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DOES A TRIAL PENALTY EXIST IN A CRIMINAL JUSTICE SYSTEM THAT PROVIDES A RIGHT TO JURY SENTENCING?

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I. ABSTRACT

Sentencing research largely supports the notion that defendants who plead guilty receive substantially shorter sentences than observably equivalent people who were convicted at trial, indicating that defendants receive a discount for accepting a plea offer from the prosecution. This is called the trial penalty. The current study investigates whether a trial penalty

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exists in the Marine Corps justice system, a jurisdiction that offers jury sentencing in criminal cases. Using Marine Corps courts-martial data from 2012-2015, the study finds no trial penalty effect and finds that juries are less likely to impose severe types of punishment as compared to judges. Jury sentencing may have the potential to reduce the impact of the trial penalty. The paper discusses implications for public policy, theory and future research.

II. INTRODUCTION

This research describes criminal case processing in the Marine Corps justice system. The military criminal court system uses the same rules of evidence as those used in civilian federal courts, but it has very few mandatory minimum sentencing guidelines, and it provides a more robust right to jury trial by providing for jury sentencing. This research also compares sentences issued after accepting pre-trial agreements (PTA) and those issued after exercising the right to trial, to test whether a trial penalty exists in a criminal justice system with a right to jury sentencing.

Fewer than 3% of all federal criminal charges go to trial, with the vast majority resolved via plea bargains and guilty pleas (Rakoff, 2014). In the civilian federal court system, sentences after trials are higher than those issued after guilty pleas (Human Rights Watch, 2013). Many legal experts call this concept the trial penalty; "threats of harsher charges against defendants who reject plea deals often are the most influential factor in the outcome of a case" (Oppel, 2011). The prosecutor can use the threat of a trial penalty to convince defendants to plead guilty, even to charges they may not be guilty of. Most states and all federal criminal courts have bench sentencing; this means that after a trial or guilty plea the judge determines and issues the sentence. A judge-issued sentence in a criminal court system with mandatory minimums results in a very predictable outcome for the prosecutor and therefore much more powerful discretion at the charging stage.

One way to remedy the coercion to accept plea deals and to reduce the excessive power and control of the federal prosecutor is to allow for jury

sentencing after trial; to extend the right to a jury trial to include sentencing by jury. Jury sentencing could reduce coercion to accept plea deals by restoring an actual choice between trial and offered plea deal. If a criminal defendant is not guilty, and has a 50% chance of an acquittal at trial, but he knows that the judge will give him a three-times greater sentence if he exercises his right to trial, his attorney may aptly advise him to plead guilty. But if a criminal defendant is not guilty, and has a 50% chance at an acquittal, and he knows that if he exercises his right to a trial he will also be fairly sentenced, the advice from defense counsel changes and the criminal defendant has a real choice. By removing the judge's (and prosecutor's) ability to punish a defendant for exercising his right to trial, coercion is removed from the process and the defendant is free to make a real choice.

A jury of 12 is unlikely to punish differently based on whether the defendant pled guilty or exercised his right to a trial. A jury does not have the career or reputational concerns that a judge has in issuing a sentence. And coupled with a criminal justice system with very few mandatory minimum sentences, jury sentencing reduces the power behind the prosecutor's discretion when making charging decisions or offering plea bargain deals.

There are legal and historical arguments for jury sentencing; many have argued that reading the Sixth Amendment[i] next to the Seventh Amendment,[ii] the only interpretation that makes sense is that the right to jury trial guaranteed by the Sixth Amendment also includes a right to sentencing by jury (Hoffman, 2003). There certainly is no difference in the text of the Sixth and Seventh Amendments that would support or require

[i] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[ii] In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

the difference that evolved between the right to a jury in criminal versus civil cases. "A Sixth Amendment interpreted to include the right to jury sentencing would also restore the textual symmetry between the Sixth and Seventh Amendments" (Hoffman, 2003, p. 951). The Seventh Amendment protects the right to a jury in civil cases, and it has always been interpreted to guarantee a right to a jury to determine both responsibility and damages in civil trials. Looking at the language of the Seventh and Sixth Amendments there is no reason for one and not the other to guarantee a right to a jury in the second phase of trial (sentencing in a criminal trial and damages in a civil trial). Historically in this country, the jury has played a role in sentencing; "for the entire nineteenth century, sentencing schemes with no input from the jury were the American exception, not the rule" (Hoffman, 2003, p. 964). Currently, there are six state court systems that still use some form of jury sentencing in non-capital cases – Arkansas, Virginia, Kentucky, Missouri, Texas and Oklahoma (Holland, 2006).

Jury sentencing has the potential to reduce prosecutorial discretion, the hidden power granted to the prosecutor by sentencing guidelines and mandatory minimums. The federal sentencing minimums removed the judge's sentencing discretion and created charts and formulae for determining a defendant's sentence based on the charge and defendant characteristics. The guidelines offer a "very precise calibration of sentences, depending upon a number of factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his acts." (*Payne v. Tennessee*, 1991, p. 821). And while the guidelines are advisory after the *Booker* decision, the Supreme Court has not addressed mandatory minimums that are still in place.

