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Jury Sentencing in the United States: The Antithesis of the Rule of Law

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JURY SENTENCING IN THE UNITED STATES: THE
ANTITHESIS OF THE RULE OF LAW

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I. INTRODUCTION

In his dissent in *Glossip v. Gross*, Justice Breyer declared that “[t]he arbitrary imposition of punishment is the antithesis of the rule of law.” He went on to assert that, for a defendant, to be sentenced to death was akin to being struck by lightning. Such randomness and arbitrariness in capital sentencing results from the wide discretion granted to sentencing actors, and runs counter to the firmly held belief that every defendant in the criminal justice system deserves fair and just treatment.

However, these arbitrary sentences are not limited to the capital context; they are the result of every sentencing jury determination. In Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia, juries determine a defendant’s sentence in the non-capital context. These sentences are the result of broad discretion and little guidance. As a result, non-capital juries tend to impose sentences that are just as arbitrary as those imposed by juries in the capital context. Such arbitrary sentences run counter to the purpose of jury sentencing and undermine the Founders’ belief that the jury is “the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”

Because jury sentencing tends to produce such arbitrary and unjust results,

2. *Id.* at 2764 (“From a defendant’s perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?”).
3. *Id.* at 2759–64 (“The imposition and implementation of the death penalty seems capricious, random, indeed arbitrary. From a defendant’s perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?”).
7. See King & Noble, *supra* note 4, at 332.
significant revisions need to be made to the jury sentencing regime if such a regime is to continue.

This article demonstrates that the statutory jury sentencing scheme in each of these states contributes significantly to the arbitrary nature of sentences imposed, as each sentencing scheme is characterized by significant discretion for juries and a lack of guidance as to how to wield such discretion.\textsuperscript{10} It contends that this lack of guidance leads to arbitrary and unjust sentences that juries ultimately do not feel responsible for imposing.\textsuperscript{11} Instead of accepting responsibility,\textsuperscript{12} jurors tend to place responsibility on other actors in the criminal justice system like the defendant, the judge, the prosecutor, or the state.\textsuperscript{13} This trend has been analyzed and studied in the capital context but has yet to be explored in the non-capital context.\textsuperscript{14} In fact, numerous studies have demonstrated that capital jurors do not feel responsible for the death sentences they impose.\textsuperscript{15} Instead, capital jurors are insulated from the punishment they impose by procedural safeguards surrounding the

\begin{itemize}
  \item \textsuperscript{11} William J. Bowers & Benjamin D. Steiner, \textit{Choosing Life or Death: Sentencing Dynamics in Capital Cases, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION} 319 (James R. Acker, Robert M. Bohm & Charles S. Lanier, eds. 1998).
  \item \textsuperscript{12} Throughout this paper, I define responsibility as the sense of accountability that jurors experience as a result of the sentence they choose to impose. This requires an accurate understanding of what will happen to the defendant as a result of the sentence imposed and an appreciation of their role in causing that impact on the defendant.
  \item \textsuperscript{13} Bowers & Steiner, \textit{ supra} note 11, at 320; \textit{see also} Craig Haney, \textit{Violence and the Cap. Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death}, 49 STAN. L. REV. 1447, 1481 (1997) (“[M]any capital jurors further distance themselves from the moral implications of this awesome responsibility by maintaining the belief that \textit{someone else}— typically appellate judges—will ultimately decide the sentencing question that has been posed to them.”).
  \item \textsuperscript{14} King, \textit{ supra} note 6, at 195 (“Capital sentencing research includes extensive study of the sentencing proceeding, the jury decision-making process, and the influence of various factors on the outcome of the sentencing decision.” In contrast, “relatively little attention has been devoted to jury sentencing in non-capital cases . . . .”).
  \item \textsuperscript{15} Bowers & Steiner, \textit{ supra} note 11, at 320.
\end{itemize}
imposition of the death penalty. This lack of responsibility stems, in part, from the decision by each state to adopt statutory provisions that insulate the jury from the impact of their decisions, allowing them to feel as if they are not solely responsible for the sentence imposed.\(^\text{16}\) Such insulation enables jurors to enact more severe sentences than they may otherwise enact and undermines the credibility of the criminal justice sentencing system.\(^\text{17}\)

The demonstrated lack of responsibility felt by capital jurors is a critical issue, but it is one that effects few defendants.\(^\text{18}\) On the other hand, the lack of responsibility that is similarly perpetuated by state processes, and that is felt by jurors in non-capital cases, has a significant impact on the justness and consistency of every single jury sentence imposed throughout the country. If the goal of the criminal justice system is to ensure sentences are reliable and equitable, it is important to both increase procedural protections for defendants sentenced by juries and to explicitly stress to jurors the impact their decisions will have on the defendant. In order to truly be sentenced by a jury of one’s peers,\(^\text{19}\) it is essential for jurors to accept responsibility for the choice they have made and the sentence they have imposed. By providing the jury more information and being explicit about the court’s expectations of jurors, jurors will have to directly face the sentences they choose to impose, acknowledge their role in the criminal justice system, and acknowledge their role in the life of that defendant. The solutions proposed in this article draw on studies about promoting attentive students in the classroom to similarly create attentive jurors. This new approach to creating an engaged jury represents minor steps that states can take to ensure their jury sentencing systems are operating equitably and non-arbitrarily. While these steps are minor, they can significantly contribute to the credibility of jury sentences and the criminal justice system in states that continue to regularly use sentenced juries.


\(^{17}\) See King, supra note 6, at 198; see also King & Noble, supra note 4, at 332–33.


