Damned if they do, damned if they don’t
Jurors’ reaction to defendant testimony or silence
during a capital trial

by MICHAEL E. ANTONIO, PH.D.,
and NICOLE E. ARONE

During the infancy of American legal thought, a
fierce debate raged over whether the accused
should be given the opportunity to speak at his or
her own trial.1 For the past century, the U.S. Supreme
Court has consistently
found that, while the
accused has the constitu-
tional right to testify on
his or her own behalf, he
or she also possesses the
right not to testify: “The
Fourteenth Amendment
secures against state in-
vasion the same privilege
that the Fifth Amendment guarantees against federal
infringement—the right of a person to remain silent
unless he chooses to speak in the unfettered exercise of his
own will, and to suffer no penalty … for such silence.”

But how do jurors, those individuals called upon to
decide another’s fate, react when the accused does not
speak in court? Does the accused truly suffer no penalty
at the hands of a jury for invoking the right not to testify?
This article presents evidence about jurors’ reaction to
defendant testimony or silence during a capital murder
trial as revealed through extensive in-depth interviews
with actual jurors who made the critical life-or-death deci-
sion. The data come from the Capital Jury Project, a
national study of the exercise of sentencing discretion in
capital cases conducted with the support of the National
Science Foundation. The findings raise important ques-
tions about how jurors interpret defendant testimony or
silence inside the courtroom and how they use this infor-
mation in deciding guilt and punishment.

Studies have found that jurors often report confusion
when a criminal defendant waives the right to testify.2
They do not understand why the accused would give up
the right to tell his or her side of the story, and often con-
duct that the defendant has something to hide. More-
over, researchers have found that instructions to the jury
not to draw any adverse conclusions from the fact that
the accused did not test-
ify often fall on deaf
ears.

Richard Friedman
wrote, “The accused’s
failure to testify affirma-
tively raises the jurors’
probability assessment of
guilt from the baseline
level. No matter how vig-
orous the court instructs the jurors not to take into
account that failure to testify, they are almost certain to do
so.”3 Similarly, Supreme Court Justice Potter Stewart
opined: “whenever in a jury trial a defendant exercises this
constitutional right, the members of the jury are bound to
draw inferences from his silence. No constitution can pre-
vent the operation of the human mind … [and] the danger
exists that the inferences drawn by the jury may be
unfairly broad.”

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1. See, e.g., Robert G. Spector, Impeaching the Defendant by His Prior Conve-
Steps Backward, 1 L.O.V. J., 71-79 (1970), and Robert Popper, History and Development
2. Justice William Brennan writing for the majority in Moby v. Hogan, 378
U.S. 1, 8 (1964). See also Rock v. Arkansas, 483 U.S. 44, 44 (1987); United States
v. Valencia-Bernal, 458 U.S. 838 (1982); Faretta v. California, 422 U.S. 806
(1975); Washington v. Texas, 388 U.S. 14 (1967); and In re Oliver, 335 U.S. 257
(1948).
3. Alan D. Hornstein, Between Rock and a Hard Place: The Right to Testify and
4. Richard D. Friedman, Character Impeachment Evidence: Psycho-Bayesian
Analysis and a Proposed Overhaul, 38 UCLA L. REV. 637 (1991). See also Peter
Given the likelihood that jurors may draw adverse inferences from silence, why would a defendant refuse to take the stand? Legal professionals have noted several legitimate reasons: it keeps the pressure of the burden of proof on the state and prosecuting attorney; the testimony might leave a bad impression on the jury, particularly if the defendant is not fit emotionally or psychologically to take the witness stand in front of a courtroom full of people; or the defense may want to avoid introducing information to the jury about the defendant's prior criminal record.

Regardless of why a defendant does not testify, remaining silent at trial can be problematic and places a burden on the defendant and the courts. By testifying, a defendant may be able to offer new insight to the jury on previously ambiguous evidence. More important, hearing what the defendant has to say may "be highly relevant to the issue of guilt or innocence." For these reasons, it is important that the defendant have the opportunity to testify at trial, as free as possible from the worry that his or her statements will have a detrimental effect on the outcome.