The federal prosecutor determines the charges, determines the sentence, and has control over any plea deals offered. "To illustrate, defendants *convicted* of bank robbery under similar circumstances may all receive the same sentence (say, forty-one months), but defendants who *commit* bank robbery under similar circumstances may receive different sentences (from probation or six months to forty-one months) if they are convicted of radically different offenses as a result of the plea bargaining process." (Nagel & Schulhofer, 1993). The charge sheet has become a

negotiation tool instead of a reflection of evidence and facts. And the changes to the charge sheet that happen in the prosecutors office are not on any official trial record and are not open to appeal or review and therefore are arguably more harmful than the judicial sentencing discretion that the guidelines were designed to limit. Mr. Paul Cassell, a former federal judge said "[w]ith mandatory minimums and other sentencing enhancements out there, prosecutors can often dictate the sentence that will be imposed." (Oppel, 2011).

If there was a right to jury sentencing, the prosecutor would draft charges based on the facts and evidence and what he can prove, because with jury sentencing the defendant has an actual right to trial that has not been erased through coercion and therefore more defendants will exercise their right to trial, as they did 30 years ago. With jury sentencing, the prosecutor does not know whether the defendant will exercise his right to trial and must make a decision about charges based on the actual evidence because that charge sheet may be presented to a jury in court, and not based on an attempt to negotiate with defense counsel for a plea. If the prosecutor selects charges that are beyond what the evidence supports, the jury will find the defendant not guilty, so the prosecutor has to carefully select charges supported by the evidence in order to obtain any conviction.

Currently there are 6 states that use some type of jury sentencing, however in most of these states judges have more flexibility in sentencing and jury sentencing is not an equal choice (King and Noble, 2004). King and Noble (2004) examined jury sentencing in 3 states, however none of these states give the same authority to a jury issuing a sentence as to a judge, "[s]tate law in each of these three states deprives the jury of either full information or power, to varying degrees" (p. 5). An example of this is Virginia law (§19.2-308) that gives judges (not juries) the power to order sentences for each offense be served concurrently. This means jury sentences in Virginia will look much more severe in an empirical study and jury sentencing is rarely used in practice. Studying jury sentencing in these states and comparing it to judge sentencing is not a fair or adequate comparison and results in misleading conclusions. Because of the differences between state justice systems and the federal system and

because these states do not give a full right to jury sentencing, comparing state jury sentencing and federal sentences is not ideal. Our research will address this limitation in existing research by providing a better comparison of jury sentencing and judge sentencing because the military courts-martial system does not impose limitations and restrictions on jury sentencing.

The existing research on jury sentencing is limited. Breen (2011) used one year of court-martial data from the Air Force and found no trial penalty effect and less severe sentences from juries as compared to judges. Our research expands on the existing research by statistically describing case outcomes over the course of three years in the Marine Corps to more fully understand jury sentencing, comparing sentences from PTAs and trials, and then (in a later paper) comparing those outcomes to a system that only allows for judge sentencing.

The purpose of this research is to understand and describe jury sentencing in criminal trials and how it affects the concept of a trial penalty. In the military justice system, the 6th Amendment right to a jury trial includes the availability of jury sentencing. A court martial conviction is a federal conviction, the same rules of evidence are used and the criminal procedure is very similar to the procedure in federal district courts. The data for this research is compiled in an excel file and contains the full population of case data from the Marine Corps between 2012 and 2015. The data includes a significant amount of administrative data that is not relevant and will be excluded.

This topic is important because criminal trials in federal (and many state) courts have largely been replaced by guilty pleas and plea-bargains. This becomes a problem when it is combined with judges issuing harsher sentences to defendants who exercise their right to trial and prosecutors who use the charge sheet as a bargaining tool and know the sentence at the time of bargaining because of the federal sentencing guidelines. When a criminal defendant accepts a plea deal, he waives his right to file many motions challenging police action, interrogations, and evidence seizures and the government no longer has to prove the case in the same way they would have to at trial. These factors create coercion to accept offered plea deals

and erode the 6th Amendment right to a jury trial. We expect this research to contribute to debates and further research on prosecutorial discretion, plea bargains, jury sentencing, federal sentencing guidelines, the trial penalty and coercion to plead guilty.

III. LITERATURE REVIEW

1. The Military Criminal Justice System

The court martial process is modeled after civilian federal court procedures and written into law by Congress in the form of the Uniform Code of Military Justice (UCMJ).[iii] The military justice system is similar and comparable to state and federal courts (Holland, 2006). Some differences include military specific offenses (e.g. criminal prosecution for adultery or conduct unbecoming an officer), and the lack of sentencing guidelines (last year Congress passed a law requiring a bad conduct discharge after conviction of certain sex offenses, and there are a few other exceptions, but for the most part there are no sentencing guidelines). Additionally, in the military court system the 6th Amendment right to a jury trial includes the availability of jury sentencing after the guilt phase of trial.

