DEATH BY DEFAULT: AN EMPIRICAL DEMONSTRATION OF FALSE AND FORCED CHOICES IN CAPITAL SENTENCING

William J. Bowers & Benjamin D. Steiner

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I. Introduction: The Challenge of Brown v. Texas¹

How capital jurors should make the life or death sentencing decision is a critical issue at the core of modern capital jurisprudence. Since its 1976 decisions in Gregg v. Georgia,² Proffitt v. Florida,³ and Jurek v. Texas⁴ authorized the states' return to capital punishment, the United States Supreme Court has grappled with the two-sided question: To what extent can we trust jurors to understand and apply the law correctly and to what extent must they be explicitly directed in their decision-making? Once the Court has determined that some constraints are necessary, it then must decide whether they are needed only to correct misbehavior or, more fundamentally, to shape the constitutional contours of capital sentencing. What the Court decides to do, or not to do, has often depended on untested assumptions about how jurors make the critical punishment decision.⁵ Such empirical assumptions need to be informed, and sometimes revised, in light of the kind of data presented in this Article.⁶

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5. See James R. Acker, Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications, 8 JUST. Q. 421, 435 (1991) (suggesting that “conservative” judges rely less on social science than “activist” judges because “it may be easier to uphold legislation in the abstract by presuming rational bases for legislative objectives and assuming evenhanded application than to sustain the validity of a statute as actually administered” (citation omitted)); William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 IND. L.J. 1043, 1070, 1062-72 (1995) (comparing the Court’s “algebraic” model of jury decision-making with other models and noting that the Court’s model is unsupported by empirical evidence); Craig Haney & Deana Dorman Logan, Broken Promise: The Supreme Court’s Response to Social Science Research on Capital Punishment, 50 J. SOC. ISSUES 75, 92 (1994) (criticizing the Court’s rejection of social science research that demonstrated juror bias resulting from the disqualification of jurors who admitted opposition to the death penalty); Jordan M. Steiker, The Limits of Legal Language: Decision Making in Capital Cases, 94 Mich. L. REV. 2590, 2614-15 (1996) (considering studies on juror misunderstanding to support the argument that current capital sentencing juror instructions do not provide adequate guidance to the jury).
6. This Article draws upon data collected as part of the Capital Jury Project (CJP), a multidisciplinary study of how capital jurors make life or death sentencing decisions. The CJP’s findings are based upon 3-4 hour personal interviews with 916 jurors from 257 capital trials in 11 states.
In the denial of certiorari in *Brown v. Texas,* one of these perplexing empirical issues surfaced as a clear concern of four Supreme Court justices. Basically, the issue is this: Should capital jurors know how long the defendant must spend in prison before becoming eligible for parole, or how long he is apt to serve before actually being paroled, if the defendant is not given the death penalty? Can jurors make a reasoned moral choice between life and death without such information? On this issue, Texas's sentencing scheme presents a particular irony, as Justice Stevens observed in *Brown:*

> The situation in Texas is especially troubling. In Texas, the jury determines the sentence to be imposed after conviction in a significant number of noncapital felony cases. In those noncapital cases, Texas law *requires* that the jury be given an instruction explaining when the defendant will become eligible for parole. Thus, the Texas Legislature has recognized that, without such an instruction, Texas jurors may not fully understand the range of sentencing options available to them. Perversely, however, in capital cases, Texas law *prohibits* the judge from letting the jury know when the defendant will become eligible for parole if he is not sentenced to death.

Why shouldn't Texas jurors, or those from any other state, know about parole in making their capital sentencing decision? Isn't parole an even more important consideration in capital than in noncapital sentencing? Justice Stevens cites evidence from citizen surveys in a number of states that indicates people find the death penalty less attractive the longer offenders would stay in prison before becoming eligible for parole, and

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The CJP is an ongoing research program initially undertaken with the support of the National Science Foundation. See generally Bowers, supra note 5, at 1077-85 (describing the research design and methodology of the Capital Jury Project).  
9. *Brown,* 118 S. Ct. at 356 (opinion of Stevens, J., respecting denial of certiorari) (emphasis in original) (footnote omitted). For a discussion of legislatures' resistance to enacting a life-without-parole alternative for fear that juries would be less likely to impose the death penalty, see infra note 292 and Patricia H. Dugan et al., Massachusetts Legislators' Crime and Justice Policy Preferences 8, 12, 15 (Spring 1995) (unpublished manuscript, on file with the Texas Law Review).  
10. See *Brown,* 118 S. Ct. at 356 n.2 (opinion of Stevens, J., respecting denial of certiorari) (citing William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer,* 22 Am. J. Crim. L. 77, 89-90, 101, 105 (1994) (presenting data from surveys in various states showing that citizens asked to choose between a death and a life sentence for a convicted first-degree murderer are more likely to choose life when they are informed that the defendant will not be eligible for parole for 25, 30, or 40 years as well as when the alternative sentence is life without parole)). Surveys also show that these periods before parole eligibility are longer than...
surmises that the Texas rule against informing jurors of parole eligibility in capital cases “tips the scales in favor of a death sentence that a fully informed jury might not impose.” He concludes with a call for further study of the issue of false choice to assist the Court in its correct resolution: “[T]he likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals ‘to serve as laboratories in which the issue receives further study before it is addressed by this Court.’”

Though uncommon, opinions respecting denial of certiorari have sometimes foreshadowed portentous developments in capital jurisprudence, including the Court’s holdings in *Batson v. Kentucky*, and *Coker v. Georgia*.

Although the assumption that jurors disregard parole in their decision-making has undergirded the thinking of courts about how jurors should make capital sentencing decisions, the empirical data shows it is a false description of what jurors actually do—a legal fiction. The stage is thus set for an examination of two related empirical questions that hold the key to understanding the implications of not informing capital juries of the death penalty alternative: Do capital jurors misunderstand the death penalty alternative, in the absence of being informed; and, if so, do such misunderstandings bias their sentencing decisions? In *Simmons v. South...*
Carolina, the Supreme Court first grappled with these questions, focusing on the narrow range of capital cases in which the defendant is alleged to be dangerous and the only sentencing alternative would be life without parole (LWOP). The Court held that when a defendant's future dangerousness is at issue, due process requires that a jury be informed of the fact that state law makes the defendant ineligible for parole. In reaching its decision, the *Simmons* Court relied upon evidence from public opinion research and early findings from this Article's study of jurors' decision-making in capital cases. *Brown* invites a more comprehensive and thoroughgoing examination of the role of jurors' beliefs about the death penalty alternative in their capital sentencing decisions—an examination of the extent to which the sentencing decisions of capital jurors are "false" and "forced" choices. Such a broader empirical inquiry into the possibly

17. Following common parlance in the field, we abbreviate as "LWOP" the term "life without parole," a sentence of life in prison under which the convicted offender is statutorily barred from ever being eligible or considered for parole.
18. *Simmons*, 512 U.S. at 171 (plurality opinion). For further discussion of the *Simmons* opinion, see infra notes 167-82 and accompanying text.
19. *Id.* at 159 (plurality opinion) (citing the petitioner's evidence from an unpublished statewide public opinion survey conducted by the University of South Carolina's Institute for Public Affairs).
20. *Id.* at 170 n.9 (plurality opinion) (citing William J. Bowers, *supra* note 10, at 170 tbl. 6 (1993) (finding that capital jurors in California, Florida, and South Carolina believe that murderers not sentenced to death will usually be released from prison and back on the streets sooner than the law permits and that this belief is associated with voting for death) and Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 15 (1993) (finding that South Carolina jurors vote for death "because of false impressions about parole eligibility"). These two investigations are the earliest published studies based on the data of the Capital Jury Project. The Eisenberg and Wells investigation is the work of the South Carolina component of the CJP; the Bowers investigation is based on the work of the California, Florida, and South Carolina components of the CJP—at that time the sampling goals had been met in only those three states. For further details of the rationale, design, and early findings of the CJP, see generally Bowers, *supra* note 5, at 1077-85 and infra subpart IV(A).
21. The *Brown* opinion flags an "obvious tension" between the Texas rule not to inform capital jurors about parole and the ruling in *Simmons* that entitles jurors to be so informed at least in some cases; indeed, it plainly suggests that the holding in *Simmons* was too narrow. *Brown* v. Texas, 118 S. Ct. 355, 355 (1997) (opinion of Stevens, J., respecting denial of certiorari). *Simmons* held that capital jurors should be informed of the death penalty alternative, but only when the defendant was alleged to be dangerous and only when the alternative was an LWOP sentence. *Simmons*, 512 U.S. at 163-64 (plurality opinion). In *Brown*, the jury found the defendant to be dangerous, see *Brown*, 118 S. Ct. at 355 (opinion of Stevens, J., respecting denial of certiorari), as is required for a death sentence under Texas law, see *infra* note 40, but the alternative to the death penalty was 35 years in prison before parole eligibility, not LWOP. Texas has since increased parole ineligibility to at least 40 years for a capital felony. See *Tex. Gov't Code Ann.* § 508.145(b) (Vernon 1998). Thus, *Brown* raises the specter of extending the *Simmons* rule to the death penalty alternative whatever its duration—requiring that juries be informed of the death penalty alternative in all instances, not merely when the alternative is LWOP.
22. False choice refers to the situation in which a decision-maker misunderstands at least one of the available options from which he or she must choose; forced choice refers to the situation in which the available options exclude the one that the decision-maker deems most appropriate. When capital
The Constitutional Context: Toward a "Reasoned Moral Response"

The United States Supreme Court’s historic decision in *Furman v. Georgia* held that the death penalty was being imposed in an arbitrary and capricious manner in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. States responded to the Court’s invalidation of their existing statutes with new laws designed to remedy the ills of arbitrariness and discrimination in sentencing. Some state legislatures enacted “mandatory” capital statutes intended to eliminate arbitrariness by simply doing away with the jury’s sentencing discretion altogether; such statutes made death the only available punishment for specified forms of murder. Other states adopted “guided discretion” capital statutes designed to control and direct jurors’ exercise of sentencing discretion by setting out standards or guidelines—typically in the form of aggravating and mitigating considerations—to be applied by capital jurors in sentencing.

