trial and the sentence imposed after a guilty plea is commonly known as the "plea discount," or, less kindly, the "trial penalty" or "trial tariff."<sup>37</sup> Much has been written about this pervasive feature of American criminal justice. In brief, this differential in punishment serves two basic functions: First, it recognizes the greater rehabilitative potential of the person who readily admits that he has committed a crime, as compared to the person who insists that a prosecutor must prove that he is guilty.<sup>38</sup> Second, it encourages defendants to forgo trial, saving money, time, and trouble for attorneys, victims, judges, witnesses, and taxpayers. This predictable difference in the penalties that follow plea and trial is commonly assumed to be fuel on which our system of bargained justice runs.<sup>39</sup> In jury-sentencing jurisdictions, where

35. VA-P1-U.

36. AR-P2-R.

37. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUDIES 289, 311-12 (1983); Peter F. Nardulli et al., *Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process*, 76 J. CRIM. L. & CRIMINOLOGY 1103, 1129 (1985).

38. For a recent endorsement of the practice of encouraging defendants to accept responsibility by imposing lesser sentences, see *McKune v. Lile*, 536 U.S. 24, 36-37 (2002) (Kennedy, J.) ("Acceptance of responsibility in turn demonstrates that an offender 'is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.'" (quoting *Brady v. United States*, 297 U.S. 742, 753 (1970)); Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility," The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1513, 1553 (1997) (noting that a plea discount was viewed as a necessary "incentive to encourage guilty pleas," and stating that the Commission apparently felt that Section 3E1.1 could advance the same purposes of an automatic plea discount without the "unseemly results," and that Section 3E1.1 "seems generally to function as a plea discount," creating an incentive for defendants to forgo their constitutional right to trial by jury).

39. E.g., David Brereton & Jonathan D. Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45 (1981-1982); Easterbrook, *supra* note 37; David L. Weimer, *Plea Bargaining and the Decision To Go to Trial: The Application of a Rational Choice Model*, 10 POL'Y SCI. 1, 1-24 (1978); Thomas M. Uhlman &

judges might have less control over the punishment that follows from trial, it could be more difficult to maintain a predictable “plea discount.”<sup>40</sup> Yet in Kentucky, Virginia, and Arkansas, jury sentencing not only accommodates, but is perceived as facilitating, the disposition of felony cases without jury trial. Like so many other procedural rights, particularly those associated with jury trial, the defendant’s right to sentencing by jury is in most cases not exercised but bargained away. Unlike most trial-related rights, however, jury sentencing often operates somewhat like mandatory minimum sentencing laws, providing the government, not the defendant, extra leverage in settlement negotiations. Ironically, rather than increasing the community’s say in the punishment of offenders, jury sentencing as practiced is perceived as shrinking the frequency of lay participation in criminal justice by steering defendants away from jury trials and toward bench trials or guilty pleas.

For jury sentencing to serve as a deterrent to jury trial, two features must be present: Some sentences after jury trial must be high enough for prosecutors and judges to feel comfortable setting lower sentences for conviction after guilty plea or bench trial, and prosecutors must have the means to preserve that punishment differential so that it remains a credible threat during negotiations over disposition.<sup>41</sup> The subsections that follow detail evidence suggesting that both of these features are present in each of the three states, for at least some offenses, which helps to explain the effects reported by interviewees. For each state, we 1) relate comments from the interviews that reflect the perceptions that jury sentencing is used as leverage to secure jury waivers and that jury sentences are higher than judge sentences, 2) offer reasons drawn from interviews and state law that might explain that differential, 3) examine each of the several mechanisms that serve to preserve that differential when it

---

N. Darlene Walker, *“He Takes Some of My Time; I Take Some of His”: An Analysis of Judicial Sentencing Patterns in Jury Cases*, 14 L. & SOC’Y REV. 323 (1980).

40. In jurisdictions with few constraints on judge sentencing, judges can use their sentencing discretion to maintain discounted sentences for defendants who plead guilty. Even in jurisdictions with mandatory sentencing guidelines, judges and prosecutors can maintain what amounts to a plea discount by taking advantage of guidelines credits for acceptance of responsibility, remorse, or cooperation, for example. The plea discount in the federal system under the guidelines was intended to replicate the going rate prior to the guidelines, about one-third of the sentence. O’Hear, *supra* note 38; Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 40 n.32 (2002) (citing U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (1987)).

41. See, e.g., GEORGE FISHER, PLEA BARGAINING’S TRIUMPH 220 (2003) (“[P]lea bargaining depends on the prosecutor’s (or judge’s) power to assure the defendant a lower sentence than he would face after trial”).

exists, 4) summarize the statistical findings on the relative severity and variance of judge and jury sentencing, and 5) examine the effect of the jury's reputation as trial penalty on prosecutors' views of abandoning jury sentencing in favor of judge sentencing.

### C. *Jury Sentencing as a Trial Penalty in Kentucky*

#### 1. Descriptions of the Jury Sentence as Bargaining Chip for Prosecution

Kentucky lawyers and judges consistently described jury sentences as severe. Summed up one defender: "Prosecutors like jury sentencing better, juries [are] more inclined to give higher sentences."<sup>42</sup> Prosecutors, defense counsel, and judges reported that juries are particularly punitive in theft, sex abuse, and drug cases.<sup>43</sup>

These high sentences reportedly serve as an incentive to avoid jury trial. As one defender put it, "[It is] hard to take chances with a jury that might return a 3-5 [year] sentence when if you plead you get 7 months and 21 days."<sup>44</sup> One judge thought it was the

42. KY-D6-U.

43. See, e.g., KY-P1-U ("They'll be more severe on property crimes . . . it's bard to justify some of these sentences. A guy shoplifts \$305, he gets 1 to 5 years as a class D felony, and if there's a [prior felony offender charge,] up to 20 years for that. Or 1-5 for possession of a forged instrument 2d degree, up to 20 with [a prior felony offense]. . . . Property crimes are where the jury tends to be hardest. Theft and burglary and forgery. Violent offense they are already pretty tough."); KY-P2-U (juries are "higher in child sex abuse cases. They're tough on guilt or innocence, don't even need to be guilty and they'll sentence you. If you make the case it's like they'll drop nuclear bombs. Sometimes you wonder if innocent people plead guilty to avoid that. . . . Out in other parts of the state, why I saw a guy get 5 years for cutting down 6 cedar trees!"); KY-D3-U (in a sex abuse case before a jury, "if there is a conviction, you are looking at a rather long sentence"); KY-D4-R ("You're not going to expect sympathy from a jury in a child sex case or a violent rape. . . . There are some offenses where the juries are going to deliver really long sentences."); KY-J1-R (reporting that juries imposed high sentences in crimes "that relate to violence. There was a robbery not too long ago, I would have given much less, the jury gave 'em 40 years. . . . [Prosecutors] don't want [judge sentencing] either, they think judges have been desensitized and would go too easy on some. . . . Take my jurisdiction here . . . I've got one community that is terribly conservative. Sentences would be quite punitive, and there are very few jury trials there."). Three of the attorneys interviewed, all from urban areas, did not report that jurors were inevitably harsher sentencers than judges. Said one defender, "Jury sentencing really makes no difference in the decision whether go to trial or not. If you have a good case, you never get to jury sentencing, if bad case, wouldn't take it to trial anyway." KY-D1-U. One prosecutor reported that juries were more lenient on white-collar offenders than he would be, KY-P2-U, and another mentioned that the "defense attorney has the chance to put on mitigating evidence, and may have their mama or boss or sponsor testify. . . . Juries respond to mitigating testimony, sometimes they want to see the defendant take responsibility for their actions, they pay a lot of attention to the demeanor of the defendant." KY-P1-U.

44. KY-D5-U.

unpredictability of jury sentences that prompted settlement, “The jury is a wild card, even more so at sentencing than at the guilt or innocence phase, that’s why they negotiate a deal. Judges are more predictable, you can just look at their record, juries have no memory.”<sup>45</sup>

## 2. Reasons Given for High Jury Sentences

When asked why they thought jurors imposed stiff sentences, some volunteered that they thought jurors become particularly outraged about certain offenses.<sup>46</sup> For example, some attributed serious sentences for property offenses to community norms against stealing.<sup>47</sup> Prior offenders were considered at special risk before a jury as well.<sup>48</sup>

Features of Kentucky law reportedly reinforced higher jury sentences, particularly rules creating disparities in the information that jurors and judges receive and disparities in the sentencing options each possesses. According to interviewees, because jurors are only told about parole eligibility and are prevented from learning of actual release probabilities, they tend to impose higher sentences than they would impose if they were given more complete information.<sup>49</sup> “Unfortunately jurors . . . think being eligible for parole means you’re going to get parole. They don’t understand that with this parole board you have now, prisoners seldom if ever get parole when they first come up for parole.”<sup>50</sup> Others mentioned that jurors may overestimate the

---

45. KY-J6-U. On the effects of unpredictability on settlement behavior, see *infra* note 122.

46. See *supra* note 43.

47. Professor James Lindgren mentioned to me that this suggestion that some Kentuckians consider property offenses worse than violent confrontations between adults is reminiscent of an alleged exchange with a Texas judge years ago. An incredulous visitor inquired how it was that a man could be hanged for stealing a horse but barely punished for murder. The judge responded, “I never met a horse that needed stealin’.”

48. *E.g.*, KY-D5-U (“Many clients have felony records, don’t want jury sentencing. More apt to go to trial with client who never had a felony before.”).

49. This effect is somewhat similar to the problem addressed in *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (holding that where “the defendant’s future dangerousness is at issue, and state law prohibits the defendant’s release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible”). See also Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 293-94 (2001). For a detailed account of this problem in capital sentencing, see 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).

50. KY-D3-U; see also KY-D1-U (“The way sentencing goes now invites speculation by jury. They hear from the prosecutor’s witness at sentencing, a parole officer, that the defendant will be eligible in 20 percent. They think he gets out then, they can’t calculate the odds. Also, they never learn that a sentence of 1-5 will be served out in jail (counties get paid by state for keeping) and



benefits of prison programs.<sup>51</sup> Finally, interviewees observed that jurors do not learn the usual sentence for a defendant who pleads guilty to the same charge, nor do they sentence regularly enough to know when the sentence they select greatly exceeds or falls below sentences in like cases. "Everybody's afraid that jury sentences are higher than what a judge would do—jurors haven't seen one of these guys before, don't know his is a fairly typical crime."<sup>52</sup>

Even if jurors in Kentucky had full information and were inclined to exercise leniency and impose probation, they, unlike judges, cannot do so. They have no authority to recommend probation, nor can they suspend a sentence, send an offender to boot camp or to a drug treatment program, or impose any other sort of alternative sentence. Kentucky law requires a judge to consider the defendant for probation or community service as an alternative to imprisonment for most offenses,<sup>53</sup> but a jury's only choice is incarceration.<sup>54</sup>

not paroled from there. State is paroling their worst guys, not the guys getting under 5 yrs . . . . If we were to change it, I would give juries REAL truth-in-sentencing—more information about the computation of time to be served."); KY-D6-U ("For most offenses the parole eligibility is 1/5, but only a small percentage get parole at 1/5, 10 or 15 percent or so, and you can't get this information before the jury."); KY-P6-U ("We'll use charts to explain, 'He'll be eligible after 20 percent on charge A, that's 1 of the 5 years, 85 percent on charge B' . . . Q: Do defendants ask these witnesses to explain that not everyone who becomes eligible gets out? A: Yes, they always ask about the probability of being granted parole, and our objection is always sustained because it is speculation. He's not an expert on those statistics.").

51. A judge reported, for example,

Just recently a jury just gave a first offender a maximum sentence. They learned during the trial about his family, really total thugs, this guy never finished high school. They believed he would get an education in the prison and be isolated from his family, give him a chance. That's why they gave him the max (yes, they said this afterward). But there is no meaningful treatment in the penitentiary.

KY-J1-R. Even prison programs available in state facilities are not available in county jails, where many class D felons are housed for up to five years. *See Kentucky Releases 567 Inmates Early*, UPI, Dec. 18, 2002; *supra* note 50.

52. KY-D1-U.

53. KY. REV. STAT. ANN. §§ 533.010(2), 500.095(1) (Michie 1999). For a discussion of which offenses are and are not eligible for probation, see LESLIE W. ABRAMSON, 9 KENTUCKY PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 31.132 (3d ed. 1997 & Supp. 2002).

54. One judge explained: "Truth in sentencing is a misnomer. Q: Why? A: Because juries never get all the information. They just learn the defendant's legal record. That's about it. Q: What should they learn? A: They should learn that if you give him ten years it's not going to be ten years. Q: Don't they learn about parole eligibility? A: Sure, but they don't learn about shock probation, [KY. REV. STAT. ANN. § 439.265], and this new animal, prerelease probation. [KY. REV. STAT. ANN. § 439.575 (allowing inmates eligible for a prerelease program to be placed in half-way houses under supervision)]. And the juries don't learn that the judge can reduce the sentence." KY-J1-R; *see also* KY-J3-R ("[The judge has more latitude, can look at more sentencing alternatives, there is more the court knows about that juries never see."].

### 3. Enforcing the Discount

If jury sentences are so high, what keeps a defendant from undercutting the prosecutor's leverage by seeking a sentence from the judge that is lower than the sentence a jury would give? Here unfolds one of the most interesting aspects of criminal procedure in Kentucky. Jury sentencing may serve as such a powerful incentive to plead guilty because trial judges have given the prosecutor nearly complete control over the sentencing differential between plea and jury trial. Defendants in Kentucky have virtually no access to independent judicial assessments of sentence severity. Their choice is stark: risk the jury's sentence or take the prosecutor's offer.

Theoretically, there are four alternative avenues that could allow a defendant to bypass both the prosecutor and the jury in order to obtain a potentially more lenient punishment from a judge. First, judges could reduce jury sentences—jury sentences would not be as much of a deterrent if they were subsequently discounted by the judge. Second, a defendant could ask for judge sentencing instead of jury sentencing after a jury trial, thereby waiving his "right" to jury sentencing in favor of sentencing by the judge. Third, bench trials, while not providing the defendant with a jury's assessment of guilt or innocence, would permit the defendant to contest his guilt while avoiding the jury as sentencer. Finally, a defendant who throws himself on the mercy of the judge and pleads "straight up" to the charges could avoid both jury sentencing and the sentencing preferences of the prosecutor. As it turns out, all four avenues of access to sentencing by the judge are solidly blocked in Kentucky.

*Limits on access to judicial modification.* A judge may reduce a jury sentence if the judge believes that the sentence is unduly harsh.<sup>55</sup> However, judicial reduction or suspension of jury sentences is a rare occurrence in Kentucky, according to those interviewed.

These judges, particularly in small counties, they are elected, don't want to be known as the jurist who, after summoning sixty-five people to the courthouse, after twelve of them deliberated and decide on twelve years, says, "No, I'm only giving ten." It is like the unspoken rule here in Kentucky, judges will never probate a jury verdict. . . . I even had a judge announce this as his policy. "If you go to the jury and roll snake eyes, even if your guy is probation eligible, you won't get it."<sup>56</sup>

---

55. KY. REV. STAT. ANN. § 532.070(1).

56. KY-D5-U; see also KY-P5-R ("[I]t's a real burden, jury service is, just called in these people, twelve jurors have sat there for \$12.50 a day, they've made this decision, and our judges are elected, they won't do it. If he does, that juror's going to go home and tell his family at the dinner table, and his seven cousins, 'This judge just ignored us.' Our judges don't ignore jury sentences. . . . [juries] come in higher than we offer on narcotics offenses, they don't like drug offenders, and they come in lower on flagrant non-support. . . . They think it is a civil matter. Q:

Said one judge: “[T]he judges have the attitude, ‘Fine, if you want a trial, you are stuck with the jury’s sentence and you won’t be eligible for squat.’ It’s a judicial management thing, to encourage plea-bargaining. It is also a genuine respect for the earnest work of twelve citizens.” “Ninety-nine percent of the judges,” he reported, will not probate a jury sentence.<sup>57</sup>

Two urban prosecutors, by contrast, reported some modification did take place, reportedly linked to greater anonymity on the part of the judges in their jurisdictions. One noted that judges in his jurisdiction do modify jury sentences in a small percentage of cases. “These judges try a lot of cases, maybe things are different out in [the] state where the judges cover 2-4 counties and try 4-5 criminal cases per year.”<sup>58</sup>

---

Do you get more trials on these because of the lower jury sentences? A: No, because judges will not routinely probate jury sentences like they will pleas. Still a better deal with plea bargain even with longer term because the judge will probate it. Normally I’d recommend 2 or 3 years on a 5-year non-support. They’re guaranteed probation if they enter into a plea agreement. If they go to trial, they aren’t. . . . So the defendants are better off with 2-3 years from me, than 1 year from the jury.”); KY-D3-U (“Seldom [do judges modify jury sentences]. Kentucky judges are inclined to follow the jury’s verdict. Our judges are elected.”); KY-D1-U (“[J]udges don’t modify jury sentences except when they reject recommendations to run sentences concurrently and run them consecutively . . . . Judges never bring jury sentences down. These judges are elected.”).

57. KY-J1-R; *see also* KY-J2-U (“I can only recall once [modifying a jury’s sentence].”); KY-J4-U (“[Jurors] want to know what happens after the trial, they don’t understand there is another step where actual sentencing takes place and that I’ll get a presentence report and may get more information, some six weeks later, at the final sentencing. . . . Q: Do the juries ever tell you when they hear about this later phase what they want you to do? A: Sometimes, they do. They’ll say, ‘We don’t want you to probate’ or sometimes they may specifically request that probation be granted. Usually it is pretty obvious what the jury wants by the sentence it gives. I’ll tell jurors that it’s rare that I’ll vary what they do.”). Denying probation to offenders who insist on trial has a long history. Historian David J. Rothman concluded that probation persisted in the early decades of the twentieth century, despite public hostility and cost, because of its “operational convenience.” DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 98-116 (rev. ed. 2002). “The function of probation was to facilitate [the] plea bargaining process, which it did remarkably well.” *Id.* at 99.

58. KY-P6-U. This prosecutor also stated,

Jurors once they convict are ready to hit somebody hard with a term of years. Judges are less willing to send people away. Judges will modify jury sentences by reducing or probating. Probating is very frequent. Reducing happens less than 10 percent of the time; infrequent . . . . Judges respect the jury verdict as a sign of what community thinks. . . . Juries are always shocked a month and a half after they sentence to find out that the judge has ordered probation instead of the sentence they imposed. They have no idea.

*Id.*; *see also* KY-P2-U:

Q: Do judges ever modify jury sentences?

A: Sometimes. I had one judge [though,] he’d take defendant back and tell ‘em, “If you take this deal the Commonwealth’s attorney is offering, I’m going to agree with it, but if you go to trial and twelve people send you to the penitentiary, I’m elected, I’m not going to change what they say.”

Q: Do judges ever probate jury sentences?

*Limits on access to judicial sentencing after guilty verdict.* In Kentucky, the Commonwealth has a right to jury sentencing and must consent before jury sentencing can be waived.<sup>59</sup> Many reported that it would be rare for the defendant and the prosecutor to agree to waive jury sentencing after a guilty verdict. One prosecutor explained, "We had one guy who wanted a bench trial because he expected more leniency in the sentencing phase from the judge; he [was] charged with attempted murder of a police officer. But it would be a rare case when I'd agree to judge sentencing after jury trial. When the guilt phase is a slam-dunk, I want the jury to sentence him."<sup>60</sup>

In one urban jurisdiction in Kentucky, waiver of jury sentencing has become common, but it has a price. Prosecutors have managed to use the defendant's fear of jury sentencing to their advantage: they'll agree to waive jury sentencing only if the defendant agrees to waive his appeal rights. A judge explained it this way:

Q: How often is the sentencing phase of a jury trial waived by the defendant after a guilty verdict as part of a sentence bargain?

A: 75 percent of all jury convictions here.

Q: What is the nature of these agreements?

A: Typically, after guilty verdict, I'll take a break and ask the defense and prosecution if they've had a chance to discuss penalty. Prosecutor will offer a sentence at the low end and agree to forego jury sentencing if defendant will waive jury sentencing as well as waive appeal.

Q: Waive appeal of conviction and sentence?

A: Yes.

Q: Post-conviction as well as direct appeal?

---

A: Sure, right and left. . . . There is a lot of anonymity when you have such a large community [with this many] circuit judges. They don't remember who the hell did it, they leave, all they know is it was the guy with the red hair. People know so little about judges. Nobody cares about judicial elections. The coverage during elections is next to nothing. Different in more rural counties, probably.

59. *Commonwealth v. Collins*, 933 S.W.2d 811, 817 (Ky. 1996) (prosecution entitled to have jury determine sentence following conviction; defendant cannot waive jury sentencing without Commonwealth's consent).

60. KY-P1-U. Another reported that defendants have never asked to settle the sentence after a guilty verdict. "Sentencing gives 'em one more chance to whine and beg a little bit. I'm not noted for being one of the more lenient prosecutors when it comes to sentencing, They don't want my opinion, they'd prefer the jury's." KY-P5-R. One judge reported that "[i]n 9 years [this has] happened twice. Once, I think the prosecutor was being responsible, just doing the right thing, the kid committed a minor crime, offered a low sentence. The other case the prosecutor knew the jury would come in with a low sentence, and just gave it to 'em." KY-J1-R.

A: Yes—I've had defendants come back later and say, "My lawyer misled me," but I try to take the waiver carefully and nail down with the defendant that he's had the advice of counsel and he's happy with it, so when he comes back on [a] post-judgment motion to vacate or set aside the conviction it isn't a problem.

Q: Is the appeal waiver a condition for no jury sentence, prosecutor wouldn't agree to a sentence bargain without it?

A: Right—the prosecutor would be comfortable going forward with the jury, they just convicted the defendant. Doesn't always happen, sometimes no deal.

Q: Do all judges accept these agreements, are there some who don't?

A: Usually, although the sentencing phase is relatively short, the benefit of no future postjudgment appeals is very attractive.

Q: Do some defendants resist them?

A: They like them because they think they are getting a better sentence than they could without the agreement and because they don't think there is any error to appeal . . . <sup>61</sup>

61. KY-J6-U. Another judge reported:

[O]ften after a guilty verdict, I'll take a 15-minute break, talk about the line up of witnesses for sentencing, and the parties will come to an agreement then, the defendant will plead guilty and waive appeal rights, in return for a sentence recommendation. . . . It is marked as a guilty plea after a verdict. Because pleading guilty, the defendant waives right to appeal. It essentially wipes out the trial.

Q: How often does this happen?

A: Happens often when there is a PFO [a persistent felony offender charge], defendant will go for trial, see if he can get an acquittal on the underlying offense, and then agree on sentence.

Q: Why would the prosecutor agree to a lower sentence? Why waive jury sentencing?

A: Because the defendant waives his right to appeal, by pleading guilty and agreeing to a term of years. This can take away post trial motions, appellate issues.

Q: This is seen as a fair trade off—lower sentence for appeal waiver?

A: Yes, now sometimes this doesn't apply. If there is a clean trial, sometimes the prosecutor will say we'll just see what the jury says.

Q: How do the judges view this? What is the judicial attitude?

A: All the judges are fine with this. It's part selfish, from my standpoint, better than the possibility that they're going to come back with an appeal.

KY-J4-U. This has attractions for prosecutors as well as judges. See KY-P2-U:

Q: Say there is a jury trial, a guilty verdict, do you ever settle before the sentencing phase?

A: Sure.

Q: How often?

A: About 50 percent, no, more than 1/2. At that point the defendant is stuck. Looking for the best way out. Usually he will take just about anything. And now they're doing something that we didn't used to, they'll get defendant to waive his right to appeal.

Q: Now is this a guilty plea, or just a sentence settlement?

