Chapter 14

The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction

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Legal Context

The capital jury is unique. It makes the fundamentally moral decision of whether a convicted defendant should live or die.1 Yet, it is not free to make this decision however it pleases. Indeed, it was the “arbitrary” and “capricious” way juries were making such decisions that brought capital punishment to a halt in 1972 when the U.S. Supreme Court held, in *Furman v. Georgia* (1972), that the death penalty, as applied, was unconstitutional. Seeking to remedy such arbitrariness and capriciousness, most state legislatures enacted new capital statutes that separated the trial into guilt and sentencing phases and provided standards or directions to guide jurors’ exercise of discretion at the sentencing stage of the trial. Four years after *Furman*, the Supreme Court endorsed these “guided dis-

1. In death penalty states, the capital sentencing decision is typically made by the same jury that convicted the defendant of capital murder. Two states (Alabama and Florida) permit the trial judge to override a jury death or life verdict; two others (Delaware and Indiana) did so until 2002. Five states (California, South Carolina, Virginia, Ohio, and Kansas) permit the judge to override a jury’s sentence of death but not of life. Five states (Arizona, Colorado, Idaho, Montana, and Nevada) gave sole sentencing responsibility to the trial judge (with no jury participation) until the Supreme Court ruled in *Ring v. Arizona* (2002) that the capital sentencing decision must not be made without jury participation. Few states give juries sentencing responsibility in non-capital cases (e.g., Kentucky and Texas).
cretion" capital statutes in Gregg v. Georgia (1976) and companion cases—saying such a bifurcated system "is more likely to ensure elimination of the constitutional deficiencies identified in Furman" (at 192).

Writing for the Court in Gregg, Justice Stewart explained how these statutory guidelines are presumed to remedy the Furman ills:

Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.... In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines (id. at 206–207, plurality opinion).

At the same time that the Supreme Court endorsed "guided discretion" capital statutes it rejected statutes that made the death penalty mandatory upon conviction for capital murder in Woodson v. North Carolina (1976) and Roberts v. Louisiana (1976) on the ground that "individualized treatment" in capital sentencing was constitutionally indispensable. This requirement of individualized treatment became an essential ingredient in later rulings that relaxed the force of statutory guidelines, and in the Court's emergent conception of the capital sentencing decision.

2. This represented a turnaround in the Court's thinking about sentencing guidelines. Only five years earlier in McGautha v. California (1971) it had concluded that the task of devising such guidelines was "beyond present human ability" (at 204).

3. The Supreme Court approved three forms of guided discretion—threshold, weighing, and directed statutes—in Gregg v. Georgia (1976), Proffitt v. Florida (1976), and Jurek v. Texas (1976), respectively. Most states adopted "weighing statutes," like Florida's, which list aggravating and mitigating considerations and require jurors (in different ways) to weigh the aggravating against the mitigating factors in making their punishment decision. Some states followed Georgia's "threshold statute" in which only aggravating considerations are listed and jurors may impose death if they find at least one such aggravator and have considered the evidence in mitigation. A few states have "directed statutes" like Texas', which single out specific aggravating factors, such as the defendant's future dangerousness or the heinousness of the crime, that jurors must consider, together with mitigation, in making their penalty decision. The terms "weighing," "threshold," and "directed" were first assigned to these kinds of statutes in a 1974 article (Note at 1699–1712). See also Gillers (1980) and Acker and Lanier (1995:33–52) for detailed discussions of these statutory distinctions.

4. The Court eased the role of statutory guidelines by allowing the consideration of any mitigating factors, not just those enumerated in the statutes (Lockett v. Ohio 1978); by permitting the sentencing decision to be unguided once the jury finds a single statutory aggravating factor and considers mitigation (Zant v. Stephens 1983); and by not requiring states to monitor the proportionality or evenhandedness of capital sentencing under their statutes (Pulley v. Harris 1984). These and related decisions that had lines, have been described by Weisberg (1986) where capital juries function much as they unconstitutional (See, Weisberg 1984; also 5. In Perry (1989:319) the Court described individualized treatment, sentencing reliability.

Underlying Lockett and Eddings, be directly related to the personal character of the sentencer is to make an individualized determination of whether the death penalty, "evidence about which is relevant..." [quoting California v. Brown]. Moreover, Eddings makes clear that the defendant has the right to present mitigating evidence and is also able to consider and give effect to it. (Hitchcock v. Dugger 1987). Only recently have we treated the defendant as a "uniquely reliable determination that death is appropriate" (Woodson v. North Carolina 1976:304–305). Penalty stage should reflect a respect for the defendant's humanity, his character, and his past. (Qua nos, J., concurring, emphasis in original).

For further discussions and analyses of the decision see, e.g., Bilbousis (1991); Stelker an
Beyond sentencing guidelines, individualized treatment, and a separate penalty stage of the trial, the Supreme Court has articulated a conception of the capital sentencing decision as a "reasoned moral choice" in 

\textit{Penry v. Lynaugh} (1989). Accordingly, the decision must be an "individualized assessment" of the character and record of the particular offender and the circumstances of the particular offense, unencumbered by ignorance or emotion, and supported with information sufficient and relevant for reliable rational decision-making. At sentencing:

\begin{quote}
[f]ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "reasoned moral response to the defendant's background, character, and crime." In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime (at 328, citations and internal quotation marks omitted).
\end{quote}

The conception of the capital sentencing decision as a reasoned moral response is reflected in Court decisions about who is qualified to serve as a capital juror, how they must approach the sentencing task, what legal rules govern

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1984). These and related decisions that had the effect of circumscribing the role of such guidelines, have been described by Weisberg (1984) as "deregulating death" to the point, he contends, where capital juries function much as they did before 

\textit{Furman} ruled standardless decision-making unconstitutional (See, Weisberg 1984; also Gey 1992).
\end{quote}

5. In 

\textit{Penry} (1989:319) the Court described how a reasoned moral response embodies individualized treatment, sentencing reliability, and the retributive element of personal culpability:

Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentence is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant..." (quoting California v. Brown 1987:545, O'Connor, J., concurring). Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencing. The sentence must also be able to consider and give effect to that evidence in imposing sentence (Hitchcock v. Dugger 1987). Only then can we be sure that the sentence has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence (quoting Woodson v. North Carolina 1976:304–305). "Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime" (quoting California v. Brown 1987:545, O'Connor, J., concurring, emphasis in original).

For further discussions and analyses of the Court's evolving conception of a "reasoned moral" decision, see, e.g., Billoria (1991); Steiker and Steiker (1992); Sundby (1991).
their decision making, what kinds of information they need for a reliable decision, the need for them to accept responsibility for the defendant’s punishment, and the need for their decision-making to be race neutral. Since it is essential to the task of deciding punishment and since it contrasts with the essence of deciding guilt, we review in more detail what the Court has in mind as a reasoned moral choice.

The Sentencing Decision As a Reasoned Moral Choice

Unlike the guilt decision, which entails assessing whether the facts that establish every legal element of the crime charged have been proven beyond a reasonable doubt to all twelve jurors, the punishment decision is directed and constrained by a very different set of considerations and procedures, appropriate for a fundamentally moral judgment. Generally, the jury must unanimously find an aggravating factor beyond a reasonable doubt for the defendant to be death-eligible. But, the fact that the defendant is guilty of capital murder must not, in and of itself, be a reason that he or she should be sentenced to death (Sumner v. Shuman 1987; Woodson 1976). Nor may the presence or strength of aggravating factors alone mandate the death penalty. Hence, jurors must be open to imposing a life sentence despite the presence and strength of aggravating circumstances. Capital jurors must, therefore, approach the sentencing task with a different frame of mind from the one they employed in reaching the guilty verdict.

An individualized assessment of personal culpability based on the defendant’s background and character is constitutionally required in capital sentencing.”

6. Most (but not all) state capital statutes explicitly require that aggravators be proven beyond a reasonable doubt to all jurors (Acker and Lanier 1993:309–310; Acker and Lanier 1995:34–35). While the Supreme Court has not ruled on whether aggravating circumstances must be proven beyond a reasonable doubt, or whether a jury’s finding of aggravation must be unanimous, the rationale for requiring proof beyond a reasonable doubt in criminal trials articulated in In re Winship 397 U.S. 358 (1970) arguably would require that this high standard be met for establishing aggravating circumstances in capital sentencing. Moreover, the Court’s ruling in Ring v. Arizona (2002) holds that statutory aggravating factors in capital sentencing are properly understood as factual elements of the crime that must be determined by jury rather than judge in accord with the Sixth Amendment. As such, they are presumably subject to the requirement that they be found beyond a reasonable doubt in capital cases.

7. The Supreme Court has approved capital statutes that require the jury to impose a death sentence if it finds that aggravating circumstances outweigh mitigating circumstances (Boyd v. California 1990:374, 386) or when it finds aggravation but no mitigation (Blystone v. Pennsylvania 1992:305) but the assessment of mitigation — whether it is present and what weight it should be given — is up to each individual juror. Hence these statutes require a death sentence only if no juror finds mitigation or none find that mitigation is not outweighed by aggravation.

8. See, e.g., Fletcher (1996) observing that capital punishment, without any reference to race, is used disproportionately by the state of California, which has the nation’s highest incarceration rate. In California, more than 50% of the death row population is black, while the state’s population as a whole is only 10% black.

9. In the United States, the Federal Government has not carried out an execution since 1963. Last year, however, the European Court of Human Rights ruled that the execution of Englishman Charles Bronson violated Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment. On the other hand, the European Court of Human Rights has not considered the issue of capital punishment because “defendants who commit murder, generally those from disadvantaged background, or others are considered less culpable than defendants who have committed murder in the course of another crime” (California v. Brown 1987:545). And courts have held that mitigating evidence even if it does exist is insufficient to conclude a defendant not guilty of the crime (Eddings v. Oklahoma 1982:578). Capital sentencing is thus far broader than the death penalty in the criminal law, generally. Capital punishment is to be given to particular evidence that, if mitigating evidence is no weight to be given to particular evidence an Eighth Amendment “they may not be excluded by the Constitution, jurors must at least might call for a sentence less than death, if given to any mitigating factor is up to the jury mitigating evidence no weight (California v. Brown 1992:738).

Moreover, capital jurisprudence requires fundamentally an individual moral decision making the punishment decision on the evidence of mitigating factors. The appropriateness of the punishment is not required to agree with the standard of reasonable doubt in assessing the fact generally required for the determination of the evidence do not apply to the consideration (California v. Brown 1990; Mills v. Maryland 1988).

Defining the punishment decision that jurors must understand the concept of a reasonable doubt, choose, that they must accept responsibility for the choice they make must not be
formation they need for a reliable decision-making for the defendant's punishment to be race neutral. Since it is essential and since it contrasts with the more detail what the Court has in mind.

As assessing whether the facts that established have been proven beyond a reasonableness decision is directed and considerations and procedures, appropriate for this, the jury must unanimously find an doubt for the defendant to be death-eligible guilty of capital murder must not, in should be sentenced to death (Sumner v. Texas, 1986:4). Hence, jurors must be open to impose and strength of aggravating circumstance the sentencing task with a defendant employed in reaching the guilty verdict. Personal culpability based on the defendant's responsibility, required in capital sentencing, explicitly require that aggravators be proven (Acker and Lanier 1993:309–310; Acker and Lanier 1993:309–310) and not ruled on whether aggravating circumstances whether a jury's finding of aggravation must be beyond a reasonable doubt in criminal trials actually would require that this high standard be met in capital sentencing. Moreover, the Court's rule that aggravating factors in capital sentencing are crime that must be determined by jury rather than the jury. As such, they are presumably subject to the reasonable doubt in capital cases.

Statutes that require the jury to impose a death sentence outweigh mitigating circumstances (Boyd v. vacation but no mitigation (Blystone v. Pennsylvania—whether it is present and what weight it should be given) these statutes require a death sentence only if no mitigating evidence is outweighed by aggravation.

ing because "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse" (Perry 1989:319, quoting California v. Brown 1987:545). Accordingly, jurors are required to consider mitigating evidence even if it does not "relate specifically to the [defendant's] culpability for the crime he committed" (Skipper v. South Carolina, 1986:4). They may not dismiss mitigating factors on the basis that they do not "excuse" the crime (Eddings v. Oklahoma 1982:113). The concept of mitigation in capital sentencing is thus far broader than the notion of reduced responsibility in the criminal law, generally. Capital jurors are free to assess the appropriate weight to be given to particular evidence offered in mitigation, but under the Eighth Amendment "they may not give it no weight by excluding such evidence from their consideration" (Eddings 1982:115). In other words, to comply with the Constitution, jurors must at least consider any evidence in mitigation that might call for a sentence less than death (Lockett 1978). While the weight to be given to any mitigating factor is up to the sentencer, it is not permissible to give mitigating evidence no weight (Eddings 1982:114–115; Morgan v. Illinois 1992:738).

Moreover, capital jurisprudence has cast the capital sentencing decision as fundamentally an individual moral judgment. Each juror is responsible for making the punishment decision on the strength of his own personal satisfaction with the evidence of mitigation and his own moral consciousness about the appropriateness of the punishment. Thus, in selecting the punishment, a juror is not required to agree with others on the presence or weight he or she assigns to various aspects of mitigation. Nor must he or she observe the standard of reasonable doubt in assessing the evidence of mitigation. The standards of proof beyond a reasonable doubt and of unanimous jury findings of fact generally required for the determination of guilt and of aggravation simply do not apply to the consideration of mitigation (McKay v. North Carolina 1990; Mills v. Maryland 1988).

Defining the punishment decision as a reasoned moral choice also implies that jurors must understand the alternative punishments from which they choose, that they must accept responsibility for the choice they make, and that the choice they make must not be biased by improper considerations such as

8. See, e.g., Fletcher (1996) observing that lack of full responsibility and excuse may diminish punishment, without any reference to mitigation.
9. Indeed, most capital jurisdictions leave the level of proof for evidence of mitigation wholly unspecified. The exceptions are Maryland, New Hampshire, Pennsylvania, Wyoming, and federal law for drug-related killings; they specify that jurors must find mitigating circumstances by a "preponderance of the evidence," but it is not clear that this is a distinction of any consequence (Acker and Lanier 1994:342, n. 225).
race. Understanding the alternatives means that jurors should not have misleading impressions about the available punishment options. They should have information about the alternatives that will prevent them from making a “false choice” (Simmons v. South Carolina 1994). Accepting responsibility means that jurors must assume personal responsibility for the punishment they impose. They should not see the law as the responsible agent, or believe that others who may review their verdict thereby relieve them of responsibility for the punishment (Caldwell v. Mississippi 1985). And in choosing between life or death, jurors must not be influenced, consciously or unconsciously, by the race of the defendant, by the race of the victim, or by their own race (Turner v. Murray 1986).

We now turn to what is known about how capital jurors make their sentencing decisions, and to whether or how well they abide by the standards for a reasoned moral choice. We begin with the development of this research and review the findings of early investigations, especially their efforts to learn about the role of statutory sentencing guidelines. We then review the results of a national program of research on the decision-making of capital jurors known as the Capital Jury Project (CJP) for an account of how well juries in the post-Furman era comport with constitutionally grounded sentencing requirements.

Research Background

The first systematic look at the capital jury came through the eyes of trial judges. Kalven and Zeisel (1966), in their pioneering study of the American jury, devoted a chapter to juries in capital cases. They compared the sentencing decisions of capital juries, as reported by the presiding trial judges, with the sentences those judges said they would have imposed in 111 pre-Furman capital cases. They found, as the Furman Court did six years later, that the sentencing decisions of these juries were arbitrary. Judges and juries disagreed about whether death should be the punishment more often than they agreed on the death penalty. Beyond this, Kalven and Zeisel observed, “many of the murder cases in which the judge and jury disagree on the death penalty appear no less heinous than those in which they agree” (at 439). Their research also documented that race of victim was a source of disparity in sentencing; a judge who disagreed with the jury’s life vote in a black on black murder case said, “A Negro killing a Negro, that is, the value of human life due to race.

After this glimpse at the capitcaped empirical scrutiny until the Simmons v. South Carolina and Zeisel may have been partly prompted lawmakers to block the purposes. Studies of sentencing (Caldwell v. Mississippi 1985) may also decision-making process. This line culminated in the Baldus, Woodworth, and Woodworth 2003) may also decision-making process. This line culminated in the Baldus, Woodworth, and Woodworth 2003) may also decision-making process. This line culminated in the Baldus, Woodworth, and Woodworth 2003) may also decision-making process. This line culminated in the Baldus, Woodworth, and Woodworth 2003) may also decision-making process. This line culminated in the Baldus, Woodworth, and Woodworth 2003) may also decision-making process. This line culminated in the Baldus, Woodworth, and Woodworth 2003) may also decision-making process. This line culminated in the Baldus, Woodworth, and Woodworth 2003) may also decision-making process. 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Background

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the value of human life due to race” (at 442).

After this glimpse at the capital jury through the eyes of trial judges, it es-
caped empirical scrutiny until the late 1980s.11 Ironically, the work of Kalvin
and Zeisel may have been partly responsible for this hiatus. Their research
prompted lawmakers to block the direct observation of real juries for research
purposes.12 Studies of sentencing outcome in capital cases (reviewed in Baldus
and Woodworth 2003) may also have diverted research attention from the de-
cision-making process. This line of research on sentencing outcomes which
culminated in the Baldus, Woodworth, and Palaski (1990) study presented to
the Supreme Court in McCleskey v. Kemp (1987), demonstrated, many
thought, that Georgia’s guided discretion capital statute—the model the
Supreme Court upheld in Gregg as a remedy for the Furman ills—failed the
test of purging racial bias from the capital sentencing process, and would thus
end America’s post-Furman experiment with capital punishment.