The Supreme Court passed judgment on these post-*Furman* statutory schemes in a quintet of cases in 1976 and decided that the latter approach, but not the former, was a lawful remedy to the arbitrariness forbidden by *Furman*. The Court rejected the mandatory statutes of North Carolina and Louisiana, concluding in *Woodson v. North Carolina* that “in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a

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23. 408 U.S. 238 (1972) (per curiam).
24. See id. at 239-40 (per curiam). The five separately concurring Justices in *Furman* variously characterized the death penalty’s imposition as “freakish[]” and “wanton[].” *Id.* at 310 (Stewart, J., concurring); “whimsical” and “capricious,” *Id.* at 295 (Brennan, J., concurring); “random” and “rare,” *Id.* at 293 (Brennan, J., concurring); and “discriminatory” and “arbitrary,” *Id.* at 242 (Douglas, J., concurring). In a memorable analogy, Justice Stewart described the death penalty as “cruel and unusual in the same way that being ‘struck by lightning’ is cruel and unusual.” *Id.* at 309 (Stewart, J., concurring).
26. See id. at 199 n.461, 238 tbl.1 (listing the guided discretion legislation enacted in 35 states between June 29, 1972 and July 1, 1976).
27. 428 U.S. 280 (1976) (plurality opinion).
constitutionally indispensable part of the process of inflicting the penalty of death.” In another opinion issued the same day, the Court held in *Roberts v. Louisiana* that the sentencer must be given “meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.” The *Woodson* Court declared that because “death is a punishment different” in kind from lesser punishments, the Eighth Amendment requires “individualizing sentencing determinations,” and thus prohibits a death sentence fixed by law.

A. Guided Discretion

In three other opinions issued the same day, the Court endorsed “guided discretion” statutes that divided the trial into separate guilt and punishment stages, and set forth guidelines and procedures for jurors to follow in making their sentencing decisions during the punishment stage. In announcing the judgment of the Court in *Gregg*, Justice Stewart explained:

> 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.

The statutes of Georgia, Florida, and Texas, which respectively represent “threshold,” “balancing,” and “directed” capital statutes, differ in the way they guide sentencing discretion. Georgia’s threshold statute

28. Id. at 304 (plurality opinion).
30. Id. at 333-34 (plurality opinion).
32. See *Gregg v. Georgia*, 428 U.S. 153, 189-95 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 251-60 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 268-76 (1976) (plurality opinion). The Court’s lead opinion, delivered by Justice Stewart, reasoned that “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Gregg*, 428 U.S. at 189 (plurality opinion).
33. *Gregg*, 428 U.S. at 206-07 (plurality opinion). The guided or channeled discretion, as articulated in *Gregg*, was subsequently recast as narrowing the class of death-eligible defendants in *Zant v. Stephens*, 462 U.S. 862, 877 (1983).
34. Various commentators have analyzed the distinctions among these different types of early post-*Furman* capital statutes. See Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 26-31, 41-43 (1980) (discussing how state legislation more precisely defined who deserved the death penalty as *Furman* required, and how the Supreme Court assessed these statutes); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1699-1712 (1974).
requires jurors to find beyond a reasonable doubt the existence of at least one aggravating factor from a list specified in the statute before they can impose a death sentence. 35 Once jurors make such a finding they are free to impose life or death without further statutory guidance. 36 Florida’s balancing statute requires jurors to weigh aggravating factors 37 against

(describing the four approaches to guiding capital sentencing that developed after Furman: three that included sentencing hearings when aggravating or mitigating factors would be considered, and one that required the death penalty for certain crimes). Acker and Lanier provide a detailed discussion of the forms that these statutes now take. See generally James R. Acker & Charles S. Lanier, In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws, 30 CRIM. L. BULL. 299 (1994).

35. See GA. CODE ANN. § 17-10-30(c) (1997). The aggravating factors enumerated in Georgia’s current capital statute are as follows:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior conviction for a capital felony;
(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties;
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;
(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;
(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or
(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Id. § 17-10-30(b). The above quoted statute is substantially the same as the post-Furman version which was challenged, but approved, in Gregg. See Gregg, 428 U.S. at 165-66 n.9 (plurality opinion) (citing GA. CODE ANN. § 27-2534.1 (Supp. 1977)).

36. Under the United States Constitution, however, jurors may not ignore or disregard whatever relevant evidence of mitigation the defense proffers. See Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (holding that the Eighth Amendment requires that "the sentencer may not refuse to consider 'any relevant mitigating evidence.'" (quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982))); see also Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (holding that the Eighth and Fourteenth Amendments mandate that a jury have the opportunity to consider and give effect to mitigating circumstances before imposing the death penalty).

37. See FLA. STAT. ANN. § 921.141(5) (West Supp. 1998). The enumerated aggravating circumstances in the Florida statute are as follows:

(a) The capital felony was committed by a person under sentence of imprisonment or placed on community control.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
mitigating factors, both of which are specified in the statute, in making their sentencing decision; jurors then recommend life or death depending on the assessment of the relative "weight" of the aggravators and mitigators. Texas's directed statute restricts the death penalty to persons

(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.
(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
(j) The victim ... was a law enforcement officer engaged in the performance of his official duties.
(k) The victim ... was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

Id. Factors (a) through (h) of the current Florida statute are essentially the same as the statute that was challenged in Proffitt. Proffitt, 428 U.S. at 248 n.6 (plurality opinion) (citing FLA. STAT. ANN. § 921.141(5) (West Supp. 1976-77)). Factors (i) through (k)—focusing on premeditation and the characteristics of the victim—were not part of the statute challenged in Proffitt. Id. (citing FLA. STAT. ANN. § 921.141(5) (West Supp. 1976-77)).

38. See FLA. STAT. ANN. § 921.141(6) (West Supp. 1998). The enumerated mitigating circumstances in the statute are as follows:

(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.
(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

Id. This list of mitigating factors differs from the statute challenged in Proffitt only in the addition of general factor (h). See Proffitt, 428 U.S. at 248 n.6 (plurality opinion) (citing FLA. STAT. ANN. § 921.141(5) (West Supp. 1976-77)).

39. See Wainwright v. Goode, 464 U.S. 78, 86-87 (1983) (considering the propriety of using certain factors in weighing the aggravating and mitigating circumstances); Enmund v. Florida, 458 U.S. 782, 785 (1982) (illustrating the Florida jury recommendation procedure); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995) (holding that once mitigating or aggravating factors are established, the "relative weight" of each is within the sound discretion of the jury and not governed by the burdens of proof applicable when establishing the factor itself); see also Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995) (holding that "[i]t is within the sentencing judge's discretion to determine the relative
convicted of capital murder, defined by certain enumerated circumstances, similar to those that the Georgia and Florida statutes use to guide jurors’ sentencing discretion. Under Texas’s statute, the jurors’ imposition of a life or death sentence is then strictly determined by their findings on three propositions, or special issues: the likely future dangerousness of the defendant, the defendant’s intent to kill or level of responsibility for the victim’s death, and the existence of any mitigating circumstances that would warrant a life sentence. Statutes with such

weight given to each established mitigator; however, some weight must be given to all established mitigators”.

40. TEX. PEN. CODE ANN. § 12.31 (Vernon 1994). These aggravating circumstances include:
(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, aggravated sexual assault, arson, or obstruction or retaliation;
(3) the person commits the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
(4) the person commits the murder while escaping or attempting to escape from a penal institution;
(5) the person, while incarcerated in a penal institution, [murders an employee of the penal institution or commits murder as part of a conspiracy];
(6) the person [while incarcerated for certain offenses] murders another;
(7) the person murders more than one person [during the same criminal event or as part of a common scheme];
(8) the person murders an individual under six years of age.

Id. at § 19.03.

Various statutory changes since the decision in Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion), have yielded the current version of the statute: aggravator (2) replaced “forcible rape” with “aggravated sexual assault” in a 1983 amendment, TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 1994); aggravator (6) was added in a 1985 amendment, id. § 19.03(a)(6); aggravator (2) was amended to include “obstruction or retaliation” in 1993, id. § 19.03(a)(2); “robbery” was dropped from aggravator (2) in a 1993 amendment, id.; aggravator (5) was expanded to include conspiracy in a 1993 amendment, id. § 19.03(a)(5)(B); and aggravators (7) and (8) were added in a 1993 amendment, id. § 19.03(a)(7)-(8). See Jurek, 428 U.S. at 268 (plurality opinion) (discussing the Texas Penal Code in effect in 1974). Although these changes expand the types of murders that qualify as death-eligible, eliminating robbery as an accompanying felony circumstance decidedly restricted the number of offenders who could be convicted of capital murder, given the frequency of robberies in which a murder occurs. But see Enmund, 455 U.S. at 799 & n.23 (discussing the results of an American Law Institute study that found only about one-half of one percent of robberies included a murder).

41. See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (Vernon Supp. 1998). The Texas statute requires the jury to address these three issues in a sentencing proceeding that follows a guilty verdict against the defendant for any one of the categories of capital murder enumerated supra note 40. See id. § 2(a). Specifically, the jury must answer the following questions:
(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty [for his own conduct or criminal responsibility for the conduct of another], whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

See id. § 2(b)(1)-(2).
sentencing guidelines appeared "on their face" to remedy the arbitrariness ruled unconstitutional in Furman: No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Other states have adopted variations on the threshold, balancing, and directed statutes upheld in Gregg, Proffitt, and Jurek. Several states

If the jury unanimously finds that the State has proven beyond a reasonable doubt that the answer to each of these two questions is "yes," see id. § 2(c), the jury must then answer the following question:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Id. § 2(e). If the jury unanimously returns a negative finding to this question, the court shall sentence the defendant to death. See id. § 2(g). If the jury returns a negative finding on either of the first two questions or an affirmative finding on the question of mitigating circumstances, the court shall sentence the defendant to life imprisonment. See id.