The Capital Jury Project

The Capital Jury Project (CJP) is a national study of the decision making of capital jurors conducted by a consortium of university-based researchers with the support of the National Science Foundation. The findings of the CJP, based on in-depth interviews with persons who have served as jurors in capital trials,
chronicle the jurors’ experiences and decision making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.

The present CJP working sample includes in-depth interviews with 1,198 jurors from 353 capital trials representing both life and death sentencing outcomes in 14 states chosen to reflect the principal variations in guided discretion capital statutes. Since 1993, the findings of the CJP have been presented and discussed in approximately 40 scholarly articles and have been cited in U.S. Supreme Court decisions.

During the interviews, jurors were asked whether the defendant testified at the guilt and punishment stages of the capital trial. Following their “yes” or “no” responses, they were prompted for the impression the defendant’s testimony or silence made. When jurors offered further explanation about the defendant’s testimony or silence, their comments provided a way to understand how trial testimony or silence impacted their decision-making behavior. Although not every juror elaborated on his or her response, many did. Jurors’ narrative responses are the focus of this analysis.

Guilt stage

Impact of not testifying. Table 1 reveals themes that emerged from jurors’ reaction when the defendant did not testify at the guilt stage of the trial. In general, jurors reacted negatively. Many believed not testifying was an obvious admission of guilt (27.4 percent), while others thought it indicated the defendant was not sorry or lacked remorse for the crime and murder victim (10.7 percent). Several jurors expressed curiosity, wondering why the defendant would not take the stand to testify on his or her own behalf (13.1 percent). A few jurors said the defendant’s silence did not influence their decision about guilt (6.0 percent), and some indicated the defendant’s testimony was not needed because his or her videotaped or signed confession was shown in court as evidence during the guilt stage (10.7 percent).

Many jurors recognized there might have been legitimate reasons to explain why the defendant did not testify (25 percent). For example, these jurors thought the defendant might actually hurt his or her case by saying something implicating while on the stand, or that the prosecution would make the case look worse for the defendant upon cross-examination.

The narrative accounts indicated that jurors wanted or expected the defendant to testify on his or her own behalf. This was generally true regardless of sentencing outcome. Eleven jurors (5 from death juries, 6 from life juries) expressed confusion and curiosity when the defendant did not speak inside the courtroom. Two male jurors from separate death cases remarked: “I think it was strange. I do remember that being very strange, and the more we got into it, I kept thinking, well, he’ll eventually, he’s going to get his day in court, so to speak. Well, he never stood up,” and “I wondered why she would not testify on her own behalf. It left a reasonable

<table>
<thead>
<tr>
<th>Table 1. Themes derived from jurors’ narrative accounts when the defendant did not testify during the guilt stage of a capital trial</th>
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<tbody>
<tr>
<td>Juror themes</td>
</tr>
<tr>
<td>Implied defendant was guilty</td>
</tr>
<tr>
<td>Showed a lack of remorse</td>
</tr>
<tr>
<td>Curious why defendant would not testify</td>
</tr>
<tr>
<td>Did not influence decision</td>
</tr>
<tr>
<td>Unnecessary, defendant confessed to authorities</td>
</tr>
<tr>
<td>Strategy used by the defense</td>
</tr>
</tbody>
</table>

*Percentages are based on 84 juror narratives about the defendant’s silence during the guilt stage of the trial. Other themes emerged about the defendant’s silence at trial. These themes, which fewer than 5 respondents expressed, include: defendant “appeared smug,” defendant “appeared insincere,” and jurors were “instructed by the court not to draw adverse conclusions because the defendant did not testify at trial.”