At the time there was little interest in the arduous task of studying the sen-
tencing process—how jurors reached their sentencing decision, whether they
followed statutory guidelines, whether they understood sentencing instruc-
tions, and just how race or other prohibited considerations might have crept
into their decision-making. All this changed, however, in 1987 when the
Supreme Court, by a single vote in McCleskey, acknowledged the evidence of
system-wide racial disparities in sentencing outcomes but denied that such pat-
terns were sufficient to impeach the decision-making of capital jurors. The
Court reaffirmed its faith in the capital jury, saying:

The capital sentencing decision requires the individual jurors to
focus their collective judgment on the unique characteristics of

11. Mock jury studies of the capital sentencing decision were, of course, an option, but one
with the serious drawback of having to simulate the reality of making the life or death decision.
Some researchers did devote attention during this period to the more limited but more managen-
table task of studying whether jury selection procedures in capital cases, particularly the “death
qualification” requirement, actually yield an unbiased jury for making the guilt decision (e.g.,
Fitzgerald and Ellsworth 1984; Haney 1984). Despite the merits of this research (Ellsworth
1988) the Supreme Court in Lockhart v. McCree (1986) rejected the evidence that jury selection
procedures in capital cases produced guilt prone juries. See, Sandys and McClelland (2003) for a
discussion of “death qualification” and a review of the related research.

12. Following the disclosure in 1955 of the audio taping of jury deliberations in connection
with Kalven’s and Zeisel’s research, the U.S. Attorney General publicly censured “eavesdropping”
on jury deliberations. Congress and more than 30 states responded by enacting statutes pro-
hibiting jury taping (Kalven and Zeisel 1966:xv). Such barriers have occasionally been relaxed
for media interests (e.g., the airing of video taped deliberations of a Wisconsin criminal jury on
the PBS “Frontline” program, April 11, 1986; and of four Arizona juries on a two hour NBC
Special, April 16, 1997).
a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "build[d] discretion, equity, and flexibility into a legal system" (at 311).

This made it clear that, in the Court's mind, the analysis of sentencing outcomes would not suffice. To demonstrate unconstitutional arbitrariness or discrimination in capital sentencing, researchers would need to learn how capital jurors actually made their sentencing decisions. Given the legal taboo on observing jurors in the process of making decisions, even by means of unobtrusive or concealed filming or listening devices, and given the Court's premium on the experience of actual jurors in actual cases, this would mean interviewing former jurors about their decision-making. Thus, it was the McCleskey Court's affirmation of its faith in the capital jury, despite the demonstrated racial disparities in sentencing outcomes, that drew research attention to persons who had served as capital jurors.

Soundings in Florida, California, and Oregon

Shortly after the McCleskey decision, researchers undertook studies based on in-depth interviews with persons who had served on capital juries in Florida, California, and Oregon. These interviews focused on how jurors actually made their decisions and whether, or to what extent, they were guided by the capital statutes in their respective states. The questioning was largely an open-ended inquiry into what factors influenced the sentencing decision, and whether jurors' decision-making was being guided by statutory provisions and the Court's conception of the sentencing decision as a reasoned moral choice.

In Florida, Geimer and Amsterdam (1987-88) interviewed some 54 jurors from 10 trials, five of which the jurors voted for death, and five in which they voted for life. They asked jurors to explain the reasons for their life or death sentencing decisions and to evaluate the role or influence of Florida's statutory aggravating and mitigating considerations on their decisions. Two out of three jurors (65%) indicated that Florida's statutory aggravating and mitigating guidelines had "little or no influence" on their sentencing decisions.

From jurors' explanations of how they did make their decisions, Geimer and Amsterdam identified what they called the "operative factors" that actually shaped jurors' sentencing decisions.

death (64%) cited the "manner of first degree murder" as the most important factor. (at 45-46). Next in line as influences were "defendant's demeanor" and "21% of the jurors in death cases, juror's comment that the "[defense] argument was a heartbeat of regret. He didn't By the time of the penalty phase, him. Minds were already colored." (at 29).

Likewise, Geimer and Amsterdam found that jurors who voted for life. Most convicted jurors in the murder verdict. An exception: he guilty, there wasn't anybody who execute him because some evidence of his guilt (at 53).

In California, Sontag (1990) interviewed 27 jurors in one life case in each of five counties. Costanzo (1990) interviewed 27 jurors in one single urban county responsible for capital murder. The findings of these two studies are not directly comparable.

Under California's statute, which states that jurors must vote for death and without indicating how the fact of the defendant's punishment, juries seem to make their sentencing decision. Sontag found that broader and less coherent agendas, to reach a sentencing verdict than to determine the crime and on issues of the trial. Haney et al. (1991) sample refocused the penalty phase itself, and did so in a way that amor
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(1987–88) interviewed some 54 jurors

e who had served on capital juries in the United States. The questioning was largely an

evaluation, and being guided by statutory provisions and statutes as a reasoned moral choice.

In California, Sontag (1990) interviewed 30 jurors drawn from one death

e one life case in each of five counties throughout the state. In Oregon, Costanzo (1990) interviewed 27 jurors from five death and four life cases from a single urban county responsible for the majority of Oregon's capital trials. The findings of these two studies are reviewed and contrasted in Haney, Sontag, and Costanzo (1994).

Under California's statute, which lists "special circumstances" without specifying whether those factors are to be considered as aggravating or mitigating, and without indicating how the factors are to be weighed in deciding on the defendant's punishment, juries seemed quite confused about how to make the sentencing decision. Sontag found that California juries deliberated with much broader and less coherent agendas, and took approximately three times longer to reach a sentencing verdict than did the Oregon juries studied by Costanzo. Many California jurors tended to search for a key factor that would make the decision clear-cut. They typically narrowed the decision by focusing almost exclusively on the crime and on issues which had already come up in the guilt phase of the trial. Haney et al. (1994) reported that "fully one-third of our sample refocused the penalty phase inquiry entirely on the nature of the crime itself, and did so in a way that amounted to a presumption in favor of death"
Capital penalty instructions (frame or carefully guide) that they direct jurors to understand that death involves nothing but adding up of the pluses and minuses of one’s life (at 172).

These studies raised serious questions about capital statutes. Jurors appear to believe especially their obligation to give effect to the idea that death is the appropriate punishment for mitigation. They seem to focus on decision-making and to reach consensus to impose the death penalty; they did not believe that the sentencing process was merely a black box of jury decision-making.

The Capital Jury Project is a national effort to empirically study the decision-making of capital jurors conducted with the support of the National Science Foundation. The aims of the CJP are based on an in-depth examination of jury decision-making as jurors in capital trials. The research and decision-making over the various influences come into play, forth their final sentencing decisions.15

14. The CJP was undertaken by univesity scholars and investigations of their respective states and the states of the Project: (1) to examine and compare the exercise of capital discretion; (2) to identify the sources of statutes in controlling arbitrariness in Cap. Laws and the Social Sciences Program of the National Science Foundation.

15. The research is based on a commitment to the usefulness of the instrument in the research in the core interviews, conducting additional case studies and incorporating additional cases.
Capital penalty instructions fail to acknowledge (let alone clearly frame or carefully guide) the inherently moral nature of the task that they direct jurors to undertake. They seem to imply that death sentencing involves nothing more than simple accounting, an adding up of the pluses and minuses on the balance sheet of someone's life (at 172).

These studies raised serious questions about the operation of post-\textit{Furman} capital statutes. Jurors appear to understand sentencing instructions poorly, especially their obligation to give effect to mitigation. Many appear to presume that death is the appropriate punishment for capital offenses without regard for mitigation. They seem to focus narrowly on a single issue to simplify decision-making and to reach consensus on punishment. In explaining the decision to impose the death penalty, they invoke guilt related considerations as if the sentencing process was merely a replay of the guilt decision. These soundings were sufficiently ominous to justify a more extensive investigation of the capital sentencing process, one that would take a more systematic look into the black box of jury decision-making.

The Capital Jury Project (CJP)

The Capital Jury project is a national program of research on the decision-making of capital jurors conducted by a consortium of university based researchers with the support of the National Science Foundation.\textsuperscript{14} The findings of the CJP are based on in-depth interviews with persons who have actually served as jurors in capital trials. The interviews 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.\textsuperscript{15}

\textsuperscript{14} The CJP was undertaken by university-based investigators specializing in the analysis of data collected in their respective states and collaborating to address the following objectives of the Project: (1) to examine and systematically describe jurors' exercise of capital sentencing discretion; (2) to identify the sources and assess the extent of arbitrariness in jurors' exercise of capital discretion; and (3) to assess the efficacy of the principal forms of capital statutes in controlling arbitrariness in capital sentencing. This project was supported by the Law and Social Sciences Program of the National Science Foundation, grant NSF SES-9013252.

\textsuperscript{15} The research is based on a common core of data collected in the participating states. The investigators cooperatively developed a core juror interview instrument and enhanced the usefulness of this instrument in their respective states by adding to the information gathered in the core interviews, conducting additional interviews in selected cases of special interest, and incorporating additional case-specific data from other sources. The juror inter-
The CJP began in eight states and has since grown to include six more, for a total of fourteen states in which interviews have been conducted. States were chosen for this research to reflect the principal variations in guided discretion capital statutes. Within each state, 20 to 30 capital trials were picked to represent both life and death sentencing outcomes. Each trial, a target sample of four jurors was systematically selected for in-depth three-to-four-hour personal interviews. Interviewing began in the summer of 1991. The present CJP working sample includes 1,201 jurors from 354 capital trials in 14 states. These 14 states are responsible for 76.1% of the 3,718 persons on
decision-making committees.

views obtained data on some 700 variables through structured questions used in all states, and also included open-ended questions that called for detailed narrative accounts of the respondents' experiences as capital jurors. Advanced law and social science students working under the supervision of the various faculty investigators carried out much of the interviewing and other data collection in the respective states. All jurors selected for interviews were guaranteed confidentiality. The preparation of the interview data for state-level and projectwide statistical analyses was carried out at the College of Criminal Justice, Northeastern University under the direction of William J. Bowers, Principal Investigator of the CJP (See Bowers 1995:1082, n. 206 for further information on the interview questions and methods used).

16. The sample was designed to include (1) states with "threshold," "balancing," and "directed" statutory guidelines for the exercise of sentencing discretion; (2) states with "traditional" and "narrowing" statutory definitions of capital murder; and (3) states that make the jury sentencing decision binding and those that permit the judge to override the jury's decision. For further details about sampling states, see Bowers (1995:1077–1079).

17. The sample of trials was restricted to those in which the defendant was charged with a murder punishable by death, convicted of that murder in the guilt phase of the trial, and sentenced to life or death by a jury in the sentencing phase of the trial. The sampling plan for each state called for an equal representation of trials that ended in life and death sentencing decisions to maximize the potential for comparing and contrasting jurors in "life" and "death" cases within each state. Hence, trials were not sampled to be strictly representative within states or within the nation as a whole, but to facilitate analytic comparisons (See, Bowers 1995:1079, 1080 nn. 200–203 for further details about sampling trials within states).

18. Investigators had discretion to conduct additional interviews in cases where the initial interviews raised questions that further interviews might help to resolve. In two states (Kentucky and Virginia), samples of more than four jurors were drawn from cases where the minimum sample of trials with life or death outcomes could not be met within the initial time frame for data collection. The target sample of four jurors per case was not always met due to difficulties in applying the sampling and replacement protocol, locating jurors whose addresses and phone numbers had changed or were not initially correct or sufficiently detailed, and unwillingness of some jurors to be interviewed, despite a $20 incentive payment. Of the 354 trials in the sample, 39 trials are represented by a single juror, 45 by two, 72 by three, 152 by four, 31 by five, 13 by six, and 1 each by seven and eight jurors.

19. The number of jurors interviewed and the number of trials from which they were drawn in each state are shown below:

<table>
<thead>
<tr>
<th>State</th>
<th>Number of jurors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>59</td>
</tr>
<tr>
<td>California</td>
<td>152</td>
</tr>
<tr>
<td>Florida</td>
<td>117</td>
</tr>
<tr>
<td>Georgia</td>
<td>77</td>
</tr>
<tr>
<td>Indiana</td>
<td>101</td>
</tr>
<tr>
<td>Kentucky</td>
<td>113</td>
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<tr>
<td>Louisiana</td>
<td>30</td>
</tr>
<tr>
<td>Missouri</td>
<td>61</td>
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<tr>
<td>North Carolina</td>
<td>83</td>
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<tr>
<td>Pennsylvania</td>
<td>78</td>
</tr>
<tr>
<td>South Carolina</td>
<td>114</td>
</tr>
<tr>
<td>Tennessee</td>
<td>49</td>
</tr>
<tr>
<td>Texas</td>
<td>120</td>
</tr>
<tr>
<td>Virginia</td>
<td>47</td>
</tr>
</tbody>
</table>

21. See the Capital Jury Project Website (1995), and on 916 jurors from 11 states in F.
22. Statistical analyses were based on interviews with all 1,201 jurors. Additional analyses were based on interviews with a subset of the initial sample of 1,201 jurors, including cases from which the minimum sample of trials for each state was not met, and cases in which the sampling protocol could not be applied.
death row as of June 1, 2002, and for 79.0% of the 795 persons who were executed between 1977 and September 1, 2002.20

Since 1993, some 30 articles presenting and discussing the findings of the CJP have been published in scholarly journals.21 In the pages that follow we review the principal findings of this research on jurors' comportment with constitutional standards. The finding presented under these major headings: "premature," "misguided," and "race-linked" punishment decision-making. The findings, statistical tabulations, and excerpts from jurors' interviews we present below come principally from four of these publications (Bowers 1995; Bowers, Sandys, and Steiner 1998; Bowers and Steiner 1999; Bowers, Steiner, and Sandys 2001; they are accessible on www.cjp.neu.edu). The statistics from the first three of these sources have been updated in the text and tables below with the data now available.22

**Premature Punishment Decision-Making: Deciding on punishment at the guilt trial**

Every jurisdiction that authorizes capital punishment requires the sentence to be determined at a separate penalty phase of the trial according to sentencing guidelines set forth in its capital statute. This bifurcated procedure assumes that jurors can and do make independent decisions, first, about guilt, and then

<table>
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<tr>
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<td>47</td>
</tr>
</tbody>
</table>

22. Statistical analyses were based on interviews with 684 jurors from seven states in Bowers (1995), and on 916 jurors from 11 states in Bowers et al. (1998) and Bowers and Steiner (1999).
Table 1*
Capital Jurors’ Stands on Punishment at the Guilt Stage of the Trial in 13 States and the Full Sample

<table>
<thead>
<tr>
<th>State</th>
<th>Death %</th>
<th>Life %</th>
<th>Undecided %</th>
<th>No. of Jurors (N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>32.7</td>
<td>46.2</td>
<td></td>
<td>(52)</td>
</tr>
<tr>
<td>California</td>
<td>16.2</td>
<td>57.7</td>
<td></td>
<td>(142)</td>
</tr>
<tr>
<td>Florida</td>
<td>23.1</td>
<td>52.1</td>
<td></td>
<td>(117)</td>
</tr>
<tr>
<td>Georgia</td>
<td>28.8</td>
<td>39.4</td>
<td></td>
<td>(66)</td>
</tr>
<tr>
<td>Indiana</td>
<td>17.7</td>
<td>51.0</td>
<td></td>
<td>(96)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>25.1</td>
<td>42.6</td>
<td></td>
<td>(108)</td>
</tr>
<tr>
<td>Missouri</td>
<td>16.9</td>
<td>54.2</td>
<td></td>
<td>(59)</td>
</tr>
<tr>
<td>North Carolina</td>
<td>13.9</td>
<td>56.9</td>
<td></td>
<td>(72)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>18.9</td>
<td>47.3</td>
<td></td>
<td>(74)</td>
</tr>
<tr>
<td>South Carolina</td>
<td>14.4</td>
<td>52.3</td>
<td></td>
<td>(111)</td>
</tr>
<tr>
<td>Tennessee</td>
<td>13.0</td>
<td>52.2</td>
<td></td>
<td>(46)</td>
</tr>
<tr>
<td>Texas</td>
<td>10.8</td>
<td>51.7</td>
<td></td>
<td>(120)</td>
</tr>
<tr>
<td>Virginia</td>
<td>31.1</td>
<td>51.1</td>
<td></td>
<td>(45)</td>
</tr>
<tr>
<td>All states</td>
<td>18.9</td>
<td>50.8</td>
<td></td>
<td>(1,135)</td>
</tr>
</tbody>
</table>

* Source: Bowers et al. (1998:Table 1), updated.

It should be death, two of ten (18.2%) jurors (50.8%) remained undecided; no CJP state is within five points of the sample departure by as much as ten percent. There much variation in taking an within five points of the sample vote for death; only Virginia is more than and with the smallest sample of jury. Evidently, no state effectively curbed the.

According to the data in Table 1, the constitution requires the imposition of the penalty stage evidence and arguments for the guidance of sentencing decisions. Could it be, however, that the punishment at guilt were actually due at this early point in the trial.

To say this possibility, we ask the stage of the trial that the punishment, did you think so? They could be "pretty sure," or "not too sure." Seventy-nine (70.4%) and six of ten who characterized themselves as "absolutely" as the remaining jurors who took a stand. Only a meager 2.6% and 4.8% of the jurors characterized themselves as "not sure" and "absolutely sure". Hence, these early stands were not in controlling. To the contrary, most jurors were convinced that they were convinced hearing the evidence and arguments for sentencing in and arguments of their fellow jurors.

A further test of the firmness of the degree to which they dominate judgment. Do jurors hold tenaciously of the trial? We asked jurors about their points in the trial; during the petitions, and at the first and the final reveal that most jurors who thought punishment at the guilt stage of the trial rest of the proceedings (Bowers et al. 1998:Table 1) four of five early pro-death jurors pathway until the jury's final vote.

about punishment. If jurors are to be guided in their exercise of capital sentencing discretion by statutory provisions, as constitutionally required, it goes without saying that they must wait until the penalty stage of the trial to deliberate what the punishment should be. A juror should reach a decision concerning punishment only after hearing and giving effect to the evidence, the arguments, and the instructions for making that decision.

