

# PLEA BARGAINING AND THE DEATH PENALTY: AN EXPLORATORY STUDY

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*One of the most troubling criticisms of plea bargaining is that it is coercive, insofar as prosecutors may use their discretion to induce defendants to forfeit their trial rights out of fear of receiving a harsher sentence if they do not plead guilty. Inducements and concerns surrounding guilty pleas are especially important in murder cases carrying a possible sentence of death, as prosecutors may threaten the death penalty to encourage defendants to plead guilty. This issue raises ethical and legal concerns and carries significant implications regarding the human and financial costs of capital punishment, yet empirical research addressing the use of the death penalty as leverage is largely lacking. Using data from interviews with defense attorneys and prosecutors, this article takes a first step in exploring prosecutors' and defense attorneys' experiences with, and perceptions of, the plea-bargaining process in death-eligible cases.*

The role of plea bargaining in the criminal-justice system has been the subject of much scholarly research (e.g., Eisenstein and Jacob, 1977; Emmelman, 1996; Heumann, 1977), and the advantages and disadvantages of this practice have been widely debated (e.g., Alschuler, 1981; Easterbrook, 1992). Over 90 percent of defendants in felony cases forgo their right to trial, instead pleading guilty, many after accepting a plea bargain (Pastore and Maguire, 2003). In exchange for giving up their rights, defendants are sometimes rewarded with more lenient sentences than they would receive had they pursued a trial and been found guilty (Alschuler, 1981). Plea bargaining is thought to provide benefits of cost, efficiency, and certainty to both defense attorneys and prosecutors (Bibas, 2003), so that it fits the crime-control model of the criminal-justice process in which a premium is placed on speed and finality in the disposition of criminal cases (see Packer, 1968). On the other hand, reflecting the due-process model, which emphasizes the importance of "formal, adjudicative, adversary fact-finding processes" (Packer, 1968:163), plea bargaining has been criticized on grounds that it unfairly causes criminal defendants to waive their Fifth, Sixth, and Fourteenth Amendment rights (see, e.g., Halberstam, 1982).

One of the most troublesome criticisms of plea bargaining is that it is coercive, with prosecutors using their discretion to induce defendants to forfeit their rights out of fear of being punished with additional charges and a harsher sentence if they do not plead guilty. The Supreme Court condoned this practice in *Bordenkircher v. Hayes* (1978) and has said that guilty pleas induced out of fear of the death penalty or because of prosecutors' threats may be voluntary and free of coercion in a constitutional sense, and that the decision to enter a plea is not coerced so long as a defendant can make a voluntary and intelligent choice among alternatives (see

*Bordenkircher v. Hayes*, 1978; *Brady v. United States*, 1970; *North Carolina v. Alford*, 1970; *United States v. Jackson*, 1968). However, this does not necessarily mean that coercion is absent from the process of plea bargaining. Questions about its propriety remain and are particularly significant when charges involve a potential sentence of death, which is different in degree and kind from lesser punishments (*Gregg v. Georgia*, 1976). Indeed, Littrell (1979) argues that structural coercion is embedded in the organization of the prosecution by the making of offers that cannot be refused. The concern is that the threat of death will drive defendants who are not death-worthy, and may even be innocent, to plead guilty out of fear of possibly being executed (Gross, 1996).

The incentives for prosecutors, defense attorneys, and defendants to plea bargain in death-eligible cases are magnified, given the punishment at stake and the cost of a trial to determine that punishment. Defendants and defense attorneys may not ordinarily consider pleading to a sentence of life or life without parole (LWOP), but, when faced with the possibility of a death penalty, they may be inclined to accept pleas that would otherwise be rejected if the difference between a plea bargain and a trial conviction were a matter of years and not a matter of life and death. While there is little empirical evidence that innocent defendants plead guilty to avoid more lengthy terms of imprisonment, there is evidence that innocent defendants plead guilty to avoid death (Radelet, Bedau, and Putnam, 1992). Accepting a plea provides the defendant with the advantage of securing a sentence less than the maximum punishment allowed under the law, as the Supreme Court pointed out in *Brady* (1970). The government benefits as well, said the Court, in that plea bargaining allows for the conservation of scarce judicial and prosecutorial resources. Thus, in using the death penalty as leverage, the prosecution both secures a plea to a higher sentence than would otherwise be obtained and avoids the administrative and financial costs of a murder trial, and especially those of a capital murder trial.