A: It's not a guilty plea. The defendant agrees to plead to the sentence. Like a guilty plea, judge goes over what he's waiving.

*Limits on defense access to judicial sentencing after bench trials.* No Kentucky law bars trial by judge rather than by jury,<sup>62</sup> but bench trials are “incredibly rare.”<sup>63</sup> They are so rare, in fact, that some attorneys and judges, when asked, admitted that the possibility of a felony bench trial had never occurred to them.<sup>64</sup> Prosecutors and

---

Q: Is there a set agreement, a standard set of terms?

A: Well, they just use the plea sheet, but just for sentencing.

Q: Why do you settle these, why not just take them to jury sentencing?

A: For certainty. To get rid of it, get rid of the case. We aren't totally volume driven, but we have to get rid of them, there are others waiting to go. If you settle it, it won't come back in 18 months because some witness said something he shouldn't have. So to get this certainty you make it a little sweeter than you would otherwise.

Q: How does this play with victims?

A: I always tell 'em, say in a murder, “Folks, the appeal isn't based on if he did it or not, it's based on all sorts of issues, he can appeal the play of the case, he's got an issue here, and here, and here. We can give him this sentence and he'll be barred from raising those issues, or we can go ahead and try this case.”

Another urban prosecutor explained that after a guilty verdict, defendants

will bargain over sentence, waive jury sentencing and appeals, settle for a given sentence, the judges go along, happens about half the time. Give you an example of a case in which jury convicted on two felonies: I offered the defendant to run these new sentences 10 years concurrent. Rejected. The jury gave him maximum, judge ran consecutively for a total of 20. Judges encourage these settlements. They are more inclined to probate or run concurrent with settled sentence. Although not supposed to be punished for exercising right to jury sentencing.

KY-P6-U. Reported a defender:

I've tried to bargain with prosecution on sentence. Once the jury convicts, it tends to get pretty punitive, you want to avoid it if you can. In one case I tried in which the jury returned a guilty verdict on a lesser offense the prosecutor and defendant agreed to waive jury sentencing and agreed on the penalty.

Q: What is the nature of these agreements?

A: The defense (and the prosecution) waives the right to jury sentencing—agree on a sentence.

Q: I understand that in some places the sentence agreement includes waiver of appeal?

A: Sure, that'll be part of it . . . Trial is hard work, by the time you've been through a couple of days of days [of trial], it'll wear you out. The prosecutor is more likely to bargain away jury sentencing after conviction—by then we have a better idea of what the jury will do with sentence.

KY-D5-U. The waiver of appeal in this situation was recently upheld by the state's Supreme Court. *See Johnson v. Commonwealth*, 120 S.W.3d 704 (Ky. 2003).

62. *See, e.g.*, KY. R. CRIM. P. 9.26 (referring to cases “tried without a jury”).

63. KY-D6-U. One prosecutor explained the lack of bench trials as

tradition. People are used to what they are doing. We do have them in district court, they use only a 6-person jury there too. From the defense standpoint it would be like a slow guilty plea. Judges would also convict more easily than juries. A lot of judges concerned about keeping their name off that front page. They can't afford acquittals.

KY-P1-U.

64. *See, e.g.*, KY-P6-U (“It never occurred to me to consider a bench trial. . . . Defendants always ask for jury. I wouldn't want bench instead of jury either. Maybe a matter of ego, my

defenders both expressed distrust of judges, and didn't want them making guilt/innocence decisions.<sup>65</sup> A defender put it bluntly: "It would be malpractice to go to bench trial in this state. The judges are all elected, they'd convict more often than juries."<sup>66</sup>

*Limits on defense access to judicial sentencing through "open" guilty pleas.* Access to a sentence set by someone other than the prosecutor or jury seems to be nonexistent for most defendants.<sup>67</sup> As in most states, a prosecutor can veto a defendant's guilty plea and insist on trial.<sup>68</sup> "Open pleas" without sentence recommendations are rare, and judicial compliance with the prosecutor's recommended sentence is routine.<sup>69</sup>

talent would go to waste with the judge. Judges here think they can see through the prosecutors, want to be able to persuade the jury of some things couldn't persuade the judge about."

65. See KY-P5-R ("I'm r]eluctant to do a bench trial. Both my judges were really good trial lawyers. Turns out when you become a trial judge, there is a real longing on the part of the judge to be part of the battle again rather than the referee. I'm concerned that might happen with a bench trial, that I'd have an advocate up there. I have a highly developed belief in the dual role of the prosecutor. It would bother me, I might worry one judge might lapse back into being a [what they were before]. It just isn't fair to put a single individual in the position of making the decisions that the jury was designed to make."). One prosecutor was more accommodating. "Q: If a defense attorney asked you for a bench trial, what would you say? A: I would never turn that down. They are getting big enough sentences already; going for the highest sentence is just piling it on." KY-P1-U.

66. KY-D1-U.

67. One judge explained that 90 percent of the cases have sentence agreements. KY-J6-U.

68. There is no constitutional right to plead guilty as charged. *E.g.*, United States v. Gamboa, 166 F.3d 1327, 1331 (11th Cir. 1999).

69. KY-P1-U ("Most cases are resolved like this," explained one prosecutor, "We'll offer a recommended sentence term, and either oppose or recommend probation. Judges follow the recommendations 99 percent of the time."); KY-P2-U ("[T]hey go along. I can shut down his court room if he doesn't, just by taking everybody to trial. Haven't done it but I've threatened. Q: Tell me about that. A: Once had a judge here, thought he'd mess with these. We'd go in with a recommendation and he'd say, 'That's silly, I'm not going to accept that.' After the third time, I told him, 'If we can't come to an agreement here, we'll have to see what a jury says on all these cases, it'll be two cases a week.' That would just sbut him down. He's just like me— he has as many cases, and has to move them in x number of days, and they're looking at his statistics. He can't afford that. Q: Did it work? A: Yes."); KY-D5-U ("Judges almost never vary from the bargain, even though the judge could impose a different sanction, this never happens."); KY-J6-U ("Where the judges sentences after a plea, in 90 percent of those cases there is a sentence recommendation and the judge goes along with that."). Another explained that it was not uncommon for his judges to disagree with his recommendation not to give probation, but noted that they were bound to consider probation by law. "Judge rarely deviates from the recommended sentence. The judge regularly deviates from my recommendation about whether its probated or not. I agree to probate in about 35-40 percent of cases, judges are more than half. . . . They're weak willed. [A recent statute] was a watershed law, it imposed a strict presumption in favor of probation and I have two judges who can read and they're following the law." KY-P5-R.

#### 4. Summary of Statistical Findings

The analysis of sentencing data from all three states is reported in detail in a separate article.<sup>70</sup> Only a very brief summary of the preliminary results is presented here. Sentencing data from Kentucky included all noncapital felony convictions from 2000 and 2001, and was consistent with most of the perceptions summarized above.<sup>71</sup> Of all felony convictions recorded, only .1% followed a bench trial, confirming statements that bench trials were exceedingly rare in felony cases.

Perhaps the most surprising feature of the Kentucky data was that it did not support the assumption that sentences selected by juries are always less consistent than sentences after guilty plea. When non-incarceration and incarceration sentences were included in offense-specific comparisons for several fairly serious offenses, sentences after jury trial were actually more consistent than sentences after guilty plea.<sup>72</sup> This greater variability for plea-based sentences does not translate necessarily into greater unpredictability, however, as judges reportedly closely follow prosecutors' recommended sentences after guilty pleas and presumably the defense has a good idea of the recommendation before entering the plea. When only sentences of incarceration were compared, the expected relationship emerged: sentences after jury trial were much less consistent than plea-based sentences for the same offense.

A comparison of the severity of sentences imposed after jury trial with the severity of sentences imposed after guilty plea,<sup>73</sup> offense by offense, confirmed the expected: the price of a jury trial is a higher sentence, on average. For example, for cocaine trafficking the average incarceration sentence after jury trial was 107 months, compared to 71 months after guilty plea; for first-degree rape, 390 months compared to 191. Cases tried by juries did involve more serious offense or offender characteristics than cases settled by guilty plea.

---

70. See King & Noble, *supra* note 6.

71. Because Kentucky data included only final sentences imposed, no information was available to refute or confirm reports that judges rarely modified the sentences that juries included in their verdicts.

72. The possible explanations for this include charge bargaining (so that defendants are receiving higher sentences for offenses due to the dismissal of more serious charges), and judicial decisions to suspend or probate part of the minimum sentences that juries have no option but to impose.

73. We compared sentences after plea and sentences after jury trial using a scale that took into account both non-confinement and confinement sentences, and also compared incarceration terms measured in months. See King & Noble, *supra* note 6. All of the statistics in this paragraph are drawn from King & Noble, *supra* note 6.



Yet our preliminary regression analysis of incarceration sentences, controlling for variables associated with sentence severity, including prior offense status, number of charges, court location (urban or not), and offender demographics (race, gender, age), revealed that the choice of jury trial over guilty plea had a significant effect on sentence length.

##### 5. The Consequence: Prosecutorial Resistance to Change

A person accused of a felony in Kentucky has only two options. He can admit guilt and take the sentence the prosecutor offers, or he can insist on a jury trial and hope either that he'll be acquitted or that if he is convicted, the jury will impose a sentence that is no higher than what the prosecutor was offering. If he is lucky enough to be in certain urban areas, he may be able to secure a jury's decision on guilt or innocence *and* a sentence agreement, but only if he is also willing to waive his right to appellate and postconviction review of his conviction and sentence. There are no other options: Kentucky trial judges reportedly do not conduct trials without juries, and only rarely reduce jury sentences, depart from the prosecutor's recommended sentence, or take guilty pleas without a sentence recommendation. Why so many Kentucky trial judges do not assert more independent sentencing authority will be explored in the next Part. It is enough here to observe that this united front appears to be what allows the prosecutor to create, preserve, and wield in negotiations the sentence differential between guilty plea and jury trial.

The bargaining power provided by jury sentencing in Kentucky raises an interesting question: Does jury sentencing operate to deter jury trials *more effectively* than other incentives to waive jury trial present in judge-sentencing jurisdictions? Put differently, have jury-sentencing jurisdictions that once may have hoped to increase community input into criminal justice reduced its frequency? Testing this hypothesis would require additional data, including information on nonconviction disposition and conviction rates. Even if a further analysis showed that fewer cases go to jury trial in Kentucky than in judge-sentencing jurisdictions, or showed that jury trial rates fell as the disparity between judge and jury sentences increased, it would be difficult to prove that parties were opting for settlement because of the deterrent effects of jury sentencing. Scholars who have studied plea bargaining disagree about the reasons why defendants may plead guilty or go to trial in different proportions. There is no single explanation for the differing rates of plea bargaining that we see among the various states, among the counties within those states, or

among different offenses within a single jurisdiction. Instead the rate at which any given offense is disposed by jury, bench, plea, or dismissal seems to depend upon a large number of variables, some very difficult to measure. They include local charging and screening practices;<sup>74</sup> caseload constraints;<sup>75</sup> sentencing law, such as that explored in this article, which allows the prosecutor more leverage to extract pleas;<sup>76</sup> local bargaining and disposition norms;<sup>77</sup> attorney-specific bargaining and disposition norms;<sup>78</sup> and case-by-case assessments of probability of risk. Consequently, we do not claim here that the use of jury sentencing to maintain a trial tariff is more effective in encouraging guilty pleas than are other incentives to waive jury trial that are present in jurisdictions where judges sentence.

Our conclusion is more modest, but significant nevertheless: prosecutors interviewed *believe* that without jury sentencing, trials would multiply, and that in some locations appeal waivers would be jeopardized as well. Not surprisingly, interviewees reported that efforts to abolish jury sentencing in Kentucky have been consistently opposed by prosecutors.<sup>79</sup>

74. See, e.g., Wright & Miller, *supra* note 40. Even state wide data on conviction rates, per offense, which we did not obtain from Kentucky, would not reflect local variation.

75. See, e.g., FISHER, *supra* note 41.

76. See, e.g., *id.*; ROTHMAN, *supra* note 57 (describing how prosecutors and judges used the option of probation to encourage guilty pleas).

77. Judges simply may not conduct bench trials, as in Kentucky, or bench trials may be a common substitute for plea bargaining as "slow pleas." See generally Stephen Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984). Or, a prosecutor may adopt a policy prohibiting plea bargaining in certain types of cases (DUI repeaters, for example). See Malcom D. Holmes et al., *Plea Bargaining Policy and State District Court Caseloads: An Interrupted Time Series Analysis*, 26 LAW & SOC'Y REV. 139 (1992) (discussing impact of plea bargaining ban in El Paso on jury trial and jury conviction rates).

78. See MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 121-22 (1978) (describing differing views of prosecutors); Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 830 (2000) (collecting authority finding that "justice notions and self-serving personal preferences have independent effect"); Thomas A. Goldsmith, *Felony Plea Bargaining in Six Colorado Judicial Districts: A Limited Inquiry into the Nature of the Process*, 66 DENVER U. L. REV. 243 (1997) (empirical study concluding "Colorado plea bargaining practices are not uniform; they differ from district to district, prosecutor to prosecutor, judge to judge."); NARDULLI ET AL., *supra* note 10, at 373 (concluding that "consensus, court community norms, and shared perceptions are far more central to the guilty plea process than concessions, coercion, and bazaar-type behavior").

79. See, e.g., KY-P1-U ("Q: Have there been any efforts to switch to judge sentencing? A: From what I understand it comes up every 5-6 years and is defeated soundly every time."). Only a small group of prosecutors reportedly favor changing to judge sentencing:

There is a core group of prosecutors who are in favor of [judicial sentencing].

Q: Why do they want to change?

### *D. Jury Sentencing as Trial Penalty in Virginia*

#### 1. Descriptions of Jury Sentencing as Trial Penalty

As in Kentucky, the prospect of jury sentencing was commonly described by interviewees in Virginia as providing an incentive for defendants to avoid jury trial.<sup>80</sup> One prosecutor summed it up: "Defense counsel will plead guilty rather than run the risk of being sentenced by the jury, it tends to force a plea."<sup>81</sup> According to those interviewed, the gap between sentences after jury trial and sentences that judges impose after the defendant waives jury trial is the product of deliberate policy choices by state lawmakers.

#### 2. Reasons Given for Higher Jury Sentences

*Disparity of options.* Several expressed the view that juries, not limited by the guidelines, are "generally tougher"<sup>82</sup> in sentencing than

A: Because they practice in circuits with judges with different backgrounds, and they think those judges would be tougher than juries. Only about 6-8 of about 57 of us. They will push pretty hard for this but when it all lines up there is no groundswell.

KY-P5-R. One prosecutor interviewed opposed jury sentencing based on his concern for consistency:

My biggest concern with jury sentencing is its unpredictability. With judge-based sentencing you could advise a client what he'd get, depending on which judge. With juries, they latch on to the weirdest things. The other problem is, at times they'll be more severe on property crimes. I don't want to downplay them, but it's hard to justify some of these sentences. A guy shoplifts \$305, he gets 1 to 5 years as a class D felony, and if there's a PFO, up to 20 years for that. Or 1-5 for possession of a forged instrument 2d degree, up to 20 with PFO. . . . I'm a big proponent of judicial sentencing. I don't think juries are better. They are good on guilt or innocence, but by the time you get to sentencing, they are tired, they don't give due deliberation to the sentence. They'd rather not do it. They've already been there two days.

KY-P1-U.

80. See, e.g., VA-P3-R (Eliminating jury sentencing "would lead to an increase in jury trials. A defendant would have nothing to lose by going to jury trial, why not go to trial? If we don't have jury sentencing option, the judge sets the same sentence, trial or plea."); VA-P3-U ("Defense attorneys are reluctant to take their cases to juries, so they end up pleading guilty to the judge. They can be confident that they'll get the lower guidelines sentence.")

81. VA-P4-R. Said one defender: "Prosecutors like having the threat of jury sentence after jury trial." VA-D6-R. Judges, too, agreed. See, e.g., VA-J2-R ("One of the practical aspects of jury sentencing is that you get a lot of guilty pleas because of it. Juries are generally tougher in sentencing than judges. Judges see a lot of cases, and to a jury this guy is the French Connection. So if you are a defense lawyer and you go with a jury your client is in real jeopardy. . ."); VA-J4-U ("Prosecutors in some places, not here, now use the threat of a jury as a weapon to get defendants in drug cases to plead guilty. In other jurisdictions, the prosecutor will say to a defendant, 'You can either plead straight up or take your chances with the jury.'")

82. VA-J2-U.

judges, who are encouraged to stay within guideline ranges.<sup>83</sup> In many cases, jurors lack authority to set sentences as low as the guidelines recommend. When an offense carries a statutory minimum sentence, under Virginia law, that minimum binds the jury, but it does not bind the judge. A judge must impose the minimum, but then may suspend the sentence “in whole or part” and/or place the accused on probation.<sup>84</sup> Juries do not receive information about probation or suspension of sentence or about rehabilitative services.<sup>85</sup> By granting only to judges, not juries, the authority to suspend or probate a sentence so that the defendant serves less than the minimum term specified for the offense,<sup>86</sup> Virginia’s General Assembly has in effect encouraged higher minimum sentences for those who opt for jury trial than for those who opt for plea or bench trial.

Specifically, many drug and property offenses carry a statutory minimum term of two or five years, but the guideline ranges for these nonviolent offenses, designed to approximate the actual pre-guidelines sentences served, call for much shorter terms. For example, prior to the abolition of parole, a drug offender sentenced to the statutory minimum five years often served less than a year. With the abolition of parole, the sentencing guidelines call for a judge to impose five years, but to suspend or probate all but one. Thus, a Virginia judge who follows the sentencing guidelines often must impose a sentence much less severe than the statutory minimum term, or else justify the upward departure. A Virginia jury, by contrast, has no power to

---

83. *E.g.*, VA-J4-U (“What kinds of cases do juries come back higher than the guidelines? Most cases, particularly drug cases and sex offenses.”); VA-J1-U (“[T]hey are about on the mark or low for paper crimes, thefts without violence, people without records, there the recommendations from the jury are fines instead of incarceration, the jurors are interested in what else can be done with the person”).

This severity as compared to judges was reported in a news article even before bifurcation was adopted in 1995. A newspaper survey of 1,300 felony dispositions and sentences from Charlottesville and Albermarle County Courts from 1989 to 1991 reported that “judges gave shorter average sentences than juries for most crimes—even though they usually were fully aware of a defendant’s history of prior convictions while the juries usually were not.” *Few Are Willing to Gamble on Jury*, DAILY PROGRESS (Charlottesville, Va.), Nov. 17, 1992, at 1. Lawyers said judges gave shorter sentences because the preliminary guidelines suggested shorter sentences, because they have information on what most of their fellow judges are setting as sentences, and because judges can suspend or exempt a person from serving even the minimum term. *Id.* The story asserted, “Lawyers usually recommend that clients plead guilty rather than risk facing a jury” and quotes one attorney as saying “I rarely recommend that clients take a jury—just because it is such a big crapshoot.” *Id.*

84. VA. CODE ANN. § 19.2-303 (Michie 1979); *Vines v. Muncy*, 553 F.2d 342 (4th Cir. 1977).

85. VA. CODE ANN. §§ 19.2-295 - 316.3.

86. See *Carcamo v. Commonwealth*, No. 1554-95-4, 1996 WL 523965, at \*5 (Va. Ct. App. Sept. 17, 1996) (the jury had no authority to recommend a sentence of less than five years for drug offense; court was not required to follow the jury’s recommendation for leniency).

suspend or probate any portion of the statutory minimum term; it must return a sentence of at least five years.<sup>87</sup> A defender was quoted by a newspaper reporter as stating, “It’s an extortion effect . . . Even if you didn’t do it, it’s safer to plead guilty than not.”<sup>88</sup> It is doubtful that Virginia juries invariably agree with the stiff minimum sentences they are required to return. For example, after convicting a man of giving a 17-year-old a puff of marijuana, and learning that the minimum sentence for that crime was ten years in prison, one jury

---

87. *E.g.*, Virginia *ex rel.* Shifflett v. Cook, 333 F. Supp. 718, 721 (W.D. Va. 1971).

In a cocaine case, maybe twenty to forty dollars’ worth, juries would give eight or nine years. And that was typical for judge sentencing after bench trial too. When guidelines came in the sentence was nine months . . . While the sentence for selling crack might be nine months under the guidelines, the minimum is five years. That’s what the jury would have to give, but the judge could suspend all but nine months.

VA-J3-U; *see also* VA-P1-U (“The legislature has enacted several crimes with minimum sentences—say abduction with intent to defile, it carries a twenty-year minimum and the jury has to impose that statutory minimum, but the guidelines are frequently under that. . . . A judge can impose twenty and suspend most of it.”); VA-D1-R (“This gives the prosecution a huge advantage in sentencing. Even if jury gives the minimum, it often exceeds the guidelines sentence. . . . The judge will have to follow mandatory minimums. But most minimums are not mandatory. Most guidelines sentence recommendations are below the statutory minimum sentence, the judge cannot set a sentence below, but can suspend. . . . Say you have a distribution of cocaine case, carries a statutory range of 5-40 yrs. Juries under the old system were giving a defendant like this 5 years, and he was pulling 1 because of parole. Now the guidelines are adjusted for that parole effect, so the sentence recommendation is for 1 year. The judge would give a five-year sentence, and suspend 4 so he serves one year. But if you go to the jury, you get five years.”); VA-P4-R (“A third-offense DUI . . . a judge may give two years and suspend all but 10 days of that; a jury will give two to four years.”). Explained one judge,

We are supposed to tell them that they should simply recommend the sentence they think is just and not concern themselves with what happens afterwards, but some judges, if there is no objection from the attorneys, will tell the jury you can make whatever other recommendations you would like along with that sentence but the court will not be bound by those. But I can’t instruct them about alternatives.

Q: What kinds of recommendations will they make when you give them that opening?

A: They might recommend drug counseling, for example.

Q: Do they know that you have the right to suspend the sentence, do they ever recommend that you do that? Do you tell them about it?

A: They might know about it, but I wouldn’t want them to know. . . . they might give the defendant a higher sentence in anticipation of something I’d do. What I’m looking for from the jury is for those 12 people to tell me what they believe I ought to give to the defendant in terms of punishment. The more information I have the better.”

VA-J1-U.

88. Alan Cooper, *Jury Trials Plunging: Sentencing Guidelines, Parole Abolition Sway More Defendants to Seek Less Risk; With a Judge*, RICHMOND TIMES DISPATCH, Mar. 30, 1997, at B1 (quoting defense attorney discussing the risk of taking a jury trial in a drug distribution case with a minimum sentence of five years from the jury, but guidelines ranges of a little more than a year); *see also* Austin Graham, *Man Guilty in Multiple Burglaries*, RICHMOND TIMES DISPATCH, May 26, 2001, at B4 (reporting defense attorney said the defendant pleaded guilty because he “feared his punishment would be more severe than state sentencing guidelines suggest if a jury found him guilty.”).

reportedly refused to return a sentence that high. The judge declared a mistrial and selected a new jury for sentencing.<sup>89</sup>

This legislated disparity in sentences raises some of the concerns that led the Supreme Court in *United States v. Jackson*<sup>90</sup> to invalidate a provision of the Federal Kidnapping Act that provided that the death penalty could be imposed only if the defendant was convicted by jury.<sup>91</sup> Virginia's system, however, does not run afoul of the Constitution.<sup>92</sup> In Virginia, the differential between the minimum sentence after jury trial and the minimum sentence available if a defendant waives a jury has two important features that the statutory differential in *Jackson* lacked. First, the lower sentencing guidelines ranges that apply in Virginia when the defendant waives a jury trial are not mandatory—the judge may depart and impose sentences that are just as high as those that juries might impose. Second, the higher statutory minimum sentences that juries are instructed to apply are not inevitable either; the judge has the authority to reduce the jury's sentence by suspending part of it, or placing the defendant on probation.<sup>93</sup> Thus, in theory, the state statutes do not necessarily impose a trial penalty. In practice, as discussed below, judicial sentences remain lower and judges rarely reduce jury sentences to approximate sentences imposed after plea or bench trial.

