

JURY SENTENCING IN NONCAPITAL
CASES: A CASE STUDY OF EL PASO
COUNTY, TEXAS

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I. INTRODUCTION

A. *The Question of Jury Sentencing*

In the archetypical Anglo-American criminal justice system, the judge determines the sentence, even in a jury trial.¹ Yet there are important exceptions. In most states that currently sanction capital punishment, the jury decides whether to impose the death penalty, mandatory life imprisonment, or some lesser penalty.² Only eight

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1. See HARRY H. KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 301 n.1 (1966) (stating that the jury usually does not determine penalties); WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 1092 (2d ed. 1992) (asserting that the trial judge is most commonly the sentencer).

2. KALVEN & ZEISEL, *supra* note 1, at 301 n.1. The procedure for sentencing in capital punishment cases varies from state to state. Some statutes dictate a death penalty for the commission of certain offenses unless the jury recommends life imprisonment. Under such a statutory scheme, the recommendation returned by the

American states, chiefly in the South, provide statutory frameworks allowing the jury to determine sentences in noncapital cases.³ Texas defendants, whether convicted upon a trial⁴ or a guilty plea,⁵ may elect to have their sentence assessed by either a judge or a jury, including the question of prison versus probation.⁶

The justification for jury sentencing in capital cases is apparent. Statutes that assign to juries the choice between life and death reflect the policy that the judge should not bear the sole responsibility for making this grave decision.⁷ Especially at a time when capital

jury may be only advisory. *E.g.*, FLA. STAT. ANN. § 921.141 (West 1985 & Supp. 1993). A sentence of life imprisonment without eligibility for parole may be imposed by the court if the jury cannot agree on punishment within a reasonable deliberation time. *E.g.*, N.H. REV. STAT. ANN. § 630.5 (1986 & Supp. 1992). In Arizona, Idaho, Montana, and Nebraska, the court alone imposes the sentence. ARIZ. REV. STAT. ANN. § 13-703 (1989); IDAHO CODE § 19-2515 (1987 & Supp. 1993); MONT. CODE ANN. § 46-18-301 (1991); NEB. REV. STAT. § 29-2520 (1989).

3. ARK. CODE ANN. §§ 5-4-103, 16-90-107 (Michie 1987); KY. REV. STAT. ANN. § 532.055(2) (Michie/Bobbs-Merrill 1990); MISS. CODE ANN. §§ 97-3-67, 97-3-71 (1972 & Supp. 1993); MO. ANN. STAT. § 557.036 (Vernon 1979 & Supp. 1993); OKLA. STAT. ANN. tit. 22, §§ 926-928 (West 1986 & Supp. 1992); TENN. CODE ANN. §§ 40-20-104, 40-20-107 (1990); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 1981 & Supp. 1993); VA. CODE ANN. § 19.2-295 (Michie 1990); KY. R. CRIM. P. 9.84.

In most of these eight states, the power of the jury to sentence is couched in general terms, *e.g.*, VA. CODE ANN. § 19.2-295 (Michie 1990), although in Mississippi the jury is the sentencing authority only in particular cases delineated by statute, *see* MISS. CODE ANN. §§ 97-3-67, 97-3-71 (1972 & Supp. 1993) (permitting jury sentences in statutory rape and rape cases). The various jury sentencing procedures also differ in other particulars. In some states, the judge has the power to fix the punishment in the event that the jury does not include a sentence in its verdict, *e.g.*, ARK. CODE ANN. § 16-90-107 (Michie 1987), if the jury does not agree on a punishment, *e.g.*, KY. REV. STAT. ANN. § 532.055(2) (Michie/Bobbs-Merrill 1990), or where the jury fixes a penalty in excess of the maximum allowed by law, *e.g.*, OKLA. STAT. ANN. tit. 22, § 928 (West 1986 & Supp. 1992).

4. TEX. CODE CRIM. PROC. ANN. art. 37.07, §§ 1(b), 2(b) (West 1981 & Supp. 1993).

5. TEX. CODE CRIM. PROC. ANN. art. 26.14 (West 1989).

6. *See infra* note 37 for a discussion of Texas probation law.

7. Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 969 (1967) [hereinafter *Jury Sentencing in Virginia*].

In *Jells v. Ohio*, 498 U.S. 1111 (1991), Justice Marshall discussed a defendant's waiver of a right to jury sentencing, stating:

[A]s we have recognized, the jury operates as an essential bulwark to 'prevent oppression by the government.' *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). . . . [O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community

punishment is hotly debated,⁸ a death sentence should be the determination of a group of twelve lay persons chosen at random from the widest population. Arguably, this compelling reason for jury punishment does not apply in noncapital cases, where the decision to incarcerate — although serious — is less grave than the decision to inflict the death penalty.

Critics of jury sentencing in noncapital cases complain that jurors are less competent or qualified than judges to decide questions about probation or incarceration.⁹ Thus far, however, views on jury

values and the penal system.' *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) . . . quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

Id. at 1114 (Marshall, J., dissenting).

However, in *Hildwin v. Florida*, 490 U.S. 638, 640 (1989), a capital case, the Supreme Court noted that there is no Sixth Amendment right to jury sentencing even when the sentence turns on specific findings of fact. The key is that the relevant sentencing factor, an aggravating circumstance in the commission of the crime in *Hildwin*, is "not an element of the offense, but instead is a sentencing factor that comes into play only after the defendant has been found guilty." *Id.* at 640 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986)). See also Tom C. Clark, *The American Jury: A Justification*, 1 VAL. U. L. REV. 1, 4 (1966) ("the jury . . . adds a humanistic touch to the law relaxing it at times so as to allow a more equitable judgment"); Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial*, 11 L. & HUM. BEHAV. 113, 114 (1987) ("Twelve members of the community have struggled to make the ultimate moral choice: Should this person live or die?"). See generally J.W. EHRlich, EHRlich's BLACKSTONE 683 (1959) (upholding the jury as the guardian of public justice and freedom from oppressive government).

8. See, e.g., John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355, 355 (1993) (citing the ongoing debate concerning the pros and cons of the death penalty); Philip R. Nugent, Note, *Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution*, 2 WM. & MARY BILL RTS. J. 185, 185 (1993) (same).

9. Commentators have consistently favored judge sentencing over jury sentencing. See Charles O. Betts, *Jury Sentencing*, 2 NAT'L PROBATION & PAROLE ASS'N J. 369, 376 (1956) (arguing that jury sentencing is less equitable and less uniform than judicial sentencing); Comment, *Consideration of Punishment by Juries*, 17 U. CHI. L. REV. 400, 408 (1950) (arguing that the authority to impose punishment should rest with the trial judge); Erwin Fleet, *Sentencing the Criminal—A Judicial Responsibility*, 9 AM. J. TRIAL ADVOC. 369, 370 (1986) (maintaining that sentencing belongs in the hands of the trial judge); James P. Juras, *On Modernizing Missouri's Criminal Punishment Procedure*, 20 U. KAN. CITY L. REV. 299, 301 (1953) (arguing that a judge is better able to assess a criminal penalty); *Jury Sentencing in Virginia*, *supra* note 7, at 1001 (advocating abolition of jury sentencing); H.M. LaFont, *Assessment of Punishment—A Judge or Jury Function?*, 38 TEX. L. REV. 835, 848 (1960) (asserting that judges do a better job of assessing punishment in noncapital cases than juries do); Charles S. Potts, *Suggested Changes in Our Criminal Procedure*, 4 SW. L.J. 437, 447-48 (1950) (asserting that judges should assess criminal penalties); SOL RUBIN, *THE LAW OF CRIMINAL CORRECTION* 145-51 (2d ed. 1973) (arguing that jury

sentencing in noncapital cases have rested largely on speculation, not on empirical evidence.

B. *The Early History of Jury Sentencing in Noncapital Cases*

At common law, sentencing power resided in the judge.¹⁰ Over a century ago, when a minority of American jurisdictions turned to juries to determine punishment, various justifications were advanced for taking sentencing power away from the judges.¹¹ Since lay persons occupied many court benches in colonial America, there was no substantial difference between judges and jurors in terms of competence, training, and experience.¹² Also, early settlers of the colonies were apprehensive of the judges appointed to preside over colonial courts, in part because some settlers experienced harsh treatment at the hands of royal courts in England during political and religious prosecutions under the Stuarts.¹³ Early Texans similarly feared the judges appointed by Spanish monarchs to preside

sentencing is less equitable and less uniform than judicial sentencing); Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1154-57 (1960) (advocating abolition of jury sentencing) [hereinafter *Statutory Structures*]; Charles W. Webster, *Jury Sentencing—Grab-Bag Justice*, 14 SW. L.J. 221, 230 (1960) (advocating abolition of jury sentencing).

10. *Jury Sentencing in Virginia*, *supra* note 7, at 301 n.1. See also *The King v. Wilson*, 100 Eng. Rep. 1134, 1134 (1791) (holding that the authority to impose punishment should rest with the trial judge); *The King v. Bunts*, 100 Eng. Rep. 368, 368 (1788) (same).

11. See *Jury Sentencing in Virginia*, *supra* note 7, at 970-71 (citing jury sentencing in the United States as a reaction to harsh penalties imposed by English judges in the colonies and to early distrust of a centralized government); *Statutory Structures*, *supra* note 9, at 1155-56 (same).

12. *Jury Sentencing in Virginia*, *supra* note 7, at 970; *Statutory Structures*, *supra* note 9, at 1155. See ARTHUR T. VANDERBILT, *JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION* 27 (1958) ("In the early years of this country . . . [m]any members of the bar and indeed many judges had little or no legal learning, and few requirements of any sort were made of the pioneer judges").

13. *Jury Sentencing in Virginia*, *supra* note 7, at 970, 988. See Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in *THE JURY SYSTEM IN AMERICA* 21, 24-30 (Rita J. Simon ed., 1975) (tracing the development of juries in pre-Revolution America); SAMUEL W. MCCART, *TRIAL BY JURY: A COMPLETE GUIDE TO THE JURY SYSTEM* 11 (2d ed. 1965) (tracing the development of juries in the United States); John V. Singleton, *Jury Trial: History and Preservation*, 32 TRIAL LAW. GUIDE 273, 273-76 (1988) (same); VANDERBILT, *supra* note 12, at 17-18 ("One of the grievances on which the colonists united in declaring their independence from the mother country concerned the royal control of colonial judges.").

over their courts.¹⁴ Moreover, many citizens of the newly formed United States feared centralized government and distrusted the judges appointed to courts created under the Constitution.¹⁵

Opponents of lay punishment argue that the justifications for jury sentencing advanced centuries ago no longer exist.¹⁶ They observe that judges generally are better educated, trained, and experienced than lay persons, and now are often directly elected by the general public.¹⁷ They contend that although the fear of an arbitrary and oppressive judiciary may have been warranted in colonial America, such concern is unfounded today.¹⁸

C. *The Study*

This Article reports the results of a field survey of jury sentencing in noncapital cases in El Paso County, Texas,¹⁹ a jurisdiction where a defendant may choose whether a judge or a jury will impose punishment. The survey consists of two parts. The first is a qualitative analysis of policy issues concerning jury sentencing. It is based on personal interviews with each of the eleven trial judges who then presided over criminal cases in the district courts of El Paso County.²⁰ The second part is a statistical analysis of actual

14. Betts, *supra* note 9, at 370; *Jury Sentencing in Virginia*, *supra* note 7, at 970 n.6; LaFont, *supra* note 9, at 836.