\(^{19}\) U.S. CONST. amend. VI.
I advance my argument in three parts. In Part I, I explore why juror responsibility is so critical to promoting just and non-arbitrary sentences. I further analyze the lack of responsibility felt by capital jurors and discuss from where that lack of responsibility originates. Part II briefly explores jury sentencing in Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. Because no article has previously explored the responsibility felt by jurors in the non-capital context, I analyze the jury sentencing processes that promote a lack of responsibility in capital cases that are also utilized in non-capital cases. I conclude that these processes in capital cases create the feeling of a lack of responsibility in non-capital jurors as well. Part III outlines a possible framework that would enable jurors to feel responsible for the sentences they impose. This framework includes efforts to increase juror activism and to increase juror comprehension. I conclude that unless such changes are made, jury sentences for felons will continue to be arbitrary and will continue to cast doubt on the credibility of the sentencing jury that was intended to contribute to the Nation’s “peace, liberty, and safety.”

II. THE IMPORTANCE OF JUROR RESPONSIBILITY

At the time the Bill of Rights was drafted, the jury was considered critical to prevent governmental overreach and abuse. They were responsible for determining guilt or innocence and based on that determination a sentence automatically flowed, making jurors “de facto sentencers.” Through time, the prominence of the sentencing jury has diminished with only six states still regularly utilizing a sentencing jury. In these states that regularly use sentencing juries, the actions the juries take have a significant impact on defendants. In these states, jurors remain the bulwark against governmental oppression, and their participation is critical to ensuring sentences are not arbitrarily imposed. In order for juries to serve such a function, it is critical that jurors feel

20. See President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801).
23. See id. at 694 (“Over time, a different division of labor evolved between judges and juries: juries decided liability; judges sentenced.”).
24. King & Noble, supra note 5, at 886.
responsible and accountable for the sentences they impose. If jurors do not feel responsible for the sentences they impose, and if they do not recognize the significant power they wield, they will be more likely to apply a sentence to a defendant based on a factor that does not speak to the defendant’s ultimate criminal culpability. Such a decision would be constitutionally impermissible, as it would lead to the arbitrary application of punishment. The arbitrary application of punishment has been well documented in the capital context. In fact, it is what led the Supreme Court to temporarily hold the death penalty unconstitutional in 1972. Here, I explore the importance of juror responsibility as a bulwark against governmental oppression and as the last defense against the arbitrary imposition of punishment. Additionally, I explore the problem that arises when jurors in the capital context do not feel responsible for the sentences they impose. I evaluate several studies that suggest capital jurors do not feel responsible for the sentences they impose, and I explore why that is likely the case.

A. Why Responsibility Is So Important?

In Oregon v. Ice, the U.S. Supreme Court recognized “the jury’s historic role as a bulwark between the State and the accused at . . . trial . . . .” This role has its roots in the Sixth Amendment of the United States Constitution. Such a role requires active participation by the jury to prevent governmental oppression. In its most basic form, it requires that the jury understand the facts and be able to apply the law to those facts. Only when they are able to do so both during trial and sentencing can they truly impose just sentences that are not based on arbitrary or impermissible factors. By understanding the awesome weight of such a role in the criminal justice system, the jury accepts responsibility for their verdict and is more likely to base their decisions on the defendant’s criminal culpability while taking account of all mitigating factors that pertain to such culpability. In this section, I further analyze the jury’s role

26. King & Noble, supra note 4, at 332–33.
30. U.S. CONST. amend. VI.
31. See Haney, supra note 13, at 1485–86.
as a bulwark against governmental oppression and I discuss how the failure to accept responsibility leads to arbitrary and unjust sentences.

1. Jurors Exist as a Bulwark Against Governmental Oppression

   The right to a trial by jury is engrained in the Sixth Amendment of the United States Constitution. As a result, juries have long been perceived as a bedrock of American democracy and as a bulwark against the unjust infringement of a defendant’s rights. A jury of one’s peers is supposed to represent a fair cross section of the community and ensure that unjust and harsh sentences are not imposed arbitrarily.

   However, in order for a jury to function effectively, a jury must have the information and resources they need to find the facts and apply the law. “[F]or a jury to effectively convey the moral condemnation of the community in a criminal case . . . the jury must be provided with tools . . . to adequately and competently exercise its responsibility.” By preventing the jury from receiving such resources, the state is placing paternalistic limitations on the jury. The application of such limitations on the jury creates the presumption that such limitations are necessary for the jury to act appropriately and suggests that “the jury is unable to shoulder the responsibility of governing the decisionmaking [sic] process.” If the jury is unable to bear this responsibility, then it is the government that is really making sentencing decisions. Thus, instead of a jury of the defendant’s peers protecting him from governmental overreach, the jury yields to the entity from whom they are supposed to be protecting the defendant. This sentencing structure results “in a reduction in the moral authority that supports the process.” To combat such a reduction and to ensure the purposes of the Sixth Amendment are effectuated, it is critical that

32. U.S. CONST. amend. VI.
33. Oregon, 555 U.S. at 168.
35. Id.
36. Id.
37. Id.
38. Id. at 207 (quoting In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1093 (3rd Cir. 1980)).
jurors are explicitly informed of their responsibility and the impact their decision will have on the defendant.

2. Arbitrary Results

Procedural safeguards, like jury instructions, are intended to ensure that the sentences imposed are just, rather than arbitrary or capricious. Such procedural safeguards exist to guide juries in both the capital and non-capital context. While these safeguards are given special emphasis in the capital context, they are inadequate in both the capital context and the non-capital context to combat the potentially arbitrary decisions that result.

In the capital context, the U.S. Supreme Court has emphasized that procedural safeguards are intended to help avoid the arbitrary application of the death penalty, to guide the jury during sentencing, and to allow the jury to understand the weight of their decision.39 In fact, in Furman v. Georgia, when the death penalty was briefly ruled unconstitutional, it was because the death penalty was being applied in an impermissibly arbitrary manner.40 There, the U.S. Supreme Court looked to state death penalty statutes and concluded that they provided too much unfettered discretion to capital juries.41 This unguided discretion was said to be the cause of arbitrary and capricious death penalty decisions.42

The same unfettered discretion that existed among capital juries when the death penalty was ruled unconstitutional in 1972 also exists today in the non-capital context.43 “Juries in non-capital cases face wide-open choices that seem to allow even more room for arbitrary, even discriminatory, decision-making than is available in the choice between life and death.” 44 The risk of arbitrary sentencing in non-capital cases should be of a similar level of concern as the risk in capital cases, especially given the additional protections that have been adopted in the context of the death penalty and have not been adopted in a non-capital context.