*Information disparities.* In addition to differences in sentencing options, interviewees in Virginia identified three gaps in the information that jurors receive that may contribute to the difference in jury and judge sentencing. Virginia jurors do not receive

---

89. *32-year Prison Term Given in Fatal Beating*, RICHMOND TIMES DISPATCH, Mar. 2, 2002, at B2 (subtitle: "Jury rejects minimum sentence in drug case").

90. 390 U.S. 570, 583 (1968).

91. See also *Atkinson v. North Carolina*, 403 U.S. 948 (1971) (invalidating, following *Jackson*, state statute that mandated the lower ceiling of life imprisonment for cases in which prosecutor accepted guilty plea, and that exposed defendant to death sentence if the defendant pleaded not guilty or the prosecutor refused to accept guilty plea).

92. There is also some doubt as to whether *Jackson* is still good law. For the best exposition of this issue, see Joseph L. Hoffman et al., *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313, 2372-90 (2001) (discussing several alternative approaches to interpreting *Jackson* today, including a finding that it is limited to invalidating "the narrow category of statutes creating what might be called a 'pure' statutory discount—absent any possible connection with the 'give-and-take' of traditional plea negotiations... for defendants who waive their constitutional rights and plead guilty," and a finding that *Jackson* "prohibits any statute that authorizes death or non death for the same crime depending upon whether a defendant proceeds to jury trial or pleads guilty").

93. Cf. *Vines v. Muncy*, 553 F.2d 342 (4th Cir. 1977) (reasoning that punishment by jury is not final, and may be suspended by the trial judge in whole or in part on the basis of any mitigating facts that the convicted defendant can marshal; the trial judge can bring his so-called superior judgment to bear upon the issue of proper punishment in reaching his decision whether to suspend the sentence or not).

information about the recommended guidelines sentence ranges, which often are lower than the sentence ranges supplied to jurors.<sup>94</sup> Interviewees also reported that jurors do not have the experience in sentencing that judges have and, as a result, may overreact to what a judge would consider a routine, less serious offense.<sup>95</sup> Finally, jurors did not until recently receive accurate information about the effect of parole on a defendant's term of incarceration. For the first five years after bifurcation, from January 1995 until June 2000, state law did not permit jurors to receive instructions about the abolition of parole. Regularly, interviewees reported, jurors selecting a sentence from within the broad statutory range would send a question to the judge about parole release. Before the abolition of parole, standard jury instructions provided that judges had to answer: "You are not to concern yourself with what happens after sentencing."<sup>96</sup> After the abolition of parole in 1995, the standard answer to jury confusion did not change.<sup>97</sup> Not surprisingly, when judges left jurors to guess about how close the sentence they recommended would be to the actual time they wanted the defendant serve, some jurors guessed incorrectly.<sup>98</sup>

---

94. VA. CODE ANN. § 19.2-298.01(A) (Michie 1994); *see also* VA-J4-U ("The jury doesn't get the guidelines."); VA-J1-U ("I have information they don't have. I know what the guidelines recommendation is, they don't. I know of mitigating evidence that they may not have."); VA-D6-R (jury sentences are higher because of "bifurcation and because juries don't get to hear about the guidelines").

95. *E.g.*, VA-J2-U ("Juries don't have the perspective that judges do, haven't seen the cases."). But consider another Virginia judge's take on juror experience:

I'd have jurors in the past that would sit for sixty days or more, and their sentences would get tougher and tougher as they had more trials.

Q: Why?

A: They see more cases and they think there's a crime wave. Especially that last day of the term. That's when they think, this is our last opportunity to put a stop to this nonsense. I always say if you've got a good personal injury case, try it on the last day of the term, the jurors tend to be their most punitive.

VA-J3-U.

96. *See* VA. MODEL JURY INSTRUCTIONS 2.7000 (1994). This instruction had been standard for over sixty years. *See* *Coward v. Commonwealth*, 178 S.E. 797, 798 (Va. 1935) (it is the duty of the jurors if they find the accused guilty to impose such punishment as they consider to be just under the evidence and within the limits stated in the court's instructions; they must not concern themselves with what may afterwards happen); *see also* *Jones v. Commonwealth*, 72 S.E.2d 693 (Va. 1952) (this is the appropriate response to inquiry by jury as to time defendant would actually serve).

97. *See, e.g.*, *Walker v. Commonwealth*, 486 S.E.2d 126, 132 (Va. Ct. App. 1997) (jurors are not entitled to consider parole eligibility, and the abolition of parole does not require departure from this rule); *Mosby v. Commonwealth*, 482 S.E.2d 72, 74-75 (Va. Ct. App. 1997) (appellate court is not at liberty to require that jurors be told of defendant's parole ineligibility in noncapital cases).

98. *See, e.g.*, VA-D1-R ("There was a widespread perception that juries were increasing their sentences to take account of parole, that juries were making that upward alignment

Five years after the change to no parole, even the Executive Director of the Sentencing Commission admitted, “[t]he average juror really isn’t fully cognizant that defendants must serve at least 85 percent of their sentences.”<sup>99</sup> Some defendants were luckier than others. They ended up with jurors who were familiar enough with the news to know already that ten years meant ten years, not two.<sup>100</sup> In other jurisdictions the trial judges reportedly answered the jurors truthfully when they asked about parole release.<sup>101</sup> The battle to allow the jury to hear the three magic words “no more parole” was even taken up as a legislative proposal, but went nowhere.<sup>102</sup> Not until June 2000 did the Virginia Supreme Court step in to declare in *Fishback v. Commonwealth* that, upon defense request, the judge must inform the jury at sentencing that there is no parole for the defendant’s offense.<sup>103</sup>

The effect of this information blackout was summed up by one defender:

They thought jury sentencing would be better after these changes because the jury would be more informed and make better decisions. But the opposite has happened. Juries are not much better—they are even more in the dark about their sentences, in relation to what the guidelines sentence is. Even if they are told under *Fishback* about the end of parole, they have no concept about what sentences for that offense typically

---

because they believed in early release. Q: So you think that was happening? A: I know it was.” Explained one judge,

Some juries had had information, and went in there and assumed there was parole when there wasn’t. I’m sure that happened. The jury should have the truth, but it is hard to tell them about this accurately. It isn’t true to say that there is *no* parole, because we still have geriatric parole.

VA-J2-U; see also Alan Cooper, *Jury Trials Plunging: Sentencing Guidelines, Parole Abolition Sway More Defendants to Seek Less Risk; With a Judge*, RICHMOND TIMES DISPATCH, Mar. 30, 1997, at B1 (quoting defense attorney decrying refusal of judges to answer jurors’ questions about parole: “by not answering the jury, you’re almost telling them there is parole . . . It’s going to take years for it to sink in that we no longer have parole.”).

99. Alan Cooper, *Jurors To Get More Info; They Must Be Told About Parole Law*, RICHMOND TIMES DISPATCH, June 10, 2000, at B1.

100. Two interviewees from urban areas reported that the later change to informing juries about the abolition of parole didn’t make that much difference. VA-P1-U (“Our juries are fairly educated, middle class. They understood that parole had been abolished. It wasn’t news to them.”); VA-D2-U (“Not really, when we had parole they didn’t learn about it, when it was abolished they didn’t learn about it. We were worried that it might make a difference but it didn’t.”).

101. VA-J2-U (“Before the law changed there were a number of judges who would tell them about parole. *Fishback* was not really a revolutionary thing. Judges were glad it was clarified.”).

102. See VA. CRIMINAL SENTENCING COMM’N, 1995 ANNUAL REPORT 64-65 (1995) (discussing proposal).

103. *Fishback v. Commonwealth*, 532 S.E.2d 629 (Va. 2000); see also *Hills v. Commonwealth*, 534 S.E.2d 337 (Va. Ct. App. 2000) (*Fishback* applies only upon defense objection and juror request).



are under the guidelines. This isn't truth-in-sentencing at all, they are even more in the dark after bifurcation because they are making less intelligent sentencing decisions.<sup>104</sup>

### 3. Enforcing the Disparity

*Keeping judicial sentences low.* As suggested above, judges in Virginia could narrow the penalty gap between judge and jury sentencing in a number of ways. They could, for example, simply impose sentences more in line with those juries deliver. In Kentucky, this would require departing upward from the prosecutor's recommendation; in Virginia, it would require departing upward from the guidelines. Why don't judges do more of this? Judges and lawyers alike explained that guidelines adherence was linked to the judicial apprehension that upward departures would be considered negatively by the legislature at reelection. Because this perceived incentive to impose lower sentences bucks the usual political wisdom that legislators are more likely to reward judges who are tough on crime and penalize those who are too "soft," an extended quote or two is warranted. Consider the comments of one judge:

A: Here the General Assembly will have our deviation rate from the sentence guidelines, they'll have that information about whether we deviate up or down.

Q: Why would they want that information—what are they looking for? In states where the trial judges are elected by popular vote, some judges are conscious of being soft on crime. What about Virginia?

A: In our state, what the General Assembly is looking for is that we stay within the guidelines. When we went to sentence guidelines and abolished parole their hope was that there wouldn't be an explosion in the prison population, and more funding needed for prisons. So if I departed *up* 45% of the time, they'd be concerned—not because they are soft on crime, but because the prisons would become overcrowded and it would cost money. If I deviated *down* that often, then there might be pressure to impose more sentences within the Guidelines for fear that I was soft on crime.<sup>105</sup>

#### Another judge explained,

A: You know if you didn't comply you were told that you get a black mark against the score kept by the VCSC, and they've made this public. There was a fellow, Rick Kern, he came to that meeting [a guidelines orientation] and he told all of us judges to watch out. They keep track of compliance judge-by-judge. And make it public. The legislature gets it. The legislature is interested in the bed space, they don't want to have to build

---

104. VA-D1-R; see also Frank Green, *Panel Guards Its Secrets on Toughest, Easiest Judges; Sentence Data Not Compiled for Each*, RICHMOND TIMES DISPATCH, Mar. 22, 1998, at A13 ("Juries are not told what the guidelines are or that there is no longer parole and that most of the reduction of sentences for good behavior in prison has been eliminated. Consequently, juries sometimes hammer a defendant with a far stiffer sentence that a judge would. Baugh [a defense attorney] said that makes many lawyers reluctant to ask for a jury trial.").

105. VA-J1-U.

more prisons. We've been taking prisoners from all sorts of other states because we have so many empty beds now.

Q: You mean the legislature would look more negatively on a judge who departs upward from the guidelines than a judge who departs downward?

A: Absolutely.

Q: Isn't that contrary to all the tough-on-crime rhetoric you often hear from legislators?

A: Sure, I used to tell the defendant from the bench: "Why, before we got 'tough on crime' I would have locked you up, but now that we've gotten 'tough on crime,' I have to put you on probation." You know, a short jail sentence, say under sixty days, but not over, can be very therapeutic, particularly for a young person or a first offender. We used to be able to suspend a sentence and give the defendant a short term in jail, but not now. Some judges still do it, and they get bad compliance records.

Q: Have the compliance figures made a difference in the judges' chances at reelection by the legislature?

A: Some judges have not been reelected, but I don't know whether it was linked to compliance. You see there are so few lawyers in our legislature, they don't understand the problems.<sup>106</sup>

106. VA-J3-U. This judge also reported:

The guidelines are an important piece of this because the judges were told that the General Assembly would have a record of how often they departed, that information would be available to them, and they would want an explanation when you were departing. They see it as a way of controlling bed space. That's what they were concerned about.

*Id.*; see also VA-P1-U ("Theoretically, they [the guidelines] are supposed to be of historical origin based on data from sentences in years past. The problem is even if they were once accurate, they go down, down, down. Q: What do you mean? A: The judges depart underneath, they rarely go above. Q: Why not, are there different incentives for judges in departing above and departing below? A: The legislature denies this, they'll deny that reappointment of judges has anything to do with compliance with the guidelines. But judges will tell me it does. This, let's call it the compliance threat, is never made explicitly, but it is there implicitly. I'm sure of it. Q: Compliance generally, or is there a difference in complying up or down? A: I believe the dirty truth to be that the guidelines are designed to relieve the pressure on the corrections system by replacing parole. They serve as the spigot in the coffee pot. To depart up would mean more public money spent, and the legislature doesn't like that. I can't swear that I'm right, but I feel that I am. This abolition of parole and guidelines went hand in hand. Had to do something to keep populations down."); VA-D2-U ("There were veiled threats to judges that if you depart from the guidelines it will be held against you at the reappointment. Q: Are these rumor or reality? A: I think they are reality. Because I've had judges tell me they were told that."); VA-P4-R ("They are elected by the majority party of the legislature, the same legislature that enacted the sentencing guidelines and there is a concern among the judges that they better stay within those guidelines or they'd be looked at. But the party in control has changed now, I would think that a judge who departs upward might be looked at favorably now."); VA-P5-R ("The General Assembly has encouraged at least implicitly every judge to follow them, by requiring judges every time they depart up or down to justify why. This is pretty strong encouragement to stay within the guidelines ranges—we're watching, if you depart, we ask you questions." Q: What would happen if they departed and imposed higher sentences? A: . . . Circuit Judges are elected by the General Assembly for 8-year terms. Men and women with 8-year terms are serving at the pleasure of the

Indeed, in 1998, in response to a request by the *Richmond Times Dispatch*, the Sentencing Commission released to the public information on the compliance rates of Virginia circuit judges, after the Commission earlier had refused to release the information.<sup>107</sup>

*Limited defense access to judicial modification.* The penalty gap between judge and jury in Virginia is also maintained, as in Kentucky, by judicial reluctance to reduce the sentences that juries recommend. Interviewees reported that modification did not happen after most jury trials. Explained one prosecutor, "In order for the jury trial to produce harsher sentences . . . the judge would [have to] sentence in accordance with the jury's sentence. Fortunately around here our judges do."<sup>108</sup> These reports are confirmed by the Annual

General Assembly. In recent years they made it very clear that judges don't enjoy lifetime tenure. Several have lost their positions. Q: Why—because they are departing from the guidelines in criminal cases? A: I haven't followed it that closely. I think in last couple years a number of judges have been replaced. Judges are like all of us. If there 100 of us and 1 gets knocked off, the other 99 are gonna get a whole lot more cautious. The rest of 'em are going to be saying, 'Whoa, I do not want to upset the fellows down at the General Assembly.' The General Assembly says we are going to be keeping an eye on what you are doing. I don't think judges are concerned about occasionally going over or under the guidelines, but I believe a judge who routinely went over or under would find himself in an awkward position at his reappointment hearing.").

Not all judges believed job security accounted for compliance. VA-J4-U ("Q: Why comply? What is your incentive? A: The sentence guidelines people did a really good job in compiling the guidelines and selling them to the judges. A really fine job selling judges on compliance. They'd see a judge set a burglary sentence in one county of 2 years and in another the same offense would get 8 to 10. That created a problem in the department of corrections, the judges understand that. The guidelines are based on a compilation of data from sentences that were actually served. This explanation was convincing to most judges, they'll go along with what most people are getting. Q: Does the compliance with the guidelines play any role in the reappointment of judges there in Virginia? A: I can't recall any judge ever saying, 'They asked me about the guidelines.'").

107. Frank Green, *Judging Virginia's Judges: They Comply with Guidelines 75% of Time*, RICHMOND TIMES DISPATCH, May 28, 1998, at B1; Green, *supra* note 104.

108. VA-P1-U; *see also* VA-J4-U ("You could change a jury sentence. But most of the judges I know are very reluctant to reduce jury sentences, particularly when the defendant has opted for the jury. They are not as reluctant to modify a jury's sentence when it is the prosecutor who seeks the jury. . . . here's an example: Take a sexual offense, where the prosecutor insisted on going to jury trial, the jury came in, as it had to, with the mandatory minimum sentence of 5 years. . . . The jury has to give at least that much, but the guidelines recommended less. So I might reduce that. Sometimes the statutory range will be [2 to 10], but the guidelines call for 7 to 8 months. We have to evaluate these on a case-by-case basis, can't simply defer to the jury."); VA-P3-U (In distribution cases, "Juries impose the [minimum time] 5 years, and the judges are historically very loath to interfere with jury sentences. But if the judge was sentencing, the judge would suspend the sentence after imposing the five. Q: How often have you seen the judge modify a jury sentence? A: Of the thousands of cases I've handled personally, less than five times. It is absolutely rare."); VA-P4-R ("Our current judge has never reduced a jury verdict in a criminal case."); VA-D1-R ("[M]ost of them will say, 'I respect the judgment of the community,' and leave it alone. . . . They acknowledge that is the way the system is set up; if you have a jury than you have to accept the jury's sentence. Now I think this is fine if it is the defendant that

Reports of the Virginia Criminal Sentencing Commission, which indicate that judges tend to reduce roughly one-quarter of jury sentences, and that of the sentences reduced, less than half are reduced to guidelines levels. The reasons why judges do not modify jury sentences more often or to a greater extent are explored in the discussion of judges in Part III.

*Limited access to judge sentencing after guilty verdict.* As in Kentucky, prosecutors and judges in Virginia do not allow a defendant to bypass jury sentencing following a jury's guilty verdict by agreeing to a waiver.<sup>109</sup> Indeed, state law now prohibits judicial sentencing once the jury has returned a guilty verdict.<sup>110</sup> Unlike defendants in many other jurisdictions, the defendant in Virginia has a right to plead guilty to a felony charge under the state's constitution, and the prosecutor and judge are powerless to block a guilty plea by insisting on jury trial.<sup>111</sup> Defendants in some counties in Virginia<sup>112</sup> use this power to plead guilty and obtain the lower guidelines sentence *after* the presentation of the prosecutor's case in chief and the denial of a directed verdict motion (called a "motion to strike" by Virginia

asks for the jury—You live by the sword and you die by the sword. But if it is the prosecutor who is insisting on the jury, and this is what happens sometimes, then it's unfair.”)

109. Defense attorneys, explained one judge, “know by now they can't come in and argue they have a right to judge sentencing. Prosecutors will just say, ‘I will not waive the jury.’” VA-J2-R. Or, as a prosecutor put it, “Once we get rocking and rolling in front of a jury, we're going to finish the thing.” VA-P5-R.

110. Although a defendant may plead guilty at any time prior to the return of the jury's guilt-phase verdict, following the return of a guilty verdict “a plea of guilty is untimely and may not upset the procedural course of a bifurcated trial.” *Daye v. Commonwealth*, 467 S.E.2d 287, 289 (Va. Ct. App. 1996); *see also* VA-J2-R (“Now, we used to have a system where the jury came back with guilt and gave the sentence all at once. Then we went to bifurcation and we got what we call ‘slow pleas.’ A slow plea is where the Commonwealth's attorney would ask for a jury trial, jury would find the defendant guilty, then the defendant would decide to plead guilty instead, and be sentenced by the judge under the guidelines. The prosecutor had no authority to object to the defendant's guilty plea. The prosecutors went to the legislature and asked this to be changed, so now once the jury comes back guilty, the jury must sentence. The net result of all this is that there are very, very few jury trials.”).

111. *See* VA. CONST. art. I, § 8 (“In criminal cases, the accused may plead guilty. If the accused plead not guilty, he may, with his consent and the concurrence of the attorney for the Commonwealth and of the court entered of record, be tried by a smaller number of jurors, or waive a jury.”); *see also* *Dixon v. Commonwealth*, 172 S.E. 277, 278 (Va. 1934) (“the language of [the Virginia Constitution] makes it mandatory that, whenever an accused pleads guilty to the whole of any indictment, the court shall try the case without the intervention of a jury”); *Graham v. Commonwealth*, 397 S.E.2d 270, 275 (Va. Ct. App. 1990) (no statute, rule, or constitutional provision limits the time by which a defendant must enter his plea of guilty, and a plea may be tendered mid-trial).

112. Some interviewees reported that this did not happen in their jurisdictions. *E.g.*, VA-D6-R (reporting that this happened “rarely”); VA-P3-U (reporting that a guilty plea with judge sentencing following a judge's denial of directed verdict “does not happen very often, but several times a year here”).

practitioners). In other words, defendants are able to test the waters, and only dive in for the jury's sentencing verdict if the temperature is acceptable. The lower guidelines sentence after guilty plea, imposed halfway through a trial requested by the prosecutor, also may discourage prosecutors from insisting on a jury trial when the defendant prefers a bench trial.

Consider the views of one prosecutor on this tactic:

Q: What would you call the situation where a defendant goes to jury trial, then after the motion to strike is denied, decides to plead guilty?

A: [chuckles] What I would call that isn't decent . . . I'd call it damnable.

Q: Why? What about it irritates you?

A: It's a no-risk gamble. The defendant makes the state go through all of this expense and risk of trial then says, "uhuh, I'd prefer to plead guilty." Seems to me to truly lack contrition. I have had little luck getting judges to agree with me on this, I've tried arguing that these people should be treated differently than the person who pleads guilty at the get go. The person who pleads right away shows more contrition, and should get lighter sentence.

Q: Judges don't agree?

A: No they don't see it this way, they say we can't penalize a person for exercising the right to trial.<sup>113</sup>

One defender, whose detailed explanation is worth reading in full, noted

[D]rug and drunk driving cases [are] where we are more likely to plead guilty after motion to strike is rejected. The prosecution makes bad offers because they are higher profile cases. Prosecutor can say he is helping keep the drug dealers and drunk drivers off the streets. These are the sorts of cases in which the prosecutor would veto a bench trial. Now for most cases they'll go along with a bench trial. They don't have a special interest in them, and they can't say no to every case because they will run out of resources. In your typical breaking and entering, or embezzling, they'll often agree to bench trial. There is another category of cases where they'll insist on jury: sexual assault, violent sex assault cases. In these high stakes-case they're going to want to go to jury trial and go for the jury sentence.<sup>114</sup>

---

113. VA-P1-U; *see also* VA-J1-U ("Q: I've heard that there are cases where a defendant will want to avoid a jury trial and ask for a bench trial, but the prosecutor will refuse, then at the jury trial, after the prosecutor's put on his case, the defendant will make a motion to strike, and if it is denied, the defendant will plead guilty. Does that happen? A: Happens sometimes. Once the verdict is returned, a defendant cannot plead guilty, but up until the jury verdict I have to accept the defendant's guilty plea . . . Q: Do prosecutors ever argue to you, 'Judge you ought not to give this defendant the same break you give the defendants who plead guilty earlier'? A: It would be illegal to penalize someone for exercising his right to go to trial but we can reward a defendant who accepts responsibility early and spares the victim the stress of testifying in court . . . I can't impose a higher sentence because the person went to trial. I tell defense attorneys they should bring this to my attention when sentencing someone who pleads guilty.").

114. VA-D1-R:

---

A: Let me give you an example. Take the drug distribution case we were just talking about. That's a case where the defendant might want a bench trial. You always want a bench trial in these cases because there you have a chance of no conviction, but if you were convicted, then you don't have that jury sentencing, you get judge sentencing. There are very few incentives to go for a jury. Most of the time you'd want a jury only when you have a strong issue on guilt or innocence, but you have a cynical judge, you've got a defense, say consent or something, that you can sell to a jury that you know you can't sell to a judge. You hope you win before the jury, but if you can't, you know you'll get hammered on sentencing. Except for those, in most cases you want a judge to hear it. You say, I want a bench trial, even though you don't have much of a chance, but there is always the chance of a witness not showing up, or you could avoid the conviction. You want to have your cake and eat it too. Maybe the prosecutor might make a mistake and your client would get off. The prosecutors have figured this out—they'll say no, we'll take you in front of a jury and if you get convicted, which is likely, as I explained, we're going to ram it down your throat.