15. *Jury Sentencing in Virginia*, *supra* note 7, at 970-71.

16. See, e.g., Alfred Blumstein, *Preface to 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM* at xi (Alfred Blumstein et al. eds., 1983) [hereinafter PANEL REPORT].

17. In Texas, district judges are elected for four-year terms. TEX. CONST. art. V, § 7 (amended 1987). See also HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 52-53 (1986); PETER DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 6-35 (1980).

18. KALVEN & ZEISEL, *supra* note 1, at 158-62 (demonstrating that "the jury by and large does understand the case and get[s] the evidence in criminal jury trials] straight").

19. For a description of the setting in which the research took place, see *infra* notes 28-52 and accompanying text.

20. The author conducted personal interviews in January 1992 with each of the judges of the eleven district courts in El Paso that then heard criminal cases, as follows: William E. Moody, 34th District Court; Mary Anne Bramblett, 41st District Court; Eduardo Marquez, 65th District Court; Robert D. Dinsmoor, 120th District Court; Guadalupe Rivera, 168th District Court; Peter S. Peca, Jr., 171st District Court; Sam W. Callan, 205th District Court; Sam M. Paxson, 210th District Court; Herb Marsh, Jr., 243rd District Court; Phillip R. Martinez, 327th District Court; Jose J. Baca, 346th District Court. Most interviews were tape-recorded. The tapes and

sentences imposed by El Paso judges and juries on convicted defendants in a random sample of 1,395 noncapital felony prosecutions commenced in the district courts during a 4-year period.²¹

The author interviewed the El Paso judges to ascertain their views concerning policy issues relating to jury sentencing. An examination of judicial attitudes toward lay punishment provides a useful way of learning about this subject not only because judges are experienced

written notes generated by these interviews are on file in the manuscripts section of the Texas Tech University School of Law library. When conducting these interviews, the author informed the judges that their remarks might later appear in print but that they would not be identified by name. The author also conducted personal interviews of a limited number of prosecutors and criminal defense attorneys. See *infra* notes 46 and 49.

21. The four years that formed the basis for the statistical part of this study were 1974-77. These years were used because data collected from them had been used as the basis for the author's pre-post study of the district attorney's policy purporting to ban plea bargaining in El Paso County, which was implemented in late 1975. See Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987), for the author's pre-post study.

There were nine district courts in El Paso County during the years 1974-77. Two of the nine district courts, presided over by Judges Jerry Woodard and Sam Callan, were in charge of the criminal docket and handled no civil cases. Judge Woodard was appointed in 1969 and presided over the 34th District Court. Judge Callan was appointed in 1973 and presides over the 205th District Court. The judges of the seven other district courts heard primarily civil matters but presided over criminal trials when needed to alleviate caseload pressures on the two criminal judges. It is estimated that approximately three or four full time judges heard criminal cases during the years under study. Sam W. Callan, *An Experience in Justice Without Plea Negotiation*, 13 LAW & SOC'Y REV. 327, 341 (1979). Judges Woodard and Callan had primary responsibility for hearing criminal cases until October 27, 1978, when the criminal docket was divided among all the district courts of the county.

The district clerk maintains a court file for each felony prosecution in El Paso County. These files are numbered in the order that indictments are returned by a grand jury. The sample included every fourth file opened during the years 1974-77. Information concerning the 1,395 cases in the random sample was gathered through the application of a 70-item questionnaire to each case. Two law student research assistants completed the questionnaire on the basis of court files kept by Eddie Rubalcaba, the District Clerk for El Paso County. Court files contain copies of all pertinent documents that the district clerk receives and provide a source of official information concerning each felony prosecution.

At the same time, with the cooperation of William Rodriguez, then chief of police, and Michael P. Davis, then sheriff, about six individuals employed in the records sections of the police and sheriff's departments completed the questionnaire on the basis of official investigative reports kept in those departments concerning the cases in the sample. These reports contain information of the kind not usually found in court files and are regularly made part of the prosecutor's case files. Police and sheriff's departments were used as sources of the reports because the district attorney did not make his case files available for this research.

in sentencing, but also because they preside over jury trials and thus are close observers of those cases in which defendants elect lay persons to set penalties. The interview data revealed a sharp division of opinion among judges over the practice of jury sentencing in non-capital cases.

The interviews were informal, did not follow a set format, and produced anecdotal data. This part of the investigation is qualitative and, unlike the statistical analysis of actual sentences imposed by judges and juries, is not a scientific survey. Its value lies not in its ability to measure data by rigorous scientific standards, but to illuminate policy questions concerning the soundness of jury sentencing.

The statistical (or quantitative) analysis is comparative, measuring the performance of the jury against the performance of the judge. In particular, this part of the study investigates whether sentences by juries differ from those by judges with respect to severity and variability. Sentence severity is examined in light of two factors: the length of prison terms and the use of incarceration over probation. Sentence variability is examined by focusing on variations in the length of periods of confinement.

The study employed multivariate regression analysis and controlled for variables which sentencing researchers have consistently found to produce strong effects on sentences — criminal history, offense of conviction, type of conviction (guilty plea or trial), and various indicators of offense seriousness.²² The multivariate analysis permitted the prediction, for certain offenses, of differences between the average length of sentences imposed by judges and juries.

Tables and diagrams display the statistical findings that jury sentences are both more harsh and more dispersed than judge sentences. Tables also display the finding that the differences between the length of average sentences imposed by the two authori-

22. See *infra* note 88 for an enumeration of the indicators of offense seriousness which were controlled for in this study. The Panel on Sentencing Research (PSR) identified the primary factors that affected sentencing: "Using a variety of different indicators, offense seriousness and offender's prior record emerge consistently as the key determinants of sentences. The more serious the offense and the worse the offender's prior record, the more severe the sentence." See PANEL REPORT, *supra* note 16, at 11. The National Research Council established PSR in 1980 to review the research on sentencing, assess its quality, and suggest directions for further research. Its members represent a variety of academic disciplines and methodological approaches to the criminal justice system. *Id.*

ties, which seem to run in the direction of greater severity by juries, increase with the seriousness of the offense. For example, in cases of theft, a relatively minor offense, jury sentences exceed judges' sentences by only three months. But in cases of aggravated rape, a far more serious crime, the study finds jury sentences, on average, fifty months longer than judge sentences. Finally, in an attempt to make value judgments, the study explores possible reasons for what appears to be the greater severity and variability of jury punishment.

These findings relate to the goal of achieving uniformity in the sentencing of similarly situated offenders. But the findings also relate to questions about the qualifications of the jury as a sentencing authority. Recent critics of the jury raise questions about its competence as a decision-maker in a variety of contexts,²³ and the findings

23. Early research credited the jury as generally competent and responsive to the evidence presented at trial. See KALVEN & ZEISEL, *supra* note 1, at 158-62. More recently, the jury has been criticized for its lack of competence. See Douglas W. Ell, Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 776 (1978) (asserting that juries are inappropriate mechanisms for the determination of facts in complex civil suits); Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 208 (1976) (same); Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U. L. REV. 486, 489 (1975) (same).

Critics of the jury have voiced doubts about the ability of juries to analyze complex data logically and to return verdicts based on evidence rather than on irrelevant considerations. In his August 7, 1979, address to the Conference of [State] Chief Justices, U.S. Supreme Court Chief Justice Warren Burger expressed concern that the information and legal issues facing jurors are too complex to permit a competent finding of fact. JOE S. CECIL, *JURY SERVICE IN LENGTHY CIVIL TRIALS* 5 (1987). Some critics of the jury have advocated a due process exception to the Seventh Amendment right to a jury trial based on the complexity of the case being tried. *E.g.*, Ell, *supra* at 798-99.

In *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970), the Supreme Court suggested that courts should consider the practical abilities and limitations of juries in determining whether an issue is of a legal nature, and therefore triable by jury. Some courts interpreted this footnote to imply a complexity exception to the Seventh Amendment right to a jury trial. See *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 67 (S.D.N.Y. 1978) (holding that *Ross* footnote 10 only restates a court's traditional equity powers); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99, 105 (W.D. Wash. 1976) (holding that *Ross* footnote 10 constitutionally limits the breadth of the Seventh Amendment).

Other critics advocate the creation of specially-qualified juries or expert nonjury tribunals. Mark A. Nordenberg & William V. Luneburg, *Decision-making in Complex Federal Civil Cases: Two Alternatives to the Traditional Jury*, 65 JUDICATURE 420, 423-30 (1982).

of this study may add to the store of information bearing on the controversy over the merits of the jury system.

The study may also raise new questions about the practice of allowing juries to fix penalties: In sentencing, do juries view evidence of the defendant's behavior in a different light than judges? Are jury sentences consistent with modern theories of punishment?²⁴ As a practical matter, do jury sentences impact the size of inmate populations²⁵ and the crisis of prison overcrowding?²⁶ Answers to these questions might provide a basis for deciding whether this mode of assessing criminal penalties ought to be retained.

D. *The Research Setting*

El Paso County is a crime-conscious,²⁷ medium-sized jurisdiction

24. For a discussion of various theories of punishment, see *infra* notes 65-76 and accompanying text.

25. With 44,022 inmates in its state prisons on December 31, 1989, Texas ranked third among all states, behind California and New York, in the size of its prison population. During 1989, the size of the Texas prison population increased 8.9%. See U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990, at 607 (Kathleen Maguire & Timothy J. Flanagan eds., 1991) [hereinafter SOURCEBOOK].

26. One federal district court found the conditions of confinement in the Texas prison system to be constitutionally inadequate. See *Ruiz v. Estelle*, 679 F.2d 1115, 1126 (5th Cir. 1982) (affirming district court's finding that Texas prison conditions impose cruel and unusual punishment on prisoners while in custody).