40. Furman, 408 U.S. at 274.
41. Id. at 298.
42. Miller, supra note 10, at 1319.
43. King, supra note 6, at 200.
44. Id.
Granted, this argument may conflict with the “death is different,” 45 refrain that motivates significant procedural protections and scrutiny in the death penalty context. However, because a significant liberty interest is implicated by prison sentences as well, arbitrary decision-making should remain a concern of the Court just as it is in the capital context. Asserting otherwise would undermine the entire criminal justice system and contradict the Federal Sentencing Guidelines. 46 Arguing that arbitrary decision-making should not be a concern of the non-capital punishment system would be equivalent to suggesting that juries should have free reign to consider any factor or no factors at all in their decision-making process—akin to allowing the jury to flip a coin to decide the length of sentence a defendant must serve. The criminal justice system loses all credibility if it allows juries to reduce the choices they are asked to make to a simple coin toss. This sentiment was echoed by Justice Clark in *Gideon v. Wainwright* when he asserted that

> [t]he Fourteenth Amendment requires due process of law for the deprival of ‘liberty’ just as for the deprival of ‘life,’ and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. 47

Thus, even though, “death is different,” 48 an abridgment of liberty should not occur arbitrarily. Instead, the jury’s discretion should be limited to consideration of the legal factors before them. To truly limit their discretion to those factors, it is critical to communicate the expectations of the court and the law clearly and unambiguously. This need has been uniquely demonstrated by studies demonstrating a lack of juror responsibility in the capital context, but the same lack of responsibility also is present in the non-capital context.

46. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(3) (U.S. SENTENC-NG COMM’N 2018) (“Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing . . . . Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce . . . .”).
47. Gideon v. Wainwright, 372 U.S. 335, 349 (Clark, J., concurring).
48. Gregg, 428 U.S. at 188.
B. A Lack of Juror Responsibility in the Capital Context

For a capital sentence to be applied justly rather than arbitrarily, jurors must have a sense of responsibility for the awesome power that they wield. Jurors are literally making a life or death decision upon which the defendant’s fate rests. Numerous studies have suggested that if they do not understand the significance of their decision, they are likely to make their decision based upon a number of different factors that may or may not pertain to the defendant’s ultimate culpability.49 They may even approach the sentencing phase of the defendant’s trial with a presumption of death on their mind.50 If jurors allow such irrelevant factors to impact the sentence they impose, their decision will be marked by the same arbitrariness that led the Supreme Court to briefly hold the death penalty unconstitutional in 1972.51 Thus, if the death penalty is to continue, sentences must be imposed in a non-arbitrary manner, in which jurors accept responsibility for the sentences they impose. In this section, I analyze this problem and evaluate several studies that suggest capital jurors do not feel responsible for the sentences they impose. I additionally explore why that is likely the case, and what factors help insulate capital jurors from the decisions they make.

1. Empirical Analysis Demonstrating Capital Juries Do Not Feel Responsible for the Sentences They Impose

In Caldwell v. Mississippi, the Supreme Court held that the reliability of a “death sentence depends upon the jury taking its role seriously.”52 This holding was narrowed in Romano v. Oklahoma.53 There, the Court limited Caldwell to instances in which the jury was intentionally misled about their responsibility for the sentence they chose to impose.54 Regardless of the Court’s limitation of Caldwell

49. See Bowers & Steiner, supra note 11, at 320; see also Haney, supra note 13, at 1481; see also King & Noble, supra note 4, at 332.
50. Bowers & Steiner, supra note 11, at 318.
51. See Furman, 408 U.S. at 274; see also Miller, supra note 10, at 1347 (“A jury with a diminished sense of responsibility cannot make a fair and reliable determination to impose the death penalty.”).
52. See Caldwell v. Mississippi, 472 U.S. 320, 329 (1985); see also Miller, supra note 10, at 1331.
54. Id.
in *Romano*, the moral of both cases is clear: the jury’s sense of responsibility was required for a sentence to be credible.

Study after study shows, though, that capital jurors do not feel this sense of responsibility. In fact, in a study of Oregon jurors in capital cases, “fully one-half of the Oregon jurors did not believe that the death penalty would actually be carried out.” This misunderstanding by Oregon jurors was likely a result of the Oregon capital sentencing scheme which requires jurors to simply answer several questions about aggravating and mitigating circumstances to determine whether the death penalty should be imposed. These questions allow jurors to characterize their interactions with the defendant as “not sentencing him to death,” but rather “just answering these questions.”

This problem is not unique to Oregon. Instead, nationally, among capital jurors, “there was a tendency . . . to shift or abdicate responsibility of the ultimate decision – to the law, to the judge, or to the legal instructions – rather than grapple personally with the life and death consequences of the verdicts they were called upon to render.” As this study suggests, it is much easier for a capital juror to blame the law or to see the law as the force driving the defendant’s punishment, rather than acknowledging that the driving force was the verdict they reached by their own free will. A subsequent study found that “overwhelmingly, jurors deny that they are primarily responsible for the defendant’s punishment.” In fact, “eight of ten jurors assign foremost responsibility to the defendant (46.6%) or to the law (35.2%).”

Beyond those who explicitly assign responsibility for the death sentence they choose to impose to other institutional factors or

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57. *Id.*; see also Steiker & Steiker, *supra* note 55, at 404 (“Casting the decision in terms of aggravation and mitigation and requiring jurors to balance or weigh these considerations might false convey to the jurors that their decision is a mechanical or mathematical one, rather than one requiring moral judgment.”).
59. *Id.*
60. *Id.* at 329.
61. *Id.*
62. *Id.*
actors, it is also important to note that in one study fifty-four percent of capital jurors acted upon a “presumption of death” in which they believed the appropriate punishment was death unless they could be persuaded otherwise. In these cases, the presumption of death was a result of the prosecutor’s charging decision and the death qualification of the jury. Such processes left the jury thinking imposing a death sentence is “what we were there for.” Such a presumption necessarily abdicates jurors of responsibility. When half of the jury believes the answer is death before they even hear the case for life, it is easy for them to not accept responsibility for the life they chose to take. The ease of that abdication of responsibility is a result of the procedures in place that allow capital jurors to insulate themselves from the plight of the defendant.