Q: Can they realistically threaten this? Don't resources prevent them from trying all these cases?

A: Oh they can do it and they will. They will do it. And you'll end up pleading guilty. Now we can also pull the plug and plead guilty after the prosecution rests. You make your motion to strike and it's overruled, you can plead guilty and get judge sentencing the judge will send the jury home.

Q: How often does this happen?

A: A lot of jury trials end that way in drug distribution cases. Other times you have a jury trial, there are other reasons for the jury, maybe the client wants a jury. Most of the time we carry jury cases all the way through, because those cases we wanted the jury to decide. But there are these drug and drunk driving cases where we are more likely to plead guilty after motion to strike is rejected. The prosecution makes bad offers because they are higher profile cases. Prosecutor can say he is helping keep the drug dealers and drunk drivers off the streets. These are the sorts of cases in which the prosecutor would veto a bench trial. Now for most cases they'll go along with a bench trial. They don't have a special interest in them, and they can't say no to every case because they will run out of resources. In your typical breaking and entering, or embezzling, they'll often agree to bench trial. There is another category of cases where they'll insist on jury: sexual assault, violent sex assault cases. In these high stakes-case they're going to want to go to jury trial and go for the jury sentence. Sometimes the defendant will want a jury too, for other reasons.

Q: Which motivates prosecutors more, the immediate publicity or are they trying to raise the price of the plea in all of these cases?

A: Absolutely to raise the price of the plea. They want the change in pleading. In these cases the prosecution wants to put pressure on the defendant with the sentencing, and very often will end up pleading guilty even in the middle of trial. Sometimes trial is really a means of educating the defendant, by that time they see what they're up against.

Q: Can the prosecutor veto your guilty plea?

A: No, not if you plead guilty before the case goes to the jury. That's the beauty of the system. You've got to make your decision in time to save yourself from jury sentencing, the last time you can do that is before the case goes to the jury. . . .

Q: Do judges ever punish you because you make them go through with half of a jury trial then plead guilty?

A: No, and they shouldn't because that would be a penalty on the exercise of the right to jury trial. I had a discussion with a judge about this once. There was a case where this happened and the prosecutor was very upset. The judge was absolutely clear with him saying that the defendant has every right to do what he did and under no circumstances would he punish him for doing so.

*Limited defense access to judge sentencing after bench trial.* As suggested by the discussion above, bench trials are more frequent in Virginia than in Kentucky, and are attractive to defendants as a means to obtain lower guideline sentences while still contesting guilt and preserving objections that would otherwise be waived as part of a guilty plea.<sup>115</sup> Judges, not subject to popular election, are reportedly quite willing to conduct bench trials, as they pose less risk of reversal than do jury trials.<sup>116</sup> Judges in Virginia need not fear losing their jobs over adverse public reactions to acquittals in bench trials. Nevertheless, some Virginia prosecutors reportedly function like Kentucky prosecutors in many cases, vetoing jury waivers and forcing defendants to choose between conceding guilt or opting for jury trial with the probability of much higher sentences. A judge explained,

A: As a matter of strategy, then, in some counties, including mine, in serious cases the prosecutor will not agree to waive a jury.

Q: So the prosecutor uses jury sentencing as leverage to get the plea?

A: Exactly. In some less serious cases, say larceny or property offenses, the prosecutor is not as likely to insist on the jury. . . . But in cases that are likely to outrage a jury, they're going to ask for a jury.<sup>117</sup>

*Defense access to open pleas.* This is where Kentucky and Virginia practice differ starkly. In Kentucky, interviewees reported that truly open pleas, without an understanding between the parties on sentencing, were rare, because judges invariably impose the prosecutor's recommended sentence, and the prosecutor could block the defendant from pleading guilty by insisting on jury trial. In Virginia, the right to plead guilty as charged, over the prosecutor's insistence on jury trial, is protected by the state's constitution. Jury sentencing pushes defendants not to the prosecutor's offer, but to an open plea with the confidence that the judge will sentence under the guidelines. As one judge explained, "We don't have a lot of plea bargains, more open pleas. The jury will sentence higher than the

---

115. See, e.g., VA-J4-U ("Q: You mean that the option of a bench trial, the prosecutor vetoes that? A: Right. . . . that has never been the practice of our Commonwealth's attorney, but in other places I understand this does happen. Q: What happens in your county, the defendants who want to avoid jury sentencing ask for bench trial and those requests are granted? A: Yes, usually.").

116. VA-D7-U.

117. VA-J2-R; see also VA-P1-U ("If you have a fragile victim, or a child victim, or a case where there is a legal issue, then we might agree to a bench trial, otherwise we set all of our cases for jury trial. Now other jurisdictions are different, they could have more jurors there who are skeptical of the police."); VA-P3-U ("Because of the sentence" this prosecutor explained, "I tend to ask for a jury in serious cases."). Use of the bench-trial veto reportedly varied from jurisdiction to jurisdiction.

guidelines, it is a safe prediction.”<sup>118</sup> The contrast between the lower, guidelines sentencing after an open guilty plea and the higher jury sentence after jury trial encourages defendants to bypass the jury and the prosecutor and seek a sentence under the guidelines from the judge.

#### 4. Summary of Statistical Findings

Data from Virginia is composed of two data sets. Data from the Virginia Criminal Sentencing Commission included all noncapital felony sentences imposed between 1997 and 2001. Another data set, provided by the Department of Corrections, allowed us to examine all sentences imposed between 1995 and 2001. The large number of cases, along with the frequency of bench trials in Virginia, allowed a comparison of sentences after jury trial with sentences after bench trial for several individual offenses.

Given what we had learned about guidelines compliance in Virginia, we expected to find that sentences that were imposed after jury trial would vary more widely than sentences after bench trial for the same offense. Comparing bench and jury sentences, we found that for most offenses this result was confirmed.<sup>119</sup> The analysis also confirmed what interviewees had been saying about relative severity. Average sentences after jury trial were more severe than average sentences after bench trial or guilty plea, with many offenses showing significant differences. In our preliminary analysis of the Virginia

---

118. VA-J2-R; *see also* VA-P4-R (“Usually we ask for a jury, then the defendant just pleads open, straight up, and gets the guideline sentence. We end up getting a conviction, which is a good thing.”); VA-J1-U (“Q: In your jurisdiction are there more pleas straight up or plea bargains? I am finding out that it differs quite a bit from place to place. A: It does differ. Here there are not a lot of plea bargains in Circuit Court. The philosophy of the Commonwealth’s attorney is that any deals have to be cut at the preliminary hearing. Q: No sentence bargaining? A: Some sentence bargaining, too. They’ll agree to recommend a sentence within the guidelines, or agree to a specific sentence, and if I don’t agree the defendant can withdraw his plea. But there are fewer bargains here than other places.”); VA-P1-U (“We refer to straight up plea as no agreement at all. We also have sentence bargains. We used to have quite a few of those before bifurcation, when it was a crap shoot, now we do very few because we think the people ought to plead straight up if they think they can get a better deal under the guidelines. Q: You mean your offers, your sentence agreements would be over the guidelines? A: Our office policy would often call for sentences over the guidelines, we think a case is more valuable than what the guidelines says. We frequently are at war with the guidelines.”). *But see* VA-D2-U (“Q: Do you have mostly plea bargains or straight up pleas? A: Mostly plea bargains. The bar here is much more aggressive, much more jury-oriented than the rest of the state. More motion oriented. Prosecutors have a hard time.”).

119. The Commission data also allow a comparison of the sentence in each case with the recommended guidelines sentence, and include a value indicating whether the sentence exceeds, falls below, or is in compliance with the guidelines. Sentences after jury trial were in compliance with guidelines in a much lower proportion of cases than sentences after bench trial.



Sentencing Commission data using ordinary least squares regression, we found that sentences after jury trial were significantly longer than sentences after bench trial for drug offenses. For defendants convicted of these offenses, the choice of jury trial rather than bench trial meant a sentence averaging anywhere from four and one-half to over fourteen years longer, depending on the offense. The difference was even greater when comparing incarceration sentences after jury trial to incarceration sentences after guilty plea. Analyses of the cases included in the corrections data set, using the same methods but different variables, also confirmed that the choice of jury over bench trial meant a significantly longer sentence.

For one offense—rape—the Commission data suggested that the choice of bench trial versus jury trial, or guilty plea versus jury trial, had no significant effect on sentence length. Rape cases may present reasons apart from sentencing outcome for defendants, or the attorneys who advise them, to avoid trial, such as publicity.<sup>120</sup> High plea-based sentences also could be a product of charge bargaining—prosecutors may be more willing to settle for a certain conviction, with a higher sentence on one count in exchange for dismissal of others. Finally, with the variation in post-trial sentences significantly exceeding the variation for plea-based sentences, defendants may be more willing to settle for “a bird in the hand” in order to avoid the possibility that their sentences would exceed the average. As one defender from Arkansas noted, “Most defendants don’t trust the system so they want to know what their deal is and have it signed before going to court.”<sup>121</sup> The risk of a particularly high jury sentence for these crimes may be small, but defendants may want to avoid it by waiving jury trial.<sup>122</sup>

---

120. See, e.g., Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 210 n.9 (stating based on his experience as a prosecutor that “judges and prosecutors placed a constant and systematic pressure on defense attorneys to make their clients plead guilty [which] led defense attorneys to frame plea offers in ways that made the offers look better than they were—good enough to overcome loss aversion and culminate in pleas”); *id.* at 239-43, 247 (collecting authority discussing the defense attorney’s incentives to agree to avoid trial); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1989-90 (1992).

121. AR-D7-R.

122. Scholarship exploring settlement behavior, including examinations of this risk-aversion model of decision making, is extensive. For one recent application to guilty pleas, collecting prior literature, see Birke, *supra* note 120.

Interestingly, one study of federal sentencing under the Guidelines concluded that expectations about greater variance prompt concessions by the prosecutor in bargaining, so that the greater the variance in an expected sentence, the lower the bargained sentence will be. Chantale Lacasse & A. Abigail Payne, *Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow of the Judge?*, 42 J.L. & ECON. 245, 267 (1999) (finding that “the less predictable a judge is in his sentencing, the more of a discount is given to a defendant who pleads guilty”). The difference between what interviews and sentencing data

## 5. The Consequence: Prosecutors Protect Jury Sentencing

As in Kentucky, jury sentencing in Virginia is overwhelmingly supported by prosecutors, in part because they *believe* the risk of a higher sentence from a jury deters jury trials.<sup>123</sup> Indeed, Virginia's own state reports suggest that jury sentencing, in combination with judicial sentencing guidelines, is in part responsible for lowering the rates of jury convictions as compared to all convictions.<sup>124</sup> As

---

suggest in these states and what Lacasse and Payne find in federal court may boil down to which party considers the choice of sentencing after trial to be riskier than negotiation. When a U.S. Attorney anticipates that a federal judge might depart *below* the guidelines sentence whether or not the defendant goes to trial, she must decide whether to run that risk or settle for something less—this allows “defendants to exploit risk aversion on the part of the prosecutor.” *Id.* In jury-sentencing states, prosecutors do not try to avoid jury sentences; prosecutors expect juries to impose sentences as high as the sentences judges would impose, so it is the prosecutor who is able to exploit risk aversion on the part of the defendant.

123. A Virginia prosecutor reported, for example:

Q: Does this come up in the legislature; are there efforts to change it, if the judges want it changed?

A: Comes up all the time. Our organization rails against it. It came up before, it was never going anywhere.

Q: What happened?

A: We said disparaging things about it.

Q: Like what?

A: Like . . . we need more citizen participation not less. We don't need more of what judges want, we need to hear from the citizens.

Q. But didn't the legislators see through that? When the jury trial rate has gone down to 2 percent how can you say this is more participation?

A: The legislature likes the 2 percent too. They may not tell you this. You won't hear them say, “The fewer jury trials the better,” but you'll hear them talk about “judicial economy and efficiency.” Also, no appeals, that's another benefit. . . . While participation by citizens may be low, it is more meaningful. . . . You can't appeal much after a guilty plea. . . . Judge sentences after guilty pleas, there isn't much to appeal. There is very little room for error. The judges aren't swayed by prejudice, so arguments aren't a problem, there is very little action there.”

VA-P1-U. Another prosecutor reported,

There have been proposals before for doing away with jury sentencing, but they fairly routinely have been laughed off. . . . About 2 to 4 years ago, there was a Commission that . . . issued a variety of recommendations, one was a proposal for abolishing jury sentencing. The prosecutor [on the commission] recommended it too, but was hooted down by all of his colleagues. Prosecutors like the option of being able to get a read on what the community standards are on these sentences.

VA-P 3-U.

124. In a 1999 report, TRUTH-IN-SENTENCING IN VIRGINIA, prepared by the Virginia Criminal Sentencing Commission in conjunction with the National Center for State Courts, the authors noted the lower overall rates of compliance with the guidelines after jury trial, and that nearly half of jury sentences studied in the report exceeded guideline ranges. BRIAN J. OSTROM ET AL., VA. CRIMINAL SENTENCING COMM'N (S.C.), TRUTH-IN-SENTENCING IN VIRGINIA: EVALUATING THE PROCESS AND IMPACT OF SENTENCING REFORM 50-51 (1999). The report also noted the declining percentage of convictions adjudicated by jury trial in Virginia, attributing this decline to reluctance by defense attorneys to steer their clients toward trial given three developments: 1)

discussed earlier in connection with Kentucky, the belief in a causal link between jury sentencing and falling jury trial rates is itself an important policy constraint, even if empirical study has yet to confirm or refute that belief.<sup>125</sup>

### *E. Jury Sentencing as Trial Penalty in Arkansas*

Jury sentencing functions in a slightly different way in Arkansas than in the other two states. According to many of those interviewed, jury sentencing operates as a trial penalty, but only for certain categories of crime. Several aspects of Arkansas law and practice make jury sentencing a somewhat less effective bargaining tool for the government than it is in Kentucky or Virginia, at least in some non-drug prosecutions.

#### 1. Descriptions of Jury Sentencing as Trial Penalty

Prosecutors in Arkansas do value jury sentencing as an aid in plea bargaining. Offered one prosecutor:

See this is the beauty of jury sentencing, though no two crimes are precisely alike, if I know you robbed a Stop and Go with a gun and a jury came in with 15 years for that, I can hold that up and say, "This is what you are facing." I've got that as a basis to negotiate.<sup>126</sup>

Defense attorneys and judges reported that prosecutors used the threat of a jury's sentence to obtain pleas in some cases, particularly drug and sex offense cases.<sup>127</sup> Arkansas courts have rejected claims by

statistics showing longer sentences in cases adjudicated by juries than in cases where judges sentenced, made public starting in 1989 by the sentencing commission; 2) bifurcation of guilt and penalty phases in 1994, permitting jurors to learn of a defendant's criminal history; and 3) the absence of any jury instructions about recommended sentence ranges, following the adoption of truth in sentencing and guidelines and abolition of parole in 1995. *Id.*

125. Comparing the data in the Virginia Commission reports with national statistics compiled by the Bureau of Justice Statistics shows that jury trials as a proportion of convictions in Virginia is lower than the national average in every category of crime. See SOURCEBOOK, *supra* note 5, at tbl. 5.42 (sharing the percent of convictions by jury trial: all offenses 3 percent; violent offenses 9 percent; property offenses 2 percent; drug offenses 2 percent. In Virginia for 2001, the percentage of convictions that followed a jury trial were: all offenses 2 percent; violent offenses 7.1 percent; property offenses 0.4 percent; drug offenses 0.4 percent).

126. AR-P1-U; see also AR-P2-R (quoted *supra* text accompanying note 36).

127. Explained one judge,

Generally speaking a prosecutor will try cases that 1) they will win and 2) that will set a standard for that particular type of case. . . . They'll pick a case that has egregious facts, the rape of a child with the child's mother assisting the perpetrator. In most parts of the state that case would be tried to a jury. Then the prosecutor uses that sentence, which would be 10 to 40 years, or life, as bargaining power in other rape cases where children are the victims.

defendants that the difference between the recommended guidelines sentence and the expected sentence from a jury creates an unconstitutional penalty on the right to jury trial.<sup>128</sup>

Most of the prosecutors, and some judges and defenders, reported jury sentences were higher than judge sentences in at least some categories of crime.<sup>129</sup> But unlike professionals in Kentucky and Virginia, Arkansas judges, defenders, and, less frequently, prosecutors, also reported that juries will often impose sentences that are more *lenient* than the sentences a defendant would obtain from a judge after bench trial, or even after a guilty plea. In other words, according to many of those interviewed, jury sentences are not predictably higher in most communities, or even in most cases. Many of those interviewed singled out drug cases as most likely to produce

---

AR-J3-U; see also AR-J5-R (“There is a probation facility with drug rehab where the offender is locked in, but the jury doesn’t have that alternative. So instead of probation he is facing a 20-year sentence.”); AR-D6-R (“In drug cases it does [change the advice one gives clients]. It is hard to find a jury that’s going to be soft on drug dealers. You end up counseling defendants that it is better to take a plea rather than taking a risk with jury sentencing. . . . Juries will go for harsher sentences.”). In addition to drug and sex offenders, multiple offenders were mentioned as particularly pressured to avoid juries, as in Kentucky. See, e.g., AR-J4-R (“[Jury sentencing after bifurcation] also puts more pressure on the defense lawyers, when they are representing a multiple offender . . . . For a multiple offender, where they expect a conviction, they know the jury is going to sock ‘em with a stiff sentence. It means they are less likely to go to jury trial, has a strong plea bargaining effect.”).

128. *Pickett v. State*, 902 S.W.2d 208, 209 (Ark. 1995) (sentencing guidelines do not burden the fundamental right to a jury trial); *Hutcherson v. State*, 47 S.W.3d 267, 272 (Ark. Ct. App. 2001).

129. See, e.g., AR-P1-U (“Jurors give higher sentences [than the guidelines call for], at least with violent offenses, with property offenses about the same”); AR-D4-R (juries tend to be “more severe” than the guidelines sentences); AR-J3-U (“Jury sentencing is in most cases, especially in nonviolent property crimes, tend to exceed the recommended sentence under the guidelines. I expect it is because those cases usually involve habitual offenders, or where the defendant does not make a very good witness. But I don’t think jury sentences here exceed guidelines all that much. . . in violent crimes the jury sentences here tend to follow the guidelines and are sometimes less severe than the recommended guidelines sentences. This seems to hold true in drug cases, as well. . . [Law enforcement supports jury sentencing because] jury sentences tend to be more severe than judge sentences.”); AR-J5-R (“Juries seldom if ever impose a sentence below the guidelines sentence. Most often they’ll come in over the guidelines. . . . A multiple offender will get a higher sentence from a jury than from the guidelines.”); AR-D5-U (“Juries are ‘less likely’ to give probation than a judge. Once the jury decides to convict, the jury is more likely to send the defendant to prison.” “Normally, a judge will find guilt and be more lenient at sentencing.” Jury sentences are “almost without fail higher” than the guidelines.); AR-P2-R (“Juries impose stiffer sentences [than judges].”); see also Linda Satter, *NLR Man Pleads Guilty to 6 Counts in Child Porn Case, Main Exhibit Was To Be Old Album Filled with Sexually Explicit Photos*, ARK. DEMOCRAT GAZETTE, May, 31, 1997, at 2B (noting that the prosecutor stated the defendant pleaded guilty with a 30-year sentence because “I think he was a little fearful that a jury might life him.”).

higher sentences from juries than from judges.<sup>130</sup> A defender put it this way:

I don't avoid jury trials to avoid jury sentencing, except in drug cases. It does affect when to waive jury trial and go for bench. Jury sentencing does make a difference in drug cases. Juries go ape-shit over drug cases. For a drug case, I wouldn't go to jury trial unless I have a real good case on possession (say your guy is a back seat passenger in a car).<sup>131</sup>

## 2. Reasons Given for High Jury Sentences for Drug Offenses

*Information disparities.* As in Kentucky, parole information is limited to eligibility only,<sup>132</sup> and several defense attorneys and judges reported that high jury sentences may be attributable to the possibility that jurors are equating eligibility with release.<sup>133</sup>

---

130. AR-D6-R ("I feel good about taking cases to trial and get better sentences from the jury than the prosecutor has offered as a plea bargain. Except drug cases. Otherwise I get better sentences from juries than the plea offers."); AR-J4-R ("I think [juries] are probably higher than the grids on drug cases."); AR-D7-R ("I think it is safe to say that drug cases, particularly methamphetamine manufacturing, and child abuse cases get stiffer penalties from juries. There is a county to the north of us [where] a man was charged with murder and possession with intent to deliver methamphetamine. He was sentenced to less than 20 years on the murder and life on the drug charge. A local jury gave a man 40 years for about a kilo of cocaine. . . . these are two types of cases I don't like to take to juries. Usually they will find guilt and sentence fairly harshly.")

131. AR-D3-U; *see also* Rob Moritz, *Drug Offender Appealing 2 Life Terms as Inhumane Penalty Too Stiff for Amount of Cocaine, Defense Says*, ARK. DEM. GAZETTE, Feb. 7, 2000, at B1 (quoting defense attorney stating that the two life sentences for a first offender convicted of selling less than a half-gram to a police informant "is harsh but consistent with most juries' treatment of drug offenders. 'It's a defense attorney's worst nightmare to go to a jury trial on a drug charge,' he said. 'Juries go bananas over drug cases' . . . penalties for drug dealing are in some cases more severe than those for murder.")

132. The model jury instructions that judges use reads:

In your deliberations on the sentence to be imposed, you may consider the possibility of the transfer of [the defendant] from the Department of Correction to the Department of Community Punishment. After he serves one-third of any term of imprisonment to which you may sentence him, he will be eligible for transfer from the Department of Correction to the Department of Community Punishment. If transfer is granted, he will be released from prison and placed under post-prison supervision. The term of imprisonment may be reduced further, to one-sixth of any period you impose, if he earns the maximum amount of meritorious good time during his imprisonment. Meritorious good time is time-credit awarded for good behavior or for certain achievements while an inmate is confined in a Department of Correction or Community Punishment facility, or in a jail while awaiting transfer to one of those facilities. It is awarded an inmate on a monthly basis so that he receives one day for every day served, not to exceed thirty days per month. Accrual of meritorious good time does not reduce the length of a sentence but does decrease the time the defendant is required to be imprisoned before he becomes eligible for transfer to community supervision, under which the remainder of his sentences will be served.

ARK. MODEL JURY INSTRUCTIONS, CRIMINAL §§ 9402, 9403 (2d ed. 1994); *see, e.g.*, Clark v. State, 944 S.W.2d. 533, 536 (Ark. 1997) (approving instructions).

133. *See, e.g.*, AR-D6-R ("This is why jury trials are so risky. Lawyers believe that juries think that the guy's going to get out real quick."); AR-D4-R ("They get the info about parole, but

Although most of those eligible are released, jurors do not learn that a significant percentage remain in prison.<sup>134</sup> Some Arkansas judges may leave the jurors in the dark about parole, and do not volunteer information about parole to jurors.<sup>135</sup> Because this explanation should affect all offenses equally, however, it does not explain why drug offenses in particular might generate jury sentences that are higher than judge sentences.

A better explanation for the pattern of higher jury sentences in drug cases involves the state's sentencing guidelines. As in Virginia, some of the sentences recommended by the guidelines are far below what jurors tend to impose. For drug crimes, in particular, Arkansas prosecutors have complained that the guidelines simply don't reflect

---

sometimes don't understand it."); AR-J3-U ("[L]ast term I tried nine or ten jury trials, and in eight or nine the jury hadn't been out twenty minutes when here comes a question about parole eligibility. . . . They ask, 'How much time will the defendant serve if we give him ten years?' . . . I read them the parole eligibility instruction. I think at that point I have to give them the standard instruction."). One judge after reporting that jurors imposed sentences higher than the grids on drug cases, explained, "I think judges know what to expect and how much time he's actually going to serve. Juries know that somewhat, but they don't know as much as the judge." AR-J4-R.