11. Id. at 1077-79, 1080 nn. 200-203 (supplying further details about sampling states and sampling trials within states). Most interviews were conducted between 1991 and 1994, when interviewing was undertaken in the original eight sample states and in four additional states added to enhance sample coverage. Interviewing continued until 1999 in two additional states that subsequently joined the CJP and in selected states to extend sample coverage or improve sample representativeness. See Bowers, supra n. 10.
12. See the Capital Jury Project website (at http://www.cjp.neu.edu) for an updated listing of CJP-related articles, commentaries, and doctoral dissertations. For Supreme Court citations, see, for example, Simmons v. South Carolina, 512 U.S. 154 (1994), n 8.
13. The exact wording of the questions asked in the CJP instrument is: 1) Did (DEF) testify at the guilt stage of the trial? — no: (IF NO,) what impression did this make on you? — yes: (IF SO,) what impression did s/he make on you?
2) Did (DEF) testify at the punishment stage of the trial? — no: (IF NO,) what kind of impression did this make on you? — yes, as a sworn witness who could be examined and cross examined by the attorneys. (IF YES,) what kind of impression did s/he make on you? — yes, though not as a sworn witness, but only to make a closing statement to the jury. (IF YES,) what kind of impression did s/he make on you?
14. Indeed, 681 jurors explained, in varying detail, what impact the defendant’s testimony or silence inside the courtroom had on them during the guilt stage of the trial, and 718 jurors did so for the defendant’s testimony or silence during the punishment stage.
15. Only jurors’ narratives that were one or more sentences in length and provided a clear theme were examined. Overall, 163 (23.9 percent) of jurors’ comments about guilt testimony or silence and 134 (18.7 percent) about punishment testimony or silence were considered in this analysis.
16. The number of cases resulting in a death sentence are signified throughout this paper by the capital letter D; cases resulting in a life sentence are signified by the capital letter L.
doubt in my mind."

Twenty-three jurors (10 D, 13 L) believed that the defendant’s silence inside the courtroom was a strong indication or an admission of guilt. A male juror from a death case who was disturbed that the defendant did not testify commented, “A guy who’s innocent would be up there voicing his innocence with indignity (sic). He was not doing that at all, so he appeared to be guilty.” Another male juror from a life case said, “I would have liked to have heard him. He was there and he knew what happened. I think if he hadn’t done it, he would be up there trying to save himself. I think they probably didn’t put him up there because he did it.”

Many jurors, envisioning themselves in the defendant’s situation, were confident that they would have taken the stand to prove their innocence. A female juror from a life case commented, “I think if my life were on the line, I would have gotten up there and said ‘hey, I didn’t do this.’” Similarly, a male juror from a separate life case remarked, “If it was me I would have testified. ... When you’re fighting for your life you gotta go all the way ... you know?” (Interviewer’s comment: “Right. Okay, so I have that you would have testified if you were in the same position?” Juror: “Yeah, if I was innocent.”)

Five jurors (2 D, 3 L) said the defendant’s silence at trial did not influence their decision for finding him or her guilty of a capital murder. One juror specifically noted that the defendant’s silence in court had “... no effect on determining the defendant’s guilt.” Another said, “You wondered why he didn’t say anything, but then again, that doesn’t mean he’s guilty. Um, I thought maybe that’s just how it is ... you don’t like to talk. I just tried to keep my mind open on it. It didn’t phase me either way.”

While these jurors indicated that the absence of the defendant’s testimony had no detrimental effect on their decision making, others said they struggled to keep it from entering and negatively impacting deliberations. A few jurors mentioned how they were instructed not to draw adverse conclusions if the defendant chose not to testify in court. One male juror in a life case explained that,

if he had testified, it would have influenced the jury positively in his favor. This was a group of people who tended to look at him as distrustful because he wouldn’t say anything. Some said, “if he was innocent, he’d get up there and say something.” The foreman would tell them that it was not part of the evidence—they couldn’t consider it. ... (My) fellow jurors thought it was unacceptable. They felt it implied things, in spite of [the judge’s] instructions that it was to have no effect on the jury’s deliberation.

A second male juror, in a separate life case, said:

You’re instructed by the judge that the defendant is not required to testify. I can understand that there are circumstances where that would be essential, but I think in the back of your head, no matter how hard you try, there’s always a little question about ‘Well, at least tell us where you were at the time?’ ... I don’t care how much they instruct you, there is always that question. I think it was nagging in the back of my brain, but I also tried very hard to make sure the evidence corroborated guilt.