2. Why Capital Juries Do Not Feel Responsible for the Sentences They Impose

Capital jurors do not feel responsible for the sentences they impose because they are not made to. States take little to no action to impress upon jurors the weight of their decision and the impact it will have on the defendants. Thus, jurors are able to remain inactive and unengaged throughout the duration of the sentencing proceeding. This inactivity allows jurors to dissociate from the sentences they impose, and it allows jurors to assign the responsibility for their decision to more active sentencing actors with more experience in the criminal justice system, like the prosecutor or judge. In addition to assigning responsibility elsewhere, jurors are insulated from the decisions they make by unclear and ambiguous jury instructions. Because jurors are not provided the information they need and the expectations of the court are not clearly expressed to them, they are forced to make decisions

63. Bowers & Steiner, supra note 11, at 318.
64. Id.
65. Haney, supra note 13, at 1449 (States are incentivized to take little action because by not insulating jurors from the weight of their decision “a system of democratically administered death sentencing would not be possible.”).
66. See Friedland, supra note 34, at 192.
67. Haney, supra note 13, at 1481.
68. Id. at 1484 (“badly framed and poorly understood instructions seem to provide jurors with a protective shield that enables them to avoid a sense of personal responsibility for their decisions.”).
for which they do not grasp the severity. I discuss each of these abdication methods in turn below.

a. The Shifting of Responsibility to Other Actors

Jurors in capital cases are provided every opportunity to abdicate responsibility for the sentences they choose to impose and to shift that responsibility to other actors in the criminal justice system, and in fact, “most capital jurors [do] disclaim primary or sole responsibility for the awesome life or death decision they make.”69 Because capital sentencing involves many different actors and the process is rather complicated, it is relatively easy for jurors to shift responsibility to someone else in the criminal justice system.70 “The result, critics assert, is a capital sentencing system that makes sentences at once unreliable and too easy to impose.”71 If jurors are looking to assign responsibility to another actor, they have many options to choose from. They can blame the defendant for setting off the sequence of events that led to the crime being committed, the defendant being charged, and the defendant being eligible for death.72 They can blame the prosecutor for charging the defendant capitally and advocating for the death penalty.73 They can blame the judge—appellate or otherwise—for being the final actor who accepts and finalizes the sentence.74 Jurors may even look to the law itself and argue that the death sentence they imposed was mandatory.75 In fact, “many capital jurors readily acknowledge the sense in which condemning someone to death is ‘not really my decision, it’s the law’s decision,’ and they come to believe they are just following orders.”76 This argument is most often a result of a misunderstanding based on ambiguous and unclear jury instructions.77

70. Eisenberg et al., supra note 69, at 340.
71. Id.
72. Id. at 341.
74. Haney, supra note 13, at 1481.
76. Haney, supra note 13, at 1484.
b. The Inadequate Resources and Information Provided to Jurors

The resources provided to juries to help them make their decision contributes to the jury’s tendency to shift responsibility to elsewhere, further allowing them to insulate themselves from the decision they make and the sentence they impose. For example, jury instructions are often unclear and written in ways that laymen would not readily comprehend. 78 Furthermore, studies suggest that ambiguous or unclear jury instructions contribute significantly to jury confusion about the meaning of life without parole, parole, and good time. 79 In Oklahoma and Missouri, jurors are not told at all whether the defendant will be parole eligible. 80 In Texas, jurors are told that while parole exists, they may not consider the manner in which parole would be applied to the defendant, and they are given no clarification as to what that actually means for their decision-making process. 81 In State v. Torrence, the South Carolina Supreme Court went so far as to prohibit the trial judge from instructing jurors about possible alternatives to a death sentence, like life without parole. 82 Instead, the court held that the jury may only be told that the terms life imprisonment and death are to be understood by their ordinary meaning. 83 Because jurors do not know what these instructions mean, jurors regularly believe the defendant will be released much earlier than he or she actually will be. 84 This misunderstanding leads them to impose harsher punishments than they may otherwise in order to fully incapacitate the defendant. 85 Death-qualified juries would often rather sentence someone to death

79. King, supra note 6, at 207; Steiker & Steiker, supra note 55, at 402–03 (“Jurors tend to misunderstand the consequences of a life without parole verdict, and, in jurisdictions that that permit the alternative of life without parole verdict, jurors consistently understate the length of time a defendant will remain in prison if not sentenced to death.”); Eisenberg, supra note 16, at 7.
80. King, supra note 6, at 209.
81. TEX. CODE CRIM. PROC. ART. 37.07
82. Eisenberg & Wells, supra note 16, at 8.
83. Id.
84. Id. at 7–8.
85. King & Noble, supra note 4, at 332.
than risk a defendant being released decades later. Such a concern is misguided, though, as it is primarily fueled by juries either not being told or simply not understanding that life without parole, truly means life without parole.

Additionally, jury instructions are often unclear as to whether the jury’s decision is actually binding on the court. Jury instructions may refer to the sentence the jury chooses to impose as a “recommendation,” which suggests to the jury that their decision is not binding, when, in reality, they are making a binding recommendation. This misunderstanding often leads juries to “overestimate the extent to which their sentencing decisions will be modified or corrected.” It also leads jurors to believe that no one will actually be executed as a result of the sentence they choose to impose. If jurors do not believe executions will be the result of their decision, then they may perceive no difference between life without parole and the death penalty, and may choose to impose the death penalty to send a stronger message to the defendant and to the community. Finally, the very sentencing guidelines that are meant to aid sentencing actors actually help insulate capital juries from the death sentences they impose. Because they provide jurors with a formula for the “correct” punishment, jurors can feel as though their decision is simply a formality that requires little consideration. Their decision is reduced to simply checking a box, and it is not one that requires the jury to feel anything in regards to the defendant. It allows them to remain detached.