27. The sentencing of offenders in El Paso, perhaps more so than in many communities, has been kept in the limelight by the two local newspapers, candidates for public office, and the attention given the district attorney's purported ban on plea bargaining. For a discussion of sentencing policies and practices in El Paso, including public attitudes toward the practices, see Weninger, *supra* note 21, at 268-69. See also Howard C. Daudistel, *On the Elimination of Plea-Bargaining: The El Paso Experiment*, in WILLIAM F. McDONALD & JAMES A. CRAMER EDS., PLEA-BARGAINING 57 (1980). Professor Daudistel noted the attention given to sentencing by newspapers and groups of concerned citizens:

Throughout the early 1970's, El Paso was called the burglary capital of the United States. Newspapers and citizen action groups called on the law enforcement community to get tough on burglars. Home owners were made fearful by rumors (some of them true) of murders committed by young illegal aliens from Mexico while they burglarized homes. Persons living in some sections of the city expressed their fears in community meetings and said they could be victimized easily by Mexican burglars who were able to stake out homes from hilltop lookouts only one-half mile away in Mexico.

Id. at 61. See also Callan, *supra* note 21, at 330-31 (asserting that judges "became the whipping boys of the press and of an irate public" for granting probation as punishment in burglary cases).

During interviews, the judges noted that El Paso citizens have increasingly shown

in Texas.²⁸ Jurisdiction over felony cases, as in other Texas counties, vests exclusively in the district courts,²⁹ which also have authority to hear the more significant civil matters.³⁰ Jurisdiction over misdemeanor cases is allocated between county,³¹ municipal,³² and justice of the peace courts.³³ In 1992, when the judges were interviewed, eleven district courts heard criminal cases in El Paso County.³⁴

Texas used a system of indeterminate sentencing during the period of the study.³⁵ Under this scheme, judges and juries exercised vast discretion in fixing prison terms. Statutes classified felony offenses into different degrees of seriousness with varying ranges of allowable punishment.³⁶ Initially, upon election of the defendant,

concern over newer forms of criminal behavior such as gang violence and drive-by shootings. See *supra* note 20 for background on the interviews conducted by the author. Judges also said that they are well aware of their accountability to the electorate for their sentencing practices. Most judges said that as a result of negative characterizations by the media, they are concerned that the public views their sentences as too lenient.

28. El Paso, the fourth largest city in Texas, is the major city in El Paso County. In 1990, the population of the city was 515,342, and the population of the county was 591,610. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS, TEXAS 7, 38 (1990). Situated on the international border, El Paso lies across the Rio Grande River from Ciudad Juarez, Mexico, a city with a population of 797,679. The population of El Paso includes people of various ethnic backgrounds. In 1990, Hispanics comprised 69.6% of the county's population; "Anglos," (all whites excluding Hispanics) 25.6%; Blacks, 3.5%; and all other nonwhites, less than 2%.

29. TEX. CONST. art. V, § 8 (amended 1987); TEX. CODE CRIM. PROC. ANN. art. 4.05 (West Supp. 1993).

30. TEX. CONST. art. V, § 8 (amended 1987); TEX. GOV'T CODE ANN. §§ 24.007, 24.008 (West 1988).

31. TEX. CONST. art. V, § 16 (amended 1987); TEX. CODE CRIM. PROC. ANN. art. 4.07 (West Supp. 1993).

32. TEX. CODE CRIM. PROC. ANN. art. 4.14 (West Supp. 1993).

33. TEX. CONST. art. V, § 19 (amended 1987); TEX. CODE CRIM. PROC. ANN. art. 4.11 (West Supp. 1993).

34. See *supra* note 20.

35. The statute on indeterminate sentences in Texas provided:

If the verdict fixes the punishment at confinement in an institution operated by the Department of Corrections for more than the minimum term, the judge in passing sentence shall pronounce an indeterminate sentence, fixing in such sentence as the minimum the time provided by law as the lowest term in an institution operated by the Department of Corrections and as the maximum the term stated in the verdict.

TEX. CODE CRIM. PROC. ANN. art. 42.09, § 1 (West 1979) (repealed 1981).

36. In Texas, a first-degree felony is punishable by imprisonment for life or for a

the judge or the jury chose prison or probation³⁷ and determined a sentence within the statutory range. But almost everyone understood that only rarely would the offender serve the entire sentence. Through its parole release decision, and within the limits of the statute,³⁸ the Texas Board of Pardons and Paroles determined the actual period of confinement, which was generally much less than that originally assessed.

In El Paso County, sentencing practices in noncapital cases are rather unique. When the defendant elects to plead guilty and be punished by the judge, a recommendation made by probation officers under a set of voluntary sentencing guidelines,³⁹ which in El Paso County has become known as the "point system,"⁴⁰ influences

term of 5 to 99 years, and the judge may also levy a fine of up to \$10,000. TEX. PENAL CODE ANN. § 12.32 (West Supp. 1993). The range of punishment for a second-degree felony is 2 to 20 years, and the judge may also levy a fine of up to \$10,000. *Id.* § 12.33 (West 1974). A third-degree felony is punishable by imprisonment for a term of 2 to 10 years, and the judge may also levy a fine of up to \$10,000. *Id.* § 12.34 (West Supp. 1993).

37. In Texas, the law governing a probationary sentence varies substantially depending on whether the judge or the jury assesses punishment. Either sentencer is allowed to grant probation, but only a *judge* may grant probation to a defendant with prior felony convictions. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4(c) (West Supp. 1993). However, only a *jury* may grant probation when it is shown that the defendant either used or exhibited a deadly weapon during the commission of the felony offense with which the defendant is charged (or during immediate flight therefrom). *Id.* § 4(a). Similarly, only a *jury* may grant probation when a defendant is found guilty of capital murder, aggravated kidnapping, aggravated rape, aggravated sexual abuse, or aggravated robbery. *Id.*

38. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(b) (West 1979) (repealed 1981, current version at TEX. CODE CRIM. PROC. ANN. art. 42.12, § 23 (West Supp. 1993)).

39. A sentencing guidelines system articulates policy as to customary lengths of incarceration. The idea that judges might use guidelines in sentencing is an outgrowth of the concept, developed by the Federal Parole Board in the 1970s, that parole officials should follow set standards in making release decisions. *See generally* DON M. GOTTFREDSON ET AL., GUIDELINES FOR PAROLE AND SENTENCING 13-19, 119-27 (1978) (providing the seminal framework for parole and sentencing guidelines). A sentencing guidelines system assumes that judges should have sentencing discretion, but that their discretion should be structured and controlled without eliminating the opportunity for individual case consideration. *Id.* at 1.

40. Under Texas law, a judge's sentencing decision is informed by a presentence report which is prepared by probation officers. The report contains information bearing on the "criminal record, social history and present condition of the defendant." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9 (West Supp. 1993). The judges of El Paso County make special use of probation officers in sentencing.

In 1975, the two judges then handling the criminal docket, Judges Callan and Woodard, devised a set of voluntary sentencing guidelines (the "point system")

the sentence pronounced by the judge. Following indictment of a defendant, probation officers use these guidelines, without consulting either prosecution or defense counsel, to calculate a sentence based on the accused's prior record and the seriousness of the offense.⁴¹

which have been administered by probation officers from the West Texas Community Supervision and Corrections Department since 1978. See Callan, *supra* note 21, for a discussion of El Paso County docket administration. Under this system, probation officers, upon defendant's indictment, ascertain the nature of the offense and investigate the defendant's background and prior record. Using an easily calculated, additive scoring system, they assign points to such indicators as offense, use of violence, amount of injury to victim, and nature and extent of the offender's prior record. The total number of points assigned a defendant governs both (1) the initial decision to either imprison or grant probation and (2) the determination of the period of incarceration. Materials prepared by the West Texas Community Supervision and Corrections Department describing the operation of the sentencing guidelines are on file in the manuscripts section of the Texas Tech University School of Law library.

The guidelines used in El Paso County categorize offenses and offenders on a one-dimensional scale. The author previously described this scale with respect to his pre-post study:

Most jurisdictions with guidelines use a matrix with two axes to articulate sentencing policy. On one axis is a ranking of offenses according to their seriousness; on the other is a criminal history score for rating the offender's prior record. Within the grid are cells that classify cases on the basis of these factors so that offenders falling within the same subgroup are seen as fairly homogeneous and deserving of similar sentences. Even a two-axis matrix is subject to the criticism that it may not take into account particular combinations of variables and may not reflect contingent patterns of decision making. A single scale, such as El Paso County's, specifies sentencing criteria in far less detail.

Weninger, *supra* note 22, at 288.

41. Many of the guidelines used by judges and parole boards in other jurisdictions have been developed on the basis of empirical information. Typically, data collection and modeling efforts are undertaken to capture the policy implicit in existing sentencing practices or to ascertain the likely impact of projected changes. For a discussion of conceptual and methodological problems associated with the construction of empirically-based sentencing guidelines, see Richard F. Sparks, *The Construction of Sentencing Guidelines: A Methodological Critique*, in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 194 (Alfred Blumstein et al. eds., 1983).

Empirical analysis, though it can result in more informed planning, played no role in the development of the El Paso County point system, either when it was created in 1975 or thereafter. When the guidelines were first devised, Judges Callan and Woodard agreed to certain normative propositions about the goals of a rational sentencing policy. See Callan, *supra* note 21, at 331-32 (adopting, as a judge, the personal conviction that sentencing should "prevent the convicted criminal from engaging in criminal behavior in the future . . . let the control fit the criminal"). Using their judgment and experience, the two judges simply wrote guidelines reflecting that agreement. *Id.* at 335-36. Subsequent revision of the point system occurred, similarly, without the benefit of empirical analysis.

Guideline sentences under the El Paso County point system apply only to defendants who plead guilty and elect to be sentenced by the judge. In such cases, probation officers make sentence recommendations to judges concerning both the initial decision to either imprison or grant probation and the length of the prison sentence. If the guidelines indicate that the defendant should be incarcerated, the probation officer recommends a specific term of confinement which is included in a presentence report that is transmitted to the judge. Since the guideline system lacks legal force, the judge is free to modify the sentence recommendation or ignore it altogether. Usually, at a pretrial hearing, the defendant is informed of the judge's decision regarding the sentence that would be imposed if the accused pleaded guilty, and then the case is set for trial or entry of a plea.⁴²

Under the bifurcated trial procedure now used in Texas,⁴³ in cases where the defendants insist upon their right to a jury trial, the jury first determines guilt or innocence. Upon a conviction, if the defendant has also elected jury punishment, the same jury sets the penalty in a second proceeding at which the defense presents additional evidence of the defendant's character, reputation, and criminal history.⁴⁴

It is not surprising that defense attorneys⁴⁵ and prosecutors⁴⁶ in

42. While the guideline sentences recommended by probation officers apply only to defendants who plead guilty and elect judge sentencing, the interview data suggests that such sentence recommendations may influence judges who have been elected to sentence offenders convicted by juries. Applying the guidelines system to jury sentencing, however, would interfere with a defendant's right to elect that a jury assess punishment. For the Texas statutes empowering a jury, upon defendant's election, to assess punishment, see *supra* notes 4-5.