To learn when jurors reached their decisions about the defendant's punishment, we asked them what, at various stages of the trial, they thought the defendant's punishment should be. The first of these questions came in the section of the interview that dealt with the guilt trial. It read, "After the jury found [defendant's name] guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think [defendant's name] should be given: a death sentence, a life sentence, or were you undecided?" Table 1 displays the jurors' responses to this question for 13 participating states and for the total sample.

Remarkably, half of the capital jurors (49.2%) thought they knew what the punishment should be at the guilt stage of the trial. Three of ten (30.3%) said
1° Punishment at the Guilt Stage and the Full Sample

<table>
<thead>
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<th>Life %</th>
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<td>23.1</td>
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<tr>
<td>16.9</td>
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</tr>
<tr>
<td>13.9</td>
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<td>51.7</td>
<td>120</td>
</tr>
<tr>
<td>31.1</td>
<td>51.1</td>
<td>45</td>
</tr>
<tr>
<td>18.9</td>
<td>50.8</td>
<td>1135</td>
</tr>
</tbody>
</table>

Guided in their exercise of capital sense, as constitutionally required, it goes the penalty stage of the trial to decide whether the defendant's punishment should reach a decision concerning the evidence, the argument.

decisions about the defendant's punishments at the trial, they thought the death penalty stages of these questions came in the sentence, a life sentence, or were jurors' responses to this question for three of ten (30.3%) said.

49.2% thought they knew what the trial. Three of ten (30.3%) said that they should be death, two of ten (18.9%) said it should be life, only five out of ten jurors (50.8%) remained undecided. Moreover, this premature decision-making is pervasive; no CJP state is spared. In fact, nine of the thirteen states are within five points of the sample wide percent saying undecided; only Georgia departs by as much as ten percentage points from the level for all states. Nor is there much variation in taking an early pro-death stand. Again, nine states are within five points of the sample wide percent saying the punishment should be death; only Virginia is more than ten points from the percentage for all states, and with the smallest sample of jurors (N=45) its percentages are least reliable. Evidently, no state effectively curbs premature punishment decision-making.

According to the data in Table 1, post-Furman capital statutes are not operating as the constitution requires. Many jurors appear not to wait for the penalty stage evidence and arguments regarding the appropriate punishment or for the guidance of sentencing instructions before making their punishment decisions. Could it be, however, that jurors who said they took a stand on punishment at guilt were actually doubtful or tentative about the punishment they chose at this early point in the trial?

To assay this possibility, we asked jurors who said they thought at the guilt stage of the trial that the punishment should be death or life, "How strongly did you think so?" They could answer that they were "absolutely convinced," "pretty sure," or "not too sure." Seven out of ten jurors who took a pro-death stand (70.4%) and six of ten who said the punishment should be life (57.7%) characterized themselves as "absolutely convinced." Furthermore, nearly all of the remaining jurors who took an early punishment stand were "pretty sure." Only a meager 2.6% and 4.8% of the early pro-death and early pro-life jurors characterized themselves as "not too sure" (Bowers et al. 1998:Table 2, updated). Hence, these early stands on punishment were not tentative or doubtful. To the contrary, most jurors who held them boldly affirmed without reservations that they were convinced of what the punishment should be before hearing the evidence and arguments at the sentencing stage of the trial, before hearing the judge's sentencing instructions, and before hearing the opinions and arguments of their fellow jurors.

A further test of the firmness of these early stands on punishment is the degree to which it dominates jurors' subsequent thinking about the punishment. Do jurors hold tenaciously to their early punishment stands for the rest of the trial? We asked jurors about their stands on punishment at three later points in the trial: during the penalty stage but before punishment deliberations, and at the first and the final jury votes on punishment. Their responses reveal that most jurors who thought that either death or life was the right punishment at the guilt stage of the trial held steadfastly to that conviction for the rest of the proceedings (Bowers et al. 1998:Table 3, updated). In particular, four of five early pro-death jurors (79.6%) followed an unbroken pro-death pathway until the jury's final vote on punishment. And, the tenth-hour
conversion to life of one in five such jurors (20.1%) was typically a step they took reluctantly to avoid being a hung jury on punishment rather than a genuine conversion to the belief that the defendant deserved a life sentence (e.g., Sandy 1995:1196).

The tendency of most jurors who take an early stand on punishment to be absolutely convinced of it and to stick with it thereafter strongly suggests that their minds were closed to evidence and arguments presented later in the trial. In this connection, we posed the following question: “Some jurors feel that the decisions about guilt and punishment go together once they understand what happened and why; other jurors feel these are separate decisions based on different considerations. Which comes closest to the approach you took?” The jurors who took an early pro-death and early pro life stand on punishment were roughly twice as likely as undecided jurors (40.9% and 34.0% vs. 19.1%) to concede that they made the guilt and punishment decisions at the same time on the same grounds (Bowers et al. 1998:Table 4, updated). Thus, jurors’ own perceptions of how they made their punishment decisions confirm the distinctive failure of many premature punishment decision makers to give effect to different considerations in sentencing than in guilt — thus rendering the penalty phase evidence, arguments, and instructions irrelevant.

These early pro-death stands clearly violate the Court’s rulings in Lockett (1978), Eddings (1982), Skipper (1986), and Morgan (1992) that the sentence be presented with, and give effect to, all relevant evidence of mitigation in making the sentencing decision. Because the defendant may not present such evidence until the later sentencing stage of a capital trial, deciding that death is the appropriate punishment at guilt, without even being exposed, much less giving effect, to mitigation, obviously violates this requirement.

The contours of early pro-death decision-making

The prevalence of premature pro-death decision-making, its substantial presence in all CJP states, the certainty that jurors feel about their early pro-death stands, the consistency with which they stick to their initial stands thereafter, and their acknowledgment that they made their guilt and punishment decisions on the same grounds, suggest that many jurors found something during the guilt trial decisive and compelling, something that removed all doubt about what the punishment should be. Are there features of the evidence or arguments at the guilt stage of the trial that convince jurors of what the punishment should be? Are early pro-death jurors exposed to especially egregious crimes or captivating evidence? Or, is there something in the personal predispositions jurors bring with them to the trial that disposes them to premature decision-making? And what at the guilt trial persuaded them, and consider the possibility that. Another evidence might account for such an examination whether some jurors’ punishment decision.

After jurors who took a life or the trial had indicated how convicted was instructed to ask them at which reached their punishment decision, the most common response, more pro life (39.0%) jurors (Bowers et al. the defendant’s guilt, then, the pros substantial additional effect of per be, more often that it should be a.

Of the jurors who indicated why punishment, three out of ten we question for their decision. Many of the proof of guilt as the reason for the FL: When I was convinced it was hard evidence.

NC: After the pathologist reported his findings.

FL: When I knew in my heart that the forensic evidence from place.

KY: I again believed in the death penalty and what my vote would be. We all agreed on guilt.

TX: Uh, before we actually voted. I mean, I was absolutely sure, and I think I told them this was the first time I agreed on death.

For some jurors, it was the the vote that convinced them that death should be.

KY: Once guilt was established to the same crime. I had no problem.

MO: Um, I’d say probably right when I was stabbed twenty-two times.

SC: When they started to talk about

Many jurors’ stressed the role of or video tapes as critical in their pu
itors (20.1%) was typically a step they try on punishment rather than a defendant deserved a life sentence (e.g.,
early stand on punishment to be it thereafter strongly suggests that arguments presented later in the following question: "Some jurors feel h comes closest to the approach you to-death and early pro life stand on as undecided jurors (40.9%) and made the guilt and punishment de- (Bowers et al. 1998:Table 4, up- of how they made their punishment of many premature punishment deci-
violate the Court's rulings in Lockett and Morgan (1992) that the sentencer relevant evidence of mitigation in the defendant may not present such f a capital trial, deciding that death is hout even being exposed, much less ates this requirement.

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premature decision-making? In this section, we examine jurors accounts of what at the guilt trial persuaded them that death was the right punishment, and consider the possibility that selective exposure to certain kinds of crimes or evidence might account for such early decision-making. In the next section, we examine whether some jurors come to the trial predisposed to make a hasty punishment decision.

After jurors who took a life or death stand on punishment at the guilt stage of the trial had indicated how convinced they were of their stands, the interviewer was instructed to ask them at what point during the guilt phase of the trial they reached their punishment decision. During “the presentation of evidence” was the most common response, more so among early pro-death (54.6%) than early pro life (39.0%) jurors (Bowers et al. 1998:Table 5). Beyond convincing jurors of the defendant’s guilt, then, the presentation of guilt evidence appears to have the substantial additional effect of persuading them of what the punishment should be, more often that it should be a death than a life sentence.

Of the jurors who indicated when during the guilt trial they took a stand on punishment, three out of ten went on to volunteer the reason or an explanation for their decision. Many of the early pro-death jurors cited convincing proof of guilt as the reason for their early pro-death stands:

FL: When I was convinced he was guilty—when we were going through the hard evidence.
NC: After the pathologist report, after I was convinced he was the one who did it.
FL: When I knew in my heart that he was guilty…. This was after hearing the forensic evidence from prosecution.
KY: I again believed in the death sentence, believe in it, so in my mind I knew what my vote would be. When he was found guilty. When everybody agreed on guilt.
TX: Uh, before we actually voted, before we went in there. I was pretty sure, I mean, I was absolutely sure, because I truly believe in what the Bible says and I think I told them this when they chose me.

For some jurors, it was the grotesque or gruesome nature of the crime that convinced them that death should be the punishment:

KY: Once guilt was established that [defendant] had committed this gruesome crime. I had no problem at all determining what punishment was applicable.
MO: Um, I’d say probably right when the prosecutor made the statement. She was stabbed twenty-two times.
SC: When they started to talk about the brutality of the crime.

Many jurors’ stressed the role of physical evidence, especially photographs or video tapes as critical in their punishment decisions:
AL: When the D.A. handed us the pictures.
CA: Video tape portion of the trial. [When the jury viewed a video tape of the killing that a store monitoring system had recorded.]
KY: After I saw pictures and hair and semen analysis.
MO: [After] looking at the pictures and seeing you know, the crime, the autopsy photos.
FL: During the evidence—when [I] saw the pictures of the victim.
MO: After I knew, when they showed us the photographs of [the victim] and how he had been murdered. I knew [the defendant] had done it by the video tape but I didn't know how severe and how gruesome it was.

In a few instances they gave vivid accounts of how photo or video evidence had affected them:

NC: During the trial. I can tell you...when we saw pictures of this woman’s body, burned.... Where her feet were burned off.... Horrible, horrible pictures of this. That convinced me.
CA: Just sitting there watching [a video tape of the killing from a store monitoring system]. I've seen a lot [of] stuff, but I never... Even Arnold Schwarzenegger movies didn't affect me like that, you know? This wasn't make-believe, watching that video tape. The video tape was very powerful.

Thus, many jurors attribute their early stands for death to unquestionable proof of guilt, heinous aspects of the crime, and physical evidence, especially in photographs and on audio or video tape.

In addition to the nature of the crime and the evidence of guilt, some early pro-death jurors focused on the defendant to explain what caused them to take a stand for death during the guilt stage of the trial. These accounts typically concerned the demeanor of the defendant and the juror's perception of his future dangerousness if not sentenced to death:

CA: Once I was convinced that he did it, I was convinced that he was kind of cold-blooded and didn't have any feelings, basically.
KY: I can't explain to you how he looked but I guess that's when I knew...the way he sat there.
TX: I think this feeling came about over days of watching him and knowing he could do something like that again.

The defendant's likely future dangerousness is an especially prominent theme—the likelihood that "he could do something like that again," in the words of the juror just quoted:

SC: When we heard all of the evidence I thought he would be dangerous if he got out and in thirty years he might still be dangerous.
CA: I feel he's like a dangerous snake. I feel that he might be a threat.

TX: Well while he was in jail.... And I could see that to me, it wasn't going to change. And if he was, then the path of crimes.
CA: ...we didn't want him to.

Early pro-death jurors found the evidence compelling. They believe the evidence is explicit and apt to repeat his crime. To be peaceable of the defendant must, they must not be the basis of speculation at the punishment stage (an examination of the decision to use death). Of course, it is impossible that different kinds of crimes occurred. Could it be, for example, that the common confronted with egregious or indications of guilt backed identification, etc. range of questions the interviews number involved as victims a savior and victim, and the kin extensive data jurors provided evidence of guilt reveal no similar death or early life decision-making waited until the sentencing stage decisions (Bowers et al. 1998:App) early pro-death decision-making with more aggravated kinds of more dangerous defendants than a pro-life stand at guilt.

Since early pro-death jurors had vivid or graphic depictions of crimes at the guilt trial, some jurors who take an early stand on trial with a predisposition to stand for capital murder—a predisposition of the crime, details made especially video tapes and the like, a predisposition to wait for the sentencing stage of judgment.
es.

When the jury viewed a video tape of the victim’s stem had recorded.

Then you know, the crime, the analysis.

the pictures of the victim.

the photographs of [the victim] and [the defendant] had done it by the mere and how gruesome it was.

Drn as how photo or video evidence

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but I guess that’s when I knew... the

days of watching him and knowing in.

business is an especially prominent something like that again,” in the thought he would be dangerous if he still be dangerous.

real that he might be a threat.

TX: Well while he was in jail waiting to go to trial for this he got in a fight.
And I could see that to me, or it looked like somebody, he wasn’t going to change. And if he was let back into society he would continue with his path of crimes.

CA: ...we didn’t want him to get back out on the street again.

Early pro-death jurors found the fact of guilt and the nature of the crime compelling. They believe the death penalty is called for when the crime is egregious, the evidence is explicit, the defendant appears unrepentant, or seems apt to repeat his crime. To be sure, the heinousness of the crime and the dangerousness of the defendant may be relevant to the punishment decision, but they must not be the basis of such a decision prior to hearing evidence of mitigation at the punishment stage of the trial (see Bentele and Bowers (2001) for an examination of the decision-making of jurors whose final votes were for death).

Of course, it is possible that early pro-death or pro-life jurors were exposed to different kinds of crimes or evidence than the jurors who remained undecided. Could it be, for example, that early pro-death jurors were more commonly confronted with egregious crimes, graphic crime scene photographs, or indications of guilt backed up by forensic analysis, fingerprint samples, eyewitness identification, etc. To test this possibility, we examined a wide range of questions the interview asked about the nature of the crime, the number involved as victims and perpetrators, the relationship between offender and victim, and the kinds of evidence presented at the trial. Yet, the extensive data jurors provided on the characteristics of the crime and on the evidence of guilt reveal no sizable or consistent differences between early death or early life decision-makers and those who, in accord with the law, waited until the sentencing stage of the trial to make their punishment decisions (Bowers et al. 1998:Appendix B). Hence, the evidence indicates that early pro-death decision-making did not occur because jurors served on cases with more aggravated kinds of killings, more convincing evidence of guilt, or more dangerous defendants than did those who remained undecided or took a pro-life stand at guilt.

Since early pro-death jurors were not exposed to stronger evidence, more vivid or graphic depictions of the crimes, or more aggravated kinds of crimes at the guilt trial, something else must be at work. It might be that jurors who take an early stand on punishment do so because they come to the trial with a predisposition to see death as the only acceptable punishment for capital murder—a predisposition that is activated by gruesome details of the crime, details made especially vivid in physical evidence, pictures, video tapes and the like, a predisposition that overrides the requirement to wait for the sentencing stage of the trial before taking a stand on punishment.
The predisposition toward death as punishment

Do jurors come to the capital trial with an open mind about punishment? If they are to give effect to aggravating considerations in their decision-making, they cannot regard the death penalty as an unacceptable option (Witherspoon v. Illinois 1968:519–520). Likewise, if they are to give effect to mitigating considerations, they must not regard the death penalty as the only acceptable punishment (Woodson 1976:305). Instead, they must regard the death penalty as sometimes acceptable for such an offense and give effect to both aggravating and mitigating considerations in deciding whether it is the appropriate punishment in the case at hand (Morgan 1992).

To detect jurors’ personal feelings or predispositions that might impair their proper functioning as members of a capital jury, we asked them about the acceptability of the death penalty to them for seven specific kinds of murder. The question read, “Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following specific kinds of murder...” Table 2 shows jurors’ responses for each of these crimes.

These data make it clear that many persons chosen to serve as capital jurors fail to appreciate or to personally accept the principle, established in Woodson (1976), that the death penalty is never the “only acceptable” punishment for a capital offense. More than half of the jurors believed that death was the only acceptable punishment for repeat murder, premeditated murder, and multiple murder. Nearly half identified death as the only acceptable punishment for the killing of a police officer or prisoner. A quarter of the jurors said that a felony related killing and the killing of a community. By contrast, very few thought that death was unacceptable as a punishment in Table 2.

Contrary to Morgan’s requirement and in the sentencing, the “only acceptable” punishment once jurors with such a predisposition agree that they might be expected to wait for further crimes for which they see stronger such a predisposition is expected to foster a precipitous prehension.

The CJP research confirms that death is the only acceptable punishment, a pro-death stand at the guilt (updated). The more of these off only acceptable punishment, the death stand. In fact, early pro-death vs. 10.09% among those who believe for all seven of these kinds of killing only acceptable punishment for r

24. See Sandys and McClelland (impaired), and see Bentle and Bowers (impossible who impose the death penalty disregard)
25. Since we asked jurors about the crimes they had served on a capital case, it may be a coincidence rather than an indication of their original impression that their initial stand a tendency known as “blind sight bias” (jurors about their stands on punishment between the feeling that death is the only stand on punishment is the product of a factor increases over the course of the trial. To believe that the death penalty was the only obvious points during the trial is stronger successive points thereafter (Bowers et al. supports the inference that the hasty or pr
26. The trial, a predisposition that encourages an
Death Penalty Is the Only Acceptable Punishment, at For Various Crimes**

<table>
<thead>
<tr>
<th>Only acceptable %</th>
<th>Sometimes acceptable %</th>
<th>Un-acceptable %</th>
</tr>
</thead>
<tbody>
<tr>
<td>71.6</td>
<td>26.1</td>
<td>2.3</td>
</tr>
<tr>
<td>57.1</td>
<td>40.3</td>
<td>2.6</td>
</tr>
<tr>
<td>53.7</td>
<td>43.7</td>
<td>2.6</td>
</tr>
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<td>48.9</td>
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<td>3.3</td>
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<td>46.2</td>
<td>50.4</td>
<td>3.4</td>
</tr>
<tr>
<td>24.2</td>
<td>68.9</td>
<td>6.9</td>
</tr>
<tr>
<td>22.3</td>
<td>72.6</td>
<td>5.1</td>
</tr>
</tbody>
</table>

Contrary to Morgan's requirement that jurors give effect to both aggravation and mitigation in sentencing, this predisposition of many jurors to see death as the "only acceptable" punishment leaves no room for mitigation. Indeed, once jurors with such a predisposition are convinced of guilt and prompted by physical evidence that lends credence to the egregious or heinous character of the crime, they might be expected to decide that death is the "right" punishment without waiting for further evidence or arguments. And, the more crimes for which they see death as the only acceptable punishment, the stronger such a predisposition is apt to be—a predisposition that might be expected to foster a precipitous pro-death punishment decision.