86. See Bowers & Steiner, supra note 11, at 321.
87. See David Bruck, Simmons v. South Carolina (1994), in DEATH PENALTY STORIES 364–65 (John H. Blume and Jordan M. Steiker, eds. 2009) (“In California, for example, where the jury’s non-capital sentencing verdict itself read life imprisonment without possibility of parole only about one-fifth of former trial jurors interviewed by the Capital Jury Project believed that a defendant who received such a sentence would actually spend his whole life in prison.”); see also BENJAMIN FLEURY-STEINER, JURORS’ STORIES OF DEATH: HOW AMERICA’S DEATH PENALTY INVESTS IN INEQUALITY (2004).
88. Bowers & Steiner, supra note 11, at 329.
89. King, supra note 6, at 207–08.
90. Eisenberg et al., supra note 69, at 358.
91. See Eisenberg & Wells, supra note 16, at 7.
92. Eisenberg et al., supra note 69, at 348.
93. Haney, supra note 13, at 1484.
These factors that allow capital jurors to avoid responsibility for the sentences they impose also exist in the non-capital context, and they allow non-capital jurors to avoid responsibility for the sentences they choose to impose. The “imposed ignorance” of juries and the endemic lack of information provided to juries is prevalent throughout the criminal justice system.\(^{94}\) Thus, it would be an easy inference to say that the same factors that allow a capital juror to avoid responsibility for the sentences they impose, similarly allow a non-capital juror to avoid responsibility for the sentences they impose.

### III. A Lack of Jury Responsibility in the Non-Capital Context

Today, only six states routinely use juries to sentence non-capital felons: Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia.\(^ {95}\) While each state’s jury sentencing scheme is somewhat unique, each system does grant wide discretion to jurors. Additionally, each system fails to effectively guide the discretion that is granted to jurors. In that regard, the non-capital sentencing systems are reflections of the capital sentencing systems, discussed above, in which there is a demonstrated lack of jury responsibility. This lack of responsibility is due in large part to procedural protections adopted in both the capital and non-capital context to insulate jurors from the choices they make.\(^ {96}\) This insulation and the lack of responsibility that results is critical to the state securing harsher sentences for defendants.\(^ {97}\)

Here, I briefly discuss jury sentencing procedures in the states that routinely use juries to sentence non-capital felons. Additionally, I explore how these non-capital sentencing procedures are similar to capital sentencing procedures and discuss the deficiencies in both systems.

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95. King & Noble, supra note 5, at 886.
96. Haney, supra note 13, at 1454.
97. King, supra note 6, at 207; King & Noble, supra note 4, at 332.
A. Jury Sentencing in Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia

The sentencing schemes of these states are marked by a lack of information provided to the jury. Even when jury instructions are given, they are often provided in an unnecessarily complicated form that lacks explanations or definitions the jury may need to make their determination.98 This lack of clarity tends to have a significant impact on the sentences jurors choose to impose. The information gap that this lack of clarity propagates has its roots in the laws and jury instructions of each state.99 In fact, “not one state gives the jury true price-setting authority today, complete with both the power and the information needed to set the upper and lower bounds of punishment within legislated ranges.”100 The most important pieces of information that are kept from jurors are the sentencing guidelines, information about parole and good time credit, and the reality of what their verdict will actually mean for the defendant. I discuss each in turn below.

1. The Denial of Sentencing Guidelines

In the non-capital context jurors are often denied access to the state’s sentencing guidelines, instead, they are given only broad statutory sentencing ranges.101 For example, in Arkansas, Virginia, Kentucky, and Missouri juries are explicitly denied access to the sentencing guidelines. 102 This leaves jurors with “no comprehension that the going rate for a given offense was often much lower than the statutory range jurors were given.”103 This causes jurors to apply much harsher sentences than might otherwise

98. Johnson, supra note 78.
99. King & Noble, supra note 5, at 888 (“State law in each of these three states deprives the jury of either full information or power, to varying degrees.”).
100. Id. at 953.
101. When I refer to sentencing guidelines, I refer to the individual state’s sentencing guidelines because those are the guidelines that impact the greatest number of defendants.
102. King, supra note 6, at 210; see also ARK. CODE ANN. § 16-97-101 (2018); 2 Arkansas Model Jury Instructions – Criminal AMCI 2d 9102 (2018); VA. CODE ANN. § 19.2-298.01 (2018); 1 Cetrulo, Kentucky Instructions to Juries § 12.11 (2018); MO. REV. STAT. § 557.036 (2018).
103. King, supra note 6, at 210.
be applied by a judge because judges are provided guidelines ranges that narrow the statutory range of punishment available to the defendant. 104 This trend was analyzed in a study by Nancy King that compared the sentence severity and variance of juries and judges in non-capital cases. 105 In that study, in Arkansas for certain types of crime, the average jury sentence exceeded both the average bench sentence and the average sentence associated with a guilty plea. 106 Specifically, “when comparing cases resulting in incarceration for manufacturing a control substance, bench trial sentences averaged 95 months while jury trial sentences average 11 years longer—233 months.” 107 This same trend was also shown to be the case in Virginia where defendants convicted of possession of a drug with intent to distribute received, on average, a jury sentence of fifty-three months (four years and five months) more than defendants who were sentenced by a judge. 108 Additionally, a 2001 Virginia study found that “less than one-third of sentences after jury trial fell within guidelines recommendations, as compared to 80 percent of bench and plea dispositions combined.” 109

By refusing to provide jurors with the sentencing guidelines, states force jurors to take a stab in the dark as long as they remain within the statutory range. 110 In Oklahoma, the statute outlining jury sentencing procedures does not explicitly discuss whether juries should be supplied with sentencing guidelines. 111 Instead the statute only provides that juries should “assess and declare the punishment in their verdict within the limitations by law, and the court shall render judgment according to such verdict.” 112 While the Oklahoma statute avoids the issue all together, the drafters of the Texas statute specifically contemplated providing juries with such information, but the Committee for Rules “concluded that it could draft no instruction that would be of practical value to jurors” because such an instruction would be too dense for jurors to be able to