43. Texas is among those jurisdictions which have established a two-phased trial procedure in criminal cases. TEX. CODE CRIM. PROC. ANN. art. 37.07 (West Supp. 1981). For a comparison of the former single-trial procedure and the two-phased trial procedure, see William G. Reid, *The Texas Code of Criminal Procedure*, 44 TEX. L. REV. 983, 1010 (1966).

44. The Texas statute provides that evidence of "the prior criminal record of the defendant, his general reputation and his character" may be presented by the State and the defendant at the trial on punishment. TEX. CODE CRIM. PROC. ANN. art. 37.07.3(a) (West Supp. 1993). But the evidence to be offered at a trial on punishment need not be limited to defendant's character, general reputation, and prior criminal record. *Id.* Any evidence that is relevant to an application for probation is admissible. *Id.*; see also *Allaben v. State*, 418 S.W.2d 517, 519 (Tex. Crim. App. 1967).

45. The author did not conduct a scientific survey of the El Paso County criminal defense bar regarding lawyer practices or attitudes toward jury sentencing. How-

El Paso divide over the soundness of the law allowing the accused a right to choose who will assess punishment. Defense counsel view the accused's election as a desirable means of avoiding those judges who sentence too harshly.⁴⁷ Prosecutors, on the other hand, view the right to choose as providing the defendant with an unjustified opportunity to forum shop in an effort to escape deserved punishment.⁴⁸

The accused's right of election sharpens the focus on the penalty patterns of El Paso judges and juries. Defense attorneys, to assist their clients in making the sentencing choice, attempt to learn the track records of individual judges for assessing punishment. They also attempt to predict, based on their knowledge of comparable cases in which juries have sentenced, the probable range within which lay persons might set penalties.⁴⁹

The bench, too, displays a keen interest in jury sentences, but perhaps for different reasons. Judges believe that lay sentences reflect community attitudes toward penalty standards, which jurors may consider in determining punishment. But judges may also believe that the balance between guilty pleas and jury trials will be upset if their sentences are perceived to be more severe than those of juries.

Therefore, one question is whether the shorter sentences given by judges suggest greater severity on the part of jurors, or whether courts are not really more lenient than lay persons but are simply

ever, valuable background information on this subject was obtained through personal interviews conducted in January 1992 with five attorneys who specialize in representing criminal defendants in El Paso: Norbert J. Garney, John D. Gates, Dolph Quijano, Jr., Michael R. Gibson, and Arvel Ponton, III. These interviews were open-ended, conducted without the use of a questionnaire, and tape-recorded. The tapes and written notes generated by the interviews are on file in the manuscripts section of the Texas Tech University School of Law library.

46. The author also obtained useful information concerning jury sentencing from prosecuting attorneys in El Paso. Personal interviews were conducted in January 1992 with eight of the nearly thirty assistant prosecutors employed in the office of Steve W. Simmons, then District Attorney of El Paso County. These interviews were open-ended and did not follow a set format. Tape recordings were made of most of the interviews and are on file in the manuscripts section of the Texas Tech University School of Law library.

47. See *infra* note 49.

48. See *supra* note 46.

49. Whether the perceived advantage of the defendant's election proves to be real or illusory depends, of course, on whether predictions of judge and jury sentences can be made correctly. Prosecutors and defense attorneys agreed that judge sentences were far more predictable than jury sentences. See *supra* note 46.

responding to institutional concerns such as the pressure of the trial docket and a desire for guilty pleas. Jurors, free of caseload pressures, are likely to think about the punishment a defendant deserves without paying much attention to the mode of disposition, and are not likely to give a guilty plea discount.⁵⁰ Perhaps, then, judges are not really more lenient than lay sentencers but simply let juries set the "price." Courts may then reduce the price set by the jury to induce defendants to waive trial.⁵¹ Possibly, if judges think only about the merits — if they were considering only the penalty the defendant deserves — they might sentence not much differently than juries.

E. *The Limitations of the Study*

The research reported here centers on jury sentencing in El Paso County, and therefore possesses the limitations of any study which focuses on only one community.⁵² Also, "sample bias" may result from the fact that in Texas, criminal defendants elect whether to be sentenced by a judge or a jury. Every case in the sample submitted to a jury for punishment apparently represents one in which the de-

50. See *infra* notes 57-60 and accompanying text.

51. See *infra* Table 2; see notes 89-90 and accompanying text.

52. PSR expressed a wide variety of particular concerns with the methodology used in statistical studies of sentencing. PANEL REPORT, *supra* note 16, at 69-125. In particular, generalizing from a study of a single jurisdiction may be problematic since it is likely that communities vary in their attitudes toward crime and punishment. PSR observed that studies of criminal courts have repeatedly demonstrated that jurisdictions vary substantially as to both norms of appropriate sentencing (*e.g.*, levels of harshness) and standard operating procedures. *Id.* at 78.

Public attitudes about crime and punishment also depend upon demographic factors. See, *e.g.*, Alfred Blumstein & Jacqueline Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's View*, 14 LAW & SOC'Y REV. 223, 239-43 (1980) (surveying public attitudes about appropriate sentence lengths, the authors compared sentences assigned by different demographic groups and found that sentences were influenced by such variables as sex, race, religion, marital status, education, income, occupation, and age). Women, for example, sentence less severely than men. *Id.* at 239. Whites sentence more severely than Blacks. *Id.* Protestants and Catholics sentence similar to one another, but Jews and persons with no religious affiliation are much less severe. *Id.* at 240. Persons with no secondary education are more severe than persons with some secondary education. *Id.* at 241-42. In terms of occupation, the least severe sentences are given by service workers, housewives, and unemployed persons. *Id.* at 242. The most severe sentences are given by professional/managerial, production/nonsupervisory, and retired persons. *Id.* In terms of income, low income persons assign milder sentences than high income persons. *Id.* at 242-43.

fendant (or, more probably, the defendant's lawyer) predicted that a jury sentence would be more lenient than a judge sentence. Conversely, every case in the sample submitted to a judge for punishment represents one in which the defense predicted that a court sentence would be more lenient than a lay sentence. In these circumstances, even though the study controlled for those variables that researchers consistently find produce strong effects on sentences,⁵³ one cannot assume that the two samples of judge- and jury-determined sentences are reasonably matched and that the study is free of selection bias.

Further, the statistical analyses reported in this Article examined sentence severity in light of only two factors — the length of prison terms and the use of incarceration over probation — and examined sentence variability by focusing only on variations in periods of confinement. Conclusions regarding *overall* sentence severity and variability depend on a complex assessment of additional factors, such as decisions to charge, trial practices, and the use of sentence types other than prison or probation — to name only a few — and necessarily await further research.

It is important to mention these limitations. But it is also important not to exaggerate their effects. First, the author believes that the research reported here identifies questions which might arise whenever the jury determines sentences in noncapital cases. Second, the study is not intended to assess the overall severity of sentencing in El Paso County, but to focus on jury behavior in assessing punishment. Moreover, since this is a comparative study of legal decision-making, measuring the performance of two sentencing authorities, the research provides a window through which one might view not only juries at work, but judges as well.

II. INTERVIEWS OF JUDGES

A. *Judicial Attitudes and Policy Issues Concerning Jury Sentencing*

The interviews of judges raised issues that touch directly on the jury's competence to perform the sentencing function. The debate between judges on these questions was fascinating and threaded with difficult value judgments. On one hand, some argued that

53. See *supra* note 16 and accompanying text. See also *infra* note 88 for those indicators of offense seriousness which were controlled for in this study.

judges, because of their education, recurrent experience in sentencing, and knowledge of the criminal justice system, are better able to fix criminal penalties than lay persons. But others defended lay sentencing, arguing that the jury is greater than the sum of its parts, and that what it lacks in professional training it makes up in common sense and experience. These judges maintained that lay persons are well qualified to sentence offenders because they are drawn from the local community and therefore mirror public attitudes toward crime and punishment.

B. *The Jury's Lack of Recurrent Experience in Sentencing*

Judges regularly participate in the criminal justice process whereas jurors assemble for the purpose of deciding a single criminal action and therefore have no recurrent experience in sentencing. Arguably, because judges routinely examine evidence of criminal offenses, they react more professionally, and less emotionally, than inexperienced lay persons.⁵⁴ One judge stressed that because of their continuous involvement in the criminal justice process, judges, unlike juries, are able to assess the sentence of one defendant in light of the punishment imposed on similarly situated offenders:

I think judges when they assess punishment are much more familiar with similar cases and other fact settings. I think judges are in a better position to gauge that type of crime, that type of setting, that type of defendant's culpability with other defendants' similar situations to give a more rational punishment. Jurors hear only one case and are much more subject to being emotionally taken away on some high cloud and having tunnel vision whereas I think judges are much more apt to compare that situation with other situations.⁵⁵

Most judges agreed that their recurrent experience in sentencing enables them to assess punishment more rationally than jurors. But a few disagreed, suggesting that their constant exposure to evidence of criminal behavior might actually make them callous or "case-hardened" at the sentencing stage. One judge said:

I still have faith in the system in that twelve randomly selected representatives of the community are the heartbeat or the pulse of the attitudes of the community. I'm not sure what

54. See *supra* note 20 and accompanying text.

55. See *supra* note 20 and accompanying text.

the one word is that describes all that, but I guess I believe in the system that is trial by your peers.

And we're only human, the judges sitting on the bench, and we inevitably and undoubtedly will eventually become case-hardened or at times may react not only because of the facts in the case presented to us but because of other factors in our lives, whatever might be happening at that moment. You might have read a real bizarre article in the newspaper about some child abuse case and then you sit on the bench and have to pass sentence on an individual who's been charged and found guilty of sexual assault on a minor or something. I think the judge is going to find himself susceptible to all of those other pressures whereas I hope that the jury, being twelve randomly selected individuals, are going to be more reflective of current attitudes and whatever the present morality of the community is.⁵⁶

In this judge's opinion, the jury's lack of recurrent experience in sentencing is actually an advantage in assessing punishment: Lay persons bring a fresh perception to this stage of the criminal justice process, avoiding stereotypes that might infect the judicial eye.