In the military justice system there are two avenues to criminal conviction, the special court martial with a 12-month statutory cap on confinement length and less severe discharge (bad conduct discharge - BCD), and the general court martial that requires an Article 32 hearing (similar to a civilian grand jury) and has no limit on confinement length and allows for the more severe discharge (dishonorable discharge - DD) (Breen, 2011). Some scholars compare the special court martial to misdemeanor offenses in civilian court and the general court martial to felony offenses and convictions (Breen, 2011). There are also non-criminal dispositions available in military justice, the most common being non-judicial punishment. Non-judicial punishment is an alternative to a criminal conviction in a court-martial. Often times military prosecutors draft charges

[iii] For a more detailed overview of the court martial process and system, see a report by R. Chuck Mason, legislative attorney for the Congressional Research Service, https://www.fas.org/sgp/crs/natsec/R41739.pdf.

for a special court martial and later negotiations result in a plea agreement that allows the defendant to accept non-judicial punishment and avoid a criminal conviction. This is comparable to civilian pretrial diversion programs (Breen, 2011). Non-judicial punishment is an administrative punishment given to the defendant by the command after a brief hearing.

In the military justice system there is a convening authority; this is a military commander, in the defendant's chain of command, who makes decisions about prosecution with the help of his or her senior legal advisor (Breen, 2011). In some cases, the prosecuting trial counsel drafts charges without any input from the convening authority based on a review of the evidence in the case-file, in other cases the prosecutor may meet with the convening authority and other members of the defendant's command to discuss why another forum or a plea offer may be appropriate, and in some cases the convening authority may feel very strongly about certain charges being drafted and can dictate those charges. The role of the convening authority can be compared to a boss or supervisory prosecutor in state and federal prosecutions.

The military criminal justice system has a wide array of sentencing options, including letters of reprimand, forfeiture of pay, fines, hard labor, punitive discharge (BCD or DD), and confinement (Breen, 2011). There is no probation and other than the recent requirement for discharge after certain sexual assault convictions, no mandatory minimum sentences. It is a common question during jury voir dire to ask whether the jurors will be able to consider the full range of sentencing options from no punishment to the applicable maximum statutory punishment in the UCMJ.

One of the differences between the military and civilian justice systems is the availability of jury sentencing. A criminal defendant in the military justice system has a few options: he can accept a plea agreement offered by the prosecutor and plead guilty in front of a judge, he may plead guilty in front of a judge (without a plea agreement) and be sentenced by a judge, he can elect to have a jury trial and then be sentenced by a judge, or he can elect to have a jury trial and be sentenced by the same jury. These additional protections are what make the military justice system unique and

provide the data for our research into jury sentencing. The military justice system is expansive and a good source for data and research, "[s]ince 2000, courts-martial have tried almost 28,000 American military personnel…military trials conducted under the Uniform Code of Military Justice (UCMJ) affect a larger population than eleven states and the District of Columbia" (Holland, p. 103, 2006).

2. The Trial Penalty

Currently in the U.S. federal court system fewer than 3% of all charges go to trial, instead cases are resolved through plea bargains and guilty pleas (Rakoff, 2014). Because of the federal sentencing guidelines and resulting power shift and because of the practice of punitively sentencing defendants who exercise their right to trial, criminal defendants in the federal system no longer have a true right to a jury trial as guaranteed by the Sixth Amendment. "In 2012, the average sentence of federal drug offenders convicted after trial was three times higher (16 years) than that received after a guilty plea (5 years and 4 months)" (Human Rights Watch, 2013). King et al. (2005) used multivariate analysis and collected trial data from five states; they found consistently longer sentences after jury trials than after guilty pleas, "[n]ationwide data evaluating sentences for the same offense type show that guilty plea sentences are the least punitive, with jury trial sentences the most punitive, and bench trial sentences in between" (p. 962-963). In Maryland, for the charge of heroin distribution, jury trials resulted in sentences 350% longer on average than those after a guilty plea (King et al., p. 973, 2005). McCoy (2005) used multiple regression techniques to compare prison sentence length between similar felony cases (n = 2,772) (controlling for factors like pretrial status, criminal history, type of defense attorney, number of charges, age, race and gender of defendant) and found that a sentence after a jury trial is 44.5 months longer than a sentence after a guilty plea (p. 89-90). McCoy (2005) concluded that the trial penalty "is so severe that the legal profession must start to ask whether it amounts to institutionalized coercion" (p. 91). Ulmer and Bradley (2006) collected felony case data from over 7,000 cases in Pennsylvania and found defendants sentenced after a jury trial received 57% longer sentences as compared to those sentenced after guilty pleas (p. 652). Defendants