104. King & Noble, supra note 4, at 332.
105. Id. at 344
106. Id.
107. Id.
108. Id. at 351.
109. Id. at 354.
110. King, supra note 6, at 210.
112. Id.
understand.\textsuperscript{113} Texas justified this decision by arguing that the constitution does not mandate that a jury instruction actually guide the jury’s decision.\textsuperscript{114} Because jurors often do not know what the sentencing guideline for the defendant is and because their discretion is in no way limited, they are left to assess the defendant’s criminal culpability without knowing the going rate for the defendant’s criminal conduct, and studies show that they tend to sentence more harshly because they do not have that guidance.\textsuperscript{115}

2. Denial of Information about Parole and Good Time Credit

Furthermore, states deny jurors information about parole and good time credit.\textsuperscript{116} Study after study shows that jurors do not understand parole, life without parole, or good time credit.\textsuperscript{117} Without accurate information in this regard, jurors are left with the impression that defendants will be released from prison much earlier than they actually will.\textsuperscript{118} As a result, jurors tend to err on the high side of the statutory sentencing range to lessen the possibility the defendant will be released for their crime any earlier than the jury deems appropriate.\textsuperscript{119} This was evident in Arkansas where the sentencing actor was the most significant variable in determining the sentence for home burglary.\textsuperscript{120} There, a defendant sentenced by a jury received on average an additional 133 months compared to what a defendant sentenced by a judge received.\textsuperscript{121} This utter confusion about parole and good time is perpetuated in Arkansas, Kentucky, and Oklahoma where such information is denied to jurors.\textsuperscript{122} Similarly, while the Texas sentencing

\textsuperscript{113} Texas Criminal Pattern Jury Charges CPJC § 12.1 (2018).
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} King, supra note 6, at 210; see also King & Noble, supra note 4, at 332.
\textsuperscript{116} Bruck, supra note 87, at 364–65.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.;} Eisenberg & Wells, supra note 16, at 9; King & Noble, supra note 4, at 332.
\textsuperscript{120} King & Noble, supra note 4, at 348
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} See 2 Arkansas Model Jury Instructions -Criminal § AMCI 2d 8000; see also 1 Cetrulo, Kentucky Jury Sections § 12.11 (2018); OKLA. STAT. § 926.1 (2018); Oklahoma Jury Instructions: OUJI-CR § 10-21.
instructions briefly address both parole and good conduct, they do so vaguely.\textsuperscript{123} They do not provide jurors any information or statistics about how much of their sentence defendants tend to serve.\textsuperscript{124} The instructions also do “not permit the introduction of evidence on the operation of parole and good conduct time lines.”\textsuperscript{125} Such sentencing schemes motivate juries to apply higher sentences than they would otherwise apply so as to ensure the retributive and incapacitation purposes of the punishment are fully realized prior to the defendant being released.\textsuperscript{126}

3. Denial of What a Sentence Means for the Defendant

In addition to being denied information about what will happen to the defendant once they are imprisoned, jurors are also denied information about what will be the likely result of the sentence they choose or do not choose to impose. For example, in Kentucky, traditionally the jury recommended to the court whether the sentence should be served concurrently or consecutively.\textsuperscript{127} However, no jury instruction was given to the jury to explain what those distinctions mean.\textsuperscript{128} Additionally, while Kentucky’s statute termed the jury’s decisions a recommendation, this “recommendation” was binding on the court.\textsuperscript{129} Likewise, there is considerable confusion among jurors regarding what happens when a unanimous opinion is not reached.\textsuperscript{130}

For example, while in Missouri, a non-unanimous sentence results in the court determining the sentence that should be served,\textsuperscript{131} in Texas and Virginia, a non-unanimous jury requires the court to impanel another jury and try the case a second time.\textsuperscript{132} The Texas and Virginia rules are consistent with what most jurors

\textsuperscript{123}. TEX. CODE CRIM. PROC. ART. § 37.07 (2018).
\textsuperscript{124}. Id.
\textsuperscript{125}. Id.
\textsuperscript{126}. Bruck, supra note 87, at 364–65; King & Noble, supra note 4, at 332.
\textsuperscript{127}. KY. REV. STAT. ANN. § 532.055 (2018).
\textsuperscript{128}. 1 Cetrulo, Kentucky Instructions to Jurors, Criminal § 12.11 (2018).
\textsuperscript{129}. Id.
\textsuperscript{130}. See FIEURY-STEINER, supra note 88.
\textsuperscript{131}. MO. REV. STAT. § 557.036 (2018).
understand the reality of a non-unanimous decision to be, but the Missouri rule challenges jurors preconceived notions of what a non-unanimous decision means, and the jury instructions utilized in Missouri do not adequately communicate this unique feature. The misunderstanding that is created by Missouri’s statute ultimately leads some jurors to concede rather than proceed as a hung jury because they do not want the case to be tried again. Such concessions are based on faulty premises, but Missouri does little to correct such misunderstandings because the sentence they seek is secured.

B. Non-Capital Sentencing Procedures and Capital Sentencing Procedures are Similarly Designed and Similarly Motivated

This trend of a lack of information and clarity in jury instructions for non-capital juries also exists in the capital context. In fact, “jury sentencing in non-capital cases appears to share several features of death sentencing by jury that capital punishment critics have long condemned.” These shared features include an inactive and unengaged jury and a significant information gap between what the court expects jurors to understand and what they actually understand. In both the capital and non-capital context, these features contribute to arbitrariness in sentencing. These commonalities and the procedural mechanisms that promote them allow jurors to abdicate any sense of responsibility they may feel for the sentences they choose to impose, regardless of the potential sentence.