C. *Jury Sentencing and the Trial Tariff*

Consider the judge's point that court sentences might be affected by pressures to which lay persons are not susceptible. One such pressure may be that of the trial docket, possibly resulting in a "trial tariff" or "guilty plea discount" whereby judges sentence defendants convicted at trial more harshly than those who pleaded guilty. Studies of other populations found that defendants who concede their crimes are sentenced more leniently than trial defendants.⁵⁷

56. See *supra* note 20 and accompanying text.

57. See, 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, 69 (1982) (affirming the tenet that defendants are sentenced more leniently if they plead guilty); Thomas M. Uhlman & N. Darlene Walker, *A Plea is No Bargain: The Impact of Case Disposition on Sentencing*, 60 *SOC. SCI. Q.* 218, 218 (1979) (stating that the legal community assumes as a given that the defendant receives a reduced charge or a more lenient sentence if the defendant pleads guilty). But two studies cast doubt on the proposition that defendants who plead guilty are sentenced more leniently than trial defendants. See JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 269-70 (1977) (asserting that if examiners "consider not only the type of disposition but also the offense on which a person is convicted, his personal characteristics, the strength of the case against him, and the identity of the courtroom workgroup that sentenced him, the effect of dispositional mode is insignificant in accounting for the variance in

Whether perceived as a reward for a plea of guilty or as a penalty for the exercise of the right to a trial,⁵⁸ sentence differentials are of

sentence length"); WILLIAM M. RHODES, PLEA BARGAINING; WHO GAINS? WHO LOSES? at IV-6 to IV-8 (1978) (asserting "there were few large [sentencing] differences between trial cases and guilty plea cases"). For commentary on various studies that have examined the issue of differential sentencing, see Douglas A. Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949 (1986).

58. The concept of a sentencing differential was justified during the 1970s by two prestigious legal authorities, the American Bar Association and the American Law Institute, on the theory that although it is improper to penalize a defendant for exercising the right to trial, it is appropriate to reward a defendant for waiving this right and pleading guilty. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3(3) (Proposed Official Draft 1975); STANDARDS RELATING TO PLEAS OF GUILTY § 1.8(a) (1968); STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PLEAS OF GUILTY § 14.18(b) (2d ed. 1979).

The distinction between rewarding the waiver of a right and penalizing the exercise of the same right was accepted by Chief Judge William Campbell, who once wrote: "[I]t is incorrect, in my opinion to say . . . that a 'more severe sentence' is imposed on a defendant who stands trial. Rather, it seems more correct to me to say that the defendant who stands trial is sentenced without leniency . . ." *United States v. Wiley*, 184 F. Supp. 679, 685 (N.D. Ill. 1960); *accord* *United States v. Ramos*, 572 F.2d 360, 363 n.2 (2d Cir. 1978) (Lumbard, J., concurring); *Fielding v. Lefevre*, 548 F.2d 1102, 1106 (2d Cir. 1977); *United States v. Rodriguez*, 429 F. Supp. 520, 524 n.5 (S.D.N.Y. 1977). *See also* Thomas W. Church, Jr., *In Defense of "Bargain Justice"*, 13 LAW & SOC'Y REV. 509, 519-20 (1979) (asserting that, although plea bargaining should result in less than theoretically correct sentences, judges in reality possess wide discretion in sentencing); Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 698-99 (1980) (stating that it is morally impermissible to penalize a defendant with a more severe sentence for failure to cooperate with authorities); Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471, 489 (1978) (observing that it is difficult to prove that a prosecutor overcharged because courts defer to prosecutorial discretion).

The Supreme Court, however, has questioned whether a principled distinction can be drawn between reward and penalty. In *Roberts v. United States*, 445 U.S. 552, 555 (1980), a trial judge mentioned a drug dealer's refusal to name his suppliers as one circumstance that the judge considered in sentencing. The defendant apparently conceded that a sentencing judge properly could reward a defendant's guilty plea but argued that a failure to volunteer information should not be regarded as justification for enhancing his sentence. *Id.* The Supreme Court responded:

We doubt that a principled distinction may be drawn between "enhancing" the punishment imposed upon the petitioner and denying him the "leniency" he claims would be appropriate if he had cooperated. The question for decision is simply whether petitioner's failure to cooperate is relevant to the currently understood goals of sentencing.

Id. at 557 n.4.

Judge Bazelon referred to the implausibility of the distinction when he observed, "if we are 'lenient' toward [defendants who plead guilty], we are by precisely the same token 'more severe' toward [those pleading not guilty]." *Scott v. United States*, 419 F.2d 264, 278 (D.C. Cir. 1969). *See also* LLOYD L. WEINREB, DENIAL OF

doubtful constitutionality. They encourage guilty pleas by making it costly for an accused to claim his constitutional right to an adversarial procedure.⁵⁹ When convicted following a jury trial, the defendant is effectively punished twice: once for the crime and then again for “enjoy[ing] the right to . . . trial . . . by an impartial jury.”⁶⁰ Moreover, the existence of such differentials likely dissuades other defendants from exercising their right to trial.

During the interviews, one judge adverted to the possible existence of trial tariffs or guilty plea discounts in El Paso:

I know that a judge could be a sort of demigod on behalf of his constituents and say, so to speak, that whenever anyone goes to trial I'm going to give him the maximum and make people afraid to go to trial. That's a bad thing and there's no doubt that it's a worry. Jury sentencing keeps judges from taking vengeance on people who go to trial.⁶¹

The conclusion that there would be no trial tariffs or guilty plea discounts if juries always determined punishment makes sense. Judges suffer from caseload pressures because they are regular participants in the criminal justice process and face crowded trial dockets. But juries, convened only for the purpose of deciding a single criminal action, have no dockets and are not subject to caseload pressures. Therefore, one likely advantage of jury sentencing is that defendants convicted upon a jury trial are not punished more harshly for seeking an adjudication of guilt.

D. Sentencing on the Basis of Extraneous Factors

The Panel on Sentencing Research reported that “[u]sing a variety of different indicators, offense seriousness and offender's prior

JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 85 (1977) (stating that although not widely accepted as proper, courts penalize defendants who forego plea bargaining and are convicted at trial); Malvina Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 CRIM. L. & CRIMINOLOGY 1, 2, 8 n.42 (1982) (“[D]efendants are threatened with harsh penalties if they go to trial and are promised more lenient sentences if they plead guilty.”); Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 220 (1956) [hereinafter *Influence of Defendant's Plea*] (asserting that “whether by means of forfeiting a reward or incurring a penalty, a demand for trial will result in a more severe punishment than would be imposed following a guilty plea”).

59. *Influence of Defendant's Plea*, *supra* note 58, at 221.

60. U.S. CONST. amend. VI.

61. See *supra* note 20 and accompanying text.

record emerge consistently as the key determinants of sentences. The more serious the offense and the worse the offender's prior record, the more severe the sentence."⁶²

The interview data, however, suggests that the sentences imposed by jurors may be influenced by considerations far removed from offense seriousness and the offender's prior record. Judges critical of jury sentencing argue that extraneous factors, such as appeals to emotion, the skill of counsel, and the defendant's appearance and demeanor at trial often improperly effect the sentencing decisions of lay persons. One such judge said:

Judges, if there's anything in the world judges learn, is that you cannot judge by appearances. The appearance of the defendant — his facial features, his expression, his mannerisms, his personal merits — have more to do with jury sentencing than does anything else. And that's just a totally unreliable basis for sentencing. A jury cannot help but consider these things because really that's all they know — they just judge everybody by appearances.

They also judge from a different standpoint. A jury judges from the lawyers. In sentencing, a judge doesn't pay any attention to the lawyers. I mean he listens to what they say, but in terms of being emotionally moved by them a judge simply can't be, because he's just seen too much. For if they really try to appeal to him, other than by just logic, they put him off, irk him. But jury reaction to lawyers is much different than a judges.⁶³

As an example of extraneous factors which may affect jury punishment, another judge cited the sentencing of a defendant convicted of aggravated rape in a case involving particularly offensive behavior. At the punishment hearing, the defense attorney called the defendant as a witness. On the stand, the defendant appeared contrite, "admitted his sins," and requested that the jury assess a probationary sentence. The defense attorney also called the defendant's priest as a witness, who supported the defendant's request for leniency. The jury granted probation. In his interview, the judge who had presided over the trial opined that the sentence was excessively lenient and based entirely on emotion, appearances, and lawyer ingenuity. The judge said that without jury sentencing, those

62. See PANEL REPORT, *supra* note 16, at 11.

63. See *supra* note 20 and accompanying text.

factors would have had no effect and the defendant would have received a long prison term.⁶⁴

E. *The Purposes and Theories of Punishment*

There are diverse theories of punishment⁶⁵ that have at one time

64. See *supra* note 20 and accompanying text.

65. For a discussion of various theories of punishment, see generally JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 3-12 (1987) (discussing theories of punishment based on such goals as utilitarianism, retributivism, and denunciation); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 23-27 (2d ed. 1986) (discussing theories of punishment based on such goals as prevention, restraint, rehabilitation, deterrence, education, and retribution).

One's view of jury sentencing may depend on the assumptions made about the normative goals of sentencing. If these goals are the utilitarian ones of preventing crime (deterrence, incapacitation, and rehabilitation), sentences are justified on the basis of predictions of future crime and rehabilitative potential. Individualized sentencing is appropriate in pursuit of utilitarian aims. The rehabilitative goal, for example, prescribes sentence variation based on offender characteristics — lengthy confinement for some offenders but not others. It may be questioned whether juries are either competent enough or provided with adequate information to sentence offenders in light of utilitarian goals.

Jury sentencing might be appropriate if the purpose of sentencing is retributive and sentences are determined on the basis of the seriousness of the offender's criminal conduct, personal culpability, and the harm done or risked. But it is important to note that the retributive aim also requires similar punishment for similar cases. See also ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 66-67 (1976) ("Severity of punishment should be commensurate with the seriousness of the wrong."). See generally NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 73-76 (1974) ("[T]he maximum of punishment should never exceed the punishment 'deserved.'"); JAMES F. STEPHENS, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 75 (1883) (describing early justifications for retributive punishment); JAMES Q. WILSON, *THINKING ABOUT CRIME* 209 (1975) (discussing the retributive nature of the death penalty); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 497 (1985) ("punishment is . . . often justified simply on the grounds that it is just, not on the grounds that it is effective"). But see Gerhard O.W. Mueller, *Punishment, Corrections and the Law*, 45 NEB. L. REV. 58, 68-70 (1966) (asserting that mankind has generally outgrown the retaliatory phase and bridled its retributive urge).

PSR noted the enactment of determinate sentencing statutes during the 1970s. Under these statutes, prisoners could predict their release dates at the time of sentencing assuming good behavior in prison. PANEL REPORT, *supra* note 16, at 2. Determinate sentencing is associated with the retributive theory of punishment, commonly put forward under the rubric of "deserts" or "just deserts," which is gaining currency today. See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 67 (1981) (asserting that the retributive theory of punishment addresses the concept of moral responsibility); Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, WIS. L. REV. 781, 814-15 (1976) (advocating a cautious and humble embrace of the retributive theory of punishment); LAFAVE &

or another enjoyed enthusiastic support. Currently, there is widespread disagreement over the normative goals of sentencing and over which of those goals are appropriate in individual cases.⁶⁶ Also, theories sometimes conflict⁶⁷ and, depending on their relative priority in a particular case,⁶⁸ might suggest alternative sentences for the offender.⁶⁹ Viewed in this light, a proper sentence may depend first on assumptions made about the normative goals of sentencing and, second, on whether the sentencing authority is competent to set penalties consistent with the theory of punishment appropriate for the particular offender.