exercising their right to trial receive much longer sentences than defendants accepting plea deals, this creates coercion to accept any plea deal offered by the prosecutor regardless of actual guilt: "it is generally accepted by trial judges throughout the United States, that it is entirely proper and logical to grant some defendants some degree of leniency in exchange for a plea of guilty . . . as the reverse side of the same coin . . . he must necessarily forego leniency, generally speaking, where the defendant stands trial and is found guilty" (Kipnis, 1976, p. 95 citing Chief Judge Campbell in *United States v. Wiley*). Zottoli et al. (2016) conducted a study of juvenile and adult defendants charged with felonies in New York City and found that juveniles were sentenced to penalties 98% smaller as a result of accepting plea bargains and that adults were sentenced to penalties 80% smaller as a result of accepting plea bargains. Zottoli et al. compared the sentences facing the defendants based on their original charges and the sentences received after acceptance of a plea bargain and pleading guilty. While original charges may not be the best representation of the sentence that would be received after a full trial, the options are limited in this kind of research and it does provide a basis for comparison. Reductions in sentences of 80 and 98% are extreme and add to the literature and evidence of coercion to accept offered plea bargains.

Many legal experts call this concept the trial penalty; "threats of harsher charges against defendants who reject plea deals often are the most influential factor in the outcome of a case" (Oppel, 2011). The U.S. Sentencing Guidelines include a one or two level downgrade for a defendant who accepts responsibility (**§**3E1.1). The federal prosecutor determines the charges and because of the federal sentencing minimums knows the outcome of the trial or guilty plea and likely sentence, before the trial or plea hearing even begins. Some legal scholars and attorneys argue that this research does not prove causation, and that there are case specific reasons for the difference in sentences. Statistical methods like regression analysis and multinomial logistic regression can help us move towards an argument that accepting a guilty plea causes a lower sentence, especially when the combined research covers thousands of cases across decades. Currently we do know that this discrepancy exists (shown by many studies across

jurisdictions and years) and this effectively erodes a defendant's constitutional right to a jury trial. Senior Judge John L. Cane Jr. of United States District Court in Denver believes that one result of the threats of harsher charges, the trial penalty, is a sharp decline in trials, "[i]n 1977. . . the ratio of guilty pleas to criminal trial verdicts in federal district courts was a little more than four to one; by last year, it was almost 32 to one." (Oppel, 2011). Even more concerning are the numbers of acquittals, "[l]ast year, there was only one acquittal for every 212 guilty pleas or trial convictions in federal district courts. Thirty years ago, the ratio was one for every 22." (Oppel, 2011). These numbers indicate that legally innocent defendants are pleading guilty, and the evidence points to the coercive nature of prosecutorial charging, plea bargains and the trial penalty, as the driving forces.

3. Jury Sentencing Research

There is empirical evidence to support the argument that juries tend to be more lenient than judges in sentencing, and thus a return to jury sentencing could reduce excessive incarceration terms, but we need more research to fully understand jury sentencing. Hans et al (2015) collected capital sentencing data in Delaware from 1977-2007. During that time period Delaware shifted from jury sentencing to judge sentencing specifically for the death penalty. Their study found that juries sentenced defendants to death around 20% of the time and judges sentenced to death 53% of the time. Delaware now uses a combination of judge and jury for death sentences, as is constitutionally required under the Supreme Court decision, *Ring v. Arizona* (2002).

In *Ring v. Arizona*, the Supreme Court found that the judge ruling on aggravating factors, known as sentencing factors or considerations, during the sentencing phase, violated the defendant's Sixth Amendment right to a jury trial. The court held that these aggravating factors, called sentencing enhancements, were actually findings of fact that must be left to the jury in accordance with the defendant's sixth amendment rights. This has become a murky area of law beginning with another Supreme Court decision in 2000, *Apprendi v. New Jersey*. The murkiness stems from the

definition and delineation between sentencing considerations or factors and elements of the offense. This issue is the reason why the federal sentencing guidelines were ruled to be advisory, in *U.S. v. Booker* in 2005. The Supreme Court found that the federal sentencing guidelines as written (mandatory) were unconstitutional because they could result in a judge basing a sentence on factors that were not proven beyond a reasonable doubt in front of a jury.

Jury sentencing would resolve this confusion and murkiness in the law; new factors could be presented during sentencing because the jury would again be making the decision and the defendant's Sixth Amendment rights would be protected. Smith and Stevens (1984) compared average judge and jury sentences in six different states from 1957 to 1977. They found that Texas, which used jury sentencing during the entire period, had the most consistent mean sentences, with an average change of only two years. During the study period, Alabama shifted from jury to judge sentencing, Smith and Stevens (1984) found that jurors imposed high sentences in 25% of their cases while judges imposed high (above average) sentences in 50% of their cases. While the empirical data is limited, there is evidence that jurors impose more moderate incarceration terms.