The CJP research confirms that there is a strong association between feeling that death is the only acceptable punishment for these kinds of crime and taking a pro-death stand at the guilt stage of the trial (Bowers et al. 1998:Table 7, updated). The more of these offenses for which a juror believed death is the only acceptable punishment, the more likely he or she was to take an early pro-death stand. In fact, early pro-death stands are five times as common (52.2% vs. 10.0%) among those who believe death is the only acceptable punishment for all seven of these kinds of killings as compared to those who said it was the only acceptable punishment for none of these offenses.24

24. See Sandys and McClelland (2003) for evidence that many jurors are "mitigation impaired," and see Bentele and Bowers (2001:1041-1053, Part 3C) for evidence that many jurors who impose the death penalty disregard or disapprove mitigation.

25. Since we asked jurors about the acceptability of the death penalty not before but after they had served on a capital case, it might be that their responses are the product of having served rather than an indication of their feelings or predispositions prior to this service (i.e., that they mistakenly recall their initial stands to be consistent with their final votes on punishment), a tendency known as "hindsight bias" (Nisbett and Wilson 1977). As noted earlier, we asked jurors about their stands on punishment at four points during the trial. If the association between the feeling that death is the only acceptable punishment and taking an early pro-death stand on punishment is the product of jury service, we would expect to see that this association increases over the course of the trial. The contrary is true, however. The association between believing that the death penalty was the only acceptable punishment and the stand jurors took at various points during the trial is strongest at the initial guilt stage of the trial and diminishes at successive points thereafter (Bowers et al. 1998:Appendix A). The pattern of associations thus supports the inference that the hasty pro-death stand taken by roughly a third of the capital jurors at the guilt stage of the trial is the result of a predisposition jurors bring with them to the trial, a predisposition that encourages an early pro-death stand on the defendant's punishment,
The obvious implication is that voir dire questioning has failed to detect many jurors who, because of their pro-death predispositions, should fail the "life qualification" test for capital jury service. They may say under oath that they can disregard their personal feelings and beliefs, but the evidence shows that in practice they do not. Perhaps this is because abstract questions are an unrealistic test of the realities of jury service. Clearly, the range or kind of questions now employed or even permitted, the discretion judges exercise in culling out biased jurors, and attorneys' skills in conducting voir dire questioning are not sufficient to purge prospective jurors who will not abide by sentencing standards. The reality is that pre-existing feelings that death is the only acceptable punishment for many kinds of aggravated murder substantially contribute to taking a firm pro-death stand at the guilt stage of the trial, and this reality is manifestly contrary to the principles of capital sentencing in Lockett (1978), and to the qualifications for capital jury service in Morgan (1992).

The contamination of guilt with punishment considerations

The fact that many jurors had decided on punishment during the guilt trial means that they might possibly have voiced their views about the defendant's punishment during guilty deliberations, with adverse implications for the guilt verdict. The very danger that the guilt decision might be contaminated by punishment considerations is what Witherspoon (1968) that prospective jurors should be kept apart from their attitudes or beliefs.

Despite this insistence that prospective jurors should be kept apart, most jurors reported that they were influenced by legally irrelevant and likely common considerations. Bowers et al. (1998:Table 11, unpaged) found that when asked about the right punishment in the hypothetical situation, Beyond expressions of fear, the most frequent element of advocacy in these decisions was deciding guilt, did jurors talk about the death penalty? The jurors who made statements that the defendant's punishment should be death.

They also reported that the discus- deal on elements of aggravation. The most common was death as the cruel and unusual punishment, such as the cruel brutality of the victim, and the future of the defendant (1998:1521, n. 87). Because they were considered as the only acceptable punishment by others to have decided what was the most justifiable, their pro-death advocacy may, in fact, be a realistic approach to the question of punishment.

Does jurors' punishment advocacy affect their decisions? The jurors themselves pro- posed the following scenarios: Did jurors talk about whether the defendant should be guilty? The jurors who made statements that the defendant's punishment should be death.

SC: It was almost a—this may not, it may have been the way the jurors would have thought, with the [capital] jury's [verdict] but, Mowrer, it probably was like four days deliberating.

AL: Uh, it was probably contrary to the judge's instructions. But, to determine guilt or innocence, we discussed the possible penalties, and the jury room. A couple of times, we didn't find him guilty of a crime. We had to discuss the penalty. But we were convinced that he shot the victim.
ire questioning has failed to detect athe predispositions, should fail the race. They may say under oath that and beliefs, but the evidence shows is because abstract questions are an race. Clearly, the range or kinds of the discretion judges exercise in voir dire questioning—who will not abide by sentencing—feeling that death is the only aggravated murder substantially cont the guilt stage of the trial, and this plea of capital sentencing in Lockett jury service in Morgan (1992).

In punishment during the guilt trial d their views about the defendant’s h adverse implications for the guilt ion might be contaminated by pun-

ishment considerations is what prompted the Supreme Court to require in Witherspoon (1968) that prospective jurors be able to make the guilt decision apart from their attitudes or beliefs about the death penalty.

Despite this insistence that guilt and punishment considerations be kept apart, most jurors reported that during guilt deliberations they did discuss the legally irrelevant and likely confounding matter of the defendant’s punishment (Bowers et al. 1998:Table 11, updated). One-half (49.0%) said “jurors’ feelings about the right punishment” were discussed “a great deal” during guilt deliberations. Beyond expressions of feelings, four of ten jurors (38.7%) indicated an element of advocacy in these discussions, answering “yes” to the question, “In deciding guilt, did jurors talk about whether or not the defendant would, or should, get the death penalty?”

The jurors who made premature punishment decisions were the ones more apt to say that the defendant’s punishment came up during guilt deliberations. They also reported that the discussion during guilt deliberations focused a great deal on elements of aggravation, typically of relevance to the determination of punishment, such as the cruel and unusual nature of the crime, the pain and suffering of the victim, and the future dangerousness of the defendant (Bowers et al. 1998:1521, n. 87). Because they were more likely than others to see the death penalty as the only acceptable punishment, and because they were more likely than others to have decided what the punishment should be during the guilt trial, their pro-death advocacy may, in many cases, have dominated guilt deliberations.

Does jurors’ punishment advocacy actually influence the jury’s verdict on guilt? The jurors themselves provide answers. After the question, “In deciding guilt, did jurors talk about whether or not [the defendant] would, or should, get the death penalty,” interviewers were instructed to ask the jurors who answered “yes” the further question: “What did they say? Sometimes quite explicitly, their responses indicated a contamination of the guilt decision with punishment considerations, as illustrated in the following accounts (Bowers et al. 1998:1522):

SC: It was almost a—this may sound petty—but it was almost a trade off, with the juror, with the other jury members. We'll go along with the [capital] guilty [verdict] but there won't be a death [sentence]. I mean it was like four days deliberation on guilt and two hours on sentencing.

AL: Uh, it was probably contrary to the rules and it was certainly contrary to the judge's instructions. But the discussion came up when we were trying to determine guilt or innocence of a capital crime. At that stage, we discussed the possible penalties and [a] very unusual situation arose in the jury room. A couple of the jurors,... one in particular... were disposed not to find him guilty of a capital crime... So in order to get a verdict, we had to discuss the penalty prematurely.... Um everybody was finally convinced that he shot the victim intentionally, and that it was not accidental. But even acknowledging that, we still had two people who in the
face of that evidence, and after themselves acknowledging it, were still not inclined to find him guilty of a capital crime unless the other jurors agreed not to recommend the death penalty."

In these cases, jurors with doubts, about a capital murder verdict agreed to vote guilty of capital murder in exchange for an agreement with early pro-death jurors to abandon their pursuit of the death penalty. Such a guilt for punishment trade-off not only forfeits the punishment decision to guilt considerations, but also confounds the guilt decision with punishment concerns, thus nullifying a guilty verdict for a lesser crime.

Jurors experience a strong temptation, if not pressures, to talk about punishment at guilt, even when they know it is inappropriate. In some instances they manage to overcome the temptation; in others, the temptation prevails. When punishment is part of the discussion, pro-death jurors often declare—sometimes in forceful, impassioned words—that the law requires death or that the character of the crime or of the defendant demands it. They emphasize the cruelty or the premeditation of the offender and the aggravated character of the crime; they stress the need for incapacitation as well as retribution (Sarat 1995). They argue that the jury was selected for its ability to impose death, and they alloy others' reluctance to impose death by saying that jurors must not feel personally responsible for the defendant's punishment, that judges are the ones who actually impose the sentence, and that the death penalty is seldom carried out (Hoffmann 1995).

The evidence here from the experience of real jurors in real cases reveals not only the failure to achieve impartiality in sentencing, but also the failure to protect the guilt decision from the confounding effect of premature stands on punishment voiced in guilt deliberations. The presumed insulation of guilt and punishment decisions by means of a bifurcated capital trial is in many cases a legal fiction—leaving jurors to make the guilt and sentencing decisions with the same arbitrariness and caprice condemned by Furman (1972).

**Misguided Punishment Decision-Making**

**Misunderstanding the standards for considering mitigation**

When a capital trial moves from the guilt to the punishment stage, the decision rules change. Unlike the guilt decision, the punishment decision is to be a reasoned moral choice on the part of each individual juror. While the standard of proof beyond a reasonable doubt and the agreement of all 12 jurors are generally necessary for a guilt verdict and for findings of aggravation, not so for mitigation. The Supreme Court's rulings in McKoy (1990) and Mills (1988) hold that the individual juror may judge that mitigation is sufficient to block a death sentence without the concurrence of the other jurors, provided that the evidence is not only personal to the juror, but also found to be of significant mitigating value. 

Once jurors have heard the sentencing stage of the trial, they are left with the sentencing decision. Experience has shown that jurors ask themselves questions about the comprehensive mitigating value of the evidence concerning the defendant and the nature of the crime he committed. 

"The language used is that of a death penalty trial, even though the trial judge and the prosecutor have already settled on a life sentence.

The CJP investigators for North Carolina (Eisenberg 1996) found that the sentencing standards of sentencing instructions are wrong about which factors of mitigation are considered by the jury to be aggravating and mitigating. All of these misunderstandings would make the sentencing decision rules governing the consideration of mitigating evidence unnecessary and improperly reject mitigating evidence.

This pro-death bias is most evident when jurors are asked to consider the mitigating value of evidence that they would not find aggravating. There is a misconception that mitigating evidence is less important than aggravating evidence. Meanwhile, the jury is not asked to consider the evidence that would support a reduction of the sentence, but only the evidence that would support a finding of aggravation.

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29. Quoting California v. Brown, 430 U.S. 359 (1977), in which the Court held that the Eighth Amendment prohibits the death penalty in cases in which factors which may call for a lesser sentence are not considered by the trial court.

The Eighth Amendment, however, does not mandate that the jury be informed of the mitigating factors considered by the trial court. In Zant (1983) the Supreme Court held that the Eighth Amendment prohibits the death penalty in cases in which factors which may call for a lesser sentence are not considered by the trial court.
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that mitigation is sufficient to block a
death sentence without the concurrence of other jurors if he finds that it is
proven to his own personal satisfaction.27 This difference respects the critical
role of mitigation as the essence of the punishment decision, once findings of
aggravation have narrowed the class of death eligible offenders (Zant
1983:878).28 The sentencing decision is thus an individual moral judgment;
each juror's stand on the defendant's punishment should be a "reasoned moral
response," apart from the judgments of other jurors (Penry 1989:319).29

Once jurors have heard the evidence and arguments presented at the
sentencing stage of the trial, they are instructed by the judge on how to make their
sentencing decision. Experimental studies of prospective jurors raise serious
questions about the comprehensibility of such instructions, and point in par-
ticular to an apparent pro-death bias in sentencing decisions owing to jurors' mis-
understandings concerning mitigation (Diamond and Levi 1996; Lug
buhl 1992; Wiener et al. 1998; Zeisel 1990). The possibility that capital jurors
make their sentencing decisions with distorted or biased understandings of the
guidelines they are to follow is an unsettling proposition that the CJP is well
suited to test with persons who have actually served as capital jurors.

The CJP investigators for North Carolina (Luginbuhl and Howe 1995) and
for South Carolina (Eisenberg and Wells 1993) have examined jurors' under-
standing of sentencing instructions in those states and found that many jurors
are wrong about which factors can and cannot be considered, what level of
proof is needed, and what degree of concurrence is required for findings of ag-
gravation and mitigation. Critically, both studies found that the nature of
those misunderstandings would lead jurors to improperly accept aggravating
and improperly reject mitigating considerations.

This pro-death bias is most conspicuously the product of jurors' mistaken
views about mitigation and it is not limited to these two states where it was
first confirmed. Two questions in the CJP interviews dealt specifically with
rules governing the consideration of mitigation. One asked, "For a factor in
favor of a life or lesser sentence to be considered, did it have to be proved 'be-
yond a reasonable doubt,' by a preponderance of the evidence,' or only to 'a
juror's personal satisfaction.'" Proof beyond a reasonable doubt is clearly mis-

27. Or by a preponderance of the evidence in Pennsylvania (supra note 9).
28. Zant (1983) recast the sentencing process as one of narrowing the class of death-eligible
defendants by requiring a finding of at least one statutory aggravating factor and then permit-
ting the unguided exercise of discretion in selecting the punishment, except insofar as Lockett
mandates the consideration of mitigation.
decision is in accord with the view in Lockett that "the risk that the death penalty will be imposed
in spite of factors which may call for a less severe penalty...is unacceptable and incompatible
with the commands of the Eighth and Fourteenth Amendments" 438 U.S. at 605 (opinion of
Burger, C.J.).
Table 3
Capital Jurors’ Misunderstanding of Rules for the Consideration of Mitigating Evidence

<table>
<thead>
<tr>
<th>State</th>
<th>Mitigating factors must be proved beyond a reasonable doubt</th>
<th>All jurors must agree on mitigating factors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>% (N)</td>
<td>% (N)</td>
</tr>
<tr>
<td>Alabama</td>
<td>53.8 (52)</td>
<td>32.7 (52)</td>
</tr>
<tr>
<td>California</td>
<td>37.6 (149)</td>
<td>49.7 (149)</td>
</tr>
<tr>
<td>Florida</td>
<td>48.7 (117)</td>
<td>23.1 (117)</td>
</tr>
<tr>
<td>Georgia</td>
<td>62.2 (74)</td>
<td>74.0 (73)</td>
</tr>
<tr>
<td>Indiana</td>
<td>58.2 (98)</td>
<td>57.1 (98)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>61.8 (110)</td>
<td>69.7 (109)</td>
</tr>
<tr>
<td>Missouri</td>
<td>34.5 (58)</td>
<td>51.7 (58)</td>
</tr>
<tr>
<td>North Carolina</td>
<td>43.0 (79)</td>
<td>43.8 (80)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>32.0 (75)</td>
<td>58.7 (75)</td>
</tr>
<tr>
<td>South Carolina</td>
<td>48.7 (113)</td>
<td>66.7 (114)</td>
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<tr>
<td>Tennessee</td>
<td>46.7 (45)</td>
<td>67.4 (46)</td>
</tr>
<tr>
<td>Texas**</td>
<td>66.0 (47)</td>
<td>56.3 (48)</td>
</tr>
<tr>
<td>Virginia</td>
<td>51.2 (45)</td>
<td>72.7 (44)</td>
</tr>
<tr>
<td>All states</td>
<td>49.2 (1,085)</td>
<td>54.7 (1,089)</td>
</tr>
</tbody>
</table>

* Source: Luginbuhl and Howe (1973:Table 1), updated with breakdown by state added.
** The number of Texas jurors is reduced in this table because these two questions were replaced with others while the interviewing in Texas was underway.

Taken. The other question asked, “For a factor in favor of a life or lesser sentence to be considered, did all jurors have to agree on that factor, or did jurors not have to agree unanimously on that factor?” For the CJP states and the sample as a whole, Table 3 shows the extent to which jurors are mistaken about the level of proof and level of agreement for considering mitigation.

Most jurors in the full sample are either wrong or ignorant about each of these rules for the consideration of mitigating evidence, and the mistaken ones assume rules that tend to block findings of mitigation. Half of the jurors (49.2%) wrongly believed that a mitigating factor had to be proved beyond a reasonable doubt, and even more (54.7%) mistakenly believed that jurors had to agree unanimously on a mitigating factor for it to be considered in mitigation. Although not shown in Table 3, another 15.4% and 11.8% indicated that they did not know the required level of proof or degree of agreement, respectively. Thus, only about a third of the jurors were correct about either of these standards; 35.4% about the level of proof (including either “personal satisfaction” or “preponderance of the evidence” as acceptable responses) and 33.5% about the degree of agreement for a finding of mitigation.

As with premature punishment decision-making, the breach is pervasive; no state is spared. Here, there is more variation from state to state in the percent mistaken about level of proof and level of agreement concerning mitigation, yet the differences do not identify the jurors of any states as substantially and consistently better informed.

It is true that the state that is more than five points below or above the national average as a whole on both mitigation rules has a mitigating factor rule on one and at five points below the national average on the other.