The drain of the death penalty on the resources of the judicial system is well-known (see Bohm, 2003, and Dieter, 2005, for reviews of cost studies), with death penalty cases more expensive than non-death penalty cases at every stage of the judicial process (Brooks and Erickson, 1996; Garey, 1985). There is, however, some recognition of the possibility that the death penalty may produce a savings in cost (Bohm, 2003; Dieter, 2005), but this possibility is largely dismissed without evidence either way or without taking cost savings into account (Cook and Slawson, 1993; State of Kansas, 2003). Costs especially burden local governments, which often bear the brunt of the expenses in capital cases (Dieter, 1994). Threatening the death penalty to induce a plea may provide a prosecutor with the ideal solution to the Catch-22 of wanting to appear tough on crime but not wanting to drain the county budget.

## THE CURRENT STUDY

Although prosecutors' use of the death penalty has long historical roots (see, e.g., McGowen, 2007) and prosecutors' use of the death penalty in this way has been rec-

ognized (e.g., Bedau, 1982; Gross, 1996; Tabak, 1986), little empirical research on the topic has been conducted. The factors influencing both prosecutors and defense attorneys to discuss a plea bargain in death-eligible cases have been discussed anecdotally, based on interviews with attorneys (e.g., White, 1991), but thus far, there has been only one systematic study (Kuziemko, 2006). Thus, it is important to ask whether prosecutors use the death penalty as leverage and to study both prosecutors' and defense attorneys' experiences with, and perceptions of, the plea-bargaining process in death-eligible cases.

This article presents an exploratory study of such matters for both death and non-death-eligible murder cases in a death penalty state. The state has a diverse population and is composed of a number of large, densely populated urban areas, although a substantial portion of the population resides in smaller cities and more rural counties. This state has three top sentences for the offense of murder—death, life without parole, and life—and its death penalty statute is typical of most, requiring the prosecution to establish one or more aggravating factors to make a murder death-eligible and then requiring the jury to consider aggravating and mitigating factors when deciding on a sentence. Prosecutors are elected locally and, under law, are given autonomous discretion over capital-charging decisions, although they are required to provide notice, within a fixed time period after the defendant has been arraigned, of their intent to seek the death penalty. Although the state may provide the county with additional personnel and resources for the prosecution of capital cases, the brunt of expense typically is borne by local government.

Data consist of twenty-seven in-depth interviews, fifteen with defense attorneys and twelve with prosecutors. Participants were chosen from a complete list of the death-noticed cases in this state and are representative of cases in both urban and rural jurisdictions. Only lawyers who either defended or prosecuted at least one capital-eligible case and at least one non-capital-murder case were included. All the defense attorneys were appointed private attorneys with the training and experience required to defend capital cases in this state. Nearly 70 percent of the defense attorneys who were contacted agreed to participate; the participation rate for prosecutors was 50 percent. Not one of the respondents expressed a belief in the innocence of the defendants represented or prosecuted. Nor did defense attorneys, who did not report any clients denying they committed murder, express doubt that the murders their clients committed qualified for the death penalty.

The interviews, which lasted an average of ninety minutes and were guided by an open-ended questionnaire, were conducted over a six-month period in 2005.<sup>1</sup> Participants were asked two sets of nearly identical questions about their experiences with the process of plea bargaining in murder cases where the maximum sentence for the offense charged was either death, or life, or life without parole (LWOP). Special

<sup>1</sup> All interviews were tape-recorded and subsequently transcribed, with the exception of those with one defense attorney and two prosecutors who requested not to be recorded. Interview instruments are available upon request.

attention was paid to the role of the maximum possible sentence in the prosecution's decision to offer a plea and the defense's decision to accept it. Respondents were asked about the initiation, duration, and extent of any plea negotiations and about factors that influenced their pursuit of a plea or a trial, specifically including the weight of a potential life or death sentence.