As these responses indicate, jurors struggled against drawing adverse conclusions when the defendant did not testify. Other findings revealed that 21 jurors, a majority from death cases (14 D, 7 L), speculated about the possible reasons why a defendant would not testify on his or her own behalf. Some recognized there may be legitimate reasons, including that testifying may hurt his or her case. A male juror from a death case commented about what would happen if the defendant testified at trial: “If he opened his mouth, he would only hurt his case. He couldn’t present any reason to the jury, uh, for his innocence.” A female juror from a life case also thought having the defendant testify in his own behalf would be harmful to his case:

Basically, the impression it made was that he would be detrimental, not necessarily that he was guilty, but that he would maybe say something that would make him look more guilty. ‘Cuz we never heard him speak. You know, possibly had we heard, if he had a harsh voice, you know, is he aggressive? His attitude might’ve opinioned (sic) how we felt about him.

Other jurors said they were more suspicious of defendants who did not take the stand to testify, believing the defendant had something to hide. Consider the following comment from a male juror in a death case: “Just like all defendants, if they don’t testify, they have something to hide. That’s the way I feel about it.” A female juror from a life case noted: “It seems like when somebody keeps their mouth shut they’re guilty. I think he might have been afraid that the prosecuting attorney would ask him some questions he couldn’t answer.”

Given that many jurors believed not testifying at trial was an admission of guilt, what negative impact, if any, did the defendant’s choice not to testify have on their decision making about punishment? According to some jurors, not testifying had a significant impact on the jury deliberation and trial outcome. The following comment shows how influential testifying at trial can be, and how appearing remorseful can impact decision-making behavior. This female juror from a death case explained how the defendant’s silence during the guilt stage affected her: “I just felt like ... he should have been remorseful and sorrowful for what he done. That might have, you know, helped him, helped us or maybe me, especially in my deliberations.” (Interviewer’s question: “If he had testified and expressed some remorse, how would that have affected your ...?” Juror: “I probably wouldn’t have voted for the electric chair.”) Altogether, nine jurors (6 D, 3 L) mentioned that the defendant’s silence during the trial made him or her appear to lack remorse for the crime or the murder victim.

Impact of testifying. Table 2 reports findings when the defendant did testify at the guilt stage of the capital trial. The majority of jurors reacted negatively to the defendant’s testimony—indicating they believed the defendant was lying (30.4 percent), showed no sorrow or remorse for the
crime or the murder victim (15.2 percent), and/or lacked all emotional displays while on the witness stand (7.6 percent). Several jurors mentioned how the defendant’s testimony sounded inarticulate (10.1 percent), while others observed it made him or her appear smug or arrogant (7.6 percent). For a small minority of jurors, however, the trial testimony at the guilt stage left them with a favorable impression (6.3 percent).

Despite the large number of defendants who did not testify on their own behalf at the guilt stage of the trial, some did take the stand. In these cases, six capital jurors (2 D, 4 L) commented about the pleasant nature of the defendant (i.e.: “...seemed nice, likable guy. Served in Desert Storm, could be normal member of society,” and “did not appear as a murderer— he was a likable person.”) Most often, however, jurors reacted negatively or disapproved of the defendant and his or her trial testimony. Findings showed that six jurors (5 D, 1 L) believed the defendant lacked all emotion during the trial. One female juror from a life case said:

He appeared to be playing— it was like he had rehearsed everything or was coached by his lawyer on how to behave, how to cry, stuff like that. There was no real emotion to him.... All through the trial he sat there with the same look on his face like he had no emotions one way or the other. Then, all of a sudden, when he got up on the stand, he was Mr. Remorseful and crying for the poor girl he murdered. It just didn’t ring true.

Moreover, 24 jurors (14 D, 10 L) said they thought the defendant’s testimony was fabricated. A female juror in a life case said:

...I didn’t believe him. I thought they were crocodile tears, and I thought he ... he was just making it all up. And I think he ... just went up there and said, ‘didn’t do it, I’m innocent, I didn’t kill my great aunt and uncle,’ those were his words and then he cried. And I studied him intensely for his body language and his mannerisms and I didn’t believe him.