By contrast, two states do not use the same rules, suggesting that the above threshold statutes may foster a better consideration of mitigation, but this has nothing to do with the nonunanimity of mitigation. Some Alabama and Florida on the use of the nonunanimity of mitigation. No states are greater than 10% better, not to say correct, uncertain, and poorly govern the consideration of mitigation.

Clearly, a great many jurors in the decision-making about guilt and verdict, some of this “tilt toward” to evidence instructions is due to a “carryover” phase of the trial in the minds of these jurors. The instructions all jurors in a criminal trial must be unanimous in their verdicts. Jurors are held to be required that each mitigating factor is proved beyond a reasonable doubt in both cases, and whatever the punishment they are being called upon not to do. They do not understand that the Constitution requires that evidence of mitigating circumstances is sufficient to reduce the death penalty. Thus, the death penalty is not for the crime and whatever the punishment is not for what the punishment might be. The judge is convinced that the death penalty will consider mitigating circumstances, that juror is morally justified.

Mistakenly believing that the death penalty is required...

As fundamental to capital punishment is needed...
standing of Rules for
Mitigating Evidence

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ed with breakdown by state added.

: because these two questions were replaced

factor in favor of a life or lesser sen-
to agree on that factor, or did jurors
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considering mitigation.
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and consistently better informed in both respects. North Carolina is the only state that is more than five points below the mistaken responses in the sample as a whole on both mitigation rules; California is more than five points below on one and at five points below on the other.

By contrast, two states do consistently worse than the rest. Georgia and Kentucky are more than ten points above the sample wide figures on both rules, suggesting that the absence of enumerated mitigating factors in these threshold statutes may foster such mistaken impressions. South Carolina, the other threshold state, is ten points above the rest on one but not on both of these rules. The greatest departures from the sample wide statistics come with Alabama and Florida on the unanimity requirement. To be sure, only in these two states may juries recommend a death sentence, without being unanimous, but this has nothing to do with the level of agreement required for considering mitigation. Some Alabama and Florida jurors may simply have generalized the application of the nonunanimous standard from the penalty verdict to findings of mitigation. No states are giving their jurors substantially and consistently better, not to say correct, understandings of the distinctive rules supposed to govern the consideration of mitigation.

Clearly, a great many jurors wrongly believe that the fact finding rules for decision-making about guilt and aggravation apply as well to mitigation. No doubt, some of this “tilt toward death” in jurors’ understanding of sentencing instructions is due to a “carry-over” of the guilt decision rules to the sentencing phase of the trial in the minds of jurors. It is a matter of folk knowledge that jurors in a criminal trial must unanimously agree that specifically enumerated factors are proved beyond a reasonable doubt for the jury to hand down a guilty verdict. Obviously, many jurors wrongly assume that the same requirements of unanimity and reasonable doubt also apply to the consideration of mitigation in sentencing. They fail to appreciate that the decision rules are different for evidence of mitigation, probably because they do not realize that they are being called upon not for a finding of facts but for a reasoned moral judgment. They do not understand that for such a reasoned moral choice the Constitution requires that each capital juror independently decide whether mitigation is sufficient to reject a death sentence, whatever the aggravation, and whatever the punishment decisions of other jurors. When a juror becomes convinced that the death penalty is not appropriate in light of mitigating considerations, that juror is morally obligated to vote for a life sentence.

Mistakenly believing a
death sentence is required

As fundamental to capital sentencing as which factors can be considered, what level of proof is needed, whether unanimity is required, or how the
weighing of factors must be conducted and interpreted, is the prohibition against having the death sentence be, or be seen by jurors as, "mandatory." In Woodson (1976) the Supreme Court established that no state can require the death penalty simply or solely upon the finding of a particular aggravating factor or given level of aggravation. The punishment decision must always entail the consideration of mitigation.

To test jurors' understanding of this basic principle, CJP investigators asked jurors about two relatively common aggravating factors. The question asked whether they believed, after hearing the judge's sentencing instructions, that the death penalty was required (a) "if the evidence proved that the defendant's conduct was heinous, vile or depraved," or (b) "if the evidence proved that the defendant would be dangerous in the future." Jurors' responses reveal that many capital jurors mistakenly believed that the death penalty was "required" when these aggravating circumstances were present (Bowers 1995:Table 7, updated). Four out of ten jurors (43.9%) wrongly believed that they were required to impose the death penalty if the evidence proved that the crime was heinous, vile, or depraved, and only somewhat fewer (37.0%) mistakenly thought the death penalty was required if the evidence proved the defendant would be dangerous in the future. Half of the jurors (50.3%) believed that the death penalty was required under one or the other of these two aggravating conditions. This misunderstanding of statutory standards obviously biases the sentencing decision in favor of the death penalty to the extent that jurors do, in fact, find that the evidence proves these allegations.

Jurors' answers to a further question are relevant here. Concerning the particular case on which the jurors sat, the interview asked whether the evidence proved that the crime was heinous, vile, or depraved, and whether it proved that the defendant would be dangerous in the future. The overwhelming majority of jurors believed that the evidence did, in fact, prove these factors (Bowers 1995:Table 8, updated). Some 81.5% said the evidence proved that the defendant's crime was "heinous, vile, or depraved," and 78.2% said it proved that the defendant would be "dangerous in the future." Some 84.7% of the jurors believed that the evidence in their case proved at least one of these two aggravating circumstances. As a consequence, 44.6% of the capital jurors entered sentencing deliberations with the misimpression that the death penalty was required by law in the case before them (This represents the percent of jurors who believed that the death penalty was required for one or the other of these two factors, a factor which they also believed was proved by the evidence).

Hence, the presence of an aggravating factor, which should merely make a defendant eligible for a death sentence, operates as a mandate for the death penalty in the minds of many jurors. This is illustrated in their responses to questions about how the jury arrived at its decision to sentence the defendant to death (Bentele and Bowers 2001):

NC: if you answer two questions—That would automatically
TX: I don't remember the specific one you asked. The laws imposed by the supreme court did not ask for aggravating factors—They didn't require that.
SC: What would the defense say?
CA: I think she [an almost haphazard response]-was easily hurt someone else—were required to give death.

Believing that death is required when aggravating factors are present is imposed by the court, with or without their knowledge. Indeed, these facts are self-reinforced by law when aggravation rules for considering mitigation and punishment from later evidence is precluded under the law. Many jurors base their decision on the prosecution's argument for various kinds of aggravating factors that requires death when these relative.

This constellation of faults—ment decision-making, mistakes, misunderstanding mitigation rules conveyed in the judge's sentencing instruction guide for the punishment decision—CJP investigators bears on this point. The sentencing instructions to the jury instructed most jurors had already made

Virtually three out of four jurors did not guide the jury recommendation as a rationale for a decision in the instructions (Bowers 1995:Table 8). sentencing instructions obviously sent the jury arrived at contrary to what consti

Underestimating the death penalty

If jurors are to make a reasonable decision, they must not be fully and accurately informed about which they must choose? The Court's death penalty sentencing information is an


and interpreted, is the prohibition seen by jurors as, "mandatory." It is disliked by many that no state can require the using of a particular aggravating facet.

The question asked of the jurors was, "If the evidence proved that the defendant's past behavior was similar to the crime, would it prove that the defendant has a similar moral compass?" The jurors' responses reveal that the death penalty was "required" present (Bowers 1995:Table 7, up)

In the interviews, jurors believed that evidence proved that the crime was more severe than usual (37.0%) mistakenly thought the evidence proved the defendant's moral compass (50.3%) believed that the other juror had a similar moral compass as the defendant (27.8%) contentions are obviously biased. Jurors have a tendency to believe that jurors do, in fact, believe that the evidence proved the death penalty was required. The overwhelming majority of jurors (94.7%) said the evidence proved that the death penalty was required for one or the other juror.

Some 47.9% of the jurors believed that the evidence proved the death penalty was required for one or the other juror. This represents the percentage of jurors who believed that the evidence proved the death penalty was required for one or the other juror. However, this belief was not shared by a majority of jurors. Some 52.1% of the jurors believed that the evidence proved the death penalty was not required for any juror.

Believing that death is required by law when certain circumstances are present is a case goes hand in hand with being predisposed to vote for death, with making the punishment decision prematurely, and with failing to understand the standards for considering mitigation. Indeed, these faults are self-reinforcing. The belief that the death penalty is required by law when aggravation is proven obviates the need to understand the rules for considering mitigation, and insulates an early pro-death stand on punishment from later evidence and arguments for a life sentence. Surely, the predisposition of many jurors to see death as the "only acceptable punishment" for various kinds of aggravation of murder nourishes the belief that the law requires death when these relatively common aggravators are present.

This constellation of faults — premature punishment decision-making, mistakenly believing a death sentence is required, and misunderstanding mitigation rules — suggests that the statutory guidelines as conveyed in the judge's sentencing instructions may serve more as a foil than a guide for the punishment decisions of most jurors. One question asked by the CJP investigators bears on this point. It asked, "Would you say the judge's sentencing instructions to the jury...simply provided a framework for the decision most jurors had already made?"

Virtually three out of four jurors (74.2%) acknowledged that sentencing instructions did not guide the jury's decision making on punishment but served instead as a rationale for a decision most jurors made without regard for the instructions (Bowers 1995:Table 9, updated). For many jurors, the judge's sentencing instructions obviously serve to rationalize in legalistic terms a decision arrived at contrary to what constitutional law requires.

Underestimating the death penalty alternative

If jurors are to make a reasoned, responsible sentencing decision, should they not be fully and accurately informed of the punishment options from which they must choose? The Court in Gregg (1976:190) asserted that "accurate sentencing information is an indispensable prerequisite to a reasoned de-
Table 4*  
Capital Jurors’ Estimates and Mandatory Minimums of Time Served before Release from Prison for Capital Murderers Not Sentenced to Death in 13 States and the Full Sample

<table>
<thead>
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<th>State</th>
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<td></td>
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</tr>
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<tr>
<td>South Carolina</td>
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<tr>
<td>Virginia</td>
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<tr>
<td>All states</td>
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</table>

* Source: Bowers and Steiner (1999:Table 1), updated.  
** Median estimates exclude “no answers” and unqualified “life” responses but include responses indicating “life without parole” or “rest of life in prison.”  
*** These are the minimum periods of imprisonment before parole eligibility for capital murderers not given the death penalty at the time of the sampled trials in each state.  
**** Kentucky gives capital jurors different sentencing options with 12 years and 25 years before parole eligibility as the principal alternatives (See Bowers and Steiner 1999:646, n. 198).

termination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.” Georgia capital trial transcripts reveal that the most common question jurors ask judges during sentencing deliberations is how long would the defendant actually spend in prison if not given the death penalty (Lane 1993). The jurors typically return a death sentence soon after being denied an answer (at 336). Could it be that Georgia jurors often vote for death in such cases because they mistakenly underestimate what the alternative punishment would be?

The CJP investigators asked jurors “How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?” In Table 4 we show jurors’ median estimates in response to this question, and the legally established mandatory minimums before parole consideration for persons convicted of capital murder but not sentenced to death by state and for the full sample.

The CJP interviews reveal that capital jurors consistently and substantially underestimate the death penalty alternative. In every state, the median esti-
mandatory Minimums of prison for Capital Murderers and the Full Sample

<table>
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<td>30</td>
<td>21.75</td>
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...and="life" responses but include responses in before parole eligibility for capital murderers trials in each state.

...life or die by a jury of people who decision." Georgia capital trial...the defendant actually spend in prison...The jurors typically return a death er (at 336). Could it be that Georgia because they mistakenly underestimate?...ow long did you think someone not older in this state usually spends in an estimates in response to this questi...murderer but not sentenced to death by jurors consistently and substantially live. In every state, the median esti-

mate was well below the mandatory minimum for parole eligibility. That is to say, most jurors believe that capital murderers not given the death penalty will usually be back on the streets even before completing the legally mandated minimum sentence for parole consideration in their state.

Do these usually mistaken impressions about the alternative punishment influence jurors’ sentencing decisions? The CJP data show that the shorter jurors think prison confinement would be, if they did not impose the death penalty, the more likely they are to vote for death (Bowers and Steiner 1999:Table 3). Between jurors who say the alternative is less than 10 years and those who say 20 or more years, the difference in percent voting for death is 16 points (66.7% vs. 50.3%) at the first ballot on punishment, and 25 points (71.5% vs. 46.4%) at the final sentencing decision. Before the sentencing stage of the trial and before sentencing deliberations, the corresponding differences in pro-death stands are 11 and 9 percentage points. The data thus show that the more jurors underestimate the death penalty alternative the more likely they are to vote for death, and this pro-death leaning becomes more pronounced later in the trial. In particular, misimpressions about the alternative to the death penalty appear to become critical in the final give and take of punishment deliberations.

Jurors’ narrative responses reveal the sources of their estimates of the death penalty alternative:

SC: We were discussing our prisons are so overcrowded now it's already a fact that there are people being released that would've been there a lot longer had we not had an overcrowding situation...[I know this because] my boyfriend's mother works at the South Carolina department of corrections. And I mean [I] know that you hear, just you know, street talk. You know, anybody knows that you can commit a murder these days and be [out] in no time.

AL: I read the papers everyday, just about it, and I'd say 60% to 70% of the crime committed in Birmingham, this area here, is committed by people who've been in prison, get out several different times. We've had quite a few murders, now that's the cause of it.

Fear of the defendant's recidivism led jurors to impose a death sentence even when they believed a life sentence was deserved:

GA: Unanimously[ly], we'd have voted for life without parole but that wasn't an option, and we felt sure that if he was given life, he'd be given parole....

---

30. Owing to the exceptionally low release estimates of Georgia jurors, they were excluded from this tabulations in order to obtain representative statistical comparisons for the remaining twelve states. See Steiner, Bowers, and Sarat (1999:Table 4, Part B) for the association between release estimates and jurors' stands on punishment in Georgia.
We all felt like that he did not deserve...[that] there wasn't enough evidence to feel like he deserved...I mean death.

NC: We all had decided if we were absolutely sure that he would never have gotten out of prison we wouldn't have given him the death penalty. But we were not sure of that. That's why we imposed the death penalty.

VA: We all knew that he's (sic) probably be in prison for a considerable amount of time but the other thing we looked at is that because he was very quiet, because he appeared, apparently could contain himself very well, especially in an environment where he was restricted. That he would end up being a model prisoner and be out in 15 to 20 years....

Claims of early release may be the trump card for convincing life holdouts to vote for death:

KY: It was two guys. I just think they felt really bad about putting another person to death, but then they realized. Well, another factor was, we also told them that if he was to be put to death, he would probably never be put to death. He was going to be on death row probably till he dies. But that was the only way to keep him in prison.

TX: One of the jurors held out.... Very intelligent man. But I don't think he appreciated a lot of the unsaid things about the American justice system (laughs). Such as life does not mean life. And frankly, if there had been a complaint, at that time. There probably would have been a mistrial.... Seriously, because I kind of felt kind of like the jury badgered him to the point to where he changed his vote.... There was a lot of hostility. A lot of frustration and a lot of hostility towards this person.... I wouldn't say there was anything physical about it.... Well I think there was a basic frustration on the part of the jurors that this guy.... We were like....”What the hell are you even doing here?”

In Simmons v. South Carolina (1994), the Supreme Court ruled that a capital defendant was protected from having his jury make a “false choice,” that is, making a choice between the death penalty and a false or incorrect understanding of the alternative. It limited the application of this principle, however, to situations, such as Simmons', in which the death penalty alternative was a life sentence without parole and the prosecution argued the defendant’s future dangerousness. While the CJP data do indeed show that jurors are more apt to vote for death if they underestimate the alternative under this circumstance, the data show as well that underestimating the alternative also leads to a vote for death when the alternative is not life without parole and the defendant is not alleged to be dangerous (Bowers and Steiner 1999:Table 6). Hence, to inform jurors as provided by Simmons is, at best, a partial corrective to a widespread tilt toward death in capital sentencing.

Since the CJP interviews were conducted without parole (LWOP) as the alternative, jurors are aware of such changes as it says the pro-death bias of underestimation recede. Yet, jurors in three of the states also alluded to not confident that the law made sense: in Alabama, 17 jurors said the alternative was LWOP or the defendant would spend the rest of his life in prison in five jurors correctly identified the law as not making sense. Ratifying an alternative is they may have doubts and the legal fiction that jurors cannot consider the burden of proof on those who would undergo the death penalty. The burden of proof on those who would undergo the death penalty. The burden of proof on those who would undergo the death penalty.

Denying responsibility

The U.S. Supreme Court in the 1994 case of Simmons v. South Carolina held that a capital defendant is protected from having his jury make a “false choice,” that is, making a choice between the death penalty and a false or incorrect understanding of the alternative. It limited the application of this principle, however, to situations, such as Simmons', in which the death penalty alternative was a life sentence without parole and the prosecution argued the defendant’s future dangerousness. While the CJP data do indeed show that jurors are more apt to vote for death if they underestimate the alternative under this circumstance, the data show as well that underestimating the alternative also leads to a vote for death when the alternative is not life without parole and the defendant is not alleged to be dangerous (Bowers and Steiner 1999:Table 6). Hence, to inform jurors as provided by Simmons is, at best, a partial corrective to a widespread tilt toward death in capital sentencing.