As under the current statute, at the time of the Jurek decision, the defendant's sentence was strictly determined by the jury's answers to three questions. See Act of June 14, 1973, 63rd Leg., R.S., ch. 426, art. 3, § 1, 1973 TEX. GEN. LAWS 1122, 1125 (amended 1991) (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (Vernon Supp. 1998)). The current questions, however, differ slightly from those which were at issue in Jurek. Question one (regarding future dangerousness) is the same as it was in the statute reviewed in Jurek. Question two (regarding criminal responsibility and responsibility for the killing) rephrases slightly the requirement regarding intent. Finally, question three now explicitly incorporates the issue of mitigation, which was absent from the statute at issue in Jurek. In place of a question about victim provocation. For a discussion of the challenged capital sentencing procedure, see Jurek, 428 U.S. at 269 (plurality opinion). These changes in the sentencing procedure came about as a result of the Supreme Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that Texas juries must be informed that mitigating evidence may be considered in determining if the death penalty should be imposed). See Act of May 17, 1991, 72nd Leg., R.S., ch. 838, § 1, 1991 TEX. GEN. LAWS 2898. 2898-2900 (codified as an amendment to TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1998)) (adding the requirement, during the first legislative session after Penry, that juries take mitigating circumstances into consideration before imposing the death sentence); Peggy M. Tobolowsky, What Hath Penry Wrought?: Mitigating Circumstances and the Texas Death Penalty. 19 AM. J. CRIM. L. 345, 363, 362-64 (1992) ("The Penry Court rejected the Franklin plurality's view that Jurek had 'unconditionally' upheld the manner in which mitigating evidence is considered under the Texas special issues.").


43. Id. Notably, the Court's holding in Gregg represented a fundamental turnaround in the Court's stand on statutory standards to guide capital sentencing. Just one year prior to Furman, in McGautha v. California, 402 U.S. 183 (1971), the Court had voiced serious doubts about whether standards for capital sentencing could actually be articulated, much less effectively guide jurors' exercise of capital discretion. See id. at 207-08. In McGautha, the Court reasoned that "[it] to identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." Id. at 204.

44. A few states have adopted capital statutes that give sentencing authority to the trial judge rather than the jury. See, e.g., ARIZ. REV. STAT. ANN. § 13-703(B) (West 1989); IDAHO CODE § 19-2515 (1997). The Supreme Court has found these few judge-sentencing statutes constitutional. See Walton v. Arizona, 497 U.S. 639, 647-49 (1990) (rejecting the argument that only a jury may make the findings required to impose a death sentence); Clemons v. Mississippi, 494 U.S. 738, 745 (1990)
have narrowed the definition of capital murder, as Texas did, by restricting it to murders committed under specified aggravating conditions.45 A few states have also mimicked Texas in making the defendant’s future dangerousness a prominent sentencing consideration.46 Oregon’s statute most closely mirrors Texas’s directed model.47 Other states have followed Georgia’s threshold model in providing that the finding of a single aggravating circumstance is sufficient for the jury to impose a death sentence.48 Most states, however, have followed Florida’s lead by having jurors weigh or balance aggravating and mitigating considerations.49 Some of these states, including New Jersey50 and Pennsylvania,51 require or prohibit a death sentence depending on the balance between aggravating and mitigating factors, while others, including Tennessee52 and North Carolina,53 leave the jury’s life or death decision open, to be informed but not dictated by the balance of factors. Notably, in some states with balancing statutes, the jury’s sentencing decision is not binding; that is, the trial judge may override the jury’s sentence.54

B. Deregulating Death

While the various capital statutes approved by the Supreme Court in Gregg and its companion cases were presumed to provide jurors with the guidance needed to overcome arbitrariness in sentencing, and though the

(allowing an appellate judge to affirm a death sentence after finding that an aggravating factor outweighs mitigating evidence); see also Adave v. Creech, 507 U.S. 463, 470-74 (1993) (holding that the “utter disregard” standard for judicial review of the sentencing decision was sufficiently narrow to uphold Idaho’s capital sentencing scheme as constitutional).


47. See OR. REV. STAT. §§ 163.095, .105, .150 (1997).


49. Twenty-one of the 38 penalty states employ some type of balancing statute. See Steven Hornbuckle, Note, Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court’s Case Law, 73 TEXAS L. REV. 441, 448 n.38 (1994). At the time of Hornbuckle’s publication, only 36 states used a balancing statute. See id. However, since then Kansas and New York have also adopted balancing statutes. See KAN. STAT. ANN. § 21-4624(e) (1995); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1998).

50. See N.J. STAT. ANN. § 2C:11-3c(3) (West Supp. 1998) (requiring judges to sentence defendants to death if the jury’s written findings indicate that aggravating circumstances outweigh mitigating circumstances).

51. See 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iv) (West 1998) (specifying that the verdict must be death if the jury finds aggravating factors and no mitigating ones, or if aggravating factors outweigh mitigating circumstances).


Court continued to voice its affirmation of guided discretion,\(^{55}\) the Supreme Court did not, thereafter, insist on adherence to these guidelines. Instead, it held that statutory guidelines must not restrict considerations of mitigation, and need not restrict considerations of aggravation. In *Lockett v. Ohio*,\(^ {56}\) the Court first invalidated statutory restrictions on what could be considered by a jury in mitigation.\(^ {57}\) Then in *Zant v. Stephens*,\(^ {58}\) it ruled that a jury’s consideration of aggravation need not be restricted to aggravating factors specifically enumerated in state statutes.\(^ {59}\) In effect, the Court began to discount the guidelines it celebrated as the remedy to the *Furman* ills in a series of decisions that Robert Weisberg has aptly labeled “deregulating death.”\(^ {60}\)

Concerning mitigation, the Court ruled in *Lockett* that the constitutional requirement of “individualized treatment” in capital sentencing, as articulated in *Woodson v. North Carolina*,\(^ {61}\) meant that jurors could consider virtually any mitigating factor, not just those explicitly set forth in the respective state statutes.\(^ {62}\) According to several Justices in *Lockett*:

\(^{55}\) See California v. Brown, 479 U.S. 538, 541 (1987) (“The Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.”); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion) (directing that states “must channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’” (citations omitted)).

\(^{56}\) 438 U.S. 586 (1978) (plurality opinion).

\(^{57}\) *Id.* at 604 (plurality opinion) (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the [potentially mitigating] circumstances of the offense that the defendant proffers . . . .” (emphasis in original)).


\(^{59}\) *Id.* at 878. In *Zant*, the Georgia Supreme Court clarified, in its response to a certified question, that the Georgia capital sentencing scheme required that the jury find at least one of the statutory aggravating factors in order to impose a death sentence. *Id.* at 871-72 (citing *Zant v. Stephens*, 297 S.E.2d 1. 3-4 (Ga. 1982)).


\(^{61}\) In *Woodson*, Justice Stewart stated that any exclusion of the “compassionate or mitigating factors stemming from the diverse frailties of humankind” that are relevant to the sentencer’s decision would fail to treat all persons as “uniquely individual human beings.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion); *see also supra text accompanying note 27* (criticizing Texas’s perverse use of parole information in noncapital felony cases, but not in capital felony cases).

\(^{62}\) *See Lockett*, 438 U.S. at 604 n.12 (plurality opinion) (“Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense.”). Excluded from consideration in mitigation have been factors such as the death penalty’s lack of deterrent efficacy. *See Illinois v. Yates*, 456 N.E.2d 1369, 1386 (Ill. 1983). Jurors have also been precluded from considering descriptions of execution methods in mitigation. *See Underwood v. Indiana*, 535 N.E.2d 507, 521 (Ind. 1989); LeVasseur v. Virginia, 304 S.E.2d 644, 660 n.5 (Va. 1983).
[T]he sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.63

Once Lockett made it clear that nonstatutory factors may be offered in mitigation, the Court held that nonstatutory mitigating factors must not be ignored;64 indeed, it required that they must be given effect in reaching a sentencing decision,65 and that such factors need be proven only by a preponderance of the evidence66 to a single juror67 in order to block a unanimous verdict for imposition of a death sentence. These decisions thus effectively removed considerations of mitigation from the guidance of state statutes.

Concerning aggravation, the Court relaxed the guidance of statutory aggravating considerations by setting a minimum requirement for statutory aggravators,68 and by opening the door to, and extending the scope of, nonstatutory aggravators. In Zant v. Stephens,69 the Court held that the Constitution requires that only a single valid statutory aggravator need be found for a death sentence to be imposed, and that nonstatutory considerations, unless explicitly precluded from consideration by state law,

63. Lockett, 438 U.S. at 604 (plurality opinion) (emphasis in original) (footnote omitted).

64. See Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.") (emphasis in original)).

65. See Penry v. Lynaugh, 492 U.S. 302, 318 (1989) (declaring that when mitigating evidence is presented, upon the submitting party’s request, jurors must be given instructions that allow them to give effect to the mitigating evidence); see also Skipper v. South Carolina, 476 U.S. 1, 7-8 (1986) (declaring that “a defendant’s disposition to make a peaceful adjustment to prison life as an aspect of his character . . . is by its nature relevant to the sentencing determination,” and finding reversible error).

66. See Walton v. Arizona, 497 U.S. 639, 649 (1990) (plurality opinion) (upholding an Arizona statute that required the defendant to prove the existence of mitigating factors by a preponderance of the evidence); see also Lockett, 438 U.S. at 609 n.16 (plurality opinion) (declining to address whether a state may require the defendant “to bear the risk of nonpersuasion as to the existence of mitigating circumstances”).


68. The narrowing of the class of convicted murderers to those eligible for a death sentence could be accomplished either at the guilt or the punishment phase of the trial. For example, the Texas statute accomplished this at the guilt stage by requiring death-eligible murderers to be convicted of murder aggravated by at least one of eight enumerated circumstances. See TEX. PEN. CODE ANN. § 19.03 (Vernon 1994); see also supra note 40 and accompanying text. Florida and Georgia do so by enumerating aggravators, at least one of which must be found by the jury during the sentencing stage of the trial. See FLA. STAT. ANN. § 921.141 (West Supp. 1999); GA. CODE ANN. § 17-10-30(b) (1997); see also supra notes 35, 37 and accompanying text.

may be taken into account in capital sentencing. Moreover, in *Payne v. Tennessee*, the Court extended the scope of nonstatutory aggravators to include previously unacceptable “victim impact” considerations. It held that personal characteristics of the victim and the emotional impact of the killing on the victim’s family, friends, and community can be presented to jurors during the sentencing stage of the trial. Writing for the Court in *Payne*, Chief Justice Rehnquist reasoned that precluding such evidence “unfairly weighted the scales” in favor of the capital defendant. In so doing, the Court reversed earlier rulings that were explicitly intended to insulate the sentencing process from the arbitrary effects of emotional, inflammatory, or prejudicial influences.