Some jurors were personally offended when the defendant appeared to be lying on the stand (“... it was an insult to the jurors’ intelligence”), while others used the testimony to draw adverse inferences about the defendant’s attitude or character (“I’m glad they put him on the stand. It really added to his guilt. We knew he was lying. I couldn’t take my eyes off him, he was no longer showing a calculated look, he looked smug”).

Six jurors (4 D, 2 L) specifically commented about the attitude of the defendant. One female juror noted that the defendant appeared “...scared and then he got very defensive at some of the questions.” (Interviewer’s question: “And did that make you think anything when he was defensive?”) Juror: “Usually when a child is very defensive about something you’ve asked him, it’s because he’s done something wrong to be defensive about. I think it hurt them more to put him on ... the stand than it helped him because of his attitude.” A male juror also commented about the defendant’s attitude: “He was very relaxed and unconcerned like he was ... ‘Top Dog’ or whatever you want to call it. In other words, he thought everything he did was right and others should adhere to what he said. ...”

Punishment stage
Impact of not testifying: Table 3 reveals themes from when the defendant did not testify at the punishment stage of a capital trial. Jurors reacted negatively toward the defendant when he or she did not take the witness stand. For many, the defendant’s silence suggested he or she had no feelings of remorse for the crime or murder victim (22.6 percent), while others thought it was a further indication or admission of guilt (9.7 percent). Several jurors expressed curiosity about why the defendant chose to remain silent (14.5 percent), but a significant number recognized this might have been a strategy by the defense (27.4 percent)

Overall, more jurors commented about the defendant’s testimony or silence during the guilt stage of the trial than the punishment stage. Among jurors’ comments about punishment stage testimony, however, similar themes emerged. For example, nine jurors, almost all from death cases (7 D, 2 L), mentioned being curious about why the defendant did not testify on his or her own behalf. Many wanted the defendant to take the stand. A male juror said:

“That really bothered us, because we kept thinking, ‘Well, eventually he must be going to get up there and beg for mercy,’ or, you know, something, but he didn’t, and that really kind of ... bothered us.”

Jurors’ comments about defendant testimony at the punishment stage also revealed that they knew not to draw adverse conclusions from the fact that the defendant remained

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**Table 2. Themes derived from jurors’ narrative accounts when the defendant testified during the guilt stage of a capital trial**

<table>
<thead>
<tr>
<th>Juror themes</th>
<th>%*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeared to be lying</td>
<td>30.4</td>
</tr>
<tr>
<td>Showed a lack of remorse</td>
<td>15.2</td>
</tr>
<tr>
<td>Lacked all emotion</td>
<td>7.6</td>
</tr>
<tr>
<td>Sounded inarticulate</td>
<td>10.1</td>
</tr>
<tr>
<td>Appeared smug/arrogant</td>
<td>7.6</td>
</tr>
<tr>
<td>Seemed likeable</td>
<td>6.3</td>
</tr>
</tbody>
</table>

*Percentages are based on 79 juror narratives about the defendant’s testimony at the guilt stage of the trial. Other themes, which fewer than 5 respondents expressed, include: the defendant “appeared insincere.”
silent. Just as during the guilt stage of the trial, however, jurors mentioned that it was difficult not to do so: “...they say that if a person doesn’t testify, it doesn’t mean anything, but I think to a juror if the person doesn’t testify, they’re not impressed. They want to hear that if a person’s innocent they should say so.”

Also, in cases where the defendant did not testify at the punishment stage, 14 jurors (7 D, 7 L) interpreted such behavior as showing a lack of remorse. When asked whether it made an impression on her, a female juror from a death case said:

... a great impression, because if he had given me any type of sorry—something to indicate his sorrow for what he’d done ... I wouldn’t be interested in him begging for his life, but just for him to have said, first of all, that he was sorry, and second of all, just being sincere, wished he’d never done it and all this type of thing .... Otherwise, I see him as cold, calculated and controlled, and have no remorse or feeling whatsoever for what he’d done, and that to me made a big impression.