31. All but three of the 38 death penalty cases that were LWOP as a death penalty. http://www.deathpenaltyinfo.org/lwop
32. See Bowers and Steiner (1999) for an analysis of capital cases that underscore their misperceptions of life without parole.
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like the jury badgered him to the
There was a lot of hostility. A lot of
wards this person.... I wouldn't say
... Well I think there was a basic frus-
this guy.... We were like..."What the

Since the CJP interviews were conducted, additional states have adopted life
without parole (LWOP) as the death penalty alternative. To the extent that ju-
rors are aware of such changes and believe that the new legislation means what
it says the pro-death bias of underestimating the death penalty alternative may
recede. Yet, jurors in three of the four CJP states with LWOP were virtually un-
aware of this fact; in Alabama, Missouri, and Pennsylvania a total of only three
jurors said the alternative was life without parole, or explicitly indicated that
the defendant would spend the rest of his life in prison. In California, only one
in five jurors correctly identified LWOP as the alternative, and many were still
not confident that the law meant what it said. The median release estimate
was 17 years. Jurors bring their own ideas about criminal sentences, parole,
and the death penalty alternative to jury deliberations, ideas which appear to
be firmly imbedded in "folk knowledge" and reinforced by selective media cov-
erage of crime and punishment (Steiner et al. 1999). When they read or hear
about released murderers killing again, they may not consider whether the of-
fender was imprisoned for capital murder. And when judges tell them what the
alternative is they may have doubts if what they hear does not conform to their
own beliefs about how the law actually works. The substantial and widespread
underestimates of the death penalty alternative documented in Table 4, place
the burden of proof on those who claim that capital jurors are not making false
choices but reasoned moral judgments. They cannot, as before, simply adopt
the legal fiction that jurors correctly understand the death penalty alternative.

Denying responsibility for the punishment

The U.S. Supreme Court in Caldwell v. Mississippi (1985) said it is an "in-
tolerable danger" for jurors to believe that "the responsibility for any ultimate
determination of death will rest with others." The Court reasoned, "A capital sen-
tencing jury is made up of individuals placed in a very unfamiliar situation and
called on to make a very difficult and uncomfortable choice.... Given such a
situation, the uncorrected suggestion that the responsibility for any ultimate
determination of death will rest with others presents an intolerable danger that
the jury will in fact choose to minimize the importance of its role" (at 333).
The mistaken beliefs of many jurors that the law requires the death penalty
if the evidence proves the crime is heinous or the defendant is dangerous is

31. All but three of the 38 death penalty states (Kansas, New Mexico, and Texas) are report-
ed to have LWOP as a death penalty alternative under at least some circumstances. See,
32. See Bowers and Steiner (1999:666–671) for excerpts from juror interviews in six Califor-
nia cases that underscore their mistrust of claims that defendant's not sentenced to death will
spend the rest of their lives in prison.
consistent with the notion that many jurors see the law, rather than themselves, as responsible for the defendant’s punishment. Indeed, Weisberg (1984:383) has argued that the very sentencing guidelines jurors are instructed to follow, by appearing to provide an authoritative formula for the “correct” or “required” punishment, may actually diminish jurors’ sense of responsibility for the punishment they impose.  

To see where capital jurors place responsibility for the defendant’s punishment, CJP investigators asked jurors about five sources or agents of responsibility. Jurors were asked to rank these five options from most to least responsible for the defendant’s punishment. The percent giving ranks 1-5 (for “most” to “least” responsible) are shown for each of the five options in Table 5.

Overwhelmingly, jurors deny that they are primarily responsible for the defendant’s punishment. As the Caldwell Court feared, they place responsibility for the defendant’s punishment elsewhere. Four of five jurors assigned foremost responsibility to the defendant, his/her conduct, and the law. Jurors were least likely to blame the culprit for what the defendant did (7.8%). Thirteen percent of the jurors blame the law (13.1%) for the defendant’s punishment in this case. Consistent with Weisberg’s argument, jurors clearly prefer to replace jurors’ sense of responsibility with more consistent and more responsible agents in the minds of the jurors. Particularly, jurors blame the defendant, the juror, and the jury for the defendant’s punishment. Jurors are more likely to blame themselves, the law, and the jury for the defendant’s punishment. The modal rank of the five options in Table 5.

Jurors were reluctant to assign responsibility to the defendant and his/her conduct, the law and the juror. Jurors were more likely to assign responsibility to the law and the jury. The modal rank of the five options in Table 5.

33. Weisberg argues that the penalty phase juror, deciding whether to sentence the defendant to death, is in a position similar to that of the subjects in Stanley Milgram’s (1974) classic program of research on obedience to authority in which subjects were instructed, by an authority figure, to inflict what they were told was “painful” punishment on a “learner” in an adjacent room (at 305). Milgram found that his subjects were willing to increase the pain-inducing electric shocks despite the erset sound of their victims suffering. Weisberg’s interpretation of his findings was that, in response to instructions from an authority figure, a moral state is induced which he called an “agentic shift,” a state of mind in which a man feels responsible to the authority directing him but feels no responsibility for the content of the actions that the authority prescribes (at 132-134). Weisberg postulates that the instructions given the capital sentencing jury, which have the appearance of legal rules, dilute the jury’s sense of responsibility, rather than guiding discretion.
of Responsibility for the Defendant's to Least "5" Responsible.

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<tr>
<th>Most (&gt;</th>
<th>2</th>
<th>3</th>
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<tr>
<td>49.3</td>
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<td>52.8</td>
<td>40.0</td>
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<td>8.9</td>
<td>23.6</td>
<td>38.2</td>
<td>25.4</td>
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<td>5.5</td>
<td>14.2</td>
<td>27.4</td>
<td>28.4</td>
<td>24.8</td>
</tr>
<tr>
<td>3.6</td>
<td>11.2</td>
<td>20.5</td>
<td>25.8</td>
<td>39.0</td>
</tr>
</tbody>
</table>

*Note: The percentages are based on the 1,095 jurors who ranked all options.*

...ers see the law, rather than themselves, hinent. Indeed, Weisberg (1984:383) states: "Injuries are instructed to follow, ve formula for the "correct" or "re-"ful jurors' sense of responsibility for responsibility for the defendant's punish-ut five sources or agents of responsi- options from most to least response- percent giving ranks 1-5 for "most" of the five options in Table 5.

...ary responsible for the de-fault feared, they place responsibility . Four of five jurors assigned foremost...
Jurors' commentaries on reaching their final sentencing decisions (from Sandys 1995:1217 and Sarat 1995:1133) aptly illustrate the Caldwell Court's concern:

Ky: It was an awareness that it would be, it was an awareness that it would be appealed, appeals mandated by law. If it had not been appealed, if I had not been aware that there would be a necessary appeal, I might not have changed my mind.

Ga: But there were still a couple who didn't want [the defendant] to die.... That meant that we had to talk about the fact that this, just for the reason that we voted for death, did not necessarily mean that [he] would die at the hands of the state. And I think we talked a good bit about the fact that this would go to the Georgia Supreme Court and it would be reviewed and that if anything was out of the ordinary then it would be thrown out, and that even after then the man would have many opportunities to appeal. And I think that probably that discussion helped more than anything to persuade the two that was reluctant.

At the time of the interviews, three of the CJP states—Alabama, Florida, and Indiana—had capital statutes that permitted the trial judge to "override" the jury's sentencing decision; the judge could impose either a death or a life sentence, contrary to the jury's recommendation. In these three judge override states, as compared to the ten "jury binding" states, one might expect even fewer jurors to see themselves as responsible for the defendant's punishment. In fact, only a fourth as many jurors said the jury alone is responsible in the judge override as compared to the jury binding states (7.7% vs. 29.8%); twice as many said responsibility was mostly in the judge's hands (32.9% vs. 17.0%).

Allowing the trial judge to override the jury's sentencing decision unmistakably diminishes jurors' sense of responsibility for the defendant's punishment.

Clearly, most capital jurors are uneasy about responsibility for the awesome life or death decision they must make. Many see the defendant as responsible for his own punishment but even more see the law first or second in responsi-

34. Indiana abandoned its judge override provision in 2002 as indicated in note 1.

35. The tendency of jurors in override states to transfer responsibility from themselves to judges is further evident in the ranks they designate for the five agents of responsibility in Table 5. They assign much greater responsibility to the trial judge and considerably less to the individual juror than do jurors in other states. In these three states, the percent ranking the trial judge 1-3 is higher by 29.8 points (58.4% vs. 28.6%) and the percent ranking the individual juror 1-3 is lower by 20.8 points (30.7% vs. 51.5%) than in the other states. Furthermore, the impact of override is virtually confined to these two agents of responsibility. The distributions of jurors' responsibility ranks for the defendant, the law, and the jury as a group are essentially the same in the judge override and jury binding states (none of the differences between the corresponding 15 percentages exceed 5 points).

36. The sample of trials from which extensive statistical analyses. After dropping cases, we have 165 W/W cases, 74 B/B cases, 25 B/W cases. Reliably comparing the differences in black and white analysis to W/W, B/W, and B/B cases avoids the mistake of attributing observe

Race Linked Pun

Racial bias: Statistical...

Shortly after the Supreme Court in Gregg and companion rewritten statutes showed disparate treatment, and especially by race. Consistent with this evidence, the Court considered the danger that both are apt to influence jurors' sense of fairness. In the case of the defendant accused of an i

The CJP has made it possible racial composition of the jury—a sentencing. In the critical black
ual sentencing decisions (from Sandys and the Caldwell Court's concern: it was an awareness that it would be If it had not been appealed, if I had a necessary appeal, I might not have
don't want [the defendant] to die. . . . the fact that this, just for the reason essentially mean that [he] would die at we talked a good bit about the fact Supreme Court and it would be re- of the ordinary then it would be the man would have many opportu- obably that discussion helped more at was reluctant.

the CJP states—Alabama, Florida, permitted the trial judge to “override” could impose either a death or a life
dition. In these three judge override states, one might expect even- for the defendant's punishment. the jury alone is responsible in the

states (7.7% vs. 29.8%); twice in the judge's hands (32.9% vs. de the jury's sentencing decision un- the defendant's punish- mibility. They want to believe that the law is responsible and that they are simply its agents. They want the cover of law for their decision, although they often make their decision before learning what the law says they should consider, or without correctly understanding what the law requires of them. Significantly, this tendency to deny responsibility for the defendant's punishment appears to make it easier for jurors to vote for death. Hoffman's (1995) examination of Indiana jurors' narrative accounts of their sentencing decisions documents the importance to jurors of "higher authority" for guidance in the momentous life or death decision. Not infrequently, they seek "divine guidance"—hardly, we think, what the Supreme Court had in mind as "guided discretion."

Race Linked Punishment Decision-Making

Racial bias: Statistical evidence

Shortly after the Supreme Court endorsed the guided discretion capital statutes in Gregg and companion cases, studies of the application of these rewritten statutes showed disparities in the use of the death penalty by race of defendant, and especially by race of victim (See Baldus and Woodworth 2003). Consistent with this evidence, the Supreme Court in Turner (1986) explicitly acknowledged the danger that both conscious and unconscious racial sentiments are apt to influence jurors' sentencing decisions in capital cases, and it singled out black defendant/white victim (B/W) cases as the ones in which jurors' racial attitudes are especially apt to confound the sentencing decision. It ruled that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias" (at 37). The Court declared that this judgment was "based on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case" (at 37).

The CJP has made it possible to examine the role of jurors' race, both the racial composition of the jury36 and the race of the individual juror37 in capital sentencing. In the critical black defendant/white victim cases where Turner

36. The sample of trials from which jurors have been interviewed is large enough to permit extensive statistical analyses. After dropping cases with exclusively hispanic or asian defendants or victims, we have 165 W/W cases, 74 B/W cases, and 60 B/B cases.

37. With a target sample of four jurors per case, we have interviews with both black and white jurors in 33 W/W cases, 25 B/W cases, and 13 B/B cases, large enough samples to permit reliable comparisons of black and white jurors who served on the same cases. Restricting the analysis to W/W, B/W, and B/B cases from which both black and white jurors were interviewed avoids the mistake of attributing observed differences between black and white jurors to race


<table>
<thead>
<tr>
<th>Number of Jurors who were:</th>
<th>White Males</th>
<th>White Females</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>% N</td>
<td>% N</td>
</tr>
<tr>
<td>0-3</td>
<td>35.3 (17)</td>
<td>54.2 (24)</td>
</tr>
<tr>
<td>4</td>
<td>23.1 (13)</td>
<td>50.0 (10)</td>
</tr>
<tr>
<td>5</td>
<td>63.2 (19)</td>
<td>61.5 (13)</td>
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<tr>
<td>6+</td>
<td>78.3 (23)</td>
<td>52.0 (25)</td>
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</table>

<table>
<thead>
<tr>
<th>Number of Jurors who were:</th>
<th>Black Males</th>
<th>Black Females</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>% N</td>
<td>% N</td>
</tr>
<tr>
<td>0</td>
<td>71.9 (32)</td>
<td>55.2 (27)</td>
</tr>
<tr>
<td>1</td>
<td>42.9 (21)</td>
<td>61.9 (21)</td>
</tr>
<tr>
<td>2</td>
<td>36.4 (11)</td>
<td>60.0 (10)</td>
</tr>
<tr>
<td>3</td>
<td>--- (3/8)</td>
<td>35.7 (14)</td>
</tr>
</tbody>
</table>

* Source: Bowers et al. (2001:Table 1).

warned of the dangers of both conscious and unconscious racism in jurors’ decision-making, the CJP finds, indeed, that the likelihood of a death sentence is strongly linked to the racial composition of the jury. The data reveal a pronounced pro-death “white male dominance” effect, and an almost equally pronounced pro-life “black male presence” effect, as shown in Table 6.

Observe first, that the number of white males on the jury was strongly associated with the imposition of a death sentence. Deaths sentences were imposed in more than twice as many of the cases with five or more white males (70.7%) than in those with four or fewer white males (30.0%). Note as well that the presence of a black male juror was strongly associated with the imposition of a life sentence. In the absence of black male jurors, a death sentence was almost twice as likely (71.9%) than in the presence of at least one black male (37.5%). 38

Furthermore, when we examined black and white jurors who served on the same B/W cases, 39 it was evident that the black and white jurors became polarized on punishment—whites for death and blacks for life—over the course of

when they might actually reflect differences in the kinds of cases from which the full complements of black and white jurors were drawn.

38. In intra-racial W/W and B/B cases, jury composition had comparatively little influence on sentencing outcomes (Bowers et al. 2001:Table 1).

39. To minimize the possibility that observed differences in the responses of black and white jurors were due to differences in the cases on which they served, the analysis of individual jurors’ responses was confined to the 24 B/W cases from which both black and white jurors were interviewed.

the trial. At the guilt phase, when the jury takes a pro-death stand on punishment, they were four times more likely than the first vote on punishment, the jury reached more than seven to one.

This progressive divergence of the same B/W cases raises the question in these cases, and how such different courses of the trial. The CJP data and white jurors in three kinds of doubt about the defendant’s guilt, and perceptions of the defendant.

First, black jurors were far more likely to harbor lingering doubts about the defendant (Bowers et al. 2001:Table 3), largely of the trial, were manifest in jurors’ actual guilt of capital murder and the possibility of mistaken identity (52.9%) as compared to less than 5% of at least some doubts about the capable black-white difference (45.5%) or defendant was the actual killer. Given the nature of the case, this suggests the possibility of distrust among black jurors in such cases.

Second, black jurors were much more likely to see the defendant as guilty (Bowers et al. 2001:Table 3) and the fact that “sorry” character there was a corresponding black juror responses to a question about who the trial.” Personal identification of the defendant deserved mercy also divided (Bowers et al. 2001:Table 4, Panel C), the defendant and with his situation, they make them more sensitive to beliefs about the defendant’s sensitive to such indications, and defendant on grounds of remorse.

Third, white jurors were more sensitive to the defendant in B/W cases as dangerous
Victim Capital Trials in which by Number of White Male, and Black Female Jurors

<table>
<thead>
<tr>
<th>Males</th>
<th>White Females</th>
<th>%</th>
<th>N</th>
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<tbody>
<tr>
<td>17</td>
<td>54.2 (24)</td>
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<td></td>
</tr>
<tr>
<td>13</td>
<td>50.0 (13)</td>
<td></td>
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<tr>
<td>19</td>
<td>61.5 (13)</td>
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<tr>
<td>23</td>
<td>52.0 (25)</td>
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<table>
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<tr>
<th>Males</th>
<th>Black Females</th>
<th>%</th>
<th>N</th>
</tr>
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<tbody>
<tr>
<td>22</td>
<td>55.5 (27)</td>
<td></td>
<td></td>
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<tr>
<td>21</td>
<td>61.9 (21)</td>
<td></td>
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<tr>
<td>11</td>
<td>60.0 (10)</td>
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<tr>
<td>16</td>
<td>55.7 (14)</td>
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</tbody>
</table>

The Capital Sentencing Decision

6th

and unconscious racism in jurors’ death the likelihood of a death sentence is of the jury. The data reveal a pro-effect, and an almost equally protector, as shown in Table 6.

males on the jury was strongly association. Deaths sentences were imposed five or more white males (70.7%) and five (30.0%) (Bowers et al. 2001). Note as well that the associated with the imposition of a jurors, a death sentence was almost at least one black male (37.5%), and white jurors who served on the black and white jurors became polar blacks for life—over the course of the trial. At the guilt phase, whites were three times more likely than blacks to take a pro-death stand on punishment (42.3% vs. 14.7%). After sentencing instructions they were four times more likely to do so (58.5% vs. 15.2%). By the first vote on punishment, the differential between white and black jurors reached more than seven to one (67.3% vs. 9.1%) (Bowers et al. 2001: Table 2).

This progressive divergence of black and white jurors’ punishment stands in the same B/W cases raises the question of what they may have seen differently in these cases, and how such differences may have become exacerbated over the course of the trial. The CJP data reveal differences of perspective between black and white jurors in three kinds of punishment related considerations: lingering doubt about the defendant’s guilt, impressions of the defendant’s remorsefulness, and perceptions of the defendant’s future dangerousness.

First, black jurors were far more likely than their white counterparts to have lingering doubts about the defendant’s guilt when making their punishment decisions (Bowers et al. 2001: Table 3). These doubts, generated during the guilt stage of the trial, were manifest in jurors’ thinking about whether the defendant was actually guilty of capital murder and whether he was even involved in the crime (i.e., the possibility of mistaken identity). In fact, more than half of black jurors (52.9%) as compared to less than one in five white jurors (17.0%) acknowledged at least some doubts about the capital murder verdict, and there was a comparable black-white difference (45.5% vs. 5.9%) in having some doubt that the defendant was the actual killer. Given the sordid history of all-white juries, sheriff’s posses, and lynchings associated with black-on-white killings, this concentration of mistrust among black jurors in these B/W cases might be anticipated.