## FINDINGS

Defense attorneys and prosecutors felt that the option to file a death notice puts the prosecution in a unique position of strength and affects the defense's decision regarding a plea in ways that a potential sentence of life or life without parole does not. A majority of defense attorneys said the death penalty gives prosecutors great leverage and is a powerful tool at the prosecution's disposal. While few prosecutors said the death penalty was used as leverage in their own county, some speculated that it was used in this way in other counties.

***The Defense Attorneys' Perspectives.*** The consensus among defense attorneys was that the threat to file and pursue a death notice in a murder-one case is the prosecutor's most powerful tool; twelve defense attorneys acknowledged prosecutors' ability and willingness to take advantage of it. One said the death penalty is a tool in the prosecution's arsenal and that prosecutors have an obligation to use all the tools in their arsenal. It was noted that some prosecutors could, and indeed do, use the leverage of seeking death to force pleas and to force them quickly: "In the majority of the death-eligible cases there [in a particular county], the DA would say, 'This is death-eligible, I think I'm going there, tell me why I shouldn't,' and the defense attorney has to run around and put it all together, and then the DA says, 'ok, fine, LWOP'" (defense attorney #47). When, as one defense attorney put it, prosecutors "say they don't" but "do, absolutely" use the threat of death as leverage to induce a plea, this is "one of the most duplicitous parts of the process in my book, when you go in for a plea on a case that is capital eligible or on which a notice has been filed and they require the client to say that I'm pleading knowingly, freely, and voluntarily and 'no, I haven't been coerced.' Bull-shit you haven't been coerced" (defense attorney #98).

Thus, from the defense attorneys' perspective, prosecutors are well aware of their power and in many cases are willing to make use of it as to what, if anything, they are going to offer. In many cases, although not all, that offer is life without parole: "I don't know anybody who pleads to life with parole. It's always LWOP versus the death penalty" (defense attorney #53). The defense thus finds itself faced with a choice between accepting a plea to life without parole or taking the risk that a death notice will be filed and a capital trial pursued. Some defense attorneys pointed to a situation where the prosecutor may offer a plea before a death notice is filed, telling the defense that if notice is filed, the offer will no longer be available. For many attorneys, the possibility of a capital trial is a risk simply too great to take: "If they offer you anything less than death and you don't take it, imagine if you guessed wrong" (defense attorney #58). Another attorney said that in one case, he was not convinced

a death notice would be filed, but he felt he could not take the chance, and thus he accepted the district attorney's offer of a plea to life without parole. Similarly, another noted that although he would go to trial if the client wanted to do so, in a death case he would never advise the client to go to trial, as the risk is just too high.

While the majority of defense attorneys leaned toward a plea in the face of death, not all felt this way. Two indicated that while others might be inclined to have their clients plead in a death-eligible case, their own inclination toward pursuing a plea or pursuing a trial is not affected by the possibility of a death sentence: "It [the possibility of death] doesn't make me nervous. . . . It doesn't intimidate me" (defense attorney #53). "I've often thought that if you're 'negotiating for life,' you're not defending. That's been my view of it" (defense attorney #22). However, these individuals were the minority, as for most, the leverage of death was a sufficient inducement to urge the defendant not to pursue a trial but to plead.

The threat of a sentence of life or life without parole might also be used as leverage to encourage a defendant to plead, but these sentences do not carry the same weight as death: "There are certainly cases where if LWOP is the max, you'd risk a trial, but where if death were the max, you wouldn't" (defense attorney #58). In a climate in which the state's parole board is averse to releasing offenders before the expiration of their sentences, some defense attorneys viewed the difference between twenty-five years to life and life without parole as largely insignificant. Indeed, only three defense attorneys said that, in a non-death-eligible case, the possibility of a sentence of life without parole was the most important factor in the desire for a plea. Thus, when faced with the choice between accepting a plea to an open life sentence or going to trial on LWOP, some defense attorneys would be inclined to take the risk of trial. However, in sharp contrast, in death-eligible cases, eleven defense attorneys said the possibility of a death sentence was the most important factor; the certainty of a sentence less than death is a significant benefit to entering a plea.