Seventeen jurors (10 D, 7 L) recognized there may have been legitimate reasons why the defendant did not speak at the punishment stage, including being cross examined by the prosecution (“the prosecutor would have turned him into chopped liver”) or lacking the ability to convey thoughts or feelings clearly (“because of his poor edu-

tion, it would have hurt him.”)

**Impact of testifying.** When the defendant testified at the punishment stage of the trial, jurors’ reactions were mixed (see Table 4). An equal percent of jurors found the defendant’s testimony lacking remorse (15.3 percent) as sounding insincere (15.3 percent), while a small but significant percent believed the testimony to be lacking in all emotional displays (6.9 percent). Other comments about the defendant’s punishment testimony were more favorable. A few jurors found the defendant to be a likable person (6.9 percent), while others believed his or her testimony showed true feelings of remorse for the crime and murder victim (13.9 percent).

Eleven jurors, all from separate death cases, commented about the defendant’s lack of remorse or sorrow for the crime or the murder victim. One male juror mentioned how the defendant’s uncaring attitude angered the jury: “She showed no sorrow or regret and that’s what made her so cold. I tell you, people were upset. Everybody was upset.” A female juror in a separate case was equally unimpressed with the defendant’s punishment stage testimony: “I thought he ... probably did himself more harm than good because all that came out was the fact that he wasn’t remorseful.”

Other jurors believed the defendant’s testimony lacked sincerity. In cases where the defendant did say he was sorry for his actions and experienced regret, jurors believed he was being dishonest. Eleven jurors (7 D, 4 L) commented about how the testimony sounded “... totally insincere, manipulative. He even let his lip tremble a little, acting all the time.” A male juror from a death case observed: “It impressed me that ... he could sound so sorry, but he wasn’t, because of the expressions on his face and his demeanor during other parts of the trial. It impressed me that he was such a jerk.”

Even though many jurors disapproved of the defendant’s testimony at the punishment stage, five jurors, all from life cases, said they were emo-

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**Table 3. Themes derived from jurors’ narrative accounts when the defendant did not testify during the punishment stage of a capital trial**

<table>
<thead>
<tr>
<th>Juror themes</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Showed a lack of remorse</td>
<td>22.6</td>
</tr>
<tr>
<td>Implied defendant was guilty</td>
<td>9.7</td>
</tr>
<tr>
<td>Curious why defendant would not testify</td>
<td>14.5</td>
</tr>
<tr>
<td>Strategy used by the defense</td>
<td>27.4</td>
</tr>
</tbody>
</table>

*Percentages are based on 62 juror narratives about the defendant’s silence during the punishment stage of the trial. Other themes, which fewer than 5 respondents expressed, include: the defendant “lacked all emotions” and jurors were “instructed by the court not to draw adverse conclusions because the defendant did not testify at trial.”

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**Table 4. Themes derived from jurors’ narrative accounts when the defendant testified during the punishment stage of a capital trial**

<table>
<thead>
<tr>
<th>Juror themes</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Showed a lack of remorse</td>
<td>15.3</td>
</tr>
<tr>
<td>Showed a lack of sincerity</td>
<td>15.3</td>
</tr>
<tr>
<td>Lacked all emotion</td>
<td>6.9</td>
</tr>
<tr>
<td>Seemed likeable</td>
<td>6.9</td>
</tr>
<tr>
<td>Sounded remorseful</td>
<td>13.9</td>
</tr>
</tbody>
</table>

*Percentages are based on 72 juror narratives about the defendant’s testimony at the punishment stage of the trial. Other themes, which fewer than 5 respondents expressed, include: the defendant “appeared sincere,” “appeared smug,” “appeared to be lying,” and “did not influence decision.”
tionally moved by the testimony. For example, a female juror said: "... He had learned a lot since this had happened that he would like the opportunity to live. It was a very emotionally charged kind of ... it just made me hurt for him. ..." A male juror from a separate life case was also moved by the defendant’s testimony: "I think he handled himself very well. The statement that he made, the closing statement—I don’t know if the word is impressed or what. It has left an impression on me in his favor, let's put it that way."