Finally, the Court decided not to require monitoring of the jury’s sentencing decision for compliance with state statutory guidelines by means of a proportionality review. In *Pulley v. Harris*, the Court confirmed that the relaxation of guidance in *Lockett* and *Zant*, together with the general absence of a record of jury findings of aggravation and mitigation, means that the jury’s sentencing decisions cannot be meaningfully reviewed for proportionality. In effect, since *Gregg, Proffitt, and Jurek*, Supreme

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70. *Id.* at 884-91. Under state law, jurors might still be prohibited from considering nonstatutory aggravators in making their sentencing decisions, though no such guidance is constitutionally required. See *Fla. Stat. Ann.* § 921.141(5) (West Supp. 1999) (stating that “[a]ggravating circumstances shall be limited to the following”); *N. C. Gen. Stat.* § 15A-2000(e) (1997) (stating that “[a]ggravating circumstances which may be considered shall be limited to the following”).


72. *Id.* at 827.

73. *Id.* at 822, 825-27.

74. *See South Carolina v. Gathers*, 490 U.S. 805, 811-12 (1989) (affirming the holding that a prosecutor’s extensive comments about a victim’s religious beliefs and voting status did not satisfy the *Booth* requirement that statements made to the jury during the sentencing phase be directly related to the circumstances of the crime); *Booth v. Maryland*, 482 U.S. 496, 509 (1987) (concluding that “the introduction of a VIS [victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment” and is “inconsistent with the reasoned decision-making we require in capital cases”).

75. In his *Payne* dissent, Justice Stevens declared that the Court had abandoned the principles of its prior jurisprudence, that sentencing in a capital case be the product of a reasoned assessment of the defendant’s blameworthiness as reflected in the characteristics of the crime and of the defendant, and that the victim’s identity and how the victim’s family feels about the crime are irrelevant. *See Payne*, 501 U.S. at 856-57 (Stevens, J., dissenting).


77. *See id.* at 44 (holding that a state appellate court is not required to compare every death sentence to the penalties in similar cases). Proportionality review of death sentences was adopted by many states in response to criticism that the death penalty was only imposed upon a small, randomly selected handful of those found guilty of capital crimes. *See Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (arguing that “the Eighth and Fourteenth Amendments cannot tolerate . . . this unique penalty to be so wantonly and freakishly imposed”). Many state legislatures and courts subsequently implemented procedures to compare death sentences to sentencing results in cases with similar aggravating and mitigating circumstances, under the principle that imposition of a death sentence is unjust when similarly situated defendants are not sentenced to death. *See Leigh B. Bienen, The
Court decisions have relaxed both statutory restraints on, and judicial scrutiny of, guided discretion in capital sentencing. 78

C. The Punishment Decision as a Reasoned Moral Response

Behind this apparent ambivalence about guiding jurors' sentencing discretion, the Court has nevertheless articulated an underlying conception of how the sentencing decision should be made. 79 Accordingly, it must


This comparative proportionality review was approved as providing a level of assurance against the possibility of arbitrary and capricious application of the death penalty. See Gregg v. Georgia, 428 U.S. 153, 206, 206-07 (1976) (plurality opinion) (noting that the jury under Georgia's new sentencing provisions "must find and identify at least one statutory aggravating factor before it may impose a penalty of death" and concluding that "[n]o longer can a jury wantonly and freakishly impose the death sentence"). However, proportionality review, especially following a wave of state legislation coming on the heels of Pulley, has been criticized as being reduced to a mere formality in many jurisdictions. See David Baldus, When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences, 26 SETON HALL L. REV. 1582, 1588 (1996) (noting that "the review conducted by most courts has little or no substance and serves only a symbolic function" for an "equal justice" ideal).

This conclusion was foreshadowed in then-Justice Rehnquist's Woodson dissent:

Under the Georgia system, the jury is free to recommend life imprisonment, as opposed to death, for no stated reason whatever. The Georgia Supreme Court cannot know, therefore, when it is reviewing jury sentences for life in capital cases, whether the jurors found aggravating circumstances present, but nonetheless decided to recommend mercy, or instead found no aggravating circumstances at all and opted for mercy. So the "proportionality" type of review, while it would perhaps achieve its objective if there were no possible factual lacunae in the jury verdicts, will not achieve its objective because there are necessarily such lacunae.

Identical defects seem inherent in the systems of appellate review provided in Texas and Florida, for neither requires the sentencing authority which concludes that a death penalty is inappropriate to state what mitigating factors were found to be present or whether certain aggravating factors urged by the prosecutor were actually found to be lacking.


78. For an insightful analysis of the failure of the Court's past two decades of death penalty jurisprudence to narrow, channel, and individualize capital sentencing decisions, see Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 HARV. L. REV. 355, 371-403 (1995) (arguing that the last twenty years of capital punishment jurisprudence have only produced a complicated body of doctrine with little utility). For a further perspective on the Court's role in monitoring the application of state law, including exceptions to the overall deregulation trend, see Louis D. Billonis, Legitimating Death, 91 MICH. L. REV. 1643, 1649 (1993) (asserting that jurisprudence in this area exhibits a coherent methodology). For the implications of capital jurisprudence on the substantive law of murder, particularly the shift from purpose and motive to act and result in grading murder, see generally Daniel Givelber, The New Law of Murder, 69 IND. L.J. 375 (1994).

79. See generally Carol S. Steiker & Jordan M. Steiker, Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing, 102 YALE L.J. 835, 839 (1992) (noting the Court's interpretation of the Eighth Amendment as providing a "right to individualized sentencing" that requires states to allow jurors in capital cases to consider mitigating factors such as the "defendant's background, character, or crime" (citing Woodson, 428 U.S. at 30)); Scott E. Sundby, The Lockett
be an “individualized assessment” of the character and record of the particular offender and the circumstances of the particular offense, it must be grounded foremost in retributive purposes of punishment; and it must be “a reasoned moral response” free of impediments to relevant sentencing considerations. Having noted the Court’s doctrine of individualized treatment above, we now turn to the role of retributive standards and of reasoned moral response as principles underlying the Court’s capital jurisprudence.

When speaking of the sentencing decision, the Court has characterized the jury’s function as making a retributive assessment of the defendant’s moral blameworthiness and guilt; it has declined to analyze deterrence; and has characterized incapacitation as a secondary consideration. Thus, Justice O’Connor declared in *Enmund v.*

*Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1148 (1991) (observing that the “principles of guided discretion and individual consideration comprise almost the entire foundation upon which the Court has built its framework of constitutional rules relating to the death penalty”).

80. Woodson, 428 U.S. at 304 (plurality opinion) (describing individualized treatment as “constitutionally indispensable”; see also supra note 62 (describing the scope of evidence potentially permissible as a mitigating factor). Subsequent cases contain similar language calling for individualized sentencing. See Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987) (holding that the existence of enumerated statutory mitigating factors does not preclude consideration of any other mitigating factors); Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (holding that good behavior while in jail awaiting trial could be considered as a mitigating factor for purposes of capital sentencing); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (noting that the Eighth Amendment requires the court to consider the character and record of each individual offender); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (“The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.”).


82. See Harris v. Alabama, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting) (“A capital sentence expresses the community’s judgment that no lesser sanction will provide an adequate response to the defendant’s outrageous affront to humanity.”).


84. When considering statutory justifications for capital punishment, the Gregg Court recognized retribution and deterrence, with no mention of incapacitation, as rationales. See Gregg, 428 U.S. at 183 (plurality opinion) (“The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.”). The secondary standing of incapacitation is affirmed in Harris, 513 U.S. at 504. When ruling on the constitutionality of particular crimes, the Court has relied chiefly upon “evolving standards” of retributive proportionality. See Stanford v. Kentucky, 492 U.S. 361, 370-73 (1989) (distinguishing the treatment of noncapital crimes but surveying other state sentencing laws to find that there is no national consensus against executing offenders who committed their crimes when they were 16 or 17 years old); Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (surveying state statutes to find that capital punishment of mentally retarded defendants is not “categorically prohibited by the Eighth Amendment”); Tison v. Arizona, 481 U.S. 137, 148-58 (1987) (holding that the death penalty is not disproportionate for a non-triggerman who is a major
Florida that the Eighth Amendment concept of proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness. In Tison v. Arizona, it explained that, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." Concerning the primacy of retributive over incapacitative purposes in jury sentencing, in California v. Ramos, Justice Marshall challenged incapacitation as a justification for imposing a death sentence, saying "[c]apital punishment simply cannot be justified as necessary to keep criminals off the streets." A year later in Spaziano v. Florida, the Court explicitly gave secondary standing to the goal of incapacitation, saying "incapacitation has never been embraced as a sufficient justification for the death penalty" and that "retribution clearly plays a more prominent role in a capital case." The Court concluded, "[i]n the context of capital felony cases, therefore, the question whether the death sentence is an appropriate, non-excessive response to the particular facts of the case will depend on the retribution justification."

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participant in the crime and shows reckless indifference to human life); Emmund v. Florida, 458 U.S. 782, 788-89 (1982) (holding that the death penalty is disproportionate for a non-triggerman who does not intend to kill); Coker v. Georgia, 433 U.S. 584, 597, 598 (1977) (noting a "legislative rejection of capital punishment for rape" and holding that "in terms of moral depravity...it does not compare with murder").