Like jurors in the capital context, there is no real incentive for jurors in the non-capital context to feel responsible for the sentences they impose. They are meant to be neutral arbiters. However, by allowing jurors to be inactive arbiters, the court is communicating to jurors that they do not have to act as responsible individuals. Jurors are told to “just listen,” but just listening cannot be effective when the average attention span for a middle-aged adult is a mere

134. See FIEURY-STEINER, supra note 88.
135. See id.
136. King, supra note 6, at 214.
137. Haney, supra note 13, at 1484.
eight seconds.138 By requiring jurors to just listen and preventing them from actively engaging, jurors, in both the capital and non-capital context, are able to avoid responsibility for the sentences they impose. This lack of engagement is considered a significant problem throughout the criminal justice system, particularly in the grand jury context.139 This problem is the reason jurors on the grand jury are encouraged to actively engage with the issue before them by asking questions of the witnesses to determine whether an indictment is appropriate.140

Furthermore, there is a significant information gap between what the court expects jurors to understand, what the court understands, and what jurors actually understand. The court assumes a certain level of sophistication of its jurors, but the information gap that exists prevents jurors from securing the information they need to adequately and accurately sentence a defendant. Jurors lack important information that judges, who are more sophisticated, do not lack. This often leads to defendants arbitrarily receiving harsher sentences from juries than from judges.141 This information gap is largely a result of a lack of training and clear information for both capital and non-capital jurors.

In a study conducted by Nancy King, this information gap between judges and jurors played a significant and similar role in both capital and non-capital sentencing.142 For example, while jurors in both settings lack information about parole, good time, and concurrent and consecutive sentences, judges have that information by nature of their positions and education.143 The jury’s lack of a legal education creates a significant hurdle for jurors as they attempt to understand the instructions they are given.144 “Several studies have suggested that jurors do not understand either the words used

139. Friedland, supra note 34, at 205.
140. Id.
141. Id. at 195; see also King & Noble, supra note 4, at 332.
142. Friedland, supra note 34, at 209.
143. Id.
144. Id. at 197.
in the instructions or the overall meaning, disabling the jurors from adequately applying those instructions of the evidence in a case.”

Even information the sentencing actor does not currently have is more readily available to the judge than the jurors. This information gap is largely a result of differing levels of legal education among jurors and judges and of different procedural mechanisms that allow judges to receive information jurors cannot receive. Additionally, this information gap stems from the nature of the judge’s role in the criminal justice system. While judges are exposed to more violent crimes and can likely better evaluate where the defendant and crime fit on a criminal culpability scale, “a juror sentencing for the very first time likely views each offender as the worst criminal she’s ever seen.” As a result, this gap often leads jurors to make sentencing decisions based on irrelevant and arbitrary factors rather than those factors required by law and laid out in complicated jury instructions.

IV. ENCOURAGING JURY RESPONSIBILITY

Study after study has shown that capital jurors do not feel responsible for the sentences they choose to impose. This lack of responsibility prevents jurors from appreciating the weight of the decisions they make and leads juries to decide cases based on arbitrary factors. The procedures that deny information and clarity to capital jurors insulate them from feeling this sense of responsibility. Those same procedures are utilized to deny information and clarity to non-capital jurors, allowing them to also abdicate responsibility for the sentences they impose. Just as this lack of responsibility is problematic for capital jurors, it is problematic for non-capital jurors who may consider arbitrary factors to make their sentencing decision. Here, I propose a solution to this problem that would ensure that non-capital jurors are not able to abdicate responsibility for the choices they make.

145. Id.; Eisenberg & Wells, supra note 16, at 9; Haney, supra note 13, at 1483.
146. See TEX. CODE CRIM. PROC. ART. § 37.07 (2018) (allowing the judge to order a presentencing report, while jurors may not).
147. Id.; King & Noble, supra note 4, at 357–58.
148. See King, supra note 6, at 207.
149. King & Noble, supra note 4, at 344.
150. Bowers & Steiner, supra note 11, at 320.
A. Increase Jury Activism

As previously discussed, clear and unambiguous information is key to getting a jury engaged in a sentencing hearing and subsequently helping them feel the weight of their decision in that hearing. An active jury is a responsible jury that produces reliable sentences.\footnote{Friedland, supra note 34, at 192 (“This more active jury role is intended to provide juries with an authority commensurate with their responsibility for resolving issues at trial. Proponents contend that the active jury model would encourage juries to become more attentive and responsible through increased participation in the process.”).} There are many possible ways to create an engaged and responsible jury. They range from attempting to create an attentive jury who understands what is going on, to training the jury, to clarifying instructions for the jury as they make their ultimate decision. A combination of these methods is critical to ensuring that juries feel responsible for the sentences they impose. By utilizing a combination of these mechanisms, the court can ensure that if one method of engagement does not reach a juror, another method may.

The challenge of creating an environment that promotes an attentive jury is like the challenge all teachers face as they try to create an environment in which their students can learn and focus. Important in an educational context is note taking and asking questions.\footnote{The Importance of Note-Taking, CAMBRIDGE NETWORK (Apr. 18, 2017), https://www.cambridgetimeit.com/news/the-importance-of-note-taking/ [https://perma.cc/A4RU-YLPS] (citing the benefits of notetaking as assisting memory, helping comprehension, providing a useful record, and providing a platform for writing.); Ronald D. Vale, The Value of Asking Questions, 24(6) MOL. BIOL. CELL 680, 681 (2013) (“Virtually all educators agree that teaching . . . should involve more inquiry-based learning and less fact-based memorization.”).} Such methods should likewise be utilized in the courtroom.\footnote{Friedland, supra note 34, at 204.} Studies have demonstrated the value in taking notes by hand in a classroom.\footnote{Joseph R. Boyle & Gina A. Forchelli, Note-Taking, OXFORD BIBLIOGRAPHIES (Apr. 28, 2017), http://www.oxfordbibliographies.com/view/document/obo9780199756810/obo-9780199756810-0110.xml [https://perma.cc/LR92-UGGK].} By allowing jurors to take notes, such value can also be realized in the courtroom and jurors can better focus on the issues at hand. Additionally, “since jurors are the ones entrusted with the responsibility of resolving issues, it appears
logical to at least permit the jury to supplement— with the framework of limitations prescribed by the process, such as the rules of evidence— the questioning of witnesses.” 155 Such questions would certainly need to be limited and most likely funneled through the judge, but the value of creating engaged and responsible jurors outweighs the minor administrative burden that might result from such questioning. Allowing jurors to think critically about the things they are told and ask questions when they have them will surely help them be active and invested participants in the trial the same way such strategies help students be active and invested participants in their classrooms.