134. See Julian E. Barnes, *It's the Law: Criminals Only Serve Bit of Time*, ARK DEMOCRAT GAZETTE, Oct. 13, 1996, at 1A (quoting Department of Corrections records as stating 73 percent of inmates are released at their first eligibility data, another 10 percent are indefinitely delayed because of disciplinary problems, and the remaining 17 percent are delayed for other reasons; but also quoting Chairman of the Post-Prison Transfer Board and stating that release is "almost automatic").

135. One judge's explanation is instructive:

Back in 1994 when we first bifurcated, the model jury instructions included an instruction which permitted the jury to consider alternative sentences such as probation and/or suspended sentences. The model instructions also contained an instruction on parole eligibility. I took the position that the parole eligibility instruction wasn't really fair to defendants. Although the instruction is a correct statement of the law, parole eligibility is affected by a significant number of factors, and consequently, it's virtually impossible to predict actual time of incarceration for a criminal defendant. So I decided not to give that instruction, and for fairness, decided not to give the alternative sentence instruction either. At present, I've changed my view on this to some extent and have given these instructions once or twice in recent cases. Very seldom are these instructions requested, and this may be a consequence of my prior position on this issue. . . . When I've given it, more than twenty times or so, invariably the sentence seems higher. . . . Jurors don't really know about the parole eligibility guidelines. I think I ought to give those alternative sentencing instructions when anybody asks, but when nobody ever asks me to give them I don't.

AR-J3-U.

Explained one defender,

I don't mention parole because whether or not the defendant is locked up in a facility, if he is on parole, he is still under sentencing. . . . Of course eligibility for parole and making parole are apples and oranges. Not everyone eligible gets out, so I think that is a prejudicial argument.

AR-D7-R.

juror sensibilities.<sup>136</sup> But the guideline recommendations are kept from the jurors, so they never learn of the disparity.<sup>137</sup> One defender complained,

The real problem is in the cases where I want to go to jury but the jury is more severe than [the] guidelines. I can't tell the jury about the guidelines, and prosecutor vetoes [the] waiver of jury sentencing and fights us telling juries about guidelines. It serves as a penalty on the jury trial right. . . . In drug cases, the guidelines provide for suspension of part of [the] sentence with certain offenses, but we cannot tell the jury that.<sup>138</sup>

A prosecutor had a different spin on the same differential:

What *jurors* give is the appropriate sentence. We've now reached the point where the pleas and the grid is the baseline sentence and what juries do is the exception. Better to let them decide. They tend to be higher than the judge. . . . When coming up with grids, the major concern was that they be no longer than what the status quo called for, because the prison walls wouldn't hold 'em. The public perception of what sentences were is a lot higher than what these grids say, [there is] a lot of difference.<sup>139</sup>

*Increased emotionalism and punitiveness.* The information gap between jury and judge on the usual sentence was not the only explanation for higher jury sentences. Other explanations included the conservativeness of the jury pool<sup>140</sup> and community outrage about drugs and violent crime.<sup>141</sup> "I think [prosecutors] like the jury sentencing . . . [b]ecause maybe it is easier to fool the jury, get them stirred up and emotionally involved. Judges for the most part are a pretty level-headed bunch, you know, and are able to detach themselves from all the hoopla."<sup>142</sup>

136. See, e.g., Ray Pierce, *Dickey Picks Apart Pryor's 9-Point Plan*, ARK. DEMOCRAT GAZETTE, Sept. 16, 1998, at B6 (quoting candidate for attorney general as stating that prosecutors want tougher sentences than the grid will allow, and criticizing the sentencing guidelines); Mike Rodman, *Grid Goes Too Easy, Some Say Critics Call for Jails, Not Sentencing Rules*, ARK. DEMOCRAT GAZETTE, July 17, 1994, at A1 (collecting complaints about the leniency of many sentences under the grid).

137. See *Pickett v. State*, 902 S.W.2d 208, 208 (Ark. 1995).

138. AR-D3-U; see also AR-D6-R ("Juries don't hear about the guidelines. Plus judges know what these cases would normally plea bargain for."); AR-D4-R ("[S]ometimes the range of punishment the jury has is higher than the guidelines sentences. They don't get the guidelines."); AR-J1-U ("Juries tend to impose higher sentences because the jury is not aware of all the factors that go into negotiations and with other prior cases earlier in the year. They aren't aware of the sentences and terms for similar cases.").

139. AR-P2-R.

140. One defender explained tough drug sentences this way: "We have a very conservative jury pool." AR-D7-R.

141. E.g., AR-J1-U ("We have had some pretty steep sentences. Sometimes I think that these sentences are not to punish the offender for his drug offense, but they are to punish for the offender because drugs are a social problem in America.").

142. AR-J2-R; see also AR-D7-R ("If the judge is one who sentences very harshly, then the prosecutor is in a win/win situation. . . . For an introverted prosecutor, this is great. A prosecutor who is theatrical and can impassion juries into high sentences, when a judge would not ordinarily slam the defendant, would like jury sentencing. Prosecutors look to getting elected, and whichever method suits their purposes will be their preference.").

*Disparity in sentencing options.* Finally, as in Kentucky and Virginia, jurors lack information about the more lenient alternatives to incarceration that judges understand. Said a defender, “The judge tries and works to be consistent. Juries don’t have that information, they just get a range, 5-20 years and pick.”<sup>143</sup> Although Arkansas jurors can and do recommend probation or a suspended sentence, some alternative sentence options are not available after jury trial. Consider the remarks of one judge discussing the problem in the context of drug cases. “We have good alternative responses to this kind of crime. There is a probation facility with drug rehab where the offender is locked in, but the jury doesn’t have that alternative. So instead of probation he is facing a twenty-year sentence.”<sup>144</sup>

While the reasons above may explain why jury-imposed terms of incarceration for drug crimes remain high in Arkansas, they do not explain reports by those interviewed that for other offenses jury sentences are sometimes lower than both bench sentences and plea-based sentences.<sup>145</sup> One reason offered for the lower jury sentences in nondrug cases may be that jurors are asking for probation or suspended sentences.<sup>146</sup> The use of the model instruction on probation, however, is spotty, according to those interviewed. Judges may refuse to give the instruction,<sup>147</sup> and will only give the instruction when defendants ask.<sup>148</sup> Alternatively, some of those interviewed

---

143. AR-D1-U.

144. AR-J5-R; *see also* AR-P1-U (“Most [alternative programs] are not available after jury trial, only bench or plea.”); AR-D3-U (“certain expungement provisions applicable only if [defendants] plead guilty, [which] operates as a trial penalty.”).

145. *See, e.g., supra* notes 130-131.

146. *Higgins v. State*, 936 S.W.2d 740, 743-44 (Ark. 1996) (jury recommended no fine and no sentence, jury was sent was sent back because the sentencing range for the offense of conviction—*theft of property over \$2500*—was 5 to 20 years, jury then returned sentence of 5 years probation and fine); *see also Hill v. State*, 887 S.W.2d 275, 280 (Ark. 1994) (AMI Crim. 2d § 9111 instructs the jury that it may recommend an alternative sentence but that the recommendation is not binding on the court, and instructs the jury to state whether the alternative sentence recommended is probation or a suspended sentence; also noting that the defendant’s closing argument “extensively discusse[d] alternative sentencing and the restrictions which would accompany probation or a suspended sentence,” so that the “jury was fully apprised of the options to imprisonment prior to setting [the defendant’s] sentence”).

147. *See, e.g., AR-P5-R* (“Most of the time the jury will be higher, the jury won’t get that instruction on probation unless the judge agrees, and the judge won’t agree unless the defendant is a first offender.”); *see also Dale v. State*, 935 S.W.2d 274, 277 (Ark. Ct. App. 1996) (no error to refuse to include instruction based on AMCI 2d § 9111, noting the trial court may, but need not, instruct the jury regarding alternative sentencing).

148. AR-J4-R (“Q: Do they ever hear that they could recommend that you impose probation—are they told about this? A: They are not told, unless they ask. Q: How often will they ask? A: From time to time, not that often.”). Stated one judge,

I give it when appropriate for the crime and when it’s requested. I’m not going to give it if nobody asks for it. They still have to fill out what the sentence is, and then if they



thought that juror leniency in sentencing was due to inexperience. Explained one judge:

Juries, especially inexperienced jurors, are more lenient. Maybe they just haven't seen that much of this. I'm talking about the young and inexperienced jurors now. We have 6-month jury terms. I like to ask [jurors] to serve six months. Once they finally get some seasoning to 'em they start to get more realistic, and deliver more appropriate sentences than when they are inexperienced. . . . [T]hey'll hear on average at least 12 cases, they may go higher.<sup>149</sup>

Notably, interviewees in Kentucky and Virginia attributed *severity*, not leniency, to sentencing inexperience.<sup>150</sup> These competing hypotheses pose interesting empirical questions for further study.<sup>151</sup>

### 3. Maintaining the Sentencing Differential in Drug Cases

In those prosecutions in which jurors are perceived as more severe sentencers than judges, Arkansas prosecutors, like their counterparts in Kentucky and Virginia, benefit from routine judicial agreement with their sentence recommendations and relatively little access by defendants to judicial sentencing without their consent.

---

want to recommend an alternative sentence, they note that. I'll give a great deal of consideration to that. [Defendants] [d]on't seem to ask for it, often not requested.

Q: Why?

A: I don't know.

AR-J2-R; *see also* AR-D4-R (“Q: Do defendants ask for the instruction? A: “Not always. Don’t know why.”); AR-P2-R (“Occasionally” they’ll ask, “Not very often.”); AR-J1-U (“Defendants have started asking for it more. . . . Some did not ask for it, they didn’t know about it. It didn’t come out at the same time as bifurcation so its fairly new, but it’s catching on now. Even that’s a recommendation on [the jury’s] part—to suggest suspending or probation.”); AR-J3-U (“Occasionally I’ll get a question about probation or suspended sentencing, then I’ll read that instruction.”).

Defenders and judges also noted the limited value of the information juries receive on alternative sentencing.

Juries at the discretion of the trial judge can be instructed that probation is an alternative to the statutory sentence and occasionally a jury will find a defendant guilty and sentence him to probation. But our jury instruction on probation does not explain well what probation is, how long it will last, what it amounts to. Not as likely to use it as an option in sentencing. . . . Jury can’t suspend a sentence. The only alternative to sentencing within the minimum is probation. But they are not given the information they need to understand what it means.

AR-J5-R.

149. AR-J2-R.

150. *See supra* notes 52, 95.

151. Twenty years ago, prior to bifurcation, Melissa J. Himelein completed a masters thesis on this very topic, and examined jury sentences in Kentucky. She found that “More experienced juries punished criminal defendants more severely, on average than did less experienced juries.” Melissa J. Himelein, *The Effect of Prior Jury Experience on Jury Sentencing* 35 (1983) (unpublished M.A. thesis, University of Kentucky) (on file with author).

*Defense access to potentially lower judicial sentences through judicial modification.* Not surprisingly, elected Arkansas judges, like trial judges in Kentucky, rarely modify jury sentences, according to those interviewed.<sup>152</sup> “I have never seen our judge do so,” explained one defender. “I think judges are hesitant to change a jury sentence, unless the verdict is just wrong, such as it was based on emotion and not the facts. In our jurisdiction, a judge selects a jury panel that serves for four months. If he just summarily changes their verdict, they will have no incentive to consider the evidence.”<sup>153</sup> “Judges are elected, jurors are votes. Judges are slaves to the jury. They don’t tend to modify the jury sentence, up or down.”<sup>154</sup> Appellate decisions include examples of cases in which trial judges have stated on the record that they don’t modify jury decisions,<sup>155</sup> and appellate courts have found it necessary to remind trial judges that there “must be an exercise of judgment by the trial judge in sentencing, not a mechanical imposition of the sentence suggested by the jury in every case.”<sup>156</sup>

---

152. *E.g.*, AR-P1-U (“Not very often.”); AR-P3-U (“Never, not once in 20 years.”); AR-D6-R (“Never.”); AR-D5-U (“Sometimes judges deviate. . . . Once a jury recommended prison sentence for a police officer and the judge changed it to probation, there was a public outcry. They can grant probation. Very rarely does it happen—when it does it is to the advantage of those whom I call ‘system players,’ like that police officer” A “Judge may modify sentence where prosecutor insists on jury trial; of course the judge could come off the jury sentence. I’ve seen them do this. One case the jury came in with several consecutive sentences, and the judge ran some of them concurrently. That happens.”); AR-J1-U (“If there is some injustice, and the jury’s sentence is way outside of the loop, a judge might change it. . . . but generally the judge follows the jury’s sentence. . . . I had a case where the jury stacked the sentence and had him serving 70 years. I changed it to 28.”); AR-J2-R (“Generally I don’t [modify the jurors’ recommendation of consecutive or concurrent], I leave them alone. Unless I know a lot more about the defendant than they do. I can’t change the sentence up, but if they recommend concurrent I can run them consecutively.”); AR-J5-R (“It is difficult for me to find a basis to substitute my judgment for that of the jury. It would be a very, very rare occurrence. The few times I have done it, the defense attorney did such a poor job that I felt it had contributed to an unjust sentence.”); AR-J3-U (“Very seldom, I’ve done it about 3 or 4 times in 13 years. . . . I never get a pre-sentence report in jury cases. I have never been asked to order a pre-sentence report. Given the fact that I’m not going to disturb a jury verdict, there is no need for one. If I have serious concerns about the verdict, I will delay sentencing for some time. If the sentence seems excessive and the defendant asks for a delay in sentencing, I will do it.”).

153. AR-D7-R; *see also* AR-P5-R (“I’ve never had a judge change a jury sentence. . . . You give the decision to twelve people, it would be kind of foolish to reject what they say.”).

154. AR-D3-U.

155. *E.g.*, *Rodgers v. State*, 71 S.W.3d 579, 580 (Ark. 2002) (reversing sentence of imprisonment for aggravated assault because in denying defendant’s motion for imposition of probation instead of the jury’s verdict of imprisonment, the judge failed to exercise discretion and instead rubber stamped the jury’s verdict, stating, “I have not gone against a jury yet and I don’t think this would be the appropriate time to start.”); *see also* *Rodgers v. State*, 64 S.W.3d 275, 276 (Ark. Ct. App. 2001) (Hart, J., dissenting) (noting that this judge admitted that as a matter of custom he imposed whatever sentence was recommended by the jury).

156. *Lawhon v. State*, 940 S.W. 2d 475, 476 (Ark. 1997) (citing *Acklin v. State*, 606 S.W.2d 594 (Ark. 1980)).

*Defense access to potentially more lenient judicial sentencing after guilty verdict.* As in Virginia and Kentucky, prosecutors in Arkansas are reluctant to allow a defendant to opt for jury trial but waive jury sentencing.<sup>157</sup> One defendant's saga illustrates how dramatic this all-or-nothing choice can be. The defendant, facing a charge of selling cocaine, first sought to contest guilt but avoid jury sentencing by requesting a bench trial. After the prosecution rejected that option, the defendant asked the judge to instruct the jury about the recommended sentence for his offense under the guidelines—four and one-half years, a sentence the judge was obligated by statute to adjust to the mandatory minimum of ten years. The judge denied the request, and the jury gave the defendant sixty years. The court of appeals rejected the defendant's argument that his fundamental right to trial by jury was impermissibly burdened by the prosecutorial power to deny the defendant the option of judicial sentencing after jury trial while denying to the jury information about guidelines ranges.<sup>158</sup>

The barriers erected by Arkansas prosecutors to judicial sentencing after jury trial are not impermeable. Interviewees reported some willingness by prosecutors to allow judicial sentencing after jury trial, particularly in cases in which prior to sentencing the prosecutor has lost confidence in the likelihood of a stiff jury sentence and is willing to settle for a sentence from the judge.<sup>159</sup> Unlike

---

157. See, e.g., AR-P1-U ("We don't bargain sentence after going to the trouble of trying the case. That would be a rare event."); AR-P3-U ("Never. . . . When the jury has heard the evidence and decided the guilt issue we let them determine sentence."); AR-J3-U ("Q: Do attorneys ever try to settle after the guilty verdict but before sentencing? A: That happened once in about 400 to 500 trials."); AR-D3-U ("Waiving jury sentencing is extraordinarily rare. Prosecutors can and do veto this . . . . The real problem is in the cases where I want to go to jury but the jury is more severe than [the] guidelines. I can't tell the jury about the guidelines, and prosecutor vetoes [the] waiver of jury sentencing and fights us telling juries about guidelines. It serves as a penalty on the jury trial right."); AR-D7-R ("Some judges won't allow a plea once a jury is called in. I have never had a guilty verdict and then settled the sentencing phase, I suppose it could be done.")

158. *Pickett v. State*, 902 S.W.2d 208 (Ark. 1995).

159. See, e.g., AR-P2-R ("If the jury is out for a long time, and it's hard for them to reach agreement, or if they come back with a lesser, after a long trial or long deliberation, rather than have a day long sentencing hearing, we may agree to a sentence. . . . Usually we'll just agree to a low sentence, it's worth it to save the trouble."); AR-D5-U ("When they come back with a guilty verdict, every so often we waive jury sentencing and let the judge do it . . . . Last time was a girl convicted of being an accessory to robbery. The jury was likely to give her too harsh a sentence. But the prosecutor didn't want to take the chance of creating error when he could avoid it so we let the judge sentence her. Q: Why would the prosecutor forego jury sentencing? A: Might be a timing thing, not wanting to spend the time, or risk jury recommending probation."); AR-D6-R (One attorney had never waived jury sentencing himself, but noted "other lawyers have. They might agree to a sentence recommendation. . . . The prosecutor may have a reasonable feel for what the case is worth and may be comfortable with that. Or he may be worried about jury sentencing."); AR-J1-U ("Infrequently there will be a sentence agreement. Actually, once the jury

Commonwealth's attorneys in some urban jurisdictions in Kentucky, however, prosecutors in Arkansas reportedly are not so confident in their bargaining power or eager to avoid the burdens of appellate review that they condition the opportunity to obtain lower judicial sentencing upon a defendant's promise to waive the right to appeal.

*Defense access to more lenient sentencing through bench trials.*

In at least some communities in Arkansas, trial judges refuse to conduct bench trials in felony cases, a practice that restricts further the defendant's access to potentially lower judicial sentences.<sup>160</sup> One interviewee reported, for example: "No bench trials in this county. Not with this judge. He was elected about ten years ago. If you want a trial, you use a jury."<sup>161</sup> Some judges admit they discourage bench trials by imposing stiff sentences:

A: Out of 2,000 felonies each year, we have maybe 50 jury trials, 10 bench trials. Not a lot of felony bench trials.

Q: Why?

A: Because I try to discourage them.

Q: How?

A: By handing down sentences that are within the guidelines, but at the upper end.

Q: What's the rationale for discouraging bench trials?

A: To encourage settlement. Right now we have 2000 new felony cases, plus another 500 revocation cases and 250 civil cases. It's a matter of judicial economy.<sup>162</sup>

Even where judges are not as aggressive in discouraging bench trials with their sentencing decisions, Arkansas defenders, like those in Kentucky, may be wary of a trial by an elected judge where the

---

is impeached, I'm still open while a trial is in progress to the possibility that the parties will settle. Sometimes when juries having trouble agreeing it happens."); *see also* *Armer v. State*, 929 S.W.2d 705, 707 (Ark. 1996) (defendant waived jury sentencing with consent of prosecutor and judge in drug case; court noted that although the defendant made no record of the reason for waiving jury sentencing, "the reason may have been that indicated in oral argument, that the trial judge did not ordinarily send first-time drug offenders to prison"); Seth Blomeley, *Ex-officer Gets Probation in Fratricide Family's Letters, Reduced Manslaughter Charge Noted in Judge's Ruling*, ARK. DEMOCRAT GAZETTE, Dec. 21, 1999, at B1 (after jury convicted defendant of lesser offense and victims pleaded for light sentence, prosecutor allowed judge to sentence defendant).

160. Some judges continue to rely on the prosecutor's recommendation even when there is a bench trial so that the prosecutor's recommendation rather than judge's independent judgment is the rule. *See, e.g.*, AR-J4-R ("Q: Do you have bench trials? A: Yes, but usually at the conclusion of the trial, the attorneys will recommend a sentence and point out where it is on the guidelines.").

161. AR-D1-U.

162. AR-J3-U.

chances of acquittal are extremely low.<sup>163</sup> Nevertheless, bench trials are more frequent in Arkansas than in Kentucky. Interviewees reported resource constraints as the explanation. Admitted one prosecutor, “[W]e’ve got some judges who sit only 52 *days* [not weeks] a year. So we can’t try many [cases]. . . . We use [bench trials] to move some of the less serious cases, not the homicides, robberies, rapes.”<sup>164</sup> Even in some urban jurisdictions, bench trials are used to move cases. Reported one defender, “Prosecutors here don’t mind bench trials, they look at it as sort of a slow plea of guilty. Most prosecutors are not that hot to trot to get king size sentences, they weren’t bent out of shape if we wanted a bench trial. May be different with other prosecutors.”<sup>165</sup>

*Defense access to potentially more lenient judicial sentencing through “open” guilty pleas.* Recall that in Virginia the right to plead guilty to the offense charged is protected by the state’s constitution, giving the defendant ready access to lower guidelines sentences when a stiff jury sentence looks likely. In Arkansas, as in Kentucky, the prosecutor has the right to insist on a jury trial even when the defendant would prefer to plead guilty as charged and argue for a lower sentence from a judge.<sup>166</sup> This allows prosecutors in Arkansas,

163. One attorney who reported trying only two bench trials in twenty-one years noted, “Normally, a judge will find guilt and be more lenient at sentencing. . . . A defendant will not receive the benefit of reasonable doubt with 99 percent of judges.” AR-D5-U; *see also* AR-D3-U (“Certain types of cases still go to a jury, identification cases, self-defense cases, always have a better chance of acquittal before a jury regardless of the risk of a higher sentence.”).

164. AR-P2-R; *see also* AR-P1-U (“It’s a physical impossibility to try more jury trials. [We already try] about all we can do. Defense attorneys recognize this, a case will have a ratchet up, say sex offenses, because of the jury, and the defense may ask for a bench trial, we’ll consent to that.”).

165. AR-D3-U; *see also* AR-D4-R (Bench trials “have become more and more frequent here. I think it’s the guidelines, judges here sentence by the guidelines.”); AR-D6-U (“There are cases where the prosecutor won’t agree to a bench trial [but] we can have 5 bench trials in a week. They may be more willing to do this here, I’m sure it raises the bench trial rate.”); AR-J5-R (“Judges like me believe in finding alternatives to the penitentiary. Defense attorneys and prosecutors know what my history and background is and they ask for a bench trial then. They don’t know what’s going to happen, but here’s a person who believes in the need to look at other alternatives for drugs, for example. . . . I do not try many bench trials at the felony level. Quite a few judges do. When we do have a bench trial, the defendant will want the judge to sentence rather than the jury. The prosecutor and the defendant can’t agree, the defendant may have prior offenses. Something that would make sentencing before a jury more risky than sentencing before a judge . . . defendants are generally not looking for acquittal when they choose bench trial. Their client is guilty, or they are certain their client is guilty, and they expect conviction. What they are looking for is the judge’s sentence rather than the jury’s. Q: Do judges after bench trials stick with the guidelines in sentencing? A: Not necessarily. Deviations must be reported . . . . But judges after bench trials should follow them.”).