86.  See id. at 825 (O'Connor, J., dissenting).
88.  Id. at 149. Concerned that the defendant's blameworthiness might be displaced as the core criterion in sentencing, the Court initially rejected the use of victim impact evidence. See Booth v. Maryland, 482 U.S. 496, 504-07 (1987) ("This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime."). When it later accepted such victim impact evidence in Payne v. Tennessee, 501 U.S. 808, 819-27 (1991), it did so ingeniously, not by discounting considerations of retribution, but by broadening them to include assessment of the harm of the defendant's crime as well as his blameworthiness for it. See id. at 825.
90.  Id. at 1023 (Marshall, J., dissenting).
92.  Id. at 461.
93.  Id. at 462.
94.  Id. at 480 (Stevens, J., concurring in part and dissenting in part). For the view that the Eighth Amendment requires desert-based sentencing, see Scott W. Howe, Resolving the Conflict in Capital Sentencing Cases: A Desert-Oriented Theory of Regulation, 26 GA. L. REV. 323 (1993). For an analysis of the contradictions between retributive and incapacitative purposes of capital punishment, see Patricia P. Perlmutter, Frightened into Selecting Death: The Use of Future Dangerousness in Death Penalty Cases and the Resultant Sacrifice of Individualized Sentencing (1997) (unpublished manuscript, on file with the Texas Law Review). For indications of the failure of post-Gregg statutes to achieve retributive purposes in practice, see Givelber, supra note 78, at 412-16 (arguing that the current range of aggravating circumstances provides immeasurable criteria for the imposition of capital punishment and thus does not fulfill its retributivist goals). See also Jonathan Simon & Christina Spaulding, Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties, in The Killing State: Capital Punishment in Law, Politics, and Culture 81, 83 (Austin Sarat, ed., forthcoming 1999)
This kind of retributive judgment, according to the Court, requires a “reasoned moral response” to the evidence and arguments, one unencumbered by ignorance or emotion and one supported with information sufficient and relevant for reliable rational decision-making. As Justice O’Connor wrote in her California v. Brown concurrence, “the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence.” In Franklin v. Lynaugh, Justice O’Connor stressed that full 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 Penry v. Lynaugh, 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 sentencer is to make an individualized assessment of the appropriateness of the death penalty, “evidence about the defendant’s background and character is relevant . . . .” Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a “uniquely individual human being” and has made a reliable determination that death is the appropriate sentence. “Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant’s background, character, and crime.”

(warning of the oversimplifying influence on jury deliberations of inflammatory aggravating factors, such as “drive-by shooters, car jackers, and wife abusers”).

97. Id. at 545 (O’Connor, J., concurring).
99. Id. at 184 (O’Connor, J., concurring) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).
101. Id. at 319 (quoting Brown, 479 U.S. at 545 (O’Connor, J., concurring); Woodson, 428 U.S. at 304; Brown, 479 U.S. at 545 (O’Connor, J., concurring) (emphasis in original)) (citation omitted). Consistent with jurors being able to consider all relevant information in making a reasoned moral judgment is the Court’s stand on the qualification of citizens to serve as capital jurors. See Morgan v. Illinois, 504 U.S. 719, 729 (1992) (barring a juror from service who “will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require”); Wainwright v. Witt, 469 U.S. 412, 422 (1985) (holding that a venire member should be disqualified
D. Relevance of Knowledge of the Death Penalty Alternative

Well before the Court described the capital sentencing decision as a reasoned moral response grounded in retributive standards, it warned in *Gregg* that “accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.”102 Despite this early recognition that accurate sentencing information is indispensable to jurors’ decision-making, the Court long overlooked the role of the death penalty alternative in ensuring that the capital sentencing decision will be a reasoned moral choice. It simply assumed that the existing alternatives to the death penalty in the various states were appropriate as retribution for crimes that do not merit execution,103 and that they are sufficiently understood by the sentencing authority to be reliably selected or rejected as a matter of retributive fit in making a reasoned moral judgment.

The Court has only recently considered how jurors’ failure to correctly understand the sentencing options from which they must choose may influence their punishment decisions. In *Simmons v. South Carolina*,104 the Court recognized that jurors might impose a death sentence because they underestimate the death penalty alternative, an infirmity it called a death sentence by “false choice.”105 To protect capital defendants against such a false choice, the Court ruled that they may inform their jurors of the death penalty alternative under the limited circumstances of Simmons’s case, that is, only when the defendant is alleged to be dangerous and the death penalty alternative is a sentence of LWOP.106

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103. *See Brown v. Texas*, 118 S. Ct. 355, 356 (1997) (opinion of Stevens, J., respecting denial of certiorari) (noting the drop in capital punishment sentences in states allowing for life imprisonment alternatives); *California v. Ramos*, 463 U.S. 992, 1014 (1983) (interpreting the state statute as prescribing a balancing test between sentencing alternatives to determine the appropriate punishment); *see also Gregg*, 428 U.S. at 175 (plurality opinion) (“[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity.”). In effect, this assumption collapses all alternative possibilities into a single homogeneous “life” category. It implies that the different specific alternatives which comprise this amalgam are all fully and equally appropriate as retribution, and it assumes that jurors in the respective states behave as if their particular alternatives are alike. The implication is that jurors need not have a clear or detailed understanding of what the death penalty alternative in their state actually is.
104. 512 U.S. 154 (1994) (plurality opinion).
105. *Id.* at 161 (plurality opinion).
106. *See id.* at 171 (plurality opinion) (holding that a defendant’s due process rights are violated when he is confronted with allegations of future dangerousness but is not allowed to establish his eligibility for parole). For a further discussion of the *Simmons* opinion, see infra notes 167-82 and accompanying text.
The recognition that jurors may impose a death sentence because they underestimate the available alternative further allows that jurors may do likewise if they correctly understand the alternative but regard it as retributively insufficient, because the state fails to provide the alternative they deem appropriate. This is an infirmity we may call a death sentence by "forced choice." While the Court has not addressed the availability of retributively appropriate alternatives to the death penalty, it has, in *Beck v. Alabama*, 107 recognized that the absence of an appropriate verdict option at the guilt stage of the trial creates the danger of an unwarranted death sentence. 108 By the same logic, the absence of a sentencing option that jurors deem more retributively appropriate, such as LWOP, creates the danger that they would choose death not as the retributively appropriate punishment, but as the least inappropriate of the available options.

This Article addresses these two impediments to a reasoned moral choice in capital sentencing: jurors' misunderstandings of available death penalty alternatives (false choice), and the unavailability of death penalty alternatives they deem retributively appropriate (forced choice). Although the Court has addressed false choice only under restricted conditions and forced choice only at the guilt stage of the trial, the research presented here assesses the character and extent of such flaws in broader and more fundamental terms. It examines, in particular, the possibility that these flaws undermine the retributive basis of the capital sentencing decision and impair the reasoned moral choice of death as punishment.

III. The Road to *Simmons*

If you were a juror on a capital case, wouldn't you want to know what the punishment would be if you did not vote for the death penalty? Wouldn't you want to know how soon such defendants, not given the death penalty, become eligible for parole, or how soon they usually are paroled? Wouldn't you want to know whether you and your fellow jurors could impose a sentence of life without the possibility of parole? Wouldn't you want to have that option if you were asked to decide whether a defendant

108. *See id.* at 637. The Court stated that:

when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

*Id.*

Such a risk cannot be tolerated in a case in which the defendant's life is at stake.
should live or die? Would the answers to these questions affect your sentencing decision?

Consider the answers to these questions implicit in the following exchanges between judges and jurors over the alternative to the death penalty, from two Georgia capital cases:

[NOTE TO JUDGE:] (1) “Is there life without parole? [(2)] In the three life sentences, would they run concurrently or consecutively?”
COURT: “I think I had instructed you, and I want to repeat my instructions for you that for the purposes of this case, despite all the things you read in the newspapers and everything else you hear, in this case life means life and death means death. . . . As far as the second question, . . . once again, I answer the same question, life means life and death means death.”

[SUBSEQUENT NOTE TO JUDGE:] “Under Georgia law give us a definition of life in prison. Under Georgia law is there a provision for parole to a person given a life sentence?”
COURT: “I have received the questions that you have sent out to me which are just like the questions I got just a few minutes ago. . . . There is no way that you can frame the question so I can answer it differently.”

The second case reflects similar confusion and frustration:

JURY FOREMAN: “Your Honor, a couple of the jurors want to know [if] what you said a while ago is that if we vote life imprisonment that he will serve the rest of his natural life imprisonment. [We want] to know what you meant by that?”
COURT: “I cannot answer that question. . . . Does that satisfy both of you lawyers?”
JUROR COLE: “That doesn’t satisfy me.”
COURT: “Did you understand that I just said that I have to abide by the law and I have given you all the law that I can give you in this case, ma’am?”
JUROR COLE: “May I say something, please? May I ask a question? May I state a question to the Court?”
COURT: “Wait just a minute until I can let the Foreman ask the question. Yes, sir. Do you have any other questions?”
JURY FOREMAN: “No, sir. That’s the only question.”

109. See J. Mark Lane, “Is There Life Without Parole?”: A Capital Defendant’s Right to a Meaningful Alternative Sentence, 26 Loy. L.A. L. Rev. 327, 376, 379 (1993) (excerpting trial transcripts to demonstrate that juries often choose the death penalty over life because they believe that life with possibility of parole is an inadequate alternative).
110. Id. at 379 (second alteration in original) (omission in original) (quoting the Record at 1313-22, State v. Hall, No. S91P-0865, aff’d, 415 S.E.2d 158 (Ga. 1991)).
COURT: “All right. Now, what did you want to ask?”
JUROR COLE: “I would like for you to state, please, my question is, will you state to this Court that as—”
COURT: “I am the Court.”
JUROR COLE: “[T]hat as jurors we are not allowed to know the law of the State of Georgia on paroles in cases of murder? I am not asking you, sir, to tell us anything about what will be done in the case of Mr. Davis. We do not desire to know what is going to be done in the case of Mr. Davis. We're asking a point of law in any murder case. Mr. Davis may go to prison and never be paroled.”
COURT: “Wait just a minute. Wait just a minute.”
JUROR COLE: “What is the law in the state of Georgia?”
COURT: “Will you wait just a minute. Don’t talk when I start talking.”
JUROR COLE: “I’m sorry sir, but I thought I was still talking when you started talking.”
COURT: “All right. Now let me instruct you one more time. . . . I cannot comment on the question . . . .”