Kalven and Zeisel's (1966) theory and the related body of work on jury deliberation is not directly related to our research, but their insight that juries are subject to group decision-making is applicable. Kalven and Zeisel's liberation hypothesis describes jury decision-making after the guilt phase of trial; they found that jury guilt decisions differed from judge guilt decisions when the evidence presented was weak (Kalven & Zeizel, 1966; Spohn & Cederblom, 1991). Deliberation after the guilt phase of trial requires a jury to apply evidence to each specific element of every offense and decide whether each offense was proven beyond a reasonable doubt. These structural components of decision-making and deliberation after the guilt phase of trial do not exist during deliberation for the sentencing decision (the subject of this research). During the sentencing phase of trial and during deliberation on a sentence there is no beyond a reasonable doubt standard, no consideration of the elements of an offense, and no requirements of proof for a jury to consider. Discussions about the strength

of evidence are not applicable to the sentencing phase. While some research has applied Kalven and Zeisel's theory to sentencing decision-making in capital cases, because of different sentencing processes and limited sentencing options it does not make sense to compare judge and jury differences in capital cases to noncapital cases (Breen, 2011; Haney et al. 1994; Kalven & Zeisel 1966).

Federal district court Judge Morris B. Hoffman argues that "[j]urors are in a better position than judges not only to take the measure of a crime, but also to take the measure of its proportionate retribution" (Hoffman, 2003, p. 1010). Jury sentencing is a democratic process that protects the rights of defendants and keeps politics and personal considerations outside of decisions of guilt and sentence. Blumstein and Cohen (1980) studied public opinions and found significant variations in sentences recommended depending on the race and education level of the individual. In their study, for first-degree murder, black respondents said they would impose a sentence of 11 years incarceration, while white males with fewer than eight years of education would impose a sentence of 49 years incarceration, whites with more than eight years education would impose 35 years with white females with less than eight years education imposing 17 years, and those with more than eight years imposing 25 years. Based on the large differences in sentences between racial and sex groups and the high consistency found within racial and sex groups, it would be "more dangerous to leave the sentencing decision to a single person, whose membership in a particular group might skew his or her views considerably, than to leave it to many people, whose memberships in many groups will force them to accommodate their inter-strata differences (Hoffman, 2003, p. 987).

The existing research points to the possible benefits of a right to jury sentencing in criminal trials, and its ability to solve two significant current problems in the U.S. federal system right now, the coercion to plead guilty and overuse of plea bargains and the disparity in sentencing between guilty pleas and trials. Both of those problems are also related to prosecutorial discretion because the prosecutor plays the lead role in charging and plea-bargaining. Providing the option for jury sentencing could change the plea-

bargaining power dynamic between prosecutors and defense counsel by creating more uncertainty for prosecutors which would result in fewer accepted PTAs and more trials. The existing research compares limited jury sentencing jurisdictions, so we do not fully understand how jury sentencing works yet. The only study of a full jury sentencing system is Breen (2011). She collected one year of case data from the Air Force and found no evidence of a trial penalty within that system. She also found that juries imposed less severe sentences as compared to judges. The same statutes govern the Air Force court system as the Marine Corps system. Our research will describe three years of case data from the Marine Corps and provide empirical descriptions to understand how jury sentencing affects a justice system and whether the trial penalty exists. This research is important because it has not been done previously, because of the possibility of jury sentencing creating a much more fair system and restoring defendant's 6th Amendment rights, and because of the risk of the jury sentencing model disappearing entirely and permanently.

Hypothesis 1: Exercising the right to trial will decrease the likelihood of receiving the most severe sentence/punishment, when compared to pleading guilty.

Hypothesis 2: Electing jury sentencing will decrease the likelihood of receiving the most severe sentence/punishment, when compared to judge sentencing.

Hypothesis 3: There will be no significant difference in sentence length for defendants who accept a plea bargain and plead guilty and those who exercise their right to trial.

IV. DATA

We started with an excel spreadsheet containing courts-martial, administrative separation, and non-judicial punishment cases obtained from the Marine Corps (n = 7188), with almost 40 variables. The data was compiled by all defense counsel in the Marine Corps between 2012 and 2015, across military bases and courts in the United States and other countries. Criminal cases in the Marine Corps are either Special Courts-

Martial (SPCM) (with a maximum confinement length statutorily limited to 12 months) or General Courts-Martial (GCM) (considered equivalent to felony charge in civilian court, each charge has specific maximums including death or life imprisonment depending on charge). After removing irrelevant administrative cases there were n = 3900 cases; n = 3329 Special Courts-Martial and n = 571 General Courts-Martial. The administrative cases begin in the criminal system and are plea-bargained to non-judicial punishment or administrative separation hearings. This is similar to deferred prosecution in civilian courts. Examples of these types of cases are short-term unauthorized absences, adultery (in the military, failing to show up for work and adultery are crimes), or a positive urinalysis for marijuana. They are removed from our analysis because they are no longer criminal cases and their disposition does not result in any type of conviction. There were n = 2266 cases that had PTAs to other non-criminal processes, n = 588 PTAs (that remained in criminal case process, SPCM or GCM) and n = 792 trials.