Second, black jurors were much more likely than their white counterparts in B/W cases to see the defendant as remorseful (Bowers et al. 2001: Table 4, Panel A). More than three of five blacks (64.7%) and fewer than one of five whites (17.3%) said that “sorry” characterized the defendant “very” or “fairly” well; there was a corresponding black-white difference (52.9% vs. 14.8%) in “yes” responses to a question about whether the defendant “appeared sorry during the trial.” Personal identification with the defendant, and feelings that the defendant deserved mercy also divided black and white jurors in these cases (Bowers et al. 2001: Table 4, Panels B and C). The greater identification with the defendant and with his situation among black jurors in these cases may make them more sensitive to subtle indications of his sorrow or remorse, and believing that the defendant is sorry may, in turn, encourage black jurors to feel that the defendant deserves mercy. By contrast, the tendency of white jurors not to be reminded of someone by a black defendant and not to imagine themselves in the situation of a black defendant’s family may make them less sensitive to such indications, and hence less willing to grant mercy to a black defendant on grounds of remorse.

Third, white jurors were more likely than their black counterparts to see the defendant in B/W cases as dangerous and to regard his dangerousness as a rea-
son for the death penalty (Bowers et al. 2001:Table 5). Both black and white jurors in these cases reported that a great deal of discussion during punishment deliberations focused on the defendant's likely dangerousness. But white jurors believe that in the absence of a death sentence, such defendants will usually be back on the streets far sooner than do black jurors. This may, in part, explain why they were especially likely to stress the defendant's dangerousness as a reason for the death penalty. Six of ten white jurors (57.2%) said that the defendant's dangerousness made them more likely to vote for death; four of ten (42.9%) said it made them "much more likely" to do so. For their part, black jurors were less willing to concede that the defendant was dangerous or to believe that such offenders soon return to society if not given the death penalty. They were conspicuous in rejecting the consideration of the defendant's dangerousness in deciding to vote for life or death. Only one in five (20.0%) of the black jurors said that the defendant's dangerousness made them more likely to vote for death, less than one in ten (8.0%) said "much more likely" to do so. Perhaps their reticence was a reaction to pressure they felt from white jurors to make dangerousness the rationale for a final death verdict.

The magnitude of these differences between black and white jurors are even more astonishing when we compare the males of each group. That is, the black-white differences in B/W cases (shown in Bowers et al. 2001:Tables 3–5) were even more pronounced when the comparisons were between males of the respective races, as shown in Table 7.40

Black males were the most likely and white males were the least likely to have lingering doubt about the defendant's guilt, chiefly about the extent of the defendant's involvement or responsibility for the crime. Again, black males were the most likely, and white males the least likely, to see the defendant as remorseful, and to identify with the defendant's or his family's situation. And on the flip side, white males were the most likely, and black males the least likely, to see the defendant as dangerous and to believe that he would be released from prison soon if not given the death penalty. Finding the males of each race at such extremes in these punishment-related considerations helps to account for the revelation in Table 6 that the effect of jury composition on sentencing outcomes is due above all to the number of males of each race on the jury.

The contrasting perceptions of the defendant's dangerousness and remorsefulness and of lingering doubts about his guilt between black and white jurors in the same B/W cases are surely grounded in their "folk knowledge" of the causes of crime and of the trustworthiness of the criminal justice process

40. When the data are broken down by jurors' race and gender, the number of jurors is reduced so that only the most sizeable and consistent percentage differences are statistically reliable. Therefore, we present only those data that show sizeable and consistent differences by jurors' race and gender in Table 7.
Both black and white juror vigil of discussion during punishment likely dangerousness. But white jurors once, such defendants will usually be black jurors. This may, in part, explain: defendant's dangerousness as a reason jurors (57.2%) said that the defense likely to vote for death; four of ten likely" to do so. For their part, black defendant was dangerous or to be scarily if not given the death penalty. Consideration of the defendant's dan- tath. Only one in five (20.0%) of the dangerousness made them more likely to said "much more likely" to do so. Pressure they felt from white jurors to death verdict.

On black and white jurors are even males of each group. That is, the in Bowers et al. 2001:Tables 3–5 comparisons were between males of the white males were the least likely to guilt, chiefly about the extent of the for the crime. Again, black males east likely, to see the defendant as re- nt's or his family's situation. And on likely, and black males the least likely, believe that he would be released nalty. Finding the males of each race noted considerations helps to account of jury composition on sentencing of males of each race on the jury.

"Dangerousness and remorse-guilt between black and white jurors led in their "folk knowledge" of the ness of the criminal justice process

's race and gender, the number of jurors is percentage differences are statistically reli- show sizeable and consistent differences by

Table 7*

Elements of (a) Lingering Doubts (b) the Defendant's Remorse and Identification, and (c) Dangerousness and Release Estimates by Jurors' Race and Gender in Black Defendant-White Victim Cases (Percent by Column)

<table>
<thead>
<tr>
<th>A. Lingering doubts</th>
<th>White Males</th>
<th>White Females</th>
<th>Black Males</th>
<th>Black Females</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Importance of lingering doubts about the defendant's guilt for you in deciding on punishment</td>
<td>Very</td>
<td>12.5</td>
<td>26.7</td>
<td>21.1</td>
</tr>
<tr>
<td>Fairely</td>
<td>6.9</td>
<td>—</td>
<td>26.7</td>
<td>15.8</td>
</tr>
<tr>
<td>Not Very</td>
<td>6.9</td>
<td>8.3</td>
<td>—</td>
<td>15.8</td>
</tr>
<tr>
<td>Not At All</td>
<td>86.2</td>
<td>79.2</td>
<td>46.7</td>
<td>47.4</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(29)</td>
<td>(24)</td>
<td>(15)</td>
<td>(19)</td>
</tr>
<tr>
<td>2. When considering punishment, did you think the defendant might not be the one most responsible for the killing?</td>
<td>Yes</td>
<td>10.3</td>
<td>4.0</td>
<td>60.0</td>
</tr>
<tr>
<td>No</td>
<td>86.2</td>
<td>96.0</td>
<td>40.0</td>
<td>52.6</td>
</tr>
<tr>
<td>Not Sure</td>
<td>3.4</td>
<td>—</td>
<td>—</td>
<td>10.5</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(29)</td>
<td>(25)</td>
<td>(15)</td>
<td>(19)</td>
</tr>
<tr>
<td>B. Remorse and identification</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. How well does &quot;Sorry for what s/he did&quot; describe the defendant?</td>
<td>Very Well</td>
<td>7.4</td>
<td>20.0</td>
<td>46.7</td>
</tr>
<tr>
<td>Fairely Well</td>
<td>7.4</td>
<td>—</td>
<td>33.3</td>
<td>21.1</td>
</tr>
<tr>
<td>Not So Well</td>
<td>33.3</td>
<td>40.0</td>
<td>6.7</td>
<td>15.8</td>
</tr>
<tr>
<td>Not At All</td>
<td>51.9</td>
<td>40.0</td>
<td>13.3</td>
<td>31.6</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(27)</td>
<td>(25)</td>
<td>(15)</td>
<td>(19)</td>
</tr>
<tr>
<td>2. Did you imagine yourself in the defendant's situation?</td>
<td>Yes</td>
<td>26.7</td>
<td>28.0</td>
<td>53.3</td>
</tr>
<tr>
<td>No</td>
<td>73.3</td>
<td>72.0</td>
<td>46.7</td>
<td>68.4</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(30)</td>
<td>(25)</td>
<td>(15)</td>
<td>(19)</td>
</tr>
<tr>
<td>3. Did you imagine yourself in the defendant's family's situation?</td>
<td>Yes</td>
<td>30.0</td>
<td>48.0</td>
<td>80.0</td>
</tr>
<tr>
<td>No</td>
<td>60.0</td>
<td>48.0</td>
<td>13.3</td>
<td>47.4</td>
</tr>
<tr>
<td>Not Sure</td>
<td>10.0</td>
<td>4.0</td>
<td>6.7</td>
<td>5.3</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(30)</td>
<td>(25)</td>
<td>(15)</td>
<td>(19)</td>
</tr>
<tr>
<td>C. Dangerousness and early release</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. &quot;Dangerous to Other People&quot; describes the defendant...</td>
<td>Very Well</td>
<td>63.3</td>
<td>52.0</td>
<td>26.7</td>
</tr>
<tr>
<td>Fairly Well</td>
<td>30.0</td>
<td>32.0</td>
<td>53.3</td>
<td>36.8</td>
</tr>
<tr>
<td>Not So Well</td>
<td>3.3</td>
<td>8.0</td>
<td>—</td>
<td>10.5</td>
</tr>
<tr>
<td>Not At All</td>
<td>3.3</td>
<td>8.0</td>
<td>20.0</td>
<td>10.5</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(30)</td>
<td>(25)</td>
<td>(15)</td>
<td>(19)</td>
</tr>
<tr>
<td>2. How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?</td>
<td>0–9 years</td>
<td>30.0</td>
<td>17.6</td>
<td>7.7</td>
</tr>
<tr>
<td>10–19 years</td>
<td>30.0</td>
<td>52.9</td>
<td>30.8</td>
<td>57.1</td>
</tr>
<tr>
<td>20 or more years</td>
<td>40.0</td>
<td>29.4</td>
<td>61.5</td>
<td>35.7</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(20)</td>
<td>(17)</td>
<td>(13)</td>
<td>(14)</td>
</tr>
</tbody>
</table>

* Source: Bowers et al. (2001), Table 7.
(Steiner et al. 1999), and in what the *Turner* Court identified as both conscious and “less consciously held” racial attitudes (at 42). These race linked differences of experience, perspective, and attitude may undercut the compatibility of blacks and whites as jury members and contaminate the deliberative process with mistrust, hostility, and invective. Far from a reasoned moral choice, jury deliberations on punishment may take on the character of a pernicious struggle to subdue opposition. Jurors’ narrative accounts of the decision making process provide a window on such sentencing dynamics (Fluery-Steiner, 2002).

**Racial bias: Narrative evidence**

In addition to the many structured questions that provide extensive statistical data, the CJP interviews also included open ended questions about jurors’ thinking and experience in their role as capital jurors. The CJP interviewers were instructed to probe for details and explanations that would refine and elaborate jurors’ initial responses to these open ended questions. We have selected excerpts from interviews with both white and black jurors in two black defendant/white victim cases that show how black and white jurors in the same cases viewed the evidence, the defendant, and one another, and how these views influenced the decision-making process.

**CASE A:** A Florida jury with one black and six white males recommended the death penalty for a black man who, with one black and one white co-perpetrator, killed a police officer.

The only black male juror on a Florida jury that included six white male jurors saw the white jurors as bent on the death penalty from the very beginning of the trial. He saw them as impatient to get home, unwilling to deliberate seriously. He felt that the white-male-dominated jury wanted the death penalty because the defendant was a black man and the victim was white.

Q: In deciding guilt, did jurors think about whether or not the defendant would or should get the death penalty? If yes, what did they say?

J: They wanted to burn both of them black boys. I’m serious, that’s the impression I got. I felt like, I was the only black male on the jury. . . . I felt like they didn’t give a shit one way or the other. They wanted to go to the football game and they wanted to go home to their husbands and all this type of stuff, and not worry about whether these people were gonna die or not. They felt like hell, these two black boys took a white man’s life: “We’re going to burn them.” That’s the impression I got from a lot of the jurors. . . . I really felt like they wanted to burn both those guys because they were black, well become, and we didn’t even as the other black guy was.

Q: Can you think of anything, or why it reached its decision?

J: . . . What I’m saying is that I didn’t know how to really give him the death penalty was it.

This black juror had lingered most responsible for the killing:

Q: Can you think of anything important in understanding his decision?

J: I felt that two people did wrong to try somebody for unjust that he was charged to keep this other guy from being shot before he could own [dues]—cause [the hand saying you pull [the] . . .

The words of a white female that at least some white jurors at sentencing stage of the trial, that they found evidence and arguments, and sentencing decision:

I: When did you first think [the] . . .

J: I think when we went in forma . . .

I: So before guilt deliberations?

J: Agreed.

Q: What prosecution evidence was most important or

J: Can’t remember.

Q: What defense evidence or trial was most important or

J: [The] defendant had received Club. We all thought that was . . .

Q: In your own words, can you say about defendant’s prior topics did it discuss, in what and how were they resolved?

41. The excerpts for Cases A and B below were drawn from more extensive accounts in Bowers et al. (2001:244–246) and Bowers et al. (2001:248–250), respectively.
er Court identified as both conscious (at 42). These race linked differences may undercut the compatibility of contaminate the deliberative process from a reasoned moral choice, jury the character of a pernicious struggle bunts of the decision making process mixics (Fluey-Steiner, 2002).

They were black, well because the white guy in the case [had a plea bargain], and we didn’t even hear his testimony. He was there just as much as the other black guy was.

Q: Can you think of anything more about the jury that helps to explain how or why it reached its decision?

J: …What I’m saying is that they had no respect for a black male and they didn’t know how to really judge him. They wanted the death penalty, give him the death penalty ‘cause he killed a white man. Boom, that was it.

This black juror had lingering doubt that the defendant on trial was the one most responsible for the killing:

Q: Can you think of anything more we haven’t talked about yet that was important in understanding the jury’s guilt decision?

J: I felt that two people did not pull the trigger, only one did. I think it’s wrong to try somebody for something somebody else done. I think it was unjust that he was charged with a capital crime for this…. He tried to keep this other guy from killing, but he was too late; the other guy had already shot before he could say anything…. Every man should pay his own [dues] —’cause [the defendant] was not holding that guy by the hand saying you pull [the] trigger or you don’t pull [the] trigger.

The words of a white female juror tend to confirm the black juror’s belief that at least some white jurors made the punishment decision before the sentencing stage of the trial, that they ignored, discounted, or trivialized sentencing evidence and arguments, and that they were in a hurry to be done with the sentencing decision:

I: When did you first think [the defendant] should be given the death penalty?

J: I think when we went in for [guilt] deliberations and we got the instructions.

I: So before guilt deliberations, but after you got the judge’s instructions.

J: Agreed.

Q: What prosecution evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

J: Can’t remember.

Q: What defense evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

J: [The] defendant had received a certificate from the PTL [Praise The Lord] Club. We all thought that was hysterical. It was very difficult not to laugh.

Q: In your own words, can you tell me what the jury did to reach its decision about defendant’s punishment? How did the jury get started; what topics did it discuss, in what order; what were the major disagreements and how were they resolved?
J: [We] did not spend a lot of time on it because we were told it was only a recommendation. [We] wanted to go home. That was the feeling of most jurors.

In Florida, the jury may recommend the death penalty by a majority vote. It did so in this case, despite the black male juror’s vote for a life sentence.

CASE B: A South Carolina jury with one black and five white males sentenced a black man to death for the robbery-related murder of a white woman.

White and black jurors made diametrically opposed interpretations of the defendant’s human qualities and remorsefulness. A white male juror perceived the defendant as emotionless, afraid that he would be dangerous in the future, and worried about what the neighbors would expect them to do. A white female juror saw the defendant’s statement of remorse as pretense and felt the “boy’s” execution might actually be good for his mother. The black juror was mistakenly convinced that the death penalty was required, though he wished he had voted for life. The white male juror was asked:

Q: What defense evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

J: His mother, really his reaction to his mother’s testimony, he was very unemotional through the whole trial and when his mother got on the stand and pleaded for his life he didn’t bat an eye, not a tear, no emotion at all, that pretty much put him in the electric chair…. The point was brought up that our friends and neighbors were expecting us to do the right thing and if this guy were to ever get out, he was so violent, his episodes of violence, we were really afraid of what might happen if he is ever allowed out into society again.

A white female juror echoed and elaborated upon the “coldness of the man,” despite his responsiveness to his girlfriend, and upon his pretense of being sorry:

Q: Did any of the testimony by defense witnesses at the punishment stage of the trial “backfire,” or actually hurt their case?

J: Well, I would have to say the one was putting the girlfriend on the stand, because she followed the mother…. The girlfriend told about how good he was with her two children although they were not his children, and how, what a good person he was. It was all well and good to hear that, but he perked up when the girlfriend got off the stand, and even when she walked off the stand he looked at her and gave her this grin and winked at her, and I mean he had no response for his mother who was up there shedding all these tears for him and yet had this response for his girlfriend, to me it really showed the coldness of the man.

Q: Did defendant testify or make a closing statement at the punishment stage of the trial?

J: It was poor…. One reason they had set up in front of him was a Bible in his hand that was obviously not for him. It was for this family and it was that they had to go through and express appreciation for how they come out and supported him so obvious that they were…

This juror took the paternalistic attitude that it would be a good thing for the defendant:

Q: What were the strongest factors in your vote for the death penalty?

J: His manner in the courtroom, the justice system does not tell you I also think…. about the boy executed and the boy executed and the boy executed and the boy executed and the boy executed and then I always think of his execution, but it was behind prison bars and when…

Note that this juror began rationalizing explanation of why his executions…

She later interrupted the flow of his being asked whether she could be:

J: I want to tell you in the sense of jury, they, his lawyer asked…[ing here was a black man and make a difference to me that was an insulting question of everybody, but I just, a…. I don’t think that those things said, I mean, the person of black or male or female just it would be in my case, and I…

The black male juror saw the way the white jurors. He was opposed to vote, when he seems to have been for a sentence:

I: In your mind, how [would…
t because we were told it was only a home. That was the feeling of most

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The girlfriend told about how good
ugh they were not his children, and
as all well and good to hear that,
'd got off the stand, and even when
at her and gave her this grin and
response for his mother who was
im and yet had this response for his
coldness of the man.
osing statement at the punishment

J: It was poor.... One reason was because he came up to this podium that they had set up in front of us, very nicely dressed with a legal, long, legal pad and a Bible in his hand, and he stood up there, and he read a state-
ment that was obviously prepared by his lawyer where he said how sorry he was for this family and the other people that had survived, the trauma that they had to go through, the families of the victim herself, and he ex-
pressed appreciation for his family members and friends and all that had come out and supported him, but they were not his words. I mean it was so obvious that they were not his words.