Such exchanges are not rare. The trial transcripts of the 280 death cases reviewed by the Georgia Supreme Court between 1973 and 1990 reveal that during their sentencing deliberations juries asked the judge questions about parole in 70, or 25%, of these cases. After hearing the judge’s response, the jury typically returns with a death sentence in short order. This suggests that parole concerns may often be the critical, last issue upon which a decision for life or death depends.

111. Id. at 376 (second alteration in original) (omission in original) (quoting the Trial Court Transcript at 1790-92, State v. Davis, No. 42697, aff’d, 340 S.E.2d 869 (Ga. 1986)).
112. See id. at 335-36.
113. See id. at 337 n.52. Although Lane was unable to obtain the elapsed time between the communication with the trial judge and the jury’s final sentencing decision in most cases, in 7 of the 8 cases where such information was available, the jurors returned with a death verdict in 15 to 40 minutes. See id.
114. See id. at 341-42. Lane observes that one capital jury “became so frustrated that it attempted to create its own alternative, entirely outside the statutory framework.” Id. at 341. Describing that exchange, Lane relays:

[T]he jury first sent the judge two questions: “Can we give the sentence of life without chance of parole? If no, when will the defendant be eligible for parole?” The judge replied that he was “not permitted to answer either of these two questions.” The jury, after deliberating further, reported that it had reached a unanimous verdict and returned the following: “We recommend mercy or that defendant’s punishment be life imprisonment with the stipulation that it be life imprisonment without parole.” The trial judge, however, refused to accept the jury’s sentence of life without parole, correctly observing that such a sentence simply does not exist in Georgia. The jury was instead sent back with the instruction to “continue your deliberations.” At that point, frustrated in its attempt to obtain information about parole, and frustrated in its attempt to render a sentence that would ensure the defendant’s permanent incarceration, the jury imposed the death penalty.
These Georgia jurors are quite evidently troubled at not being told what the death penalty alternative actually is and thus not knowing whether the punishment they deem appropriate is available. What is worse is that the absence of such information apparently leads them to vote for death by default. Shouldn’t they be fully and accurately informed of the punishments from which they must choose in order for them to make a reliable, reasoned moral choice as constitutionally required in capital cases?\textsuperscript{116}

A. Refusing to Inform Capital Jurors About Parole

Prior to the middle of this century, state appellate courts routinely allowed information and arguments about the nature of a life sentence to be presented to capital juries. They treated parole-related arguments by prosecutors and instructions by trial judges as appropriate, acceptable, or at least, harmless. In 1916, for example, the Georgia Supreme Court found it “not improper to allow counsel to refer to the possibility of the accused, at some future time, being pardoned by the Governor.”\textsuperscript{117} The California Supreme Court held in 1931 that a district attorney’s argument that defense counsel “would want you to turn this man to the penitentiary under a life sentence when it is common knowledge that he would be out on the streets again”\textsuperscript{118} did not constitute “reversible error, for it is a matter of common knowledge that a parole may be granted to a defendant serving a term of life imprisonment.”\textsuperscript{119} The court did caution that “expressions of this kind by overzealous prosecuting officers should, however, be avoided, for they are unnecessary and under a different state of facts might be serious error.”\textsuperscript{120}

The tide began to turn against telling capital jurors about parole in the late 1940s. In 1948, the Georgia Supreme Court held in Thompson v. State\textsuperscript{121} that judges could not give instructions in capital cases that

\textit{Id.} at 341-42 (quoting Westbrook v. State, 353 S.E.2d 504, 506 (Ga. 1987), overruled by State v. Freeman, 444 S.E.2d 80 (Ga. 1994)) (citations omitted). The Westbrook case. Lane notes, “dramatically illustrates that parole was not merely ‘an issue,’ but was the \textit{decisive} issue in the jury’s decision to sentence Westbrook to death.” \textit{Id.} at 342 (quoting Westbrook, 353 S.E.2d at 506) (emphasis in original).

\textsuperscript{115} See infra Part IV.

\textsuperscript{116} For a discussion of the essential place of reasoned moral choice in capital sentencing, see \textit{supra} subpart II(C). On the constitutional premium on rationality and reliability in sentencing, see Lewis v. Jeffers, 497 U.S. 764, 776 (1990) (“A constant theme of our cases. . . . has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner.” (quoting Barclay v. Florida, 463 U.S. 939, 960 (1983) (Stevens, J., concurring))).

\textsuperscript{117} Lucas v. State, 91 S.E. 72, 77 (Ga. 1916).

\textsuperscript{118} People v. La Verne, 297 P. 561, 562 (Cal. 1931) (quoting the district attorney’s argument).

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} 47 S.E.2d 54 (Ga. 1948).
implied the defendant might get out on parole.122 Three years later, in *Commonwealth v. Johnson*,123 the Pennsylvania Supreme Court sought to alleviate the prejudice of parole considerations in capital cases by instructing the jury not to consider parole, pardon, commutation, or the possibility of release.124 Similarly, in 1954 the Kentucky Supreme Court held that the jury must not consider parole because this “infringes upon the

122. See id. at 57. The Georgia Supreme Court recounted the following exchange between the judge and a juror when the jury returned to the courtroom for a third time during sentencing deliberations:

"[THE COURT]: All right, gentlemen, what can we do for you?"

"[A JUROR]: There is one question that we would like to ask. If we may: when is a man eligible for parole or pardon serving a life sentence?"

"[THE COURT]: I don’t know. Those things are regulated by rules and regulations formulated and promulgated by the Pardon and Parole Board. As to the matter that you inquire about, that is something that the Parole Board can change the rules about as often as they desire to do so, and just what the rule is at this particular time, I do not recall. If they had a rule today, and I were to tell you what it is, there would be no reason in the world why that would be the same next week, next month, or next year."

*Id.* at 55.

The Georgia Supreme Court commented, “had it been the purpose of the trial judge to deny to the defendant a recommendation of mercy, language could not have been selected to deny more effectively this substantial right to the defendant.” *Id.* at 56-57. The Court then held “[t]he instruction given was prejudicial and operated as an illegal influence against a recommendation to mercy by the jury, and a new trial must be granted.” *Id.* at 57.

123. 81 A.2d 569 (Pa. 1951).

124. See id. at 572-73. In the following exchange, the judge told the jury that the Board of Pardons could pardon anyone or parole any sentence:

[JUROR NOTE]: “What does the sentence life imprisonment mean? Does it mean what it infers or is there the possibility of a pardon after serving part of his time?” . . .

[THE COURT]: “[L]ife imprisonment means what it says . . . However, the Board of Pardons of the State of Pennsylvania, constituted under the law, has a right to intervene at any time. That is something that we cannot control. It is a separate and distinct organization from the court and in it is vested the power to pardon any of those who are convicted and sentenced by the court . . . I have no means of knowing, and cannot control, what the Board of Pardons may do. As far as the sentence of life imprisonment is concerned, it means that, subject to whatever the Board of Pardons may do in the years that are to come . . . I add to what I have already stated that the Board of Pardons has a right to commute a sentence. Instead of granting a full and complete pardon they can commute the sentence to a certain number of years. That is within their power.”

*Id.* at 572.

The Pennsylvania Supreme Court commented:

It is obvious that the jury hesitated at fixing the penalty at life imprisonment because they feared that the defendant might be pardoned at some future time by the Board of Pardons, and when the court told them that that might happen and was something beyond the control of the court they decided, after further deliberation, upon the penalty of death. The statement made by the learned trial judge, although true, of course, in fact, was highly prejudicial to the defendant.

*Id.* at 573. Thus, the court held:

whether the defendant might at any future time be pardoned or have his sentence commuted is no concern of theirs and should not enter in any manner whatsoever into their consideration of the proper penalty to be imposed, which should be determined solely in the light of the relevant facts and circumstances as they then existed.

*Id.*
prerogatives of other departments of government.” In 1955 Georgia became the first state to bar jury consideration of parole or pardon by statute; its statute provides that “the jury should not be influenced in a criminal [either capital or noncapital] case in the rendition of their verdict by a consideration of the fact that the penalty imposed by them might be commuted by the State Board of Pardons and Paroles.” In 1958, the New Jersey Supreme Court held that the capital jury should not be informed, or consider the issue, of parole on grounds similar to those of the Kentucky Supreme Court. Bucking this trend, in 1959 the California Supreme Court reasoned in *People v. Purvis* that court instruction to the jury regarding the nature of life imprisonment was needed “to assist [the jury] in assessing the significance of a life sentence.” But eight years later, in *People v. Morse*, California joined the movement against informing jurors about parole.

State courts have rationalized their decisions keeping such information and arguments from the jury in various ways, most notably citing the “separation of powers” doctrine, the likely arbitrariness of unreliable decisions, and the potential for undue influence by parole board.”

125. See Broyles v. Commonwealth. 267 S.W.2d 73, 76 (Ky. 1954).


127. See State v. White. 142 A.2d 65, 76 (N.J. 1958) (stating that the legislature intended juries to determine the punishment and another agency to handle parole issues).


129. Id. at 31. Trial judges were to instruct the jury as follows: Every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury. . . . In this determination you will consider all of the evidence of the circumstances surrounding the crime, of the defendant’s background and history and of any facts in aggravation or mitigation of the penalty which have been presented to you here in court [weighing and considering the evidence under the applicable rules of law which are given to you in the court’s instructions in this case].

130. See infra notes 316-23 and accompanying text.


132. The commonly cited separation of powers doctrine generally has held that the judicial authority’s decision was confined to a choice between a life and a death sentence, and that any consideration of the defendant’s parole was an executive responsibility that had no bearing on the judicial function of jury decision-making. The Broyles court in Kentucky explained this concept well: Under our theory of separation of governmental powers, it is the duty of the judiciary to obtain a conviction of those guilty of crime. But once that conviction has been obtained and the sentence imposed, it is the duty of other departments of government to enforce the sentence and to determine when and under what circumstances the prisoner will be eligible for release. Therefore, when the judiciary attempts to anticipate the rules of the legislative and executive departments relating to the parole of prisoners, and attempts, in
speculation, and legislative intent. These prohibitions against informing jurors about parole were generally taken as an affirmative protection for capital defendants. Indeed, they may have contributed
effect, to circumvent those rules it infringes upon the prerogatives of other departments of government. Broyes v. Commonwealth, 267 S.W.2d 73, 76 (Ky. 1954).