In interviews, however, judges were divided over the importance of a knowledge of sentencing theory. One judge criticized jury sentencing because lay persons generally lack an understanding of the goals of punishment:

The jury is not familiar with the purposes and theories of punishment, and in a trial it would be hard to educate them or give them any degree of sophistication as to really what all is involved. Sentencing is a very complicated undertaking. What's really needed is an emphasis on the theory and practices of sentencing. What is a reasonable reaction of the law to this particular person under all the circumstances?

For instance, I think that most people's attitude toward sentencing is merely a question of *social vengeance*. (Emphasis added). The only thing wrong with that is that other than keeping down a certain amount of vigilante and vengeance crime, social vengeance serves no purpose whatever to control crime. What controls crime — the only thing that I know of — is imposing a responsible control on as high a percentage of the criminals in a society as is possible. And then the question of what is a re-

SCOTT, *supra*, at 28-29 (asserting that the popularity of the retributive theory of punishment is in response to the perception that the rehabilitative theory of punishment has failed).

PSR reports that although there has been a strong shift away from indeterminate sentencing and rehabilitation as a goal of punishment, there remains widespread disagreement over the purposes of sentencing. PANEL REPORT, *supra* note 16, at 5. PSR states that decision-makers — legislators, judges, and parole officials — are rarely “purely utilitarian or purely retributive.” *Id.*

66. PANEL REPORT, *supra* note 16, at 5.

67. See PHILIP BEAN, PUNISHMENT 44-46 (1981).

68. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

69. PANEL REPORT, *supra* note 16, at 4.

sponsible control for any given defendant, it may be a guess on the part of a judge, but it's an educated guess and it's only a wild guess on the part of the jury.⁷⁰

On the other hand, another judge discounted the need for an awareness of the normative goals of sentencing. This judge favored jury punishment, suggesting that imposing a criminal penalty was simply a visceral reaction to the seriousness of a defendant's behavior:

I don't think punishment is based upon theories of law or theories of the criminal justice system. Basically, to me, punishment is a gut feeling. *What do you think this person deserves as punishment for what he has done?* (Emphasis added).

And factored in there is any consideration whether or not there's any rehabilitation that will work — not is there rehabilitation out there but whether or not it will work to some degree. There are not many success stories in the criminal justice system, but there are some, and I believe judges and juries need to try to make those success stories and consider rehabilitation.

But I really think it's a gut feeling. Take a look at the defendant, listen to what the complainant had to say, and the witnesses, and decide what punishment ought to be meted out.⁷¹

The two judges flatly disagree over what a competent sentencing authority ought to know about theories of punishment. But note their possible accord as to the goals pursued by sentencers. The first judge says that juries, because they lack understanding of other sentencing goals, seek retribution or "social vengeance." The second judge views sentencing as a matter of assessing the punishment the offender "deserves" for what he has done. Both judges seem to be referring to the "just deserts" goal to inflict suffering on the offender commensurate with the harm caused to another.⁷²

Assume that such a theory of sentencing — a just deserts model — dominates in an individual case. If the aim of the criminal law is to impose deserved punishment on the offender, is the jury competent to perform the sentencing function? An answer to the question may depend on the determinants of a proper sentence under a retributive theory of punishment.

70. See *supra* note 20 and accompanying text.

71. See *supra* note 20 and accompanying text.

72. See *supra* note 20 and accompanying text. See VON HIRSCH, *supra* note 65, for a discussion of the theories of punishment.

Under a retributive or just deserts model of punishment, the appropriate penalty is determined retrospectively by the nature of the criminal act, its seriousness, the offender's personal culpability, and the harm done or risked by the offender.⁷³ Arguably, if the jury is qualified to draw inferences concerning guilt or innocence, it is also competent to draw inferences concerning these penalty factors because they raise factual issues similar to those which are regularly resolved on the basis of evidence in the record by lay persons without special training or experience. If so, there is no reason why jurors could not properly determine punishment commensurate with the seriousness of the wrong.

But a just deserts model does not tolerate variations in the sentences of offenders guilty of crimes with the same degree of seriousness.⁷⁴ The retributive goal, if it is to avoid arbitrariness, requires that all offenders be measured by the same standard and that there be like sentences in like cases. Sentences fall short of this aim if jurors, because of their unguided discretion, irregular participation in the criminal justice process, or any other reason, return different sentences for similarly situated offenders.

On the other hand, if the goals that ought to have priority in sentencing are the utilitarian ones of rehabilitation, incapacitation, or deterrence, questions persist as to whether the jury is competent to fix penalties. In contrast to a retributive sentence, utilitarian punishment requires the sentencer to engage in a predictive function and prospectively determine the effects of the penalty on the offender and on future crimes in general.⁷⁵ A concern for the goal of deterrence, for example, requires the sentencer to determine how effective fear of punishment is as a restraint upon violations of the law by the general public.⁷⁶

Arguably, the task presented to the jury if it sentences under a utilitarian theory differs significantly from the traditional duty it performs in its role at trial as the finder of historical fact. It may be questioned whether the jury is able to evaluate behavioral effects of punishment or whether it can be presented with the information

73. PANEL REPORT, *supra* note 16, at 4-5.

74. VON HIRSCH, *supra* note 65, at 45-55, 66-67.

75. PANEL REPORT, *supra* note 16, at 4-5.

76. See FRANKLIN E. ZIMRING, PERSPECTIVES ON DETERRENCE 3-4 (1971) (discussing the theory of simple deterrence and how it affects potential criminals).

necessary to make judgments in territory so uncharted for lay persons.

F. *Sentence Disparity*

Sentence disparity is more accurately measured quantitatively. A major statistical finding of this study, presented below, is that jury sentences suffer from more dispersion or variability than judge sentences. But the interview data reported here is still useful because it provides a background against which the quantitative research can be interpreted and offers a possible explanation for the conclusion that juries are more erratic than judges in sentencing.

Disparity typically implies that defendants in like cases are sentenced differently; that is, equally situated offenders are treated unequally.⁷⁷ A lack of uniformity in punishment offends fundamental notions of fairness and raises questions concerning the competence of the sentencing authority.

The judges related copious evidence of unjustified disparity in jury sentences. Almost every judge told his or her favorite story of how a particular jury determined a sentence far outside the range of what might have been reasonably anticipated punishment. One

77. See PANEL REPORT, *supra* note 16, at 72. PSR distinguished between four types of disparity, stating that each needed to be evaluated differently. "First, there may be only the appearance of disparity. This occurs when cases seem alike to an outside observer but differ materially in case attributes observed by the judge." *Id.* at 75. For example, one defendant might exhibit remorse while another, otherwise a like offender, does not. This seeming disparity may be reduced by observation of additional variables that affect sentencing. *Id.*

The second type of disparity is that which is deliberately introduced as a matter of social policy. *Id.* For example, assume it has been decided that it is sufficient to single out and punish only one of several tax evaders. *Id.* Such disparity may be unjust to one who espouses equal treatment for like offenders, but may be tolerated by one who believes that "like' offenders are entitled only to an equal opportunity of receiving a particular sentence." PANEL REPORT, *supra* note 16, at 75.

Third, there is "interjurisdictional disparity such as that found between urban and rural courts in the same state." *Id.* Such geographical disparity may be the product of differences in community attitudes toward crime and punishment. Whether such disparity is warranted depends on one's "concern for evenhandedness or uniformity of standards versus the value of preserving local community control." *Id.*

A fourth type of disparity relates to individual judges whose differences in sentencing are explained by their varying philosophies, experiences, and backgrounds. *Id.* at 76. Some observers might tolerate such disparity as a reflection of acceptable variation in attitudes toward sentencing within a community. *Id.* Others might deplore such variation as inequitable, inconsistent with the rule of law, and undesirable because "judge shopping" may result. *Id.* at 77.

judge cited a case in which several defendants had been convicted for their part in a gang rape. Jury penalties ranged from a two-year suspended sentence for the offender who initiated the attack to a forty-year prison term for an offender who appeared to be the least culpable of those charged.⁷⁸

Another judge cited a case of four brothers who were jointly charged with murder but had separate jury trials (two defendants in one trial, two in another). The four brothers grew up in the same family, were closely grouped in age, and lacked serious criminal histories. Although the juries convicted all four, it appeared that two of the four were primarily responsible for the offense. Nevertheless, while one jury assessed sentences of thirty and thirty-two years on the two offenders who appeared more culpable, the other jury assessed terms of fifty-seven years for each of the two who seemed less culpable.⁷⁹

Judges stated almost unanimously that juries sentence offenders much more disparately than judges, primarily because lay persons bring no experience to the task of sentencing and bear no continuing responsibility for it. Recall the interview statement of the first-quoted judge who observed that while "jurors hear only one case," judges are able to assess punishment for one offender in light of the penalties they set for others.⁸⁰ The judge is almost certainly correct in his belief that the greater dispersion in sentences by juries is explained by their inability to make sentencing decisions on a comparative basis.

G. *Jury Sentencing and Compromise Verdicts*

The Texas Legislature established the two-phased trial procedure to lessen the incidence of compromise verdicts — guilty verdicts supported by jurors who disagree that the state has carried its burden of proof but who vote to convict based on an agreement to impose a low penalty.⁸¹

78. See *supra* note 55 and accompanying text.

79. See *supra* note 20 and accompanying text.

80. See *supra* note 52 and accompanying text.

81. See generally *Beck v. Alabama*, 447 U.S. 625, 637 (1979) ("the risk of an unwarranted conviction . . . cannot be tolerated"); *Jury Sentencing in Virginia*, *supra* note 7, at 986-87 (same); *Statutory Structures*, *supra* note 9, at 1156 ("[I]t can hardly be maintained that the jury can completely separate its guilt-finding from its sentence-assessing functions.").