Table 1: Frequency of Cases Going to Trial or Taking PTA

	N	%
PTA	588	16.1
Trial	792	21.7
PTA to Other Process	2,266	62.2
Total	*2,646*	*100.0*

According to our data, in the Marine Corps criminal justice system, 21% of cases go to trial (See Table 1); this percentage is even greater if we exclude the PTA to other process cases. PTA to other process cases are those that are plea-bargained out of the criminal system altogether. Those cases were removed from the criminal system altogether; after excluding those cases from analysis 57% of cases go to trial and 42% are resolved via PTA. This supports our prediction that a criminal justice system with a right

to jury sentencing will have more trials. These descriptive statistics are very interesting, because in the civilian federal court system fewer than 3% of all federal criminal charges go to trial (Rakoff, 2014) with the rest pleading guilty via plea agreement.

The difference between criminal justice systems is further demonstrated by examining the rate of acquittals in the Marine Corps; according to our data 20% of cases result in an acquittal compared to .5% in federal civilian courts in 2010 (Oppel, 2011). The 20% acquittal rate in the Marine Corps is closer to what the rate used to be in federal civilian courts 30 years ago (Oppel, 2011).

Table 2: Frequency of Acquittals

	N	%
Acquitted	212	20.4
Convicted	825	79.6
Total	*1,037*	*100.0*

V. METHODS

We followed the statistical analysis used by Breen (2011) who had similar research questions and used Air Force courts-martial data. For this paper we used multinomial logistic regression and ordinary least squares (OLS) regression. Trial penalty research with civilian court data uses incarceration length or decision to incarcerate as a dependent variable (King et al. 2005), but in military courts martial there are multiple sentencing options. After a finding of guilt, courts-martial sentences can include no punishment, incarceration, punitive discharge, a letter of reprimand, fine, forfeiture, restriction, hard labor or reduction in rank. The most serious sentences are punitive discharge (bad conduct or dishonorable discharge) and incarceration; some attorneys and judges equate a punitive discharge to

one year of incarceration because of the significant collateral consequences. Some of these consequences are loss of veteran benefits, employment restrictions and social stigma (U.S. Department of the Army 2002: Para. 8-3-23). Breen (2011) was one of the first military justice studies to combine punitive discharge and incarceration length in a dependent variable; prior studies examined incarceration or punitive discharge alone. Because of the significant punitive effects of a discharge, we think it is more accurate to include discharge and incarceration length in our dependent variable.

Our dependent variables are sentence length (measured in days) and type of punishment, which is coded into (0) neither confinement nor discharge, (1) confinement only, (2) discharge only, and (3) both confinement and discharge. The independent variables of most interest are the mode of conviction - trial (whether defendant accepted PTA or exercised right to trial) and mode of conviction - jury (whether Judge or Jury issued sentence). The other independent variables we controlled for are rank (officer (0) n = 1249 and enlisted (1) n = 2628); case type (special (0) and general (1) courts martial); and offense type (property, person, drug, and other). We used dummy variables for the different offense types, using a similar classification as Breen (2011). The "other" group includes military specific offenses; some examples are adultery, fraternization, conduct unbecoming, fraudulent enlistment, desertion, and malingering.

Table 3: Summary Statistics

Variable	*Coding*	*n*	*%*
Dependent Variables			
Type of Punishment	0 – Neither Confinement nor Discharge	68	7.7
(n=878)	1 – Confinement Only	182	20.7
	2 – Discharge Only	15	1.7
	3 – Both Confinement and Discharge	613	69.8
Sentence Length (days)	Continuous (0 – 18250 days)	878	
Independent Variable			
Mode of Conviction – Trial	0 – PTA	588	42.6
(n=1380)	1 – Trial	792	57.4
Mode of Conviction – Jury	0 – Judge	665	61.3

(n=1085)	1 – Jury	420	38.7
Rank	0 – Officer	1,249	32.2
(n=3877)	1 – Enlisted	2,628	67.8
Case Type	0 – Special Court-Martial	3,329	85.4
(n=3900)	1 – General Court-Martial	571	14.6
Offense Type	0 – Property	395	11.6
(dummy variables)	1 – Person	422	12.4
(n=3416)	1 – Drug	609	17.8
	1 – Other *(Military-Specific Offenses)*	1,990	58.3

Our data does not include a variable for sex, however there are only 13,677 females serving in the entire Marine Corps, making up 6.8% of this branch of the military (Statistic Brain, 2016) and the Bureau of Justice Statistics reports that only 14% of federal defendants are female (Motivans, 2015) so the vast majority of our cases are likely to be male. Additionally, we do not have a variable for prior criminal convictions in our data. Breen (2011) concluded that less than 2% of her military population would have a prior felony or court-martial conviction because she had information that the Air Force admitted 5 applicants with felony convictions in 2003 out of 32,000 recruits. The Marine Corps is the smallest branch and is known to have the strictest applicant requirements. Marine Corps Recruitment Command Order 1100.0 states that only applicants "with no criminal

convictions" are eligible for enlistment. Therefore it is safe to assume that our population does not have any prior criminal convictions. We do not have a race variable available in our data, however previous military justice studies have found no race effects (Breen 2011; Landis et al. 1997; Verdugo 1998) so this may not be a problem in our analysis.