Not only do many defense attorneys view the death penalty as an important prosecutorial bargaining tool that leaves them little choice but to accept whatever plea the prosecution offers, but in most cases, it is they, the defense attorneys, who initiate the possibility of a plea. Nine of the eleven attorneys who said they are more likely than the prosecutor to initiate a plea cited the death penalty as a reason. (Interestingly, in stark contrast, not one defense attorney cited the possibility of a sentence of life or life without parole as influencing whether they initiate a plea.) A majority of defense attorneys (twelve) said such plea offers were discussed early, even at day one. Seven of the twelve cited the death penalty as a reason why a plea was raised so early, while five cited the strength of the case or the strength of the evidence: "When you're looking at a death case, from day one, if there is evidence pointing to him, you're really working toward that day when you're going to ask that they agree to LWOP" (defense attorney #34). In contrast, in cases where the maximum punishment is life or life without parole, pleas were not necessarily raised immediately, and there was no clear pattern as to who is more likely to initiate a plea bargain.

Who initiated depended on a number of factors, including the prosecutor and the circumstances and strengths and weaknesses of the case.

Most defense attorneys indicated that negotiation over the parameters of the plea in death-eligible cases is limited. Six defense attorneys said that a plea offer was presented as “take it or leave it.” Another attorney said that, while there may be some give and take, “prosecutors know they are in the driver’s seat” (defense attorney #47). In two other cases, the prosecutor would not discuss a plea, so there was no negotiation or bargaining over the parameters of a plea. In contrast, about half the defense attorneys said there was negotiation and bargaining in non-death-eligible cases: four said there was little negotiation while four said it varies.

*Factors Considered.* Other than the maximum sentence, defense attorneys cited eleven different factors as influencing their tendencies to pursue a plea or trial in death-eligible cases, but they cited twenty-two different factors in non-death-eligible cases. In addition to the factors about to be discussed, those cited by more than one defense attorney are quality of the defense argument, mental and emotional state of the client, and client’s desires. What the client wants was also cited by more than one defense attorney as a factor in non-death-eligible cases, along with the chances of being convicted on a lesser charge and how evidence was acquired in terms of potential suppression.

The strength of the case or the strength of the evidence was the most commonly cited factor regardless of whether the case was death-eligible. However, while a majority (twelve) cited it as influencing their plea/trial tendencies in non-death-eligible cases, only about half (seven) mentioned it in death-eligible cases. Six defense attorneys cited the chances of winning the case as a factor in non-death-eligible cases; four cited it in death-eligible cases. Seven mentioned the fairness of the plea offer as an influential factor in non-death cases, but not one attorney mentioned it as a factor in death-eligible cases. This accords with our findings on defense attorneys’ willingness to plead when death is on the table, even for sentences as great as life without parole.

Similarly, although only two attorneys cited considerations regarding the jury in non-death-eligible cases, nearly half mentioned this as a factor in death-eligible cases: “If death is on the table, a legitimate death case . . . I think you have to do everything you can conceivably do and can’t take any chances on a trial . . . because you don’t know what a jury is going to do” (defense attorney #58). Attorneys also pointed to the Catch-22 of having to convince a jury of the defendant’s innocence in the guilt phase of the trial but then, upon conviction, having to say to the jury that the client is guilty but that his life should be spared.

*Costs.* Another factor, cited not only by only some defense attorneys but also by prosecutors, was the cost of a capital case. Five defense attorneys pointed to the financial impact of a death penalty trial on the state, particularly the local government. This is particularly an issue for rural counties, where the district attorneys are under

greater pressure from their conservative constituents to seek the death penalty. One defense attorney, speaking of a case in a rural county where the community was crying out for the death penalty, said that the district attorney filed a death notice but eventually offered a plea, telling the community that he could “save the taxpayers a lot of money.” Similarly, a prosecutor who acknowledged using the death penalty as leverage to induce a plea said, “You have to consider resources . . . even if the defendant deserves the death penalty, there may just be a realization that . . . it’s not worth the resources it’s going to take to get it, if it can be resolved by plea” (prosecutor #5).