166. *See* State v. Singleton, 13 S.W.3d 584, 585-86 (Ark. 2000) (prosecutor has veto power to block a plea of guilty); State v. Vasquez-Aerreola, 940 S.W.2d 451, 456-57 (Ark. 1997) (Arnold, J., concurring) (“Under the present Rule 31.1, a prosecutor could demand that a defendant accept the plea bargain offered, or force him to be tried by a jury . . . . [A] better rule would be to allow

as in Kentucky, to effectively shut out judges—and the sentencing guidelines—from the sentencing process. The defendant is left with the choice of either the sentence the prosecution is offering as part of the deal, or the sentence the defendant might receive at a jury trial.<sup>167</sup> The price of any given offense, then, is set by the jury and the prosecutor, rendering judicial sentence norms and the guidelines largely meaningless.

A prosecutor explained, “Occasionally you’ll have a defendant who’ll want to plead open, we won’t let him, and will insist on a jury trial, but in some of these, it’s because the guidelines would be so far off the mark.”<sup>168</sup> An Arkansas appellate judge, reluctantly joining an opinion rejecting a defendant’s objection to this arrangement, complained that state law creates “a dual criminal justice system that provides unfettered discretion to the government to select those criminal defendants who should be exposed to greater punishments and those defendants who should be exposed to lesser punishments,” a process that she predicted “will deprive individuals of personal liberties and can result in a vast difference in the sentence imposed by the jury and the court.”<sup>169</sup> This stranglehold on the price of punishment can be expensive for a prosecutor to maintain. A prosecutor simply cannot veto all open pleas and bench trials and insist on jury trial instead—it is too costly. Instead, this seems to be a correction mechanism that prosecutors resort to selectively.<sup>170</sup>

---

the accused to enter a plea of guilty to the court, while permitting recommendations from the prosecutor regarding [the] sentence.”); *State v. Smittie*, 20 S.W.3d 352, 354 (Ark. 2000) (Thornton, J., concurring) (“By these precedents, we are invalidating the forms prepared by our Administrative Office of the Courts, and distributed for many years to all trial judges, containing the statement that ‘if you are guilty you may plead guilty, and the court will decide your sentence.’ This instruction . . . while flying in the face of our recent decisions, remains a reasonable statement of what the law should be . . . . The prosecutor’s right to veto a waiver of trial by jury under Rule 31.1 should be limited to the penalty phase.”); see also Comment, *Pleading Guilty in Arkansas: A Journey Down the Rabbit’s Hole*, 55 ARK. L. REV. 401, 402 (2002) (“The effect of giving prosecutors this choice is that the prosecution can force a defendant to receive his sentence from a jury.”).

167. See, e.g., AR-P5-R (“Q: [C]ould defendants plead guilty and get a guidelines sentence? A: Not really, the judge will follow our recommendation. We have very few open pleas without a sentence recommendation from the prosecutor.”).

168. AR-P2-R.

169. *Hutcherson v. State*, 47 S.W.3d 267, 273-74 (Ark. Ct. App. 2001) (Hart, J., concurring).

170. See, e.g., AR-P2-R (“We see more unconditional pleas. Defendants think that judges will follow the grids, so they will reject an offer and go for that. . . . While in Little Rock they may have six judges to try cases, fifty-two weeks a year, we’ve got some judges who sit only fifty-two days a year. So we can’t try many of ‘em.”); AR-D3-U (“Prosecutors are making decent offers, they are pretty responsible. The courts are so crowded that they can’t realistically threaten trial.”); AR-D6-R (“When two judges cover six counties, there is about one week every three months set aside for trials. We have a part time prosecutor and part time public defender. It limits the number of trials—prosecutor has to select the six or so cases per year he wants to try.

Even with selective use of their plea veto, however, prosecutors reportedly are able to persuade defendants to accept plea offers with sentences well above the recommended guidelines sentence. In many communities in Arkansas, the guidelines mean very little.

Q: So you still make offers over the guidelines range?

A: Oh sure. The guidelines represent a bare minimum sentence. They were set up to represent what the majority of people in the penitentiary already had—most had pled guilty, and the sentences reflect offers made to move the cases. The grids are not the appropriate sentence, they reflect the need to move cases, the limited number of cases you can actually try.<sup>171</sup>

Said another,

I haven't looked at that book in years. We don't really pay any attention to it. . . you have to mark a reason for departing from the guidelines sentence, but there are sixteen reasons, and then a blank for "other". . . Very seldom does the jury come in for less [than what we've offered], a lot of cases they'll hit right on the same sentence we've offered.<sup>172</sup>

Prosecutors can be confident that judges will not disturb their sentencing recommendations. Judges "typically go along with" recommended sentences after plea agreements.<sup>173</sup>

He can't threaten to take them all to trial. We get really good deals because nobody has the time to push for trial."); AR-D4-R ("A guy gets an offer of twenty-four months (he'll serve three) or go to trial and have to serve eighteen months before his appeal on a good issue is heard. A felony is like a traffic ticket to these guys. But the main thing, of course is the numbers. The number of cases, you can't take every case to jury trial. The court system couldn't do it. You have to pick your strongest cases.").

171. AR-P2-R. Said one defender, the grids are "never mentioned during bargaining. . . I never look at them." AR-D1-U. Another said, "[A]round here [they] are complete baloney. . . meaningless" although "around the state, there were some places where the guidelines did make a difference. . . Occasionally the judge will follow them, and use it as a justification for what he does. . ." AR-D3-U; *see also* AR-D7-R ("Like anything new, the sentencing grid was met by resistance by some. In some instances, prosecutors resisted because they thought the sentences were too light, others liked it because they had been offering less and felt they were now justified in offering higher sentences in negotiated plea situations. Defense attorneys were the same. I, personally, liked the grid because our prosecutor offered more severe sentences as a rule. Others didn't because they could argue for lesser sentences and got those offers in their counties. One of our prosecutors offers the grid routinely. There has to be something serious. . . to deviate; the drug prosecutor seldom goes by the sentencing grid. . . always higher."); AR-J1-U ("Q: How about the guidelines—do you use them? A: For the most part no. My probation officers prepare the PSR—I'll have them do it even after a jury sentence—and they'll use the guidelines but they're not beholden to them, I'm not either.").

172. AR-P5-R.

173. AR-P1-U. One judge noted that he has departed from negotiated pleas "two dozen times in the past 28 years. Most of these, that I reject, they don't come back. The vast majority of them the court accepts. They are mostly first offenders and the sentences are within the guidelines. Kind of traditional to accept those." AR-J5-R; *see also id.* ("99 percent of the settlement negotiations I approve. . . The attorneys will present the agreement to me, and typically I'll approve it. If I don't, it usually ends up in a jury trial. This is my mode of operation. . . Q: So are there any cases where the defendant will simply plead guilty and let you set the sentence

#### 4. Summary of Statistical Analysis

The Arkansas statistics once again mirrored the observations of practitioners. The interviews suggested that jury sentencing as administered in Arkansas is perceived most consistently as a trial penalty in drug cases. Our preliminary analysis of the data indeed showed that, when comparing sentences for narcotics offenses imposed after jury trial with those imposed for the same offense after bench trial, average jury trial sentences were significantly higher than average bench trial sentences, and this effect remained even after regression analysis controlling for factors associated with case seriousness.<sup>174</sup> The sentencing differential between the two types of trials was not significant for several other serious offenses, such as robbery, battery, and rape.

#### 5. The Consequence: Prosecutors Favor Jury Sentencing

Arkansas prosecutors believe that a significant differential between high jury sentences and low judicial sentences is deterring defendants from opting for jury trial. The statistics do not necessarily back up this perception for some nondrug crimes; other reasons, such

---

without the prosecutor making a recommendation? A: Very few. The sentence is part of the agreement. It is rare when there isn't a negotiated plea. But the defendant is told that the sentencing is not set in stone and that the court will impose a sentence. Q: But you generally approve these? A: Right. Q: So very little independent power exercised by judges in sentencing—the sentence is recommended either as a jury verdict or as part of the negotiated plea? A: Right. Q: Except in bench trials? A: Yes.”); AR-J1-U (“Mostly I go along with plea bargains; when I first came in I didn't follow them as much and I think my sentencing was an aberration. I came from a constituency that felt drug sentences were too high, and I felt comfortable deviating from the deals. I was appealed to the Supreme Court a great deal. But we have adjusted, I've adjusted some, the prosecutor has. Some judges, I think, have taken another look at it because of my sentencing, you know we're all in the same district and don't want to give the impression that some judges are unnecessarily harsh.”); AR-D7-R (“If judges start rejecting plea agreements in mass, they are asking for a lot more work, because prosecutors will stop making offers and telling defense attorneys to plead to the court. That will back up dockets considerably because presentence reports might be required for court sentencing.”).

One amusing description was offered by a cynical prosecutor:

Usually if the judge bucks at a recommendation it's a posturing thing, they don't have to move these cases, they don't care, so they'll look out at the people in the courtroom and say, “Well, I'm really reluctant to accept such a lenient plea offer, really this despicable behavior deserves something more serious than this, but the prosecutor tells me it is important to approve this to get him behind bars. When I was a prosecutor I certainly wouldn't agree to something like this . . . blah blah blah.”

AR-P2-R.

174. See King & Noble, *supra* note 6. The average sentence for possession with intent to deliver after bench trial was about one-third the average jury trial sentence; possession of drug paraphernalia bench trial sentences averaged one-half the length of jury trial sentences for the same offense. *Id.*



as the unpredictability of a jury's sentence, may drive defendants away from jury trials. Nevertheless, because many Arkansas prosecutors seem to *believe* jury sentencing is a hammer useful for obtaining guilty pleas, they worry about what would serve as a substitute if jury sentencing was abolished.

Q: Couldn't your grid factor in cooperation—give a sentencing discount for quick admissions, etc. Go to trial, get one sentence, admit guilt, get a sweeter deal?

A: Well the problem with that is that the grids are really based on pleas already. They are already getting the sweetened deal. Now they get it only if willing to plead early. If no jury sentencing, [you'll] get access to the sweet deal no matter what you do. . . . As it is, the jury doesn't get the grid, and it works. You couldn't really do it by changing the grids, can't really put a price on trial.<sup>175</sup>

Said one judge, "prosecuting attorneys are bitterly opposed to [judge sentencing] . . . I think they feel like they can get more out of a jury. When we tried to change to judge sentencing, our Chief Justice was afraid the whole judicial article would fail because of opposition to it, so we dropped it."<sup>176</sup>

### III. JURY SENTENCING AND TRIAL JUDGES

The foregoing discussion focused on prosecutors and the basis of their support for jury sentencing in each of the three states. This next section examines *judicial* perceptions of jury sentencing. Based on the interviews, judicial allegiance to jury sentencing can be summed up with three words: deference, dodge, and docket. Together, these concerns help to explain why judges in Kentucky and Arkansas so seldom modify jury sentences, why judges in the same two states seem to shun bench trials or open pleas that would require them to exercise their own sentencing discretion rather than approve the sentencing choices of either the jury or the prosecutor, and why most of the judges interviewed in all three states oppose the abolition of jury sentencing.

---

175. AR-P2-R; *see also* AR-P1-U (When asked if he'd heard of any efforts to modify jury sentencing in Arkansas, this prosecutor replied, "No, if they did I'd probably go in with a good horror story of child molestation or murder, they'd listen. I'm talking about the victims of crime now. Victim impact helps some, but the system still fails them, the victims, more than anybody else."); AR-P5-R ("No one wants to face your peers. That's why most of them plead guilty. They don't want to face that jury sentence. If we went to a straight judge sentencing system there'd be more trials.").

176. AR-J4-R.

### A. Deference

Judges in Kentucky and Arkansas overwhelmingly considered the jury a superior assessor of the appropriate punishment due individual offenders.<sup>177</sup> Even in Virginia, where judicial support for jury sentencing is less pervasive, judges recognized the norm-setting value of jury sentencing. Said one judge,

[T]he more important reason to support jury sentencing is its leveling effect on judges. The perception of the prosecutor is that the judges are too lenient, and most people probably think judges are more lenient, but not always. The jury keeps them in line. And it can work both ways. Let's say you have a judge who is really severe, a defendant would opt for the jury in that situation. Would have a leveling effect. What supporters would say is that judges can get too far out of line and jurors can send them a message.<sup>178</sup>

### B. Dodge

But there is much more at work here than respect for the jury as decision maker, however sincere. Judges have a vested interest in jury sentencing: the jury takes the heat for sentencing so the judge does not have to. Should a judge dare to reduce a jury's sentence, his decision becomes fodder for editorial comment or even criticism by the (also elected) prosecutor. "I'm very disappointed that the jury's sentence, the sentence decided by the citizens . . . was not followed" by the judge, a Little Rock prosecutor was quoted as stating, in an article entitled, "Judge Cuts 7 Years Off Jury's Sentence in LR Man's Trial."<sup>179</sup> Judges facing election generally don't welcome this sort of attention.

---

177. See, e.g., AR-J2-R ("The jury knows everything about the defendant that I know. They find out his criminal record, they hear the victim impact evidence, they hear the evidence of the crime during trial just like I have. I go along with their collective judgment."); AR-J1-U ("Generally the judge follows the jury's sentence. They are the citizens speaking for the conscience of the community."); AR-J3-U ("Juries do a good job with most of these cases in this circuit. It is important to defer to the jury of twelve citizens in that a jury's sentencing verdict will usually reflect appropriate punishment within the community for certain criminal conduct."); KY-J4-U ("The downside of jury sentencing is that it is more cumbersome. It would be easier, more efficient to let the courts just do it. But I sort of like the idea of the jury hearing more information and then recommending a sentence within the legislatively prescribed range. Juries have a pretty good sense of what is fair. . . . It seems to work well for us."); AR-J5-R ("Sentencing is literally power over liberty. The people should have that power. I believe that the choice of submitting the sentencing decision to the people should belong to the defendant, and to the prosecution. Otherwise it concentrates too much power in the hands of the government.").

178. VA-J2-R.

179. Traci Shurley, *Judge Cuts 7 Years off Jury's Sentence in LR Man's Trial—Drug Offender Eligible for Boot Camp*, ARK. DEMOCRAT GAZETTE, Dec 8, 2001, at B2. On the high electoral salience of crime, see Sara Sun Beale, *Selling Fear: The News Media's Coverage of Crime and Why it Matters* (unpublished manuscript, on file with author).

As Justice Scalia recently noted, “elected judges . . . always face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench.”<sup>180</sup> The judges themselves reported that this affects other judges:

Judges probably don't reduce jury sentences because they are afraid of the interpretation by the public that they are soft. This shouldn't be a concern, but with elections it is. Politics plays a role in sentencing decisions inevitably, in the sense that sentencing is supposed to deter others from committing crime, and judges pay attention to that . . . there are times when I think we'd get more cases resolved with judges sentencing, other times that I appreciate jury sentencing, it is easier to explain a sentence by saying that was what the community thinks this case is worth.<sup>181</sup>

---

180. Republican Party of Minn. v. White, 536 U.S. 765, 782 (2002); see also *id.* at 789 (O'Connor, J., concurring) (“Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.” (citing 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. 759, 793-94 (1995)); Mark A. Behrens & Casy Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 Cornell J. L. & Pub. Pol'y 273, 283 (2002) (1998 study sponsored by Texas Supreme Court found that 83 percent of Texas adults, 69 percent of court personnel, and 79 percent of attorneys believed that campaign contributions influenced judicial decisions “very significantly” or “fairly significantly.” Even 48 percent of Texas judges confessed that they believed money had an impact on judicial decisions.); Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017 (concluding that because judges cannot decide capital cases in a consistent manner without fear of public persecution, politics play a role in judicial decisions to override a jury's decision to spare a defendant's life); ALFRED P. CARLTON, JR., AM. BAR ASS'N, *JUSTICE IN JEOPARDY: REPORT OF THE ABA COMMISSION ON THE 21ST CENTURY JUDICIARY* 25-26 (2003) (collecting anecdotal reports of attacks during judicial races on judges for being soft on crime); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 Am. J. Pol. Sci. 247 (2004). *But cf.* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999) (reviewing anecdotal evidence of the influence of partisan elections on the decisions of appellate judges asked to review death sentences, but finding no statistically significant relationship between the method of judicial selection and the rate at which an appellate court reverses sentences of death).

181. KY-J6-U; see also AR-J1-U (stating that elections “could make a difference to some judges in deciding whether to alter sentences. We're elected from different constituencies. To probate or suspend a sentence is probably more acceptable to my particular constituency than it might be to the voters in other districts. In other districts, where voters are not dissatisfied with steep sentences, judges may be more sensitive to that.”); AR-J5-R (“Q: Those cases in which judges do change jurors' sentences, how do the jurors react? How does the public react? A: The jurors do learn about it. It depends upon how the press treats it. Most jurors understand that when a judge adjusts a sentence, that change is based upon some information the judge has that they were not allowed to learn. But if the media picks up on it and does what they usually do, make it controversial, it can leave the impression that the judge acted without a good reason. Leaves the public unsettled about it. Q: Has this happened to you? A: Yes, it has. Q: How do you counteract this? A: You can't. It is a matter of long-term politics. If those things end up on the front page just before elections it can be devastating, and judges will try to act accordingly. Q: You mean judges will be less likely to adjust sentences right before elections? A: That's right. But there aren't many sentences adjusted. Very seldom will it occur.”); *id.* (“[Judges] do act different about sentencing close to elections and in high-profile cases.”); VA-P4-R (“I think that they like jury sentencing because they are not responsible then for the decision that's made in the case.”).

Said another, “[A] lot of judges like jury sentencing. They don’t want to be bothered with it, takes the heat off of ‘em.”<sup>182</sup>

In Virginia, where judges are selected and reappointed by the legislature and need not undergo popular elections, avoiding the exposure that sentencing brings seemed<sup>1</sup> to be much less of a concern for trial judges. Indeed, the political incentives in Virginia appeared to be aligned in favor of encouraging judges to impose lower sentences *within the guidelines*, rather than to demonstrate a “tough on crime” attitude for public consumption.<sup>183</sup> Nevertheless, responses suggested that judges have concluded that deferring to the jury’s sentence is useful for maintaining a positive reputation in the community.<sup>184</sup>

182. AR-J4-R; *see also* AR-J3-U (“The press and people like to pick on lenient liberal judges when they come in below jury sentences. Q: Ever happen to you? A: Not really, but then I live in a progressive part of the state. I’m not saying the rest of the state is not progressive, but it may be more a problem elsewhere.”); AR-J2-R (“I wouldn’t be adverse to [judicial sentencing], but I’m not a big proponent of it. A lot of judges would probably resist it because it’s gonna turn up the heat on ‘em, especially in the smaller communities . . . out here in the hinterlands of Arkansas, people tend to get bent out of shape at the juries—if judges were doing the sentencing, then they’d really hear about it. Q: What kinds of things do people get bent out of shape about at juries? A: In child molestation, rape cases, they don’t like what the jury does. Q: They complain about the sentence? Too low or too high? A: Too low, can’t get too high for these folks in those cases.”); AR-J5-R (“I always try bench trials, when requested. I don’t turn them down. Q: Are some judges afraid of them? A: Yes, because they can be very controversial cases with emotions running high on both sides. Controversial for the defendant and the defendant’s family; controversial for the victim and the victim’s family. So as a political consideration some judges will not take bench trial, if they decide they don’t want to take the heat.”); AR-J1-U (“On some matters I don’t want to do the sentencing and I’m glad they do. Q: Why? A: I’m not sure, I have mixed emotions about some cases, I’m glad to have twelve members of the community, twelve people who bring that community sense. I can live with what they do.”); KY-J4-U (“I like juries. I’m surprised we’re in the minority, on this, that more states don’t use jury sentencing. Maybe it’s because this is the only way I’ve ever done it. They make all the hard decisions, and I can call the balls and strikes.”). Attorneys see this as well. *See, e.g.*, AR-D5-U (“Sometimes judges deviate. . . . Once a jury recommended prison sentence for a police officer and the judge changed it to probation, there was a public outcry. Q: Why not more often? A: The judge is not going to alienate voters. . . .”); AR-D4-R (“Let’s be honest, we have elected judges and they don’t want that publicity—‘Jury said 10 years, but the judge says only 5.’”).

183. *See supra* notes 105-106.

184. *E.g.*, VA-J3-U (“Judges are reluctant to modify that sentence. I only did it once that I can remember, less than five times in all my years on the bench. Why didn’t I modify more often? Because they are the conscience of the community. Q: What would happen if you did [modify]? A: There’d be outcry. Q: But you aren’t elected. A: We are elected by the legislature for eight-year terms. Anybody can contest your election; can appear before the legislature and testify against you. Happens sometimes. Not modifying is a local legal culture.”); VA-J1-U (“Q: How often do you change jury sentences? A: Doesn’t happen that often. Some judges are reluctant to do it because they would get bad publicity, and because that was not the way it was done for years. This is a fairly new thing. Q: What kind of bad publicity, being soft on crime? A: Yes. . . . [Take] a case involving just a little bit of cocaine, and somebody had asked the defendant where he could get some and he had only referred that person to somebody else, it’s usually not just to give the guy twelve years for that. I have to take it down to 7-12 months to be within the guidelines, and that’s tough to do. The same case in some of those other states that have jury sentences where the judges are elected, it would be even tougher. I would hate jury sentencing if I was elected by

Indeed, at least one judge from a non-jury sentencing state recently suggested that, "jury sentencing would provide for judges a welcome respite from a morally uncomfortable chore."<sup>185</sup>

### C. Docket

Judges, like prosecutors, share the view that jury sentencing helps to move cases. Said one judge from Kentucky:

Judges have the attitude, "Fine, if you want a trial, you are stuck with the jury's sentence and you won't be eligible for squat." It's a judicial management thing, to encourage plea bargaining . . . Although in some places they can try eight cases at a time, here in the real world judges travel between counties and from a management standpoint it makes sense.<sup>186</sup>

Comments from Virginia interviewees also suggested that opposition to the abolition of jury sentencing in recent years came not only from prosecutors, but also from trial judges themselves. Trial judges have expressed concern that without the prospect of more severe sentences by juries, plea rates would go down and the jury trial rates would become overwhelming.<sup>187</sup> Explained one defender, in his circuit, trial judges have never modified a jury sentence, "Because they don't want to encourage us to have jury trials, they don't want us to think that if it goes wrong it will be fixed."<sup>188</sup>

In Kentucky, judges also admitted that the appeal waivers that urban prosecutors secure in exchange for a defendant's agreement to forego jury sentencing are quite valuable, as well. Explaining why judges routinely accept such deals, one judge stated, "although the

---

popular election. It would be really tough. . . ."); VA-P3-R ( "[T]here are some cases where I'm sure that they are happy to pass it off to the juries. We had a judge who insisted on a jury trial for every sex abuse case. He didn't want to make the call on credibility and he didn't want to weigh all the factors in sentencing."); see also VA-P5-R ("Locally, [judges] think jury sentencing is a good thing. It gives them a comfort level. Say you have a case that turns you every which way but loose, for instance, a guy with a perfect record catches his wife with another man, or misunderstands something and kills somebody. The victim's family is terrifically upset. The media's all over it. Leaders of the community are talking about it. It is nice to be able to say, 'Let's let twelve men and women decide what to do.' . . . Juries tend to get it right.").

185. Hoffman, *supra* note 3, at 994-95.

186. KY-JI-R.

187. VA-J2-R ("A: The net result of all this is that there are very, very few jury trials. Q: How do judges react to that? A: Well, it's a pretty efficient method. I don't know what would happen if jury sentencing was eliminated. The fear is that everybody would ask for a jury trial since there would be nothing to lose. That is the practical reason . . ."); see also Wright & Miller, *supra* note 40, at 40 (collecting sources, and stating that because of caseload pressures, "sentencing judges tend to validate and encourage bargains through a 'plea discount' (or a trial penalty): They impose lighter sentences on those who waive their right to trial"). On the motives of judges in case disposition, see also Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1099-1103 (1976).