133. The argument here is that information about the possibility, likelihood, or timing of parole introduces elements of uncertainty and unpredictability that tend to infect the jury's sentencing decision with unreliable speculation. See Morse, 388 P.2d at 40-41. Opining that assessing parole questions would be an impossible task for the jury, the court explained that [t]he vice of placing such issues before the jury reaches deeper than the promulgation of confusion; it frames questions that no human mind can answer, and it, in substance, transposes the task of the Adult Authority to the jury.

The questions are unanswerable because they rest upon future events which are unpredictable. The jury's attention may be focused, as it was here, upon whether the Authority will release the defendant into society at some uncertain date in the future, such as "eight, nine, ten years from now." Based upon what defendant may then be, the jury is asked whether it thinks defendant should at that time be released to society. Premised upon the unknown, the question asks for an answer that cannot be intelligently rendered. The jury is precipitated into a judgment upon the imponderable.

Id. (emphasis in original).

134. The argument from legislative intent holds that lawmakers would authorize the consideration of parole if they wanted the jury to take parole into account, and that not authorizing parole consideration is aimed at keeping jurors from being tempted to impose death when it is not deserved. See, e.g., State v. White, 142 A.2d 65, 76-77 (N.J. 1958). The New Jersey Supreme Court explained as follows: That death should be inflicted when a life sentence is appropriate is an abhorrent thought. We should not attribute that purpose to the Legislature. The Legislature could not have intended that juries shall weigh the death penalty against something less than a life sentence and by that process arrive at a punishment which does not fit the facts.

Id. at 76.

135. The North Carolina Supreme Court handed down two decisions barring arguments intended to diminish the jury's sense of responsibility if the defendant's sentence was death. See State v. Hawley, 48 S.E.2d 35 (N.C. 1948); State v. Little, 45 S.E.2d 542 (N.C. 1947).

In Hawley, the North Carolina court said, "[t]he remarks of the solicitor here under consideration are calculated even more than in the Little case to prejudice unduly the defendant in the minds of the jury." Hawley, 48 S.E.2d at 36. The solicitor's remarks were as follows:

If you find the defendant guilty as charged, and the defendant is sentenced by the Presiding Judge to be executed in the manner which the statute prescribes, that does not mean that the defendant will be put to death. Before the defendant will be put to death the Supreme Court will review his trial, whether or not the defendant appeals, and the Supreme Court will seek to find some error or errors entitling the defendant to a new trial. If the Supreme Court fails to find error, the Governor, through the Commissioner of Paroles, will be urged to extend executive clemency. Petitions and letters of recommendation, recommending clemency, will be filed, and the Commissioner of Paroles, and in all probability the Governor, personally, will carefully review and consider this case and all recommendations and petitions filed in the defendant's behalf, before the defendant is executed, and I argue to you, gentlemen of the jury, that not all, but only a certain percentage, of the defendants who are convicted in North Carolina of capital felonies finally suffer the death penalty. You can see, therefore, gentlemen of the jury, that you are only a small cog in the final determination of what may happen to this defendant, even if you find him guilty, as charged in the bill of indictment.

Id. at 35-36.

The fact that solicitors' representations of the death penalty were the focus of concern in North Carolina rather than the death penalty alternative, as in Georgia and Pennsylvania, may well reflect the
to the downturn in the pace of executions that occurred during this period.136

B. Challenging the Refusal to Inform

In the mid-1980s, capital defendants began to challenge the refusal to inform jurors about parole, claiming that their jurors had substantially underestimated how long they would spend in prison if not given the death penalty, and that this misperception made their jurors more likely to impose the death penalty, notwithstanding instructions to disregard parole. Empirical data supporting these claims were used in litigation in Georgia, Mississippi, and Virginia.

In the 1986 Georgia case of Pope v. State,137 interviews were conducted with forty members of the defendant's venire.138 Most thought

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136. The national downturn in executions after World War II came first and foremost in Georgia following the Thompson ruling and in North Carolina after the Little and Hawley rulings. See WILLIAM J. BOWERS, LEGAL HOMICIDE app. A (1984) (documenting the incidence of executions by state and date); id. at 30 tbls.1-6 (providing numbers in five-year intervals for the ten states responsible for the most executions between 1930 and 1964). By contrast, executions continued on pace in Texas, where no such bars were adopted in this period. see id. at 30-31, and in California, where such a ban on informing jurors about parole was explicitly rejected. see People v. Purvis, 346 P.2d 22, 29-30 (Cal. 1959) (holding that juries may be informed about time actually served by first-degree murderers given a life sentence, and that despite possible changes in parole law and practice such information will still assist the jury in its sentencing determination) (citing People v. Friend, 306 P.2d 463 (Cal. 1957); People v. Green, 302 P.2d 307 (Cal. 1956); People v. Barclay, 252 P.2d 321 (Cal. 1953)). But see Morse, 388 P.2d at 43-44 (cutting back dramatically on the information given to juries about parole at the sentencing stage and voicing disapproval with the earlier cases). Of course, factors other than these early decisions barring prosecutorial allegations about early release may have produced much or all of this reduction. In North Carolina, for instance, these decisions were shortly followed by a move from mandatory to discretionary capital sentencing. See BOWERS, supra, at 88 tbls.3-10 (documenting that capital sentencing became discretionary in North Carolina in 1949).

137. 345 S.E.2d 831 (Ga. 1986).

138. See Anthony Paduano & Clive A. Stafford Smith, Deadly Errors: Juror Misconceptions Concerning Parole in the Imposition of the Death Penalty, 18 COLUM. HUM. RTS. L. REV. 211, 221-23 (1987) (reporting the result of a study conducted by defense attorneys in the course of developing their appeal, on the effect of the trial court's silence on parole eligibility). The study surveyed 40 members (31.5%) of the original venire. see id. at 221 n.30 (citing F. Codner, The Only Game in Town: Crapping Out in Capital Cases Because of Juror Misconceptions About Parole 45 n.114 (Jan. 24, 1986) (unpublished study supervised by the Southern Prisoners' Defense Committee)).
a murderer given a life sentence would be paroled in seven or fewer years (median estimate). Over two-thirds stated that they would be more likely to impose a sentence of life rather than the death penalty if they were assured that "life" meant the defendant would spend at least twenty-five years in prison. Notably, this was the exact time Pope would have to serve before becoming eligible for parole consideration.

Similar data yielding like results were gathered in connection with motions for new trials in Georgia v. Gamble and in Mississippi v. White. In both cases evidence had been excluded concerning the defendant's parole eligibility. Gamble would not have been eligible for parole for at least twenty years. White was indicted as a habitual offender, under Mississippi's LWOP statute. The survey performed in connection with the Gamble appeal sampled registered voters, and the results were almost identical to those in the Pope defense study. Specifically, the survey participants' median estimate of time served before parole on a life sentence was eight years. Exactly two-thirds of the respondents said they would be more likely to sentence the defendant to life in prison if they knew the defendant would have to spend at least twenty years in prison before becoming eligible for parole. In White, counsel for the defendant interviewed thirty-one members of the venire.

139. See id. at 221 & n.33, 222. Respondents were asked, "If a person receives a life sentence for murder, how many years on the average do you think [he] spend[s] in prison before [he is] paroled?" Id. at 221 n.31.

140. See id. at 221 n.31. The question read, "In a case where you had to choose between giving a life sentence or the death penalty, would you be more likely to give a life sentence if you knew that the person would have to serve at least 25 years in prison before [he] became eligible for parole?" Id.

141. Twenty-five years was used in the question to fit the facts of Pope's case. He had previously received a life sentence and would therefore be statutorily ineligible for parole for 25 years. See Ga. Code Ann. § 42-9-39(b) (1997).

142. See Paduano & Smith, supra note 138, at 223 n.35 (reprinting the questions used in surveys that showed that jurors' predictions of parole possibilities for life sentences reflected their perceptions of state minimum parole eligibility times).


144. Grenada County Cir. Ct. No. 5061, aff'd, 507 So. 2d 98 (Miss. 1987).


146. Although Paduano and Smith report that the random sample was comprised of registered voters eligible for jury duty, the sample size and details of the sampling procedure are not provided. See Paduano & Smith, supra note 138, at 223-24.

147. Exactly half of all estimates were 8 years or less; they comprised 54.15%, excluding the 8.3% undecided. See id. at 224 n.35 (citing the defense poll in Gamble). The wording of the question was, "If a person is sentenced to life imprisonment for murder, how long will that person have to serve in prison?" Id.

148. See id. The question read, "If you, as a juror, were informed that the person would have to spend at least twenty years in prison prior to becoming eligible for parole, would you be more or less likely to sentence him to life, or would your decision be unaffected?" Id.

149. See id. (citing the defense study in White). The interview procedure is described simply as "contacting as many people as possible from the Special Venire in the case." Id.
Almost two-thirds estimated that persons receiving a life sentence spend five to ten years in prison.\textsuperscript{150} Again, almost two-thirds said they would be more likely to impose a life sentence than the death penalty if the defendant would not be eligible for parole.\textsuperscript{151}

The Virginia data,\textsuperscript{152} referred to in \textit{Turner v. Commonwealth},\textsuperscript{153} included two hundred randomly selected residents of Prince Edward County, where the trial was held.\textsuperscript{154} Respondents believed a capital defendant sentenced to "life imprisonment" for murder during the commission of an armed robbery would be released in ten years (median estimate),\textsuperscript{155} when the minimum for release was actually twenty-one years and nine months.\textsuperscript{156} Responses to two additional questions were especially revealing: 79\% of the citizens felt knowing the length of time a capital defendant given a life sentence will actually serve would be important to them in choosing between life imprisonment and the death penalty.\textsuperscript{157} Moreover, 62\% said they would disregard a judge's

\textsuperscript{150} See \textit{id}. The question read, "If a person receives a life sentence for murder how many years on average do you think they spend in prison before they are paroled?" \textit{id}.