Although bifurcation is superior to the former Texas procedure whereby the jury determined guilt and punishment in a single proceeding,⁸² the two-phased trial does not entirely eliminate the risk of a compromise verdict. Because the same jury sits at both proceedings, the danger remains that the prospect of imposing a low penalty at the second stage will persuade some jurors to vote to convict even though they were not convinced of the defendant's guilt to a moral certainty and beyond a reasonable doubt.⁸³

During interviews, the judges were divided over whether the two-phased trial prevented compromise verdicts. Some believed that the new procedure worked well and that jurors diligently followed the court's instructions to make independent determinations on the issues of guilt and punishment. Others maintained that despite separate proceedings, jurors found it too difficult to decide both issues without impinging upon a defendant's right to be acquitted unless the prosecution proved guilt beyond a reasonable doubt.⁸⁴

Despite the apparent split among judges regarding the two-phased trial, the survey generated only soft data on this subject. Judges who doubted the effectiveness of the two-phased trial related no concrete observations of compromise verdicts, only hunches and suspicions. They tended to be tentative in their interview responses, probably because the jury deliberates in secret during each stage of the proceedings, making hard evidence of illicit agreements very difficult to obtain.⁸⁵

III. THE STATISTICAL ANALYSIS

A. *Sentence Length and Variability*

For each of seven offenses studied, the statistical analysis compared the sentences of judges and juries as to both severity (initially, as indicated by the length of prison terms) and variability (variations in the magnitude of prison terms). The mean sentence length (\bar{X}) measures sentence severity and the standard deviation (S) measures sentence variability.⁸⁶

82. See *supra* note 43.

83. *Jury Sentencing in Virginia*, *supra* note 7, at 968-87.

84. See *supra* note 20 and accompanying text.

85. See *supra* note 20 and accompanying text.

86. The mean sentence length (\bar{X}) is the simple arithmetic average, computed by adding the lengths of all sentences and dividing by the number of sentences. See,

Diagram 1 illustrates the results of this preliminary examination. It depicts by judge and jury the spread around the mean for each of the seven major offenses. In the diagram, values for mean sentence lengths appear at the base of each vertical column as well as at a midpoint within the column. Values for standard deviations appear at the base of the column.

Comparing the statistics shown in Diagram 1, one finds greater severity and variability in jury sentencing for almost every offense in the study. An offense-by-offense comparison of mean sentences shows that juries imposed longer prison terms for all offenses except armed robbery. A comparison of standard deviations reveals more dispersion in jury sentences for all offenses except theft.

Diagram 1 also presents a graphic view of the severity and variability of the two kinds of sentences. As for severity, the darkened part of each vertical column represents sentence length measured by the mean sentence for the offense. In other words, the taller the darkened part, the longer the duration of imprisonment for that offense. As for variability, the entire vertical column, including darkened and undarkened parts, represents the range between the shortest sentence and the value one standard deviation below the longest sentence. The taller the entire column, the more scattered the sentences for that offense. From this perspective, it is evident that jury sentences were more variable for every offense in the study. It is also evident that juries imposed longer sentences for all offenses except armed robbery.

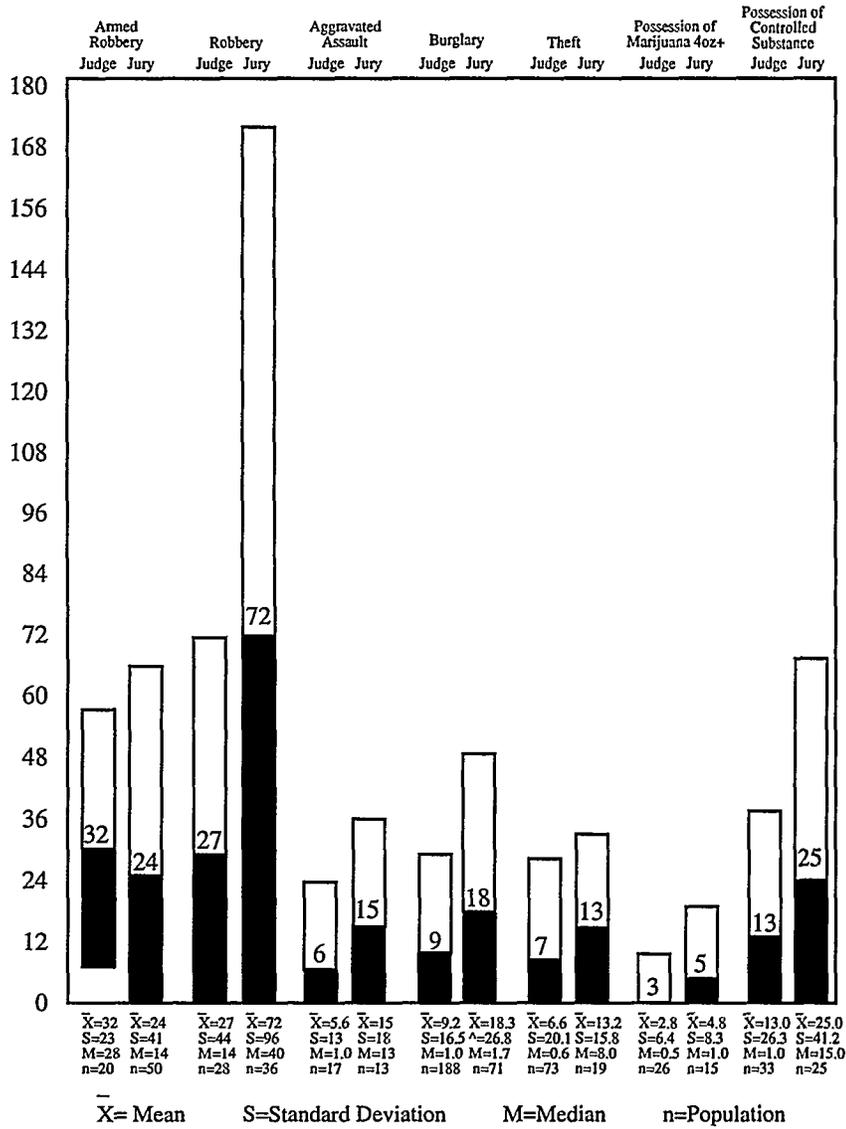
The analysis displayed in Diagram 1 did not control for prior criminal record or offense seriousness. Without controlling for these variables, the longer jury sentences might be explained by the special characteristics of those cases which resulted in jury trial, such as offense behavior or criminal history of a more serious nature. Also, the initial analysis did not control for the type of conviction, *i.e.*, guilty plea or trial. Without controlling for this variable, longer jury sentences might be explained by the trial tariff: harsher sentences imposed on defendants who contest their guilt.⁸⁷

e.g., MORRIS HAMBURG, *STATISTICAL ANALYSIS FOR DECISION MAKING* 24 (5th ed. 1991).

The sample standard deviation (*S*) measures the dispersion of sentence lengths around the mean sentence length. *Id.* at 49-50. Hence, the larger the standard deviation, the larger the sentence variability.

87. *See supra* notes 57-60 and accompanying text.

DIAGRAM 1
Sentence Spreads by Offense and Sentencer



Because of the ambiguous results in the initial analysis, multivariate regression analysis was used to re-examine the data, controlling for the type of conviction (guilty plea or trial), criminal history, and certain "seriousness indicators."⁸⁸ An interaction model was used to test whether juries react more than judges to the special characteristics of a case. The analysis also permitted a determination of whether the greater variability in jury sentences occurred by chance or by jury reactions to specific aspects of the case. Regression analysis confirmed the preliminary finding of greater severity and variability in jury sentences.

Although the regression analysis confirmed the initial findings, the reality is more complicated than suggested by a preliminary view of Diagram 1. Looking at the linear impact of the jury sentencing variable, one first sees no significant difference in severity between judges and juries. This suggests that the marked differences in sentence lengths depicted in the diagram are explained by the trial tariff. Regression analysis, however, confirmed the earlier finding of greater jury severity as depicted in Diagram 1. It also revealed that a positive and significant interaction effect existed between the jury sentencing variable and the variable measuring offense seriousness. In practical terms, this means not only that juries imposed longer prison terms for all offenses, but also that differences between judge and jury sentences, running in the direction of greater jury severity, increased as offenses became more serious. Table 1 displays this interaction effect.

88. The "seriousness indicators" included the following: offense of conviction; mean sentence imposed for that offense; number of prior arrests; number of prior penitentiary commitments; sex of offender and victim; race of offender and victim; age of offender; use of a weapon; amount of money stolen; number of perpetrators; whether the offense was committed in the victim's home; and the seriousness of any injury to victim.

TABLE 1
PREDICTED SENTENCING DIFFERENTIALS BETWEEN
JUDGES AND JURIES, BY OFFENSE

	OFFENSE					
	Aggravated Rape	Robbery	Sale of Controlled Substance (Group 1)	Possession of a Controlled Substance	Burglary	Theft
Length of Sentencing Differential	50 months	41 months	20 months	12 months	7 months	3 months

It should be emphasized that Table 1 displays not predicted sentences for the indicated offenses, but predicted differences between average lengths of sentences imposed by judges and juries for those offenses.⁸⁹

As for repeat offenders, the analysis shows that when only recidivists were examined, the judge-jury differences are even larger than those depicted in Table 1. As for the first-time offenders, the analysis reveals a somewhat different pattern. Although juries sentenced first offenders more severely than judges, juries distinguished be-

89. The following multiple regression equation was used to predict the sentencing differentials reported in Table 1:

$$\text{Sentence} = -8.6 + .79A + 13.3B + 2.83C + 19.6D - 12.2E + 7.0F - 7.1G + 16.2H - 12.2J + .86K$$

- where
- A = offense seriousness (F=5.64; β =.12)
 - B = Does the defendant have prior penitentiary commitments?
(0 = no; 1 = yes) (16.0; .14)
 - C = Number of prior arrests (31.4; .20)
 - D = Was defendant convicted by a jury?
(0 = no; 1 = yes) (6.83; .28)
 - E = Did defendant plead guilty?
(0 = no; 1 = yes) (2.7; -.18)
 - F = Was the crime committed at the victim's home?
(0 = no; 1 = yes) (9.44; .09)
 - G = Was the victim Hispanic?
(0 = no; 1 = yes) (10.53; -.10)
 - H = Was the victim seriously injured?
(0 = no; 1 = yes) (17.7; .13)
 - J = Did the jury sentence the defendant?
(0 = no; 1 = yes) (10.9; -.18)
 - K = Offense seriousness \times Did the jury sentence the defendant? (27.5; .35)

tween such offenders as to the seriousness of their offenses. Juries actually imposed shorter prison terms on first-time offenders convicted of the more serious offenses than on those convicted of less serious offenses. But the leniency shown this subset of offenders was exceptional — juries generally punished first offenders more severely than judges.