188. VA-D7-U.

sentencing phase is relatively short, the benefit of no future post judgment appeals is very attractive.”<sup>189</sup>

*D. The Result: Judicial Acceptance of Jury as Sentencer*

In brief, judges reportedly defer to jurors’ assessments of punishment because they believe that trust in the verdict by both public and victim is enhanced if the jury’s verdict remains unchanged, because they fear the public’s reaction if they disturb jury sentences, and because they consider jury sentences to be effective deterrents to jury trial and would prefer that defendants plead guilty or select a bench trial rather than insist on a jury trial. Judges are not rallying to take over sentencing authority in these states. Only one of the Kentucky judges interviewed would favor a change to judge sentencing.<sup>190</sup> A survey of judges present at the Kentucky Supreme Court’s Jury Summit in June, 2002, administered by the Kentucky Supreme Court’s Jury Task Force, indicated that judges were generally not in favor of shifting from jury sentencing to judge sentencing.<sup>191</sup> In Arkansas, where judges are more accustomed to sentencing after open pleas and bench trials than they are in Kentucky, one judge spoke favorably of abolishing jury sentencing because of its “inconsistency,”<sup>192</sup> while the rest interviewed praised

---

189. KY-J6-U. Consider also the comments of the trial judge in *Runyon v. Commonwealth*, 29 Va. App. 573 (1999), rejecting the defendant’s request to reduce the jury’s sentence in a drug case to probation (the recommended sentence under the guidelines), stating “Counsel are aware this Court did not try the defendant. She put her faith in the hands of a jury of her peers . . . . If the defendant rushed the sentencing Court . . . . Then perhaps she should have put her faith in the hands of the Court.”

190. KY-J1-R (“It’s not very efficient, it is not an efficient use of our time if we have the authority to undermine what they do. I would do judicial sentencing, with the minimum and maximum statutory range and all of the information from the presentence report. I would certainly recommend it if we had a corrections program other than a penitentiary with no education, if we had meaningful drug treatment, sex offender treatment—judicial sentencing would be mandated by the notion of [rehabilitation]. Q: Why couldn’t a jury do that? A: They wouldn’t.”)

191. Survey results provided by G. Thomas Munsterman; available from author.

192. AR-J3-U (“I’m not a fan of jury sentencing. . . . It’s inconsistent. Here the sentences are all within reason. We don’t have so-called runaway jury verdicts here, but there’s an inconsistency and it affects predictability. Judges are better suited to impose consistent sentences. . . . If you changed [to judge sentencing] there would sure to be some complaints because we’ve done it this way since the earth cooled. I’m sure you’d have some complaints when the court imposed a sentence different than what the jurors would have thought appropriate. . . . [Years ago on a state commission] I was a lone voice in a group of about 20 other people. Only one other judge there agreed with me about abolishing jury sentencing. I brought it up and it was voted down every time. . . . The majority position was that jury sentencing had worked well over the years. Law enforcement and the legislators were opposed to it as well. They argued the people wouldn’t like it. . . . I never got a logical or rational explanation for this. Most every other state and the federal system use judge sentencing and it’s worked pretty well everywhere else.”)

it.<sup>193</sup> The most ambivalence about jury sentencing was reported by judges from Virginia. Several Virginia judges considered the sentencing differential between jury trial sentences and guidelines sentences to be unfair.<sup>194</sup> The sampling of judicial opinion here is tiny, but one pattern is predictable: the more directly judges perceive their careers to depend upon popular opinion, the greater their apprehension about taking on more responsibility for sentencing.

#### IV. JURY SENTENCING AND DEFENDERS

As one might expect, many defenders in all three states despised jury sentencing because of its effect on the right to jury trial. "I prefer judge sentencing in noncapital cases," said a Kentucky defender. "We hope the judge would have experience in dealing with defendant after defendant to know more about the human element than juries. Definitely want juries in guilt phase, they are more likely to acquit, but get punitive in sentencing."<sup>195</sup> Defense attorneys in Arkansas, reported a defender from that state, "are maybe 50 percent for 50 percent against [switching to judge sentencing]. Depends on the judge. Say if they knew and trusted their judge, probably for it."<sup>196</sup> A Virginia defender summed up the attitude of the defense bar concerning jury sentencing this way: "[C]lients ought not to have their right to a jury trial chilled by the prospect of getting hammered by a jury sentence."<sup>197</sup>

---

Why don't we give it a try? A judge will know more about the defendant and about sentencing and have more expertise. I've struggled with this for years. I still don't know what an appropriate sentence is. You look at Germany and a defendant charged with attempted murder of a tennis player gets four years over there; we send drug offenders away for much longer terms. At least with our grids we can have some predictability and consistency.").

193. See *supra* notes 177, 182 (quoting judges from Arkansas).

194. See, e.g., VA-J1-U ("Q: Do judges like jury sentencing? Do they prefer it over judge sentencing? A: No, because sometimes the sentences are unjust. Q: Can you give me some examples? A: A multiple charge, multiple conviction case where the jury comes in much lower than the guidelines. Or to the contrary, a case involving just a little bit of cocaine, and somebody had asked the defendant where he could get some and he had only referred that person to somebody else, it's usually not just to give the guy 12 years for that. I have to take it down to 7-12 months to be within the guidelines, and that's tough to do."); VA-J2-R ("Probably the official position is that there ought to be judge sentencing, not jury sentencing. But I think individual judges don't feel strongly about it . . . I would guess that the official position of [the Judicial Council] would be to abolish jury sentencing and have judge sentencing. But it is a soft position, not a very firm one. I have myself sort of mixed feelings on it. If I had to vote on it today I'd vote to abolish it."); VA-J4-U ("Most judges would prefer not to have the jury sentence. Q: Why? A: Judges would have more information about the defendant and the occurrence from a presentence report. The sentencing by the court would be more objective.").

195. KY-D5-U.

196. AR-J4-R.

197. VA-D5-R. Another explained,

Nevertheless, there was considerable support for jury sentencing from the defense bar in each of the three states, particularly in Kentucky and Arkansas. Three reasons stood out. First, some defenders in Kentucky and Arkansas seemed convinced that the alternative to jury sentencing—sentencing by elected judges—would be even worse for defendants. Defenders in these states conditioned their support for judicial sentencing upon changing the method of judicial selection. “I’ve had too many terrible judges to want judge sentencing. Theoretically, it would work, with limited structure, such as non-mandatory guidelines, so long as it was calibrated to prison resources and the judges weren’t elected.”<sup>198</sup>

Second, defenders in Kentucky and Arkansas also reported that jury sentencing can work to the defendant’s advantage if the jurors learn during the guilt phase of the prospect of a stiff minimum sentence and decide to acquit as a result. In other words, the juror’s knowledge of the sentence may give defendants a chance at jury nullification in some cases.<sup>199</sup> In Kentucky, during voir dire before the

---

A: We ought to go to the federal system of jury assessing guilt and innocence and the judge setting the sentence. Not the federal system of mandatory guidelines, but the judge setting the sentence. That would be better than what we have now. . . .

Q: If the guidelines controlled, what would be the incentive not to opt for a jury trial every time?

A: That’s just it, there would be none anymore, and everybody would want jury trial, which is probably why it won’t happen. . . . If we did get rid of jury sentencing maybe we’d have the free choice of the jury, which is what we should have. I think the legislature would have to come up with something to counteract that if it was to happen.

VA-D1-R.

198. KY-D4-R; *see also* KY-P5-R (“I don’t think [defense attorneys would] like [judicial sentencing] either. For a different set of reasons. More than 50 percent of the judges are former prosecutors. Defense attorneys are afraid of that, they look at the potential political pressure having the other result, with judges being harsher. Take this case I mentioned earlier, where the judge probated a child abuser. There were eighty letters to the editor about that case, puts some pressure on them.”); KY-D1-U (“I’d keep jury sentencing, it is better than the alternative. . . . It is much fairer to go before jury; better than guidelines (those are an abomination)—you can still get some sympathy from the jury.”); KY-D4-R (“In the early 1990s there was a strong push by a fairly broad group. Real effort to go to judge sentencing. . . . Both prosecutors and defense attorneys opposed. Q: Why did defense attorneys oppose? A: Because they didn’t trust elected judges to be good sentencers. Judges can get cynical, juries can look at someone like a human being, they are seeing him for the first time. But it can be potentially disastrous too. Because juries can get really outraged.”); AR-D3-U (“Q: Would you do away with jury sentencing if you had the choice? A: Yes, if we could get rid of judicial elections, too.”).

199. Some recent research argues that accurate information about penalties could improve the quality of jury decisions, even in cases in which jurors do not sentence, because jurors may sometimes decide to acquit due to misapprehensions about sentence, or convict on the false assumption of light sentence. In a recent article, Professors Diamond and Stoffelmayr reviewed the literature examining whether the jury’s knowledge of the punishment, or knowledge that it will be setting the punishment, affects the decision to convict or acquit or the length of a sentence choice. The literature supports, although not uniformly, the “notion that juror decision



guilt phase, jurors may be asked about their attitudes toward the penalties authorized for the charged offenses, in order to insure that each juror would consider any authorized penalty.<sup>200</sup> Counsel may not, however, urge the jury during the guilt phase to nullify and acquit because the penalty is too severe.<sup>201</sup> In Arkansas, too, the jury may learn during voir dire of the sentencing consequences of their decisions.<sup>202</sup> Said one judge,

There could be situations . . . where the sentence is high and causes the jury to consider delivering a not guilty verdict in order to go below the minimum range. In a rape case, for instance, where the range is ten to forty years in Arkansas, if the case impresses the jury as one where they'd hate to see a minimum of ten years, and at this point they are not told anything about parole—this occasionally happens.<sup>203</sup>

Defenders in Arkansas also expressed a fondness for jury sentencing as a source of leniency for defendants.<sup>204</sup> Even in Virginia, one defender reported that juries in some cases impose sentences that are more lenient than the guidelines recommendations.<sup>205</sup>

making is influenced by crime and penalty severity." See Elisabeth Stoffelmayr & Shari Diamond, *The Conflict Between Precision and Flexibility in Explaining "Beyond a Reasonable Doubt,"* 6 PSYCHOL. PUB. POL'Y & L. 769, 780 (2000). A 1994 study had concluded that verdicts did not vary as a function of crime or penalty severity, while another study from 1986 found that knowledge of severe penalties led to fewer convictions only when the evidence was weakest and that mock jurors who controlled sentences assigned more severe, not more lenient, punishments than those who merely recommended punishments to a controlling authority. Jonathan L. Freedman et al., *Severity of Penalty, Seriousness of the Charge, and Mock Jurors' Verdicts*, 18 LAW & HUM. BEHAV. 189, 199 (1994); Martin F. Kaplan & Sharon Krupa, *Severe Penalties Under the Control of Others Can Reduce Guilt Verdicts*, 10 LAW & PSYCHOL. REV. 1, 14 (1986).

200. *Lawson v. Commonwealth*, 53 S.W.3d 534, 544 (Ky. 2001) (voir dire questioner should "define the penalty range in terms of the possible minimum and maximum sentences for each class of offense—i.e., . . . a term of imprisonment of one (1) to five (5) years for a Class D felony.").

201. *Medley v. Commonwealth*, 704 S.W.2d 190, 191 (Ky. 1985). For a boilerplate motion to "Prohibit Encouraging Jury Nullification" by the defense, see ABRAMSON, *supra* note 53, § 29.26, at 298.

202. One interviewee in Arkansas, however, reported that jurors did not always receive information about the sentence range or minimum before their deliberations on guilt. AR-D4-R ("Q: Do jurors learn about penalty during voir dire? A: "Maybe you could [ask about it] in [a] noncapital case but I never did, they don't learn.").

203. AR-J5-R. "The defense counsel can ask about the penalty at voir dire, and if the juror were to say, 'No I can't consider that sentence' then that juror would be excused with a challenge for cause." *Id.*; see also *Armer v. State*, 929 S.W.2d 705, 707 (Ark. 1996) (upholding trial judge's decision to allow either side to inquire about the penalty range, but not to allow defendant to ask questions such as, "Should drug addicts be treated differently than drug dealers?").

204. See, e.g., AR-D5-U ("Jury sentencing is a better deal for defendants. And prosecutors, too, they can get a more harsh verdict. When it's light it is light and when it's hard it's hard."); AR-D4-R ("I like it the way it is—jury sentencing is fine, they get the information they need."); AR-D6-R ("On balance I would keep [jury sentencing]. . . I feel good about taking cases to trial and get better sentences from the jury than the prosecutor has offered as a plea bargain. Except drug cases. Otherwise I get better sentences from juries than the plea offers.").

205. VA-D2-U ("I love jury sentencing because I find it is easier to work with, and I can have more impact on the jury. The jury is more honest, and less influenced than judges, when they are

Finally, like judges, defense attorneys may actually appreciate the leverage jury sentencing provides in settlement negotiations.<sup>206</sup> No defender admitted this personally, though one Virginia defender stated:

The sad truth is, many members of the defense bar—an overwhelming majority of criminal defense attorneys—do not like jury trials. They are time consuming, they are expensive, and they're scary . . . most attorneys want to avoid trials. I've had peers call me and ask me to talk their clients into pleading guilty. Now I tell you this, getting back to the guidelines, because the guidelines give them a way to get out of having to go to jury trial. They tell their clients you'll do better under the guidelines.<sup>207</sup>

## V. LESSONS FOR SENTENCING REFORMERS

In state criminal justice systems driven by politics and budgets, jury sentencing is not simply a privilege for the accused. Its role is much more complex. This “right” of those convicted of crime serves as a tool, adapted by legislators, judges, and attorneys, to provide incentives to avoid trial, to protect elected judges from controversial sentencing decisions, and to appease constituents who support ever higher sentences for crime but don't trust the judiciary to impose them. Because attorneys, judges, and legislators in each of these states apparently have come to rely on jury sentencing to advance these interests, modification of jury sentencing policy, either to substitute judge sentencing or to increase jury power, would face several challenges. Before accepting a modified system, prosecutors, for example, would demand equivalent bargaining leverage, elected

---

properly prepared. I trust the jury. The guidelines were written the way they were to discourage jury trials. . . . I always demand a jury. Not all defense attorneys would agree with me. They don't go to trial as much as I do. Q: Why not? A: Because they're punks. They don't have enough confidence. . . . I still run across some prosecutors who will say, 'If you don't take this deal, I'll take this to the jury.' And I give them my standard response, 'Oooh, I'll have to sleep with my night light on I'm so scared.' I love the jury—I'm not intimidated by it. So many defense attorneys do not do an adequate voir dire; some, to this day, never even ask one question. Not one question. That's so incredibly stupid. Lazy people don't go to jury trial.”)

206. See *supra* note 120. See generally Alschuler, *supra* note 10, at 1254-55; Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 210 n.9 (1999) (stating that based on his experience as a prosecutor, “judges and prosecutors placed a constant and systematic pressure on defense attorneys to make their clients plead guilty [which] led defense attorneys to frame plea offers in ways that made the offers look better than they were—good enough to overcome loss aversion and culminate in pleas”); *id.* at 239-43, 247 (collecting authority discussing the defense attorney's incentives to agree to avoid trial); Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT. L. REV. 583, 586 (1995) (“Given their huge caseloads and the economic pressures for quick turnover, appointed counsel face tremendous disincentives for thorough investigation and extensive pretrial litigation; they often survive only by pleading a huge portion of their clientele guilty as quickly as possible.”); Schulhofer, *supra* note 120, at 1989-90 (defenders tend to “develop a strong priority for moving their caseloads”).

207. VA-D2-U.

judges would demand equivalent political cover, and legislators would demand equivalent electoral appeal.

*A. Barriers to the Substitution of Judge Sentencing for Jury Sentencing*

Turning first to proposals to abandon jury sentencing in favor of judge sentencing, bargaining leverage is the first, but not the highest, hurdle. Trial rates need not explode should judges take over sentencing. In jurisdictions that use judge sentencing, incentives to waive jury trials other than punishment differences, such as resource constraints, manage to keep the jury trial rate below 10 percent.<sup>208</sup> Preserving a trial penalty, even within a guidelines system, is business as usual in judge-sentencing jurisdictions,<sup>209</sup> although the existing guidelines in Arkansas and Virginia may require expensive retooling to accommodate a systematic plea discount.

The more intractable difficulty facing jury-sentencing abolitionists is replicating the other unique functions of jury sentencing—protecting judges from the public and protecting the public from judges. Sentencing by jury and the selection of judges by popular election have a symbiotic relationship in Kentucky and Arkansas. Jury sentencing is appreciated by the public, legislators, and attorneys who do not trust judges to sentence fairly; judges who are elected appreciate jury sentencing because it allows them to avoid responsibility for sentencing. As one Kentucky judge summed up the public's attitude about jury sentencing: "The dirtier the judge, the better the people like it."<sup>210</sup> Consider this from a Kentucky prosecutor:

---

208. Consider this comment from a Virginia defender, for example, when asked if he thought there would be more trials if the state switched to judge sentencing: "I don't know. . . . We can only have one jury trial a day. When you start setting 8 jury trials for one day, there is pressure on the judge and the prosecutor to try and resolve some of these cases, because of the docket." VA-D5-R; see also Stephen Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

209. For the latest information on average sentences from a national sample for a number of major crime types, comparing sentences after guilty plea, bench trial, and jury trial, see MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2000: STATISTICAL TABLES, (NCJ 198822) (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/sc0002st.pdf>.

210. The full quote reads:

Q: Has anyone ever tried to change jury sentencing, substitute judge sentencing?

A: About 6-8 years ago some really tried. The legislature said "You can forget that in Kentucky. The boys and girls who pay the taxes will be the ones who make the decisions."

Q: What do you mean?

A: [The sponsor of the bill for judicial sentencing] kept saying it would generate more uniformity in sentencing. Well that wasn't true either. We have Circuit judges here, one who would have probated Charles Manson, another who would hang Mother Theresa. We've got some total knot-heads on a lot of things. There wouldn't be uniformity. Why I am opposed to judicial sentencing? Our system is one of elected judges. They have very low experience requirements. Sometimes we get a great judge, mostly we get mediocre judges, sometimes we get absolute lunatics, people who somehow become popular, from name recognition mostly [describes judge]. . . . So you can walk into a courtroom with that kind of nightmare. They have no idea, no balance. So his [referring to sponsor of judicial sentencing bill] whole reason to have judicial sentencing was false. And even good judges tend to get calloused to what they've seen. Anybody who is in the system for a long time starts comparing the case in front of them to the worst they've ever seen and the sentences keep getting a little lighter. There ought to be a reasonable punishment for any offense, but judges will get calloused, start easing up. Judges are, they are elected. A judge is influenced by that defense attorney standing in front of him—he knows that attorney is one of the primary contributors to his campaign.

Q: But couldn't you have the same kind of influence?

A: I could. But my assistants, they don't, they're poorly paid, they aren't big contributors to judicial races. We have a couple judges here that ought to be wearing sponsor patches on their robes. Close calls tend to go to the defense attorney who contributes.<sup>211</sup>

A: Well, you may understand this because you've had some of the same there in Tennessee, but we've got some really boneheaded judges here. In certain communities the dirtier the judge, the better the people like it [jury sentencing].

Q: Why?

A: With jury sentencing they're better able to check judicial corruption, and prosecutorial corruption too.

KY-J1-R.

211. KY-P2-U; *see also* Republican Party of Minn. v. White, 536 U.S. 765, 790-92 (2002) (O'Connor, J., concurring) (“[R]elying on campaign donations may leave judges feeling indebted to certain parties or interest groups . . . the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public’s confidence in the judiciary” and collecting empirical evidence supporting distrust of judiciary on this basis); KY-J6-U (“Both prosecutors and defense attorneys would object,” to judge sentencing. “They both think [jury sentencing] has pluses. Prosecutors will opt for jury when they fear the judge would favor the defense attorney . . . [less than 1/4 of our felony court bench] are former prosecutors . . . the balance have no prosecutorial experience.”).

A Kentucky defender had this to say about efforts to limit jury sentencing:

I know it would be so difficult. Especially with legislators from rural areas.

Q: Why?

A: Because 1) they would be opposed to tying it to resources, they'd want the maximum amount of time for these offenders and wouldn't want to compromise that. But 2) there is a tremendous populist streak in Kentucky. A move to do away with jury sentencing and give it to judges would be perceived as concentrating power—this is a populist issue. That's why it's not a liberal or conservative thing, all of those who are elected are sensitive to it.

KY-D4-R. Arkansas interviewees, too, reported that opposition to judicial sentencing would be strong. AR-J5-R (“Q: How do you think the people of Arkansas would react if the legislature was to abandon jury sentencing in favor of judge sentencing? A: The folks in Arkansas generally would be upset about it. . . . I think there is some distrust of government, in general. People are

A shift from jury to judge sentencing in Kentucky and Arkansas may not require a simultaneous shift from elected to appointed judiciary; for example, Tennessee in the early 1980s managed to move from jury sentencing to judge sentencing within the context of a system with elected trial judges.<sup>212</sup> But reforming the process of judicial selection might address one of the major reasons jury sentencing seems to be so persistently protected in these two states.<sup>213</sup>

In Virginia, where judges are reappointed by the legislature, a switch to judicial sentencing would not face this barrier. Nevertheless, a political objection to stripping all sentencing power from juries remains. The state continues to take pride in being the Jeffersonian home of democracy; jury sentencing there is a symbolic token of that republican spirit. Said a Virginia judge, "there was a Commission on the Future of the Judiciary about 15 years ago, abolishing jury sentencing was one thing that commission came up with. But the legislature says, 'The People should have a voice, we should keep jury sentencing.'" <sup>214</sup> Said another judge, "No legislator wants to undertake this issue. It would be perceived as anti-democratic, with a small 'd.' Nobody wants to be accused of taking the people out of the criminal justice system."<sup>215</sup> Perhaps if Virginia voters understood the weakness of juries, as compared to the Sentencing Commission, in setting actual sentencing policy, they might be less concerned about the prospect of abandoning jury sentencing.

---

simply more satisfied if a decision is made by twelve jurors. They have more confidence; they think there's some good reason for the decision. This attitude is not specifically related to the judiciary in particular, but to government in general. People are less suspicious, and confident the outcome is based on fact.").

212. See generally 11 DAVID RAYBIN, TENNESSEE PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 32.2, at 177-78 (1985).

213. As Justice O'Connor recently concluded, "If [a] State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges." *Republican Party of Minn.*, 536 U.S. at 792 (O'Connor, J., concurring); see also CARLTON, *supra* note 180, at 31-34, 43, 50 (reporting results of surveys and studies demonstrating public perception that campaign contributions influence case outcomes, as well as a survey reporting that 45 percent of trial judges themselves expressed the view that campaign contributions influenced judicial decisions to at least some degree).

214. VA-J3-U.

215. VA-J4-U.

*B. Strengthening the Jury as Price Setter: Increasing Jury Power and Information*

The findings reported here have implications for change in the opposite direction as well. Reforms that would provide a more muscular and informed system of jury sentencing face a different set of hurdles. The academics' hope of modifying jury sentencing to "build on the jury's democratic contributions"<sup>216</sup> by providing jurors with more information and power sounds good in theory. Give the jury adequate information and all of the sentencing options authorized by the legislature, not simply a subset of the information and options that judges receive, then ensure that the jury, not the judge, is the default price setter for both adversaries. With the jury as the default price setter, prosecutors would be able to set the price of a sentence after plea accordingly.