\textsuperscript{151} See \textit{id}. The question read, "In a case where you had to choose between giving a life sentence or the death penalty, would you be more likely to give a life sentence if you knew the person would never be eligible for parole?" \textit{id}.

\textsuperscript{152} See \textsc{national legal research group, report on jurors' attitudes concerning the death penalty} 3 (1988) [hereinafter \textsc{nlrq study}]. The \textsc{nlrq study} focused on the crime of murder in the commission of an armed robbery because the survey was conducted to aid in the application for a writ of habeas corpus filed by Willie Turner, who had been convicted of this crime. See William W. Hood, III, Note, \textit{The Meaning of "Life" for Virginia Jurors and its Effect on Reliability in Capital Sentencing}, 75 VA. L. REV. 1605, 1606-07 (1989) (arguing that the \textsc{nlrq study}, in light of Virginia's statute governing minimum sentences for capital defendants, demonstrates that Virginia's absolute prohibition of instructions on a capital defendant's parole eligibility violates the Eighth Amendment).

\textsuperscript{153} 364 S.E.2d 483 (Va. 1988).

\textsuperscript{154} The \textsc{nlrq study} randomly selected households and individuals within households and asked three filter questions to identify residents who would qualify for capital jury service. The first of these questions asked, "Are you in favor of capital punishment for murder?" The responses were: 70.0\% yes; 15.5\% no; 14.5\% undecided. \textsc{nlrq study}, supra note 152, at 1-2. The 84.5\% who said yes or undecided were then asked, "Do you believe that everyone who commits an intentional murder, no matter what the circumstances, should be sentenced to death?" Of these, 34.9\% answered yes and were eliminated from the analysis, 54.4\% said no, 7.7\% said no opinion, and 30\% did not answer. \textit{id} at 2. The 30.0\% who did not favor capital punishment or were undecided in response to the first question were then asked, "Assume you are a juror in a murder trial. Would your opinion or belief concerning the death penalty prevent or make it very difficult for you to impose the death penalty?" Of these, 61.7\% answered yes and were eliminated, 28.3\% answered no, and 10.0\% had no opinion. \textit{id}.

\textsuperscript{155} See \textit{id} at 3. The question asked, "If a person is sentenced to life imprisonment for intentional murder during an armed robbery, how many years on the average do you think that the person would actually serve before being released on parole?" \textit{id}.

\textsuperscript{156} See Hood, supra note 152, at 1606-07 (citing VA. CODE ANN. § 53.1-199 (Michie 1988) to calculate the minimum release time).

\textsuperscript{157} See \textsc{nlrq study}, supra note 152, at 7. The question asked, "Assume you are a juror deciding the appropriate sentence for someone guilty of intentional murder during an armed robbery. Do you think that the number of years the defendant might actually serve before being paroled would be an important consideration when choosing between life imprisonment and the death penalty?" \textit{id} app. at 2.
instructions not to consider parole when choosing between a life and a death sentence.158

According to these studies, then, people generally believe murderers not given a death sentence will be back on the streets in relatively few years; most said ten years or less.159 These estimates are well below the mandatory minimums for parole consideration and certainly below parole practice in these states.160 The results further indicate that potential jurors would be less likely to impose the death penalty if they thought convicted murderers would spend longer in prison before being paroled. Indeed, the Virginia study indicates that parole is so important that jurors would disregard instructions to ignore it in choosing between life and death.161 Challenges based on these and similar studies failed in state courts,162 but they set the stage for further appeals relying on more

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158. See id. at 7. The question asked:

Assume you are a juror in a trial for a murder that was committed during an armed robbery and you are deciding the sentence the defendant should receive. The judge instructs you that you are not to consider whether the defendant could be released on parole if you sentence him or her to life imprisonment. Would you still consider the length of time that the defendant might actually serve in prison when deciding whether the defendant should receive life imprisonment or the death penalty?

Id. app. at 2.

159. See id. at 8 (concluding that jurors estimate an average of 10 years imprisonment before parole for a defendant sentenced to life for intentional murder during armed robbery). See generally Paduano & Smith, supra note 138, at 211-12 (discussing the misperception held by capital jurors that “life” in prison means release in seven years).

160. In 1985, the Georgia Board of Pardons and Paroles required 15 years as the absolute minimum before parole consideration for Class I murderers (convicted of capital murder and sentenced to life). See Paduano & Smith, supra note 138, at 227 n.48 (citing Georgia State Bd. of Pardons & Paroles, Life Sentence Inmate Classification (inmate evaluation form, undated)). Offenders sentenced to life for other crimes may be paroled in seven years, but only 1% actually are and murderers are under-represented among that 1%. See Georgia State Bd. of Pardons & Paroles, Annual Report, Fiscal Year 1995, at 2 [hereinafter Georgia Parole Bd. Annual Report] (noting that only 12 inmates in the entire Georgia penal system were paroled in 7 years during fiscal year 1995). In Virginia, the minimum for capital murder is 25 years with a possible 3 years and 3 months’ sentence reduction for good conduct. See Hood, supra note 152, at 1606-07 (comparing typical Virginia jurors’ understanding of “life” with real minimum sentencing guidelines): infra note 198 (reviewing sentencing guidelines for capital cases in Virginia and a range of other jurisdictions).

161. There are obvious shortcomings in this data. The samples of venire persons interviewed for the Pope and White investigations are relatively small (40 and 31, respectively). Beyond the statement that the Gamble interviews were conducted with “a random sample of all registered voters eligible for jury service,” Paduano & Smith, supra note 138, at 223 n.35, details of sampling procedures and size are unreported. Only for the Turner survey was there a clear indication of filtering for death qualification and of sample selection and size adequate for evaluating the reliability of reported statistical findings. Despite uncertainties about the reliability of most of these investigations considered individually, the magnitude of the reported differences and the substantial consistency and convergence of the findings from all four of these investigations weighs in favor of the conclusion that prospective capital jurors substantially underestimate the alternative to the death penalty in their states.

162. For example, the courts have foreclosed the use of voir dire questioning as a way of identifying and challenging prospective jurors’ misconceptions about the availability and use of parole for capital defendants not sentenced to death. In King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988), the court rejected the claim that prospective capital jurors should be questioned regarding issues of parole
rigorous research. One appeal that incorporated research on the beliefs of citizens in general and of persons who served as capital jurors made its way to the Supreme Court in \textit{Simmons v. South Carolina}.

Until recently, the Court has avoided deciding what capital jurors can or should be told about parole or other post-conviction procedures that might affect the defendant's chances of returning to society, thus leaving this matter wholly to state legislatures. When the Court first turned to this issue in \textit{California v. Ramos}, it found no federal constitutional bar to informing jurors of the governor's power to commute a sentence of LWOP to one that permitted parole. In \textit{Ramos}, it upheld the constitutionality of California's so-called "Briggs Instruction," which required that California capital jurors be informed that an LWOP sentence could be commuted by the governor to a lesser sentence for which parole might then be available.

Thus, the Court held that the Constitution did not prevent the states from telling jurors about parole, however remote it was as a

\textit{...}
possibility, though states might continue to prohibit such disclosures, as most have done over the past several decades.166

C. A Limited Right to Have the Jury Informed About Parole

The Supreme Court returned to this issue a decade later in Simmons v. South Carolina167 with more favorable results for capital defendants. Here, for the first time, the Court held that such defendants had a constitutional right to have their juries accurately informed of their state’s death penalty alternative if: (1) the prosecution alleged that the defendant would be dangerous in the future as an aggravating consideration in sentencing; and (2) the alternative punishment would be a life sentence without the possibility of parole.168 Despite these restrictions on its application, this decision represents a critical recognition among a majority of the Supreme Court Justices that capital sentencing may be unreliable when jurors are not fully or adequately informed of the sentencing options.

At the heart of Simmons is the recognition that many capital jurors may fail to understand the alternative to the death penalty. For Simmons, the alternative was a life sentence without the possibility of parole,169 but the trial judge refused to have this made clear to the jurors.170 Writing

166. See Ramos, 463 U.S. at 1013 n.30, 1013-14.
167. 512 U.S. 154 (1994) (plurality opinion).
168. Id. at 171 (plurality opinion).
169. Id. at 156, 160 (plurality opinion). The week before his capital murder trial was to begin, Simmons pled guilty to first-degree burglary and two counts of criminal sexual conduct in connection with two unrelated assaults which occurred August 2, 1989 and June 15, 1990. See Joint Appendix at 59-60, Simmons (No. 92-9059). Under South Carolina law, these prior convictions for three violent offenses rendered him ineligible for parole consideration in any sentence imposed for any subsequent conviction for a violent offense—including the murder for which he was charged. See S.C. CODE ANN. § 24-21-640 (Law Co-op. Supp. 1997); see also State v. Torrence, 406 S.E.2d 315, 320 (S.C. 1991) (applying S.C. CODE ANN. 24-21-640 to a defendant accused of murder who was already serving a life sentence for a previous, unrelated murder conviction).
170. See Simmons, 512 U.S. at 156-60 (plurality opinion) (reporting that the trial judge relied upon the South Carolina Supreme Court’s opinion in Torrence, 406 S.E.2d at 315, in refusing to clarify the defendant’s eligibility for parole to the jurors). From the very start of Simmons’ trial, the prosecutor recognized the critical significance of the defendant’s parole ineligibility in the determination of the sentence. Indeed, at the beginning of jury selection, he advised the trial judge that the state was going to ask for any discussion of parole to be excluded from the trial. Simmons, 512 U.S. at 156 (plurality opinion). The prosecutor then obtained an order prohibiting the defense from asking prospective jurors any voir dire questions regarding the entire subject of parole. See Brief for Petitioner at 7, Simmons (No. 92-9059). As a result of this ruling, defense counsel were not permitted to question prospective jurors as to whether they harbored fixed preconceptions about parole eligibility and the actual meaning of a “life” sentence under South Carolina law, nor whether they could disregard any such preconceptions and be guided instead only by the instructions of the court. Brief for Petitioner at 7-8, Simmons (No. 92-9059). Furthermore, the trial judge advised the prospective jurors in his