***The Prosecutors’ Perspectives.*** Prosecutors are well aware that they can use the threat of death as leverage to garner a plea to a higher sentence than they would obtain if the death penalty was not an option. While all prosecutors in this sample acknowledged that the death penalty could be used this way, six said it is not, and five said that, although it is not used this way in their counties, it may indeed be used this way in other counties; two cited the potential for coercion as the reason. It may be argued that these five individuals’ responses reflect the phenomenon of projection, attributing to others what they themselves do so they can avoid a claim of ownership of a behavior that might be perceived as socially undesirable (Arthur and Nazroo, 2003; Singleton and Straits, 2005).

Only one prosecutor said that he uses the death penalty as a tool in plea bargaining. His comments reflect what defense attorneys said earlier about prosecutors using all the tools in their arsenal:

I think that even though I believe death to be a just punishment in a particular case, there may be practical considerations that would warrant me saying, if I can get a plea and a waiver of a right to appeal and finality to this case without expending all these resources, that’s justice as well, and in those cases, frankly I don’t have any problem, and I don’t believe there’s anything wrong with using death as a bargaining chip (prosecutor #5).

Notably, a prosecutor who said that he does not use the threat of death to elicit a plea and will only seek death if he feels it is the right verdict for the case nevertheless echoed these comments: “We always told the defense, the only two options are either we’re going to seek the death penalty, or if there’s going to be a plea, it’s gonna be life without parole” (prosecutor #48). Three of the prosecutors who said death is not used as leverage said the decision to seek death is made with the belief that it should be up to a jury to decide the appropriate punishment, but one of these individuals also acknowledged that death is an important bargaining tool with which to resolve a case.

It is important to point out that even if prosecutors do not openly use the death penalty as leverage, defense attorneys may perceive that they do and may in turn seek to have their client plead. Indeed, one prosecutor noted that when he is deciding whether or not to file a death notice, the defense may perceive that he is inclined to file and may want to plead without having any indication from him one way or the

other. Whether or not prosecutors make use of the death penalty in this way, they are well aware that the possibility of a death penalty provides the benefit of pleas accompanied by higher sentences.

Prosecutors' comments regarding pleas to life without parole mirror those of the defense attorneys: "If not for the death penalty, they're not going to plead to life without parole" (prosecutor #5), and "I'm not a rabid proponent of the death penalty [but] if it has an upside, it's that we've resolved some cases with pleas of life without parole where that was the appropriate sentence" (prosecutor #41). Thus, generally, prosecutors and defense attorneys agree that without the threat of death, a case is unlikely to be resolved by a plea to life without parole.

By the same token, in a non-death-eligible murder case, the threat of life without parole may provide a powerful incentive for the defendant to accept a plea bargain to something less. Although some defense attorneys did not express a vulnerability to this threat, a few of the prosecutors perceived one, and one recalled instances where defendants had pled to avoid LWOP: "They're not going to plead and take life without parole, but if they can get a sentence that gives them the possibility of getting out . . . we've had numerous examples of cases that have [been] resolved that way" (prosecutor #5). Although defendants have an incentive to plead to avoid the maximum potential penalty, whatever that may be, defense attorneys and prosecutors agreed that facing twenty-five years to life does not hold the same weight as facing LWOP. They said that plea offers in such cases were unlikely to involve a determinate sentence, and without that, the defense had little to lose in pursuing a trial.

It is important to note that about half the prosecutors said that, just as with the death penalty, they did not use life without parole as a bargaining tool and did not seek a sentence of life without parole unless they felt it was appropriate. However, this did not necessarily mean that prosecutors, aware that the maximum penalty may serve as leverage, would not accept pleas in death and non-death-eligible cases. For example, one prosecutor said that while he does not seek LWOP for the purpose of obtaining a plea, it is a built-in bargaining tool and one that enables him to get pleas and avoid trials.