In practice, however, this scheme would probably look very unappealing to prosecutors, judges, and legislators in these three states. Not one state gives juries true price-setting authority today, complete with both the power and the information needed to set the upper and lower bounds of punishment within legislated ranges. In Kentucky and Arkansas, either party can resort to the jury's sentence rather than the judge's sentence by vetoing a guilty plea and insisting on jury trial,<sup>217</sup> but the jury is denied crucial sentencing information

---

216. Iontcheva, *supra* note 3, at 382.

217. Explained one Arkansas judge:

In some instances the prosecutor will try to bring pressure on judges with the jury sentence. In violent cases I'm right in line with them, but in drug cases I'm probably more lenient. The prosecutor will sometimes use the jury's sentence to send out a message even to the judge about the sentence for those. And for new crimes, too, they'll start out by saying we want a jury to take a look at this, say registration of sex offenders, because the jury's sentences can provide a sort of benchmark for the judges and provides some guidance on what juries think these cases deserve.

AR-J1-U. Arkansas defendants, too, can insist on jury trial if the prosecutor's offer is too high, and state law prohibits judges from raising jury sentences. Should offers depart significantly from jury sentences, defense counsel can force better offers by taking insisting on taking these to jury trial. Consider, for example, the following story by an Arkansas defender:

We had a prosecutor for a short time that was really into long sentences. He would start all plea negotiations at 15 years if your client had no money to contribute to the drug fund and 10 years if he had the \$5,000. I told the DTF people they couldn't do that, so they said they would no longer give me offers. I told them I would sue them. In the meantime, I had about seven trials, all of which the jury gave my client less time than the prosecutor offered. Needless to say, their little game stopped.

AR-D7-R.

A Kentucky defender had a similar tale:

A lot of times you try a case because the deal is so awful, you take it to the jury because you think you have a chance at acquittal, but often it is the sentence. . . .

and the full range of options that judges receive.<sup>218</sup> In Virginia, the jury lacks both information and power, and is routinely bypassed by defendants who prefer the guidelines sentences that they can obtain by exercising their state constitutional right to plead guilty. The jury does not set the default sentence “floor” in Virginia. Instead, it is the Sentencing Commission that sets the going rate for crime.

The research here suggests that several obstacles stand in the way of giving meaningful power and information to sentencing juries in these states. In Virginia, where the prosecutor has no access to the jury sentence should a defendant prefer a lower guidelines sentence, the state would have to extend jury sentencing to guilty pleas, or eliminate the defendant’s constitutional right to bypass the jury’s sentence through the guilty plea process, restoring to the prosecutor and the judge the option of insisting on jury trial.<sup>219</sup> Neither option seems particularly realistic.

Second, in Kentucky and Arkansas, where jurors have power to set sentencing norms but little information about what they are doing, efforts to remove the jury’s blinders in sentencing are unlikely to succeed. Initially, there is the problem of the cost of teaching jurors what they should know about sentencing. As Professor Ronald Wright has observed, of the many information voids jurors suffer as sentencers, the “feel” for sentencing practices over time, that judges develop through experience, is perhaps the most difficult and

Q: How often do prosecutors give offers that are higher than what you think the jury would give?

A: I think that would happen with some regularity in the rural counties, there are some where the prosecutors are not willing to go with a lesser or to offer lower sentences . . . The jury is really an outlet. For both sides. It is strategically useful for the defendant in counties where the bargains are coming in really high. Prosecutors regularly coming in at max on DU1 4th, for example. Can do better with the jury.

Q: But wouldn’t that lead to too many jury trials? How could the system handle it? Wouldn’t the prosecutor have to come down?

A: Well at some point the judge comes and says to the prosecutor, “You can’t keep this up.”

Q: Has this happened?

A: Yes, I had one time where the offer was too high, we were going to trial, and the judge came in and got directly involved, put a lot of pressure on the prosecutor to settle that case, the message was clear. Judges have all kinds of ways to make the prosecutors accommodate. Some counties the prosecutor will try every single case in front of that one judge.

KY-D4-R; *see also* KY-D4-R (“Sometimes the prosecutor will just want a jury sentence on a particular case. Or sometimes both sides will say, we haven’t tried an X case in a while. Let’s see what a jury says, they take it to trial. They use it to set a benchmark that they’ll use in negotiations later on. They watch to see what the jury gives. So next time, when an offer comes in above, the defense attorney can say, but look what I’ll get from a jury.”).

218. *See supra* text accompanying notes 94-104.

219. *See supra* note 118.

expensive to fill.<sup>220</sup> More importantly, prosecutors would no doubt anticipate a net loss in bargaining leverage if jurors were to receive more complete information about sentencing options and practices. Their influence over criminal procedure policy has caused it to march unceasingly in the direction of providing greater, not fewer, incentives to avoid jury trial. In the words of Professor George Fisher, judges and prosecutors “raise up those procedural institutions that help plea bargaining and beat down those that threaten it.”<sup>221</sup> Interviews from each state suggest that the adaptation of jury sentencing that has taken place in these states is yet another illustration of this pattern: Efforts to modify jury sentencing so as to increase its utility as a penalty for jury trial have succeeded—allowing prosecutors to inform jurors about prior offenses in bifurcated trials in particular—while modifications that could shrink the differential between jury and guidelines sentences, or that would have otherwise decreased prosecutorial power, have failed.<sup>222</sup>

A third obstacle may be an equally formidable barrier to any effort to increase the power and information juries receive in these states. This obstacle is the emerging consensus among criminal justice professionals that the only politically expedient way to limit exploding prisoner populations and control state correctional spending is to sentence offenders within state guidelines designed with that purpose in mind. Sentencing policy these days is not all about disparity and deterrence; it is increasingly determined by beds and budgets.<sup>223</sup> Predictable spending requires control over the discretion

---

220. Wright, *supra* note 7. Conceivably, jury understanding of the going-rate for sentences could approximate judicial understanding if a state either (1) collected data on sentencing for a wide range of offenders and offenses over time and taught all jurors about it, trial by trial, or (2) replicated the “experience” of judges by either requiring jurors to serve on case after case, or by selecting for jury service in criminal cases those who have had prior experience sentencing. The costs of the first step in terms of time and expense are simply too high. As for the second option, any benefit in added information would be outweighed by the inevitable decrease in jury representativeness that would result.

221. FISHER, *supra* note 41, at 180.

222. See *supra* notes 50, 130-31 (release statistics); *supra* notes 54, 86 (alternative sentencing options); *supra* note 102 (failed proposal to inform juries of the abolition of parole). In addition, a member of the Virginia legislature allowed an interview, gave permission to relate his responses anonymously, and reported that there was an effort supported by defense attorneys to give juries information on the sentencing guidelines, but the general reaction was that juries would be confused by the guidelines and recommend lower sentences. In Arkansas, an effort to get rid of the prosecutorial veto over a defendant’s decision to plead guilty as charged also failed.

223. The cost of incarceration jumped from \$5 billion in 1978 to over \$49 billion today, for states, counties, and federal government combined. Vincent Schiraldi & Judith Greene, *Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Public Opinion*, 14 FED. SENT. RPTR. 332, 332 (2002). On average, corrections consumed 7 percent of state budgets in 2000. *Id.*



of those who sentence. If the state legislature is not willing to lower statutory sentence ranges, it must find someone who will, or keep building new prisons.

Of the three states examined here, Virginia is the only one that has found a potentially effective method of harnessing sentencing policy to control prison populations. Virginia's unique jury sentencing-judicial guidelines system, administered by judges who are not elected by the public, has the potential to keep sentences down for nonviolent offenders, reducing the costs of corrections,<sup>224</sup> while at the same time holding down the costs of adjudication by discouraging jury trials. Judges report that they take their cues from a legislature that demands adherence to specified sentence ranges, not from a public that demands high sentences. Legislators, meanwhile, who monitor carefully the fiscal impact of every bill related to crime,<sup>225</sup> are free to raise statutory minimum sentences in response to popular demand.<sup>226</sup> The legislators can be confident that because these minimum sentences will be routinely suspended or probated by judges following the guidelines after plea and bench trials, and enforced only after the rare trial by jury, their "tough-on-crime" legislation will not translate

---

224. See Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, 15 FED. SENT. RPER. 41, 47 (2002) (noting that from the mid-nineties to date, Virginia's "incarceration rate has grown just 6 percent, well below the national growth rate of 22 percent, indicating greater discipline in use of expensive prison beds as a sanction."). A study of the state's innovative risk-assessment pilot program in a portion of the states courts concluded that the state saved the state one and a half million dollars, and is predicted to save the state nearly five million dollars if implemented statewide. *Id.* at 48; see also Frank Green, *Va. Models New Thinking in Prison System Reform*, RICHMOND TIMES DISPATCH, Dec. 1, 1996, at A1 (predicting that the state may have a surplus of beds by 1998, noting that although there have been complaints to the sentencing commission that some of the sentences under the guidelines are too lenient, violent offenders are serving longer sentences, and quoting Professor Kevin Reitz, one of the nation's leading scholars on state sentencing guidelines, "Virginia is . . . really out in front as far as I'm concerned . . . Virginia's is the most impressive system around."); Alan Cooper, *Jury Trials Plunging; Sentence Guidelines, Parole Abolition Sway More Defendants to Seek Less Risk; With A Judge*, RICHMOND TIMES DISPATCH, March 30, 1997, at B1 (quoting head of state sentencing commission as stating that projections for prison beds have matched reality so far).

225. In Virginia, the economic effects of every change adding new crimes punishable by imprisonment, expanding the period of incarceration for existing offenses, imposing minimum or mandatory terms of incarceration or modifying the release of offenders must be printed on the face of the legislation, reviewed by an Appropriations or Finance Committee. Wilhelm & Turner, *supra* note 224, at 47. The sponsor must identify the source of revenue to fund the bill before it can be reported out of committee. *Id.*

226. See, e.g., Pamela S. Karlan, *Pricking the Lines: The Due Process Clause, Punitive Damages and Criminal Punishment*, 88 MINN. L. REV. 880, 890 (2004) ("Legislators face powerful political pressures that lead them to ratchet up sentences."); David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1285-97 (1995) (documenting legislators' responses to popular concern about crack cocaine).

into higher corrections costs. The following exchange with a Virginia prosecutor is revealing:

Q: What has the legislature done with sentencing since bifurcation and the abolition of parole?

A: Duplicity. That's the only word for it. They'll pass laws like this one on abduction with intent to defile with the 20-year minimum, they refuse to ever lower the penalty for fear they'd look soft on crime, but they have no problem with the guidelines requiring ten years less.

Q: Don't they get heat for being soft on crime in the guidelines?

A: The guidelines lines are remote, hidden. People don't connect the legislators with the guidelines. I think they could change them. But they don't. This is the greatest shell game of all.

Q: So the people don't hold the legislators responsible for low sentences under the guidelines?

A: No, the guidelines Commission is a nameless, unelected entity. It's invisible. The other great dodge is you'll hear them say, "Well the guidelines are only voluntary." As I said, the judges don't really think so.<sup>227</sup>

### Said another Commonwealth's Attorney:

A: If those in the General Assembly want to limit the sentencing ranges this way, they ought to make the open decision to do so. I'll give you an example. The minimum sentence for distributing cocaine, first offense, is five years. The low end of the guidelines for first offense with no record is seven months. You have to have a heck of a horrible record to get over five years for distribution of cocaine. The guidelines sentence would be seven months, that's the real sentence. The sentencing guidelines have given the legislature a handy way to hide from the public the true cost of their sentencing decisions. Now if you are comfortable with a sentence of seven months for distribution first offense with no record, and the General Assembly is implicitly comfortable with it because they beam upon the guidelines and encourage judges to follow them, they should reduce the statutory minimum.

Q: Why don't they?

A: They are scared to do that because they don't want to come tell the public about the seven months because the public is going to squawk. Politicians don't want to tell the public we have signed off on seven months because that's a reduction of the minimum five years.<sup>228</sup>

Virginia's effort to reduce the demand for prison beds by cutting sentences through the use of guidelines is not an isolated

---

227. VA-P1-U. Consider also the comments of one Virginia legislator, who when asked how his constituents reacted to guidelines sentences, said, "They don't see any of this. Criminal justice hasn't been an issue in 8 years. There isn't much known about the commission or the guidelines." Interview with Anonymous Virginia Legislator (Aug. 26, 2002).

228. VA-P5-R; *see also* VA-P1-U ("The guidelines are the other shoe of the abolition of parole. Sentencing is like a coffee pot, the water goes in the top, and it would overflow except for that little spigot at the bottom that lets it out, that spigot is the guidelines.").

phenomenon. A growing number of states are adopting initiatives mandating alternative sanctions for many drug offenders, repealing mandatory minimum sentences, or liberalizing parole release.<sup>229</sup> One recent report stated, "Research has shown that when sentencing guidelines are designed to use correctional resources efficiently, they are consistently associated with *lower* rates of prison admissions and incarceration rates."<sup>230</sup> Professor Kevin Reitz, Reporter for the ALI's efforts to revise the sentencing provisions of the Model Penal Code, concluded in his report this past spring: "Every state that has tried to deploy guidelines to [manage future prison growth] has succeeded, which includes a majority of all state guideline systems in current operation."<sup>231</sup> Legislators who recognize that sentencing guidelines are the most promising means to control corrections spending<sup>232</sup> will view proposals to give to juries, and not commissions, even more power to set the going rate for felony sentences as exactly the wrong proposal at exactly the wrong time.<sup>233</sup> The budget crises that state legislators face are pushing sentencing policy in the direction of more bureaucratic control over sentencing, not less.

Kentucky has no politically invisible sentencing commission actively setting policy with the state's budget in mind but no election around the corner. Instead, the prosecutors, judges, and legislators who set sentences in Kentucky either lack an incentive to cut costs or

---

229. See Schiraldi & Greene, *supra* note 223, at 333-35 (documenting changes in state law and policy around the country designed to curh the costs of incarceration); see also Wilhelm & Turner, *supra* note 224 (noting that thirteen states took legislative action to ameliorate the effects of stringent sentencing laws, and praising the use of sentencing guidelines in North Carolina, Virginia, and Kansas).

230. Schiraldi & Greene, *supra* note 223, at 334.

231. KEVIN REITZ, ALI, REPORT: MODEL PENAL CODE: SENTENCING 72 (2003). The Report collects studies documenting how state guidelines have slowed prison growth, stating that there "could be something about the very institutions of commission, guidelines, and resource-management tools that combine over the long haul in the direction of parsimony in punishment." *Id.*; see also Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 2002 CRIME & JUSTICE 39, 84 ("A consensus settled into place: the sentencing structure, like the sentencing commission itself, was perceived to be apolitical. It was a planning device that allowed the state to link its sentencing aspirations with the corrections resources at hand. This role as a credible and nonpartisan technical advisor allowed the sentencing commission and the sentencing structure to remain intact even after the legislators who created them were no longer in leadership roles . . .").

232. REITZ, *supra* note 231, at 334 (recommending that any state looking for ways to reduce state prison population pressures and correctional costs should consider creating "structure sentencing guidelines that will shape sentencing practices . . .").

233. Contrary to the suggestion of at least one jury sentencing supporter, see Iontcheva, *supra* note 3, at 332-33, interest in judicial sentencing guidelines is not in decline. See, e.g., Schiraldi & Greene, *supra* note 223. Not guidelines, but mandatory minimum sentences, in part because of their obvious corrections burden and in part because of their less obvious lack of proportionality, are being reconsidered and even repealed in several states.

respond to an electorate skeptical of coddling criminals.<sup>234</sup> Without increased spending on prison space, early release becomes the stop gap. The well-publicized exodus of Kentucky felons from the state's filled-to-capacity prisons in 2002 spared judges and prosecutors negative publicity for being soft on crime and shifted the blame instead to the state's executive, who in turn could point the finger at those responsible for the state's budget.<sup>235</sup> Giving juries more independence to set sentencing norms, community by community, is no cure for this problem.<sup>236</sup>

Arkansas has a criminal sentencing commission, but no effective incentives for judicial or prosecutorial compliance with its guidelines. Not surprisingly, although the Arkansas guidelines were developed with correctional capacity in mind, the commission has stated that the guidelines "do not appear to have affected prison growth."<sup>237</sup> Until statewide guidelines, not juries or prosecutors, set the default price for sentencing, effective corrections control will remain elusive. Put differently, the best reason to give more price-setting power to the sentencing jury runs headlong into the economic interests of state governments in controlling costs.

The interviews detailed here also expose the likely objections to the compromise solution under which jurors would apply commission-created guidelines.<sup>238</sup> Setting aside the argument that binding a sentencing jury with guidelines would eliminate the very reason to choose jury over judge sentencing in the first place,<sup>239</sup> two practical

---

234. And some Kentucky prosecutors are vehemently against guidelines sentencing. See, e.g., KY-P2-U ("There was bill for judicial sentencing in mid-nineties. I argued against it. One reason was because of the Federal Sentencing Guidelines which we thought were pretty stupid, although [the sponsor] didn't have guidelines in there at first, we thought that would be coming. [An opponent] stood up and held up the United States Sentencing Guidelines manual, which as you know is so thick it nearly broke his arm, and said, 'You pass this bill and you won't be practicing law, you'll be practicing guidelines.' . . . [The bill would have needed] guidelines to have any chance at uniformity and that would have killed it.").

235. See Fox Butterfield, *Inmates Go Free to Reduce Deficits*, N.Y. TIMES, Dec. 19, 2002, at A1 (quoting Governor Patton as saying "I have to do what I have to do to live within the revenue that we have" and reporting "some politicians expressed support for the governor's action, saying they do not oppose the early release of nonviolent offenders but do oppose higher taxes").

236. Indeed, in 1983, in a Report to the Governor, the Commission on Sentencing and Prison Overcrowding recommended "that judicial sentencing and sentencing guidelines be adopted in Kentucky." COMMISSION ON SENTENCING AND PRISON OVERCROWDING, REPORT AND RECOMMENDATIONS 6 (1983).

237. ARK. SENTENCING COMM'N, BIENNIAL REPORT 1998-2000, at 27 (2000).

238. See, e.g., Iontcheva, *supra* note 3, at 360, 369-70; Wright, *supra* note 7, at 1377.

239. Guidelines would put the "community barometer" in a pressure chamber, controlled by the those who draft the guidelines. The more constraints placed upon jury sentencing, the less valuable its independent contribution becomes, and the more easily it can be manipulated for other ends. Juries would become conduit for decisions made by state commissioners,

difficulties remain. Extending guidelines sentencing to juries would create additional burdens for jurors, judges, and participants in an already complex and costly jury trial process, requiring states to sink scarce justice dollars into guideline training and implementation by jurors. Claims to the contrary<sup>240</sup> ignore the experiences of those in the three state systems examined here. In Virginia, for example, where guidelines already rule judicial sentencing decisions, each incremental increase in criminal justice spending faces rigid review.<sup>241</sup> Advocates of extending guideline sentencing to juries are unlikely to persuade conservative legislators that the benefits are worth the price tag.

More importantly, the price tag of extending guidelines to jury sentencing may be more than the cost of juror education. Many of those interviewed feared that eliminating the difference between jury sentences and sentences imposed after plea or bench trial would mean more jury trials. Not only would applying guidelines to juries and judges alike strip jury sentencing of its independence and involve costly new procedures, it may hit criminal justice professionals where it hurts the most by reducing existing incentives to waive trial. Prosecutors would oppose the application of guidelines by jurors unless the guidelines preserved a credible sentencing differential between trial and plea. Indeed, a trial penalty could take on even more importance if guidelines allowed defendants to predict with more certainty what a jury sentence would be, reducing the deterrent effect provided by the unpredictability of jury sentencing.

As discussed earlier, preserving a trial penalty within a guidelines system has not been difficult in judge-sentencing jurisdictions. It is not surprising that judges and prosecutors in guidelines jurisdictions would adapt each sentencing system so as to give predictably lower sentences to defendants who plead guilty than they give to those who go to trial—judges, prosecutors, and sentencing commissioners are happy to cooperate in order to encourage

---

undercutting the unique value of local community participation in sentencing. With liberal tolerance of departures and lax review, juries might be free to express community norms inconsistent with the guidelines, but then the advantage of guidelines—the predictability of sentences—would be lost. *See also* Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1184-85 (2002) (discussing “bureaucratic solutions” similar to guidelines for bringing coherence to punitive damage awards).

240. One advocate of jury sentencing glossed over this objection, noting that presenting guidelines to the jury would require “little additional cost,” and that any cost would be “a small price to pay for the important democratic contribution that the jury could make.” Iontcheva, *supra* note 3, at 365, 372.

241. *See supra* note 225.

settlement rather than trial.<sup>242</sup> It would be more remarkable if judges were able to convince jurors to systematically deny to the defendant who has sought a jury's judgment the sentencing discount that a defendant who shuns a jury trial receives. "Providing jurors with sentencing statistics or guidelines" may be "essential to . . . promoting the ideal of equality before the law,"<sup>243</sup> but equality in sentencing stands in the way of plea bargaining. The plea discount was disguised as "acceptance of responsibility" in the United States Sentencing Guidelines for precisely this reason—the Commissioners feared that an overt discount would "not be in keeping with the public's perception of justice."<sup>244</sup> In Virginia, Kentucky, and Arkansas, jury sentencing without guidelines *is* the trial penalty. Once the actual disparity between trial and plea sentences is revealed and quantified, judges and prosecutors may be happy to preserve it, but jurors may not be quite so cooperative.<sup>245</sup>

To be sure, broad sentence ranges and downward departures for "cooperation" allow judges and prosecutors to impose sentences after plea that are lower than most jury trial sentences. This could keep the practice of granting plea discounts out of sight so that jurors who dutifully follow the guidelines in an individual case would never learn that the average sentence for the same sort of offense and offender is more lenient than what the guidelines suggest. Nor can there be any doubt that this is exactly what would happen if jurors and judges were instructed to follow the very same guidelines. Judges could teach jurors about the state's sentencing guidelines, but together with prosecutors they would make sure that jurors remain as clueless as ever about actual sentencing practices.

These debates over whether jury sentencing should be abolished, strengthened, or modified cannot be resolved here. Each jurisdiction will continue to decide which trade-offs it is prepared to make. The larger point is that reformers have little hope of making progress in fine-tuning sentencing policy to meet sentencing goals without first understanding what those trade-offs might be. Paying careful attention to the ways in which attorneys, judges, and

---

242. See, e.g., O'Hear, *supra* note 38, at 1567-68 (noting that in Minnesota, "substantial plea-based sentencing differentials still exist notwithstanding the exclusion of mode of conviction from consideration under the state sentencing guidelines").

243. Iontcheva, *supra* note 3, at 382-83.

244. William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender and Departures, Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 191 (1998); see also *supra* note 40.

245. Recall the comment of the Arkansas prosecutor quoted earlier: "As it is, the jury doesn't get the grid, and it works. You couldn't really do it by changing the grids, can't really put a price on trial." AR-P2-R.

legislatures have come to rely upon individual features of existing policies to advance their interests is a necessary prerequisite to change. In sentencing, as in other phases of the criminal process, acquiring information about how formal rules are actually employed on the ground is difficult and expensive, but it is a challenge that legal scholars cannot ignore.

## VI. CONCLUSION

Chief Justice Rehnquist recently stated that “the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.”<sup>246</sup> A careful look at jury sentencing in practice, however, reveals that the jury sentencing known to lawyers and judges in Arkansas, Kentucky, and Virginia today bears little resemblance to the lofty ideal of a mini-legislature, well-versed in all “societal and moral considerations” and dictating “acceptable” punishment policy for the local community. Judging from these interviews, any jury sentencing system approaching that ideal would likely be rejected as prohibitively expensive and politically unpalatable. Instead, jury sentencing in these states, hobbled as it is, plays a vital and pragmatic role within each state’s unique legal and political framework: it helps to discourage jury trials and to provide protection from, and for, an elected judiciary.

---

246. The Chief Justice mentioned this in support of his assertion that “the work product of legislatures and sentencing jury determinations . . . ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment.” *Atkins v. Virginia*, 536 U.S. 304, 324 (2003) (Rehnquist, C.J., dissenting).