B. Increase Juror Comprehension and Understanding

In addition to encouraging jurors to be active participants in the trial, the court should train jurors on what to do when they face significant problems or have procedural questions. As previously discussed, jurors do not have the legal expertise the judge or the attorneys in the case have, but this lack of practical experience should not be a bar to enabling a juror to take responsibility for their choices. Thus, special trainings for jurors on how to engage with the case are critical. These trainings would cover topics like how and in what scenarios juror questions, like those proposed above, would be appropriate. Trainings would also provide jurors with information on “how to do its job, particularly in resolving disputes and avoiding deadlocks.” 156 These trainings would also teach jurors what to do in the case of a hung jury and what having a hung jury actually means in the jurisdiction they are in. Such trainings would have no substantive legal component or implications but would simply provide procedural guidance to juries that may allow them to function more effectively.

Finally, revised jury instructions “should focus on reducing complexity and communicating clearly the sentencer’s awesome obligation to make an irreducible moral judgment about the defendant’s fate.” 157 Jury instructions should be clarified so they are more easily understood by jurors who do not have the legal experience. 158 It should not be the case that

155. Friedland, supra note 34, at 208.
156. Id. at 204.
158. Johnson, supra note 78.
after having heard the sentencing instructions read to them three times . . . almost a third [of jurors tested] provided definitions [of mitigation] that border on being uninterpretable or incoherent, and slightly more than one subject on hand was so mystified by the concept that he or she was unable to venture a guess as to its meaning.159

Clarity and unambiguity are key to increasing juror comprehension in this regard.160

Jury instructions should be explicit about the issues the jury should consider and what the jury’s responsibilities are. Jurors should be explicitly and regularly instructed “that the decision they are about to make is, despite its legal trappings, a moral one and that, in the absence of legal error, their judgement will be final.”161 They should also be explicitly informed that the responsibility for the sentence they impose belongs to them, and only them. Jurors who are contemplating sentences for defendants should have to acknowledge that the sentence they choose to impose has an impact on that defendant’s life, and in considering that impact, they should have to acknowledge that the choice they make is one for which they bear responsibility. Furthermore, “sentencing guidelines for juries, instructions to jurors requiring that they find certain aggravating facts before high-end sentences can be imposed, or even more rigorous appellate review might help to standardized jury sentencing in non-capital cases.”162

Repetition is also important to increasing juror comprehension.163 People retain information the more they hear it, the more they see it, and the more they have to wrestle with it.164

159. Haney, supra note 13, at 1484.
160. Id. at 1483 (“Psychologists know generally that, ‘through convoluted verbiage, destructive conduct is made benign and people who engage in it are relieved of a sense of personal agency.’ Yet the convoluted verbiage of the capital jury instructions distances jurors from the realities of the impending decision.”).
162. King, supra note 6, at 197.
164. Id.
Thus, jury instructions should be given early in the trial and repeated throughout the sentencing stage of the trial. They should not be reserved for only the end of the sentencing argument. By providing jurors with their instructions early and repeatedly, jurors can filter the testimony they hear through the lens of the law they learned from the jury instructions. When a juror knows why they are listening to something and what its relevance is, they are more likely to retain that information and to be more readily able to apply it.165 Because so much of the lack of responsibility felt by jurors for the sentences they impose is a result of unclear expectations and ambiguous information provided to jurors, it is obvious that no plan to address such lack of responsibility would be complete without attempting to address the expectation and information gap that prevents the jury from being fully informed.

Utilizing some iteration of all of these techniques to combat the lack of responsibility felt by jurors in non-capital sentencing is critical to address the information gap that feeds such lack of responsibility. Because a lack of information is the primary motivating factor behind the lack of responsibility in non-capital cases, providing jurors every tool to secure such information is critical. With such information comes the autonomy to make a choice and the ultimate responsibility for such choice. “If the ultimate responsibility for the outcome of a case lies with the jury, the responsibility should be complemented by a corollary predicate freedom of the jury to have some input, albeit regulated, into deciding what information is necessary for the jury to resolve relevant issues.”166 There is no just reason why then the court should continue to deny the jury information that could aid them in producing a just result. The strongest argument against implementing such procedures is the increased administrative burden such mechanisms may create. However, if the goal of the criminal justice system is promoting justice, then providing juries with the information they need to make informed and responsible sentencing choices can only advance such a goal.


166. Friedland, supra note 34, at 209.
V. CONCLUSION

In order for sentences to be just, someone must wrestle with the implications of a sentence on both the defendant and the community. In states where juries are used in the sentencing of defendants, the jury is that someone who must be accountable for the implications of the sentence they choose to impose. This sense of responsibility should lead to sentences that are no harsher or more arbitrary than need be within the constitutional framework that requires an individualized assessment of culpability in sentencing. 167 In reality though, jurors are not encouraged or enabled to assume a sense of responsibility for their decisions.

The lack of responsibility felt by the non-capital jury is a stain on the jury as an institution. The jury was intended to be a bulwark against governmental overreach, 168 but in reality, the jury is denied the information and power they need to be such a defense. Until such a time in which the jury is given the power and the information needed to decide cases responsibly and non-arbitrarily, the institution will retain its current stain. In order to combat such a problem, it is critical to create an attentive jury, to train the jury, and to fully inform the jury. Taking such steps will help establish an informed and involved jury, and an informed and involved jury is a responsible jury that recognizes the impact of the choices they are making.

167. King & Noble, supra note 4, at 332.