As to the initiation of plea possibilities, the experiences and perceptions of prosecutors underscore what the defense attorneys said about raising the possibility of a plea in such cases: a majority (nine) of prosecutors said the possibility of a plea is initiated early, and a slight majority (seven) said the defense attorney is the one to initiate the discussion. This is in contrast with non-death-eligible cases, where there is no clear pattern among the prosecutors as to who is more likely to initiate a plea bargain.

Most prosecutors said there was no negotiation over a plea in death-eligible cases; a plea bargain, if offered, was presented as "take it or leave it," as exemplified by comments regarding the nature of plea discussions: "I didn't see the process as being bargaining, negotiating, as much as persuading, the defense trying to persuade that this mitigation should be considered, these are the things you should be looking at and making the decision between offering life without parole and going for the



trial" (prosecutor #76). This perspective reflected the responses of defense attorneys. Interestingly, half the prosecutors said negotiation is also limited in non-death-eligible cases; one said there is negotiation and bargaining, and five said it varies.

*Factors Considered.* Prosecutors cited numerous factors as influencing the degree of negotiation in such cases, including the strength of the case or the strength of the evidence and the extent of the judge's involvement. While the death penalty may indeed be an effective tool to encourage pleas, it is not the sole factor in the decision of whether to offer a plea. Asked about the factors that influence their desire to pursue a plea or to pursue a trial in death-eligible and non-death-eligible murder cases, a majority of prosecutors cited the strength of the case or the strength of the evidence. Notably, five prosecutors specifically said that even if they felt the evidence weighed in favor of a conviction, the strength of the mitigation evidence might influence them not to pursue a trial. Along similar lines, a majority of prosecutors said the defendant's characteristics, including the defendant's criminal history, the nature of the defendant and his or her attitude, and the defendant's background in terms of mental capabilities and mitigating circumstances, influence their desire to plea-bargain or to pursue a trial in non-death-eligible cases.

Another factor commonly cited by prosecutors was consideration for the victim's family. Some prosecutors said the wishes of the victim's family take on greater importance in death than in non-death cases because of the length of a death penalty trial and possible years of appeals that the family will have to endure. Interestingly, not one prosecutor mentioned the influence of political factors, although one casually noted that there is a different district attorney in office now than there was when the death cases were prosecuted. However, when asked to speculate on factors they believe influence prosecutors to pursue a plea or pursue a trial in death-eligible cases, fourteen of the fifteen defense attorneys mentioned politics.

Other factors that were cited by more than one prosecutor as influencing the plea/trial decision in death-eligible cases were the nature of the crime, concerns or issues regarding witnesses, the likelihood of the jury voting for death, and concerns regarding the appellate process. More than one prosecutor cited the nature of the crime as a factor in non-death-eligible cases as well; other cited factors in non-death-eligible cases are the circumstances and facts of the crime, the relationship between the defendant and the victim, and the need for the defendant's testimony in another case.

***Beliefs About the Defendants' Perspectives.*** All respondents were asked if they believed defendants plead to a lesser sentence specifically to avoid the possibility of death or, in a non-death-eligible case, to avoid the possibility of life or LWOP. It is important to emphasize that the following discussion is based on *attorneys'* perceptions of the defendants and not on *defendants'* own expressions of their preferences. Given their closer relationship with defendants and the fact that for defendants, one of the most important factors influencing the decision to pursue a plea or a trial is their attorneys' advice (Baldwin and McConville, 1977; Casper, 1972), defense attorneys are better able to discuss this than are prosecutors. Whether their beliefs about

defendants' preferences reflect the defendants' own opinions or reflect defense-attorney influence on those opinions cannot be determined from these data. Prosecutors were also asked their perceptions of how defendants view the maximum potential sentence; this may provide an additional, albeit rough, indicator of prosecutors' belief in the power of that sentence to induce a defendant to plead.

Ten defense attorneys and ten prosecutors said defendants plead to a lesser sentence to avoid the possibility of death. Although defendants may not initially want to plead, their attitude may change as they focus on the likelihood of a death sentence: "Initially they have the mentality of the non-death case where they want to fight it, but some of them, when they start realizing they're looking at death, they get more realistic about it. I think death does make them plea [sic] more" (defense attorney #16). They may begin to see that a plea bargain does provide a benefit by enabling them to avoid the maximum possible sentence. Indeed, eight defense attorneys and seven prosecutors felt the threat of death was an important factor in defendants' decision to plead, and ten defense attorneys, but only five prosecutors, felt it was the most important factor. One attorney said that a client who might, in another situation, say "fuck them" would not necessarily do so when faced with the possibility of death if a plea was not accepted.

Ten defense attorneys and seven prosecutors said that defendants facing a sentence of life or LWOP are inclined to accept a plea to something less, although two defense attorneys and one prosecutor specified that LWOP carries more weight than life, and a slight majority of defense attorneys said the maximum sentence in such cases was the most important factor in defendants' decision to plead. As only four prosecutors said as much, in both death and non-death-eligible cases, prosecutors may be underestimating the maximum sentence's weight in inducing defendants to plead.

It is important to note that not all defendants are said to express vulnerability when faced with the possibility of a death sentence. Indeed, nine defense attorneys said there are some defendants who prefer to pursue a trial even in the face of death. This was most commonly said to stem from defendants' overly optimistic view of their chances at trial, but it may also result from their psychological problems. Also, some defendants do not view life without parole as much of an alternative and would rather die than spend the rest of their lives in prison: "There are clients who are deathly afraid of the death penalty, and there are clients who are deathly afraid of being warehoused for the rest of their lives" (defense attorney #22).

It should also be recognized that the desire for a lesser sentence is not the only factor in a defendant's decision to enter a plea. According to defense attorneys, defendants in both death and non-death-eligible cases are concerned about, and weigh, their chances at trial. Psychological factors and personality traits are also influential, but individual-specific factors that influence one defendant to plead or go to trial may not influence the next. Prosecutors speculated that the fairness of the plea offer and the defendant's belief in his or her attorney were important factors in non-death-eli-

gible cases. Generally, prosecutors noted considerable variation in the factors regarding both death and non-death-eligible cases.

## SUMMARY AND CONCLUSIONS

Given the punishment at stake and the expense of a trial, the incentives for defendants to plead guilty are greater in death-eligible cases than in noncapital murder cases. The death penalty is a major tool at the disposal of the prosecutor, and it has been suggested that prosecutors use the death penalty as leverage to induce a defendant to forgo the constitutional right to trial by jury. In such situations, the state benefits by securing a plea to a higher sentence than might otherwise be obtained and by saving the cost of a trial, particularly that of a death penalty murder trial, while the defense benefits from the certainty of knowing the defendant will not be sentenced to die.

The findings here suggest, not surprisingly, that the death penalty is a plea-bargaining tool. A majority of defense attorneys in this sample felt that the death penalty is used as leverage. While most prosecutors said they do not use the death penalty in this way, they suggested that others likely do so and illustrated their recognition of the power of death in obtaining guilty pleas. Even if prosecutors do not benefit from the use of explicit threats to use the death penalty, they benefit from the perception of threat, as defense attorneys are averse to risking a trial in a case with the potential that it will be pursued as a capital case. Defense attorneys are likely to initiate pleas in death-eligible cases and to do so at the earliest stages of the case. Their clients accepted pleas to sentences that would, in noncapital cases, not be considered; the perceived severity of life without parole changes when that sanction is compared with the alternative of death. For some defendants, the threat of death may be immaterial, but for others it is the most important factor in their decision to plead guilty.

There are important costs and benefits to weigh in plea bargaining, especially in situations where the defendant's life is at stake. Adherents to the due-process model point out the costs to the benefit of efficiency, namely, defendants' waiver of their rights to defend themselves and to have the case against them presented before an impartial judge and jury. These fundamental principles suggest that, while the death penalty may act as a tool in processing cases efficiently and cost-effectively, there are ethical and potentially human costs to consider in using the death penalty as leverage. **jsj**

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