Our model uses multinomial logistic regression and ordinary least squares regression. We use an aggregate measure of mode of conviction with a dummy variable indicating trial vs. guilty plea and a second dummy variable for jury vs. judge. This gives us an overall assessment of the effects of trial and jury on sentence. Multinomial regression is used because our sentencing outcomes (dependent variable) are categorical. Ordinary least squares regression is used for the sample with confinement (dependent variable of confinement length) to examine the relationship between incarceration length and our independent variables.

VI. FINDINGS

Table 3 presents the descriptive statistics for our independent and dependent variables in our analysis. 69% of cases received both confinement and discharge and 20.7% received confinement only. 42% of cases were resolved with a pre-trial agreement and 57% of cases went to trial. This is significantly different than the statistics from federal civilian court; here we have a majority of defendants exercising their right to trial instead of accepting plea bargains from the prosecutor. For mode of conviction, 61% of trials are judge trials and 38.7% are jury trials. 67% of the cases have enlisted defendants and the majority of cases (85%) are special courts-martial. For offense type, 58% are in the other category, which includes military-specific offenses, with drug offenses being the next most frequent (17.8%).

Table 4 shows the multinomial logistic regression model estimating the likelihood of receiving a sentence with confinement alone, discharge alone, or both confinement and discharge in comparison to receiving no punishment.

Table 4: Multinomial Logistic Regression of Punishment Type

	Confinement (n=537)	*Discharge (n=420)*	*Both*
Chi-square	23.73**	5.87	75.07***
Pseudo R^2	0.047	0.062	0.1173
Log Likelihood	-243.293	-44.323	-282.417
	Odds Ratios	*Odds Ratios*	*Odds Ratios*
Trial	1.634	0.123	0.521**
Jury	1.540	3.734	0.263***
Enlisted	0.720	0.641	1.330
General Court-Martial	0.392**	0.389	3.969***
Person Offense	1.166	*omitted*	1.260
Drug Offense	1.531	0.369	0.774
Other Offense	1.506	0.458	0.861
Constant	0.205**	0.084	2.588**

** p <0.1, ** p< 0.05, *** p<0.01*

If there is a trial penalty effect, then the trial and jury variables should increase the odds of offenders receiving sentences with confinement and punitive discharge (the most severe sentence available). Table 4 provides no empirical support for the trial penalty, and in fact shows that exercising the right to trial decreases the odds of receiving a sentence with

confinement and discharge by 48% - this supports our first hypothesis. Table 4 also shows that selecting a jury (instead of a judge trial) decreases the odds of being sentenced to confinement and discharge 74% - which supports our second hypothesis. The model does not detect a statistically significant difference between trial and PTA and judge and jury for the less severe sentence types of discharge alone and incarceration alone. The type of court-martial is positively and significantly related to the likelihood of receiving a discharge and confinement, but rank and offense type are not. General courts-martial have a 3.97 times greater odds of receiving a punitive discharge and confinement than special courts-martial. The lack of a significant rank effect means that an enlisted Marine is not more likely to receive a more severe punishment than an officer. Overall our model chi-square for confinement and discharge is 75.07 and significant with a p-value < 0.001 which tells us that our model fit is better than a model with no predictors. Our pseudo R^2 for both discharge and confinement is .12.

Our second analysis used length of confinement as the dependent variable. If there is a trial penalty effect, jury and trial sentences should result in longer confinement lengths than judge issued and guilty plea (PTA) sentences.

Table 5: Ordinary Least Squares Regression on Sentence Length (days)

	b	*SE*
Trial	293.850	236.020
Jury	-325.905	290.804
Enlisted	-110.401	182.964
General Court-Martial	1217.17***	202.720
Property	-22.058	317.477
Person Offense	493.379	330.896
Drug Offense	*Omitted*	*Omitted*
Other Offense	-88.375	276.614
Constant	290.149	276.206

Note: $R^2 = 0.1237$; * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$

This model explains 12% of the variance in logged confinement length (R^2 = 0.12). The only legal independent variable that is significant is the difference between general and special courts-martial, which makes sense since special courts-martial are statutorily capped at 12 months confinement length. Trial vs. PTA does not have a significant effect on sentence length, which supports our third hypothesis and supports the conclusion that in the Marine Corps criminal justice system there is no evidence of a trial penalty effect. In other words, controlling for conviction by judge vs. jury, rank, court-martial type and offense type there is no significant difference in sentence length for defendants who accept a plea bargain and plead guilty and those who exercise their right to trial. This is in contrast to many civilian jurisdictions where sentences after trial are

much higher than those after accepting a plea bargain. We did not find any problems with collinearity of variables (Table 6).