B. *Use of the Prison Sanction*

The severity of a sentencing authority must be gauged not only by the length of its sentences, but also by its use of the prison sanction — the decision to incarcerate rather than grant probation. Table 2 compares judges with juries in their use of imprisonment as a penalty. It displays probation rates by type of conviction (guilty plea or trial) and by prior criminal record (first offender or repeat offender).⁹⁰

TABLE 2
PROBATION RATES FOR JUDGES AND JURIES, BY
CRIMINAL RECORD AND MODE OF
DISPOSITION

	Judges	Juries	T-Value
	<u>Guilty Plea Cases</u>		
First Offender	.90*** (193)	.68*** (34)	3.62
Repeat Offender	.61 (230)	.59 (47)	.26
	<u>Trial Cases</u>		
First Offender	.59 (22)	.69 (59)	-.83
Repeat Offender	.18 (62)	.25 (169)	-1.09

Levels of Statistical Significance:

*** .001

90. The statistics reported in Table 2 should be viewed with caution because the Texas statute governing probation varies substantially with whether judge or jury imposes punishment. *See supra* note 37. A more strict approach to assessing the use of the prison sanction was not undertaken because of methodological difficulties in disentangling the effects of the additional variables stemming from the complexity of the statute.

Table 2 presents only slight evidence that juries were more severe than judges in deciding between incarceration or probation. It shows that the jury's greater use of the prison sanction is statistically significant only in guilty plea cases involving first offenders. It also shows that in trial cases, although the differences are not statistically significant, juries sentence less severely than judges.

But the data suggests questions which relate to a possible institutional preference of judges that defendants waive their right to trial.⁹¹ In guilty plea cases, might judges, by imposing a lower rate of imprisonment, be discounting the price set by juries for defendants waiving their right to an adjudication? In trial cases, might judges, by imposing a higher rate of imprisonment, be inflating the price to make defendants pay for contesting their guilt?

As for discounting jury sentences in guilty plea cases, Table 2 shows that judges were a little more lenient than juries toward repeat offenders (probation rates of 61% versus 59%) and much more lenient toward first offenders (probation rates of 90% versus 68%). Arguably, the greater leniency shown by judges to defendants who plead guilty is to be expected if jurors sentence "on the merits" and judges do not.

Similarly, it is possible that in trial cases judges might inflate the price set by juries, adding an extra penalty for a defendant's choice to go to trial. However, since there is a right of election in both guilty plea and trial cases, defendants could undercut such a strategy simply by choosing jury sentencing whenever they contest their guilt. Therefore, since judges are likely to be aware of such a response by defendants (and take it into account in setting penalties), one might expect that greater judge-jury differences would appear in guilty plea than in trial cases.

Table 2 shows that judges prescribed more severe sentences than juries on trial defendants (probation rates of 59% versus 69% for first offenders; 18% versus 25% for repeat offenders). Arguably, the greater severity of judges suggests that, to penalize those who contested their guilt, judges increase the price set by juries. Also note that judge-jury differences are greater in guilty plea than trial cases. Again, such a result is what might be expected if judges' sentences were influenced by the considerations set forth above.

91. See *supra* note 51 and accompanying text.

IV. CONCLUSION

The research reported here measures the performance of the jury against that of the judge with respect to the severity and variability of sentences in felony cases in El Paso County, Texas. A comparison of actual sentences of the two sentencing authorities shows that juries imposed longer and more variable prison terms than judges. Regression analysis predicted differences between the average lengths of sentences imposed for certain offenses. These differences, running in the direction of longer sentences by juries, increased with the seriousness of the offense.

What do these findings signify? There are at least four main issues. The first is whether longer jury sentences reflect public sentiment that judges treat offenders too lightly. Second is whether public sentiment can serve as a reasonable basis for determining sentencing policy. Third is whether the sentencing practices of juries are consistent with the retributive or just deserts theory of punishment that is currently re-emerging.⁹² Fourth is whether the jury is competent as a sentencing authority.

Do longer jury sentences mirror a community belief that judges sentence offenders too leniently? It would seem that the answer is yes. The public call for crime control through longer prison sentences is heard everywhere. Previous studies show that the public wants longer sentences than those actually imposed by the criminal justice system.⁹³ Jurors are a cross-section of the public, and it is

92. See PANEL REPORT, *supra* note 16, at 2 (describing the trend toward determinate sentencing statutes). See also *supra* note 65 and accompanying text.

93. The public is increasingly critical of perceived judicial leniency in sentencing. Timothy J. Flanagan et al., *Public Perceptions of the Criminal Courts: The Role of Demographic and Related Attitudinal Variables*, 22 J. RES. CRIME & DELINQ. 66, 66 (1985). Opinion polls in the United States and Canada suggest that most members of the public would like their criminal courts to be more severe. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 256-58 (Edward J. Brown et al. eds., 1983). Polls conducted by the Roper Public Opinion Research Center between 1972 and 1980 found the percentage of respondents who said their courts were too lenient in sentencing increased from 66% in 1972 to 83% by 1980. *Id.* at 258. Other polls have indicated that the public attaches serious consequences to this perceived leniency by courts. A 1981 poll conducted by the Gallup Organization found that 20% of the respondents believed leniency by the court was the single most important cause of increasing crime rates in the nation. *Id.* at 229. Similarly, a 1982 Gallup poll found that 36% of the respondents believed that more severe punishment could reduce recidivism rates of released prisoners. *Id.* at 264. A 1989 Gallup poll found that 83% of the respondents felt that the courts in their area did not deal harshly enough with criminals. See SOURCEBOOK, *supra* note 26, at 191.

likely that the more severe sanctions they impose reflect community preferences.

Can public sentiment serve as a reasonable basis for developing sentencing policy? It would seem again that the answer is yes, at least in the sense that a just deserts policy of punishment should be informed by some input from the general public.⁹⁴ When the dominant goal of sentencing was the rehabilitation of the offender, parole officials appropriately determined the length of sentences.⁹⁵ Today,

But other studies present a different picture of public attitudes toward sentencing. One study questioned the validity of public opinion polls depicting a perception of judicial leniency, arguing that such surveys generally do not ask respondents to consider contingencies such as offense circumstances, behavioral content of various sentences, or fiscal cost differentials. This study found that, based on a survey of 816 Illinois residents, the public is less vengeful than typically portrayed in polls. Douglas R. Thomson & Anthony J. Ragona, *Popular Moderation Versus Governmental Authoritarianism: An Interactionist View of Public Sentiments Toward Criminal Sanctions*, 33 *CRIME & DELINQ.* 337, 337 (1987). In another study of Illinois respondents, a group of 325 judges and lay persons were asked to impose sentences on the same offenders in four hypothetical criminal cases. The sentences given by lay persons tended to be equal to or less severe than those given by judges. The researchers concluded that the public perception of judicial leniency is "fueled by both inaccurate perceptions of the sentences judges imposed and distorted pictures of offenders they sentence." Shari S. Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 *BEHAV. SCI. & LAW* 73, 88 (1989).

Two Canadian scholars concluded that media coverage contributes to a public preference for more severe sentencing by unduly emphasizing crimes of violence and sentences of imprisonment and by providing too little systematic information about the sentencing process or its underlying principles. Anthony N. Doob & Julian V. Roberts, *News Media Influences on Public Views of Sentencing*, 14 *LAW & HUM. BEHAV.* 451, 451 (1990). These authors suggest that the inadequacy of newspaper accounts of criminal cases is largely responsible for public dissatisfaction with current sentencing practices. *Id.* at 458. They found that people who had information similar to that available to the sentencing judge were significantly more satisfied with the level of punishment actually imposed. *Id.* at 458-60. See generally Anthony N. Doob & Julian V. Roberts, *Social Psychology, Social Attitudes, and Attitudes Toward Sentencing*, 16 *CANAD. J. BEHAV. SCI.* 269, 269-79 (1984) (discussing the impact of information on public attitudes regarding satisfaction with judicial sentencing).

Unlike the study reported in this Article, none of the research referred to in this footnote rests on a statistical analysis of sentences actually imposed by judges and juries.

94. Some criminal justices scholars observe that under retributive sentencing, there are fewer guideposts for the "correct" sentence and that the public's view on appropriate levels of punishment becomes increasingly relevant. See Alfred Blumstein & Jacqueline Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's View*, 14 *LAW & SOC'Y REV.* 223, 258-60 (1980) (asserting that sentencing should accurately reflect public opinion).

95. PANEL REPORT, *supra* note 16, at 2.

as sentencing goals shift from rehabilitation to retribution,⁹⁶ it is apparent that public views on appropriate levels of penalties become increasingly relevant.⁹⁷

Are jury sentencing practices in El Paso County consistent with a re-emerging just deserts theory of punishment? It would seem that this question may be answered both yes and no. If the purpose of sentencing is retributive, the punishment must be commensurate with the seriousness of the offender's criminal conduct, his personal culpability, and the harm done or risked.⁹⁸ This study suggests that juries, in accordance with the retributive ideal, are sensitive to determining punishment in light of the seriousness of the behavior underlying the offense.

But a just deserts philosophy also requires equality of treatment for defendants with offense behavior and criminal records of a similar nature. If this study suggests a failure of jury sentencing to provide like treatment for like offenders, jury sentencing in El Paso County may have fallen short in meeting the goals of a retributive model of punishment.

Finally, is the jury a competent sentencing authority? Unlike judges, lay persons generally have little or no knowledge of punishment policy, sentencing alternatives, the state's correctional system, or other matters germane to the administration of penal laws. Jurors do reflect communal attitudes toward punishment, but they lack the temperament, experience, or professional discipline of courts. Jurors may respond to different stimuli than judges, who are routinely exposed to unpleasant or repulsive evidence. Lay sentencers might react emotionally to repugnant behavior, and may be both more harsh and more erratic than judges in punishing for such conduct.

A possible alternative to the present framework is a system which employs mixed tribunals of judges and lay persons in making decisions concerning punishment. Common in Europe (where mixed tribunals also determine guilt or innocence),⁹⁹ such a procedure would go far toward remedying the perceived defects of jury sen-

96. See *supra* note 16 and accompanying text.

97. See *supra* note 94 and accompanying text.

98. See *supra* notes 66-76 and accompanying text.

99. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 991-92 (1983) (discussing West German trial practices).

tencing — disparity, undue severity, ignorance of correctional alternatives, and ignorance of the resolution of past cases. At the same time, the procedure may yield sentences vastly more acceptable to the public than those determined by judges alone.¹⁰⁰

If this study is found to reflect greater jury severity in assessing punishment, it must be recognized that greater social costs are part and parcel of allocating the sentencing function to lay persons alone. If the jury continues to act as a sentencer, attention needs to be paid to the problems of larger inmate populations, increased costs to taxpayers, and greater disruption in the lives of prisoners, their families, and society in general.

100. The mixed tribunal for making sentencing decisions has, oddly, not been used in the United States. The advantages of using both professional judges and lay persons are recognized by Professor Albert Alschuler, who is a proponent of the mixed tribunal and favors its introduction into American criminal justice systems. See Alschuler, *supra* note 100, at 997-1003 (discussing how mixed tribunals might simplify American trial procedures and make them more effective).