This juror took the paternalistic view that the death penalty might actually be a good thing for the defendant's mother:

Q: What were the strongest factors for and against a life [or death] sentence?
J: His manner in the courtroom, and I think the fact that I really believe the justice system does not have a very good rehabilitation record.... I tell you I also think...about this boy's mother at that time, to watch her son behind bars for 30 years, I don't know whether that would have been any less merciful or any more merciful I should say for her than to have the boy executed and then his life is over with. Time does a healing for people and their grief, not that she wouldn't have more grief at the time [of his execution, but it would not] burden her with this boy being behind prison [bars] and what he would go through.

Note that this juror began referring to the defendant as "boy" in her patroni-
izing explanation of why his execution would probably be good for his mother.
She later interrupted the flow of the interview to say that she was insulted at being asked whether she could be racially unbiased as a juror:

J: I want to tell you in the sentencing, excuse me, in the choosing of the jury, they, his lawyer asked me if it mattered to me that the defendant sitting here was a black man and the victim was a white woman, would that make a difference to me that was the facts in the case. And I thought that was an insulting question for that man to ask. Apparently he asked that of everybody, but I just, a life is a life, and if the man committed a crime I don't think that those things ought to weigh into it. And I told him so, I said, I mean, the person that died, whether the person was white or black or male or female just should not bear into this. And I don't think it would in my case, and I was insulted.

The black male juror saw the defendant in a very different light than did the white jurors. He was opposed to the death penalty until the final jury vote, when he seems to have become convinced that the law required a death sentence:

I: In your mind, how [would you] describe the killing?
J: Accidental.
I: How did [the defendant] appear to you during the trial?
J: Psychotic, dual personality...and a drug addict.
Q: In deciding guilt, did jurors talk about whether or not [the defendant] would, or should, get the death penalty?
J: One person [apparently referring to himself] didn't think he should get it.
Q: Was there any discussion among the jurors about the meaning of proof beyond a reasonable doubt?
J: Defendant would get the death penalty if this was found.

When the questioning turned to the punishment stage of the trial, he was asked:

Q: Did [the defendant's] mood or attitude change after the guilty verdict was handed down and the focus of the trial shifted to what the punishment should be?
J: [He] seemed sorry and pleaded for [his] life.
I: Did [the defendant] testify or make a closing statement at the punishment stage of the trial?
J: [He] told the jury that he had good qualities and could change.
Q: What did the defense attorney stress most as the reason why [the defendant] should not get the death penalty?
J: Because he was human, not an animal.

According to this lone black juror, the defendant's dangerousness and the impression that the death penalty was required by law influenced the jury's death penalty recommendation. In retrospect he wished that he had not been "so vicious" and gone along with the death penalty:

Q: In your own words, can you tell me what the jury did to reach its decision about [the defendant's] punishment?
J: What would defendant do if set free? Would [the defendant] kill again? The law said the defendant must get death... The prosecutor explained that this was required by law.
Q: When you think back about serving as a juror on [this] case, is there anything you wish you had said or done differently?
J: Yes.
I: What was it?
J: [I] wouldn't have been so vicious, [I] may not have given death.

Racial bias: Implications

The CJP data from capital jurors, themselves, unmistakably exposes the influence of race in capital sentencing. This influence is felt foremost in the B/W cases, where the death penalty...
cases, where the death penalty has long served to reinforce the color line. Historical analysis suggests that these are the kinds of crimes that have been lightening rods for the expression of white rage over the crossing of racial boundaries. The death penalty in these cases has been the vehicle for demonstrating white racial dominance. These cases most poignantly represent what Gunnar Myrdal (1962), in his epochal examination of America's race problem, identified as the "American Dilemma."

The make-up of the jury, we now see, is integral to this racial influence. When juries were all-white and all-male, as they were for most of our nation's history, it was impossible to see this bias through the lens of jury racial composition. Now that the racial and gender composition of juries varies, we can see what difference it makes to have (and not to have) blacks or women on a capital jury. In fact, we have seen that the chances of a death sentence for a black defendant whose victim is white are dramatically affected by the race and gender of his jurors. The death penalty is more than twice as likely for the defendant in a B/W case who draws five or more white male jurors as for the one who draws fewer. A life sentence is almost twice as likely for the defendant who draws a black male juror than for the one who fails to do so. These are far from trivial odds in this sizeable sample of seventy-four B/W cases from fourteen different states. Indeed, the role that a juror's race plays in this sample of cases is significant well beyond a chance occurrence in a sample of this size.

Jurors' narrative accounts yield further insights into their decision-making. They reveal a lack of receptivity to mitigating evidence among white jurors when the defendant is black. White jurors often appear unable or unwilling to consider the defendant's background and upbringing in context. As one minority juror put it: "they [the white jurors] were not considering what background this kid [the defendant] came out of. They were looking at it from a white middle-class point of view.... We had to look at it like the lifestyle he came out of, the background he came out of. But nobody wanted to listen" (Bowers et al. 2001:251). Another black juror said, "they [the white jurors] had no respect for a black male, and they didn't know how to judge him. They wanted the death penalty, give him the death penalty, because he killed a white man. That was it" (Bowers et al. 2001:245). Indeed, what black jurors see as mitigating circumstances, white jurors often see in a contrary light. Where a black juror said the defendant "seemed sorry and pled for his life," a white juror saw "the coldness of the man." Evidently, a predilection of whites to see black defendants as arrogant, frightening, or dangerous, blunts or blocks their receptivity to mitigating evidence and arguments, especially their willingness to see the defendant as remorseful. The failure of jurors to give effect to mitigating evidence in their decision-making on punishment runs contrary to the Supreme Court's conception in Lockett of the role of mitigating circumstances in the sentencing decision, and to its ruling in Morgan concerning qualifications for capital jury service.
What is more, these data paint a picture at odds with the notion of a “deliberative jury” (Abramson 1994) that scrupulously weighs aggravating and mitigating considerations to arrive at what the Supreme Court has extolled as “a reasoned moral response.” In their narrative accounts, black jurors report that their white fellow jurors came to the trial with their minds made up about punishment and that they treated evidence of mitigation as trivial or ignored it. According to the statistical data, black jurors feel that the jury was in a rush to reach a verdict and intolerant of disagreement (Bowers et al. 2001:Table 6); and they feel more emphatically so in cases with five or more white male jurors (Bowers et al. 2001:Table 8). Further, these white-male-dominated juries appear to exacerbate the fissures between black and white jurors in lingering doubt, remorse, and dangerousness. Uniquely, jurors’ narrative accounts reveal tactics of ostracism, deception, and intimidation in the B/W cases. These decision-making dynamics appear to be driven by a determination to impose a particular verdict, not by a commitment to reach consensus by reviewing and deliberating about the evidence—“verdict driven” rather than “evidence driven” deliberations (Hastie, Penrod, and Pennington 1983). Jurors’ accounts reflect tension, hostility, mistrust, and misunderstanding between black and white jurors—far from the ingredients for the “reasoned moral response” called for by the U.S. Supreme Court.

The Supreme Court acknowledged in Turner that jurors’ racial sentiments are apt to confound the capital sentencing decision in B/W cases. Indeed, the Court’s thinking in Turner about how racial sentiments might come to bear foreshadows the CJP findings:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.... [A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner’s crime involved [such] aggravating factors.... Such a juror might also be less favorably inclined toward [a] petitioner’s evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror’s decision.... Fear of blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty (at 35).

The Court emphasized that the sentencing determination is especially vulnerable to the influence of racial attitudes and prejudices because “in a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves” (at 33–34). The Court explained, “we are convinced that such discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to fact-finding” (at 36, n. 8). It continued, “as we see it, the right is not entirely different order, because we involve far more subjective judgment—of innocence” (at 38, n. 12).

Yet, the remedy was insufficient to protect such deeply ingrained and powerful thinking. The failure of Turner v. Louisiana’s approach to mitigate the prejudice that titrates the choice between life and death in the States manifest in this research. The extraordinary statistical and contrary findings in the CJP examined in the statistical and counterfactual analysis in this research after Turner (1986) became effective.

The CJP evidence of racial intimidation and his colleagues were able to demonstrate that the likelihood of jury capital sentencing decision was based upon the race of the defendant and was highly correlated, with the most likely impose death sentence if the defendant was white, in the McCleskey study. Based on the greater use of the death penalty against blacks and against one or all of the and on the race of the prosecution, one or all of the. The study thus established that the race of capital defendants was race among the important determinants of capital sentencing decisions of jurors. He demonstrated that jurors’ race or race-linked attitudes and race-conscious deliberations were important factors.

The majority in McCleskey averred that the most important race in the death sentence outcome decision by capital jurors, and that stare decisis substitute for knowing how individual differences in the CJP findings: 42. In their subsequent research on the influence of race on the jury’s deliberation and the sentencing decision of the defendant, Zuckerman, Werner, and Brofitt 2001}
at odds with the notion of a "deliberately weighs aggravating and miti-

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ently different order, because the decisions that sentencing jurors must make

olve far more subjective judgments than when they are deciding guilt or in-

once" (at 38, n. 12).

Yet, the remedy was insufficient—reliance on voir dire questioning to de-

ect such deeply ingrained and often unconscious racial attitudes was wishful

thinking. The failure of Turner to purge sentencing decisions of race-linked at-

itudes is manifest in this research by the fact that virtually all of the cases ex-

ained in the statistical and qualitative analyses of the CJP data were tried

after Turner (1986) became effective.

The CJP evidence of racial influence goes a critical step beyond what Baldus

and his colleagues were able to show in McCleskey. Baldus et al. (1990) dem-

strated that the likelihood of juries imposing the death penalty differed depending

upon the race of defendant and victim; in particular, they showed that jurors were

most likely to impose death sentences when the defendant was black and the vic-

tim was white, as in the McCleskey (1987) case. Further, Baldus showed that the

greater use of the death penalty in such cases could not be accounted for by any

one or all of a vast and comprehensive set of legally relevant considerations. He

thus established that the race of defendant and victim were implicated in the sen-

tencing decisions of jurors. He did this, however, without being able to show how

jurors' race or race-linked attitudes figured into the decision-making process.42

The majority in McCleskey averred that the Baldus data linking defendant and vic-

tim race to sentencing outcome did not impeach the exercise of sentencing discre-

tion by capital jurors, and that statistical patterns of sentencing outcomes were no

substitute for knowing how individual jurors focus their collective judgment.

That is precisely what we have here—data not merely on the race of the de-

fendants and their victims, but on real black and white jurors in actual cases

who have told us how they made the life or death sentencing decision. These

data flesh out the ways in which the race of individual jurors and the racial

composition of the jury, in connection with the race of defendant and victim,

figure into the capital sentencing decision. And, these are differences of the

kind that the Court in Turner said would constitute an unacceptable risk of

race-linked arbitrariness in the sentencing decisions of capital jurors. In particu-

lar, the evidence here shows that gross race-linked differences in the critical

sentencing considerations of lingering doubt, remorse, and dangerousness are

most manifest and egregious precisely in the black defendant/white victim

cases where the Court in Turner was afraid that they might occur. The conse-

42. In their subsequent research on capital sentencing in Philadelphia, Baldus, Woodworth,

Zuckerman, Werner, and Broffitt (2001) have demonstrated a link between jury racial composi-

tion and the sentencing decision of these juries, including the extent to which age and gender of

minority jurors influences the sentences imposed (see Figure 10).
Conclusion

Fundamental to America's post-Furman experiment with capital punishment is the premise that the punishment decision be made at a separate sentencing stage of the trial held after a capital murder verdict where jurors approach that decision with an open mind so they can give effect to both aggravating and mitigating evidence and argument. The CJP finds, to the contrary, that before the sentencing stage of the trial, many jurors think they know what the defendant's punishment should be, that most who take such an early stand on punishment are "absolutely convinced" of that stand, that these premature stands on punishment remain relatively unaltered thereafter, that early pro-death stands are prompted by graphic crime evidence presented at the guilty stage of the trial, that such stands have roots in a predisposition to see death as the "only acceptable punishment" for aggravated murder that many jurors bring to the trial, and that jurors' premature stands on punishment contaminate the guilt decision process. All this runs contrary to the purpose of the bifurcated trial in which the fact finding guilt decision is separated from the reasoned moral choice of punishment decisions so that each can be made in its own time according to its distinctive rules and procedures without the confounding influence of the other.

Equally fundamental to the post-Furman experiment is the premise that jurors sentencing decisions be guided by understandings and procedures that will make the punishment a reasoned moral choice. The CJP interviews reveal that many jurors misunderstand sentencing guidelines, that they wrongly apply the fact finding decision rules for guilt to the punishment decision, and consequently approach the punishment decision with a "tilt" toward death. In particular, jurors do not understand that they are being called upon individually to make a reasoned moral choice and that this choice is governed by distinct standards for considering mitigation. They fail to understand that a mitigating factor need not be proved beyond a reasonable doubt, and that all jurors need not agree upon a mitigating factor for a juror to consider it in his or her sentencing decision. Additionally, many jurors believe the law requires a death sentence when it does not. They fail to understand that the punishment decision is never dictated by the presence of a particular aggravating factor such as the heinousness of the crime or the dangerousness of the defendant, and that a death sentence is never required by law. In reality, the chief function of sentencing guidelines may be to rationalize decisions made in other ways, as suggested by the agreement of three out of four jurors that the judge's sentencing instructions, "simply provides the death penalty".

Further, a reasoned moral standard correctly understand the options, responsibility for the choice the jury must make: the defendant's moral culpability and dangerousness. And, despite having deliberated for fewer than one in five capital jury trials individually or as a group, for their lives and three times as many since the death penalty was reinstated who made the life or death decision that they are responsible for what they have done.

Beyond this, the decision-making processes are biased. Accusations and evidence are stacked with disparities by race and gender, outcomes which the Court has acknowledged. The evidence of a constitutional failure in the process has been demonstrated that jurors' race, in conjunction with the substantial role in sentencing decision, determines the constitutional fairness of the death penalty process. Differences in the way black and white jurors decide on punishment, and the effect of mitigating circumstances on the jurors' sentencing outcomes. By showing that the process is flawed, we can demonstrate why the death penalty is not a constitutional method of punishing those who commit capital crimes.

The capital jury is the focal point of the capital punishment. New statutes that limit jury discretion were the remedy to the Furman statutes. The Supreme Court is not now performing as the court expects it to, and the jury should be allowed to make a reasoned moral choice based on the evidence presented to them. The process is flawed, and the Court should correct it.
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instructions, “simply provided a framework for a decision most jurors had already made.”

Further, a reasoned moral judgment in capital sentencing implies that jurors correctly understand the options from which they must choose and that they take responsibility for the choice they make. Yet, CJP investigators found that most ju-

ors underestimated the death penalty alternative, and that such misperceptions made them more likely to vote for death. A number of jurors said they voted for death not because they thought it was the right punishment, but because they found it more appropriate than what they misunderstood the alternative to be. And, despite having deliberated and decided on the defendant’s punishment, fewer than one in five capital jurors saw themselves as primarily responsible, individually or as a group, for the defendant’s punishment. Twice as many said the law and three times as many said the defendant was primarily responsible. Jurors who made the life or death decision were obviously uncomfortable with the idea that they are responsible for whether the defendant will live or die.

Beyond this, the decision-making of capital jurors must also be free of racial bias. Accusations and evidence of racism have stalked capital punishment in America since colonial times. The use of the death penalty since Furman has been racked with disparities by race of defendant and victim, disparities in sentencing outcomes which the Court has acknowledged but refused to accept as dispositive evidence of a constitutional fault. Still, the Court has explicitly recognized that jurors’ conscious and unconscious racial attitudes could pose an unconstitutional risk of failing to deliver evenhanded capital sentencing. The CJP has now demonstra-

trated that jurors’ race, in conjunction with race of defendant and victim, plays a substantial role in sentencing decisions. Specifically, it has shown systematic differences in the way black and white jurors in the same cases see critical aggravat-

and mitigating circumstances particularly the defendant’s dangerousness and remorsefulness, differences that contribute to known racial disparities in sentencing outcomes. By showing that the likelihood of a death sentence for a black defendant whose victim was white is significantly affected by the racial composition of his jury, and by linking these differences in the likelihood of a death sentence to stark differences in how black and white jurors in these cases think about aggrava-

and mitigation, the CJP findings obviate the challenge of constitutional insufficiency leveled at evidence of disparities in sentencing outcomes alone.

The capital jury is the focal point of the post-Furman experiment with capi-

tal punishment. New statutes supposed to guide jurors’ exercise of sentencing discretion were the remedy to the ills of arbitrariness and caprice under pre-

Furman statutes. The Supreme Court has so far rebuffed evidence that jurors are not now performing as the Constitution requires. In Lockhart (1986) it re-

jected evidence that jury selection procedures in capital cases yield death-prone juries, and in McCleskey (1987) it was unmoved by evidence that sentencing outcomes were influenced by race of defendant and victim. The Court was un-

willing to accept inferences about the decision-making of real jurors on the
basis of experiments with mock jurors in *Lockhart* and on the basis of statistics about sentencing outcomes in *McCleskey*. It complained in *Lockhart* that the evidence was flawed because it was not about real jurors in real cases. The CJP evidence is about real jurors in real cases, and it bears directly upon the exercise of discretion in capital sentencing—the issue at the heart of the post-*Furman* experiment with capital punishment.

References


Witherspoon v. Illinois (1968) 391
Zeisel, H. (1990) Affidavit (21 Au

District of Illinois, Eastern D
dges’ Instructions in the Penalty Phase of


king the Deck for Guilt and Death: The

and Empirical Analysis of Penalty Phase

Jurors Who Change Their Minds About

and Responsibility in Capital Trials: The

and Empirical Analysis of Penalty Phase

Sorting Them Out: Refining the Individu-

he Death Sentence: Toward a Theory of

“Folk Knowledge as Legal Action:

of Early Release in a Culture of Mistrust

review 461–505.