Table 6: Multicollinearity Test

Variable	*Tolerance*	*VIF*
Trial	0.540	1.85
Jury	0.518	1.93
Enlisted	0.984	1.02
General Court-Martial	0.737	1.36
Property	0.452	2.21
Person Offense	0.356	2.81
Drug Offense	*omitted*	*omitted*
Other Offense	0.347	2.88

We also conducted a simple correlation test between variables. Table 7 shows a negative relationship between trial and punishment, in other words exercising the right to trial (and not accepting a PTA) is negatively correlated with punishment severity (-0.297). Additionally, Table 7 shows a negative correlation between a jury issued sentence and punishment severity (-0.293). This is consistent with the multinomial logistic regression and ordinary least squares regression analyses.

Table 7: Correlation of Variables

	Punishment	Trial	Trial Forum	Rank	Case Type	Property Offense	Person Offense	Drug Offense	Other Offense
Punishment	1.0000								
Trial	-0.2965	1.0000							
Trial Forum	-0.2934	0.6803	1.0000						
Rank	0.0225	0.0232	0.0202	1.0000					
Case Type	0.1826	0.1105	0.2498	-0.0623	1.0000				
Property Offense	0.0240	-0.0540	-0.0538	-0.0315	-0.0508	1.0000			
Person Offense	0.1097	0.1191	0.1559	0.0130	0.4656	-0.2487	1.0000		
Drug Offense	-0.1033	0.0137	-0.0094	-0.0710	-0.1683	-0.1630	-0.1822	1.0000	
Other Offense	-0.0453	-0.0651	-0.0814	0.0574	-0.2411	-0.4658	-0.5207	-0.3413	1.0000

VII. DISCUSSION AND CONCLUSION

The limitations in our research are similar to those in other sentencing studies; the variables we can control for in our analysis are limited to those collected and there may be other relevant variables. We know this is likely because the R^2 for our OLS regression is 0.12, which means our model only explains 12% of the variance in incarceration length. Ulmer and Bradley (2006) discuss the lack of victim information in sentencing research and the possibility of victim characteristics having an effect on sentence severity. This is also a limitation here, although victim information exists in the case files maintained by the Marine Corps and we could collect that data and address that topic in a future paper.

This topic is important because criminal systems without mandatory minimum sentencing are rare, as are systems that provide for jury sentencing. Research on criminal systems with these structural differences is also very limited. Mandatory minimum sentences and sentencing guidelines have been identified as one cause of increased prosecutorial discretion. Studying and understanding criminal justice systems without mandatory minimums is important because it can provide more information about the effects of those guidelines. This research is also important for understanding the trial penalty. Criminal trials in federal (and many state) courts have largely been replaced by guilty pleas and plea-bargains. This is a problem when it is combined with judges issuing more severe sentences for defendants who exercise their right to trial and prosecutors using the charge sheet as a bargaining tool. When a criminal defendant accepts a plea deal, he often waives his right to file motions challenging police action, interrogations, and evidence seizures and the government no longer has to prove their case in the same way they would have to at trial.

The existence of a trial penalty gives the prosecutor more power during charging and plea negotiation. This power increases the effects of prosecutorial discretion. The prosecutor can use the threat of a trial penalty

to convince defendants to plead guilty, even to charges they may not be guilty of. A judge-issued sentence in a criminal court system with mandatory minimums results in a very predictable outcome for the prosecutor and therefore much more powerful discretion at the charging stage. Jury sentencing may reduce coercion to accept plea deals by restoring an actual choice between trial and offered plea deal. If a criminal defendant is not guilty, and has a 50% chance of an acquittal at trial, but he knows that the judge will give him a three-times greater sentence if he exercises his right to trial, his attorney may aptly advise him to plead guilty. But if a criminal defendant is not guilty, and has a 50% chance at an acquittal, and he knows that if he exercises his right to a trial he will also be fairly sentenced, the advice from defense counsel changes and the criminal defendant has a real choice. By removing the judge's (and prosecutor's) ability to punish a defendant for exercising his right to trial, coercion is removed from the process and the defendant is free to make a real choice.

Our research empirically describes the military justice system in the Marine Corps. It supports our prediction that a criminal justice system with the option for jury sentencing will have more trials and fewer cases resolved via plea agreements. It supports our hypothesis that the Marine Corps criminal justice system does not have any evidence of a trial penalty effect and our hypothesis that electing jury sentencing will result in a less severe sentence (when compared to judge issued sentences). Based on this research alone, we cannot conclude that jury sentencing reduces the effects of prosecutorial discretion and repairs the power imbalance during plea negotiation, but we can say that a federal criminal justice system without mandatory minimum sentences that provides the option for jury sentencing does not have the same problems with trial penalties and increasingly unchecked prosecutorial discretion. Jury sentencing has the potential to provide a realistic and feasible remedy for a number of problems: the trial penalty effect, the coerciveness of plea agreements, increased prosecutorial discretion, and the erosion of the 6th Amendment right to jury trial.

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