Finally, 10 jurors (3 D, 7 L) said the defendant seemed remorseful for his or her criminal behavior. A female from a life case observed: "He said he was sorry. I thought he was sorry for what he did, still responsible and still guilty, but I thought there was some remorse." A male juror from a life case remarked:

I guess if he could do it all over again, it never would have happened. If he could have turned back time, he would have done something differently. ...
That is the impression, and that is what he said pretty much too. Simply because when he was up and talking giving his statement, speaking directly to the family themselves ... it was a warm testimony, you see.

Conclusions and implications

Courts have recognized for some time that when the defendant invokes the right not to testify during the trial, jurors may draw adverse conclusions that could influence their decision making. While a defendant may have legitimate reasons for not taking the stand, few jurors in this study considered these, and the temptation for them to draw conclusions was strong despite instructions from the court that it should have no impact on their verdict.

Analysis of the CJP findings about guilt and punishment stage testimony revealed that jurors reacted unfavorably regardless of whether the defendant remained silent or testified. Many of the themes that emerged to describe jurors’ reactions to guilt stage testimony or silence (i.e., confusion, lack of remorse, etc.) also described how jurors felt about testimony or silence at the punishment stage.

In general, jurors wanted the defendant to testify on his or her own behalf at trial. Many reported confusion or trouble understanding why the defendant would not take the stand to prove his or her innocence, and some even interpreted such silence as an indication or admission of guilt. Others mentioned being instructed not to draw adverse conclusions if the defendant remained silent in court, but struggled not to let silence impact their decision making—even when they recognized that the defendant might remain silent for legitimate reasons.

When the defendant did choose to testify at trial, jurors generally disapproved (at both the guilt and punishment stages). In general, jurors commented that the defendant appeared to be telling lies, showed no remorse for the crime or murder victim, and/or lacked any emotional displays while on the witness stand. Many also mentioned that the defendant’s testimony sounded inarticulate or that he or she appeared arrogant or insincere. Despite these criticisms, however, several jurors said the defendant’s testimony left a favorable impression on them—that it made the defendant seem likeable and in some cases remorseful.

Few differences were found when the responses were disaggregated by juror gender or sentencing outcome. Surprisingly, jurors who recognized there might be legitimate reasons for the defendant to remain silent at guilt often served on cases that resulted in a death sentence. Most notable, however, was the finding that all jurors who commented that the defendant’s punishment testimony lacked remorse or sorrow were from death cases. Finally, in cases where the defendant testified at punishment, all of the jurors who said he or she seemed likeable and a majority of those who mentioned he or she sounded remorseful served on cases resulting in a life sentence.

The findings presented in this analysis will be of interest to trial attorneys. After all, attorneys often instruct defendants about whether to take the witness stand. Although the findings suggest that jurors view defendants negatively regardless of whether they testify or remain silent during a capital trial, the defendant’s likeability and remorsefulness were noted by a majority of jurors who served on cases resulting in a life sentence. These findings should not be overlooked. Attorneys are encouraged to assess the overall likeability and remorsefulness of a defendant as key factors in jurors’ reaction to trial testimony or silence, before putting him or her on the stand.

It is unlikely that this is all that can be said about jurors’ reactions to trial testimony. Additional research is needed to better control for demographic characteristics, including defendant/victim age, race, and sex, as well as for trial outcome (life vs. death) and relevant aggravating and mitigating circumstances associated with the killing. Under these conditions, additional findings might be revealed about how jurors react to defendant testimony—findings that may break the current research stalemate that indicates defendants are damned if they do and damned if they don’t testify during a capital trial."

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17. Research has shown that jurors often overemphasize the aggravating circumstances and downplay the mitigating circumstances related to a killing when reaching a decision about the defendant's punishment. See Ursula Bentle and William J. Bowers, How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse, 66 BROOK. L. REV. 1015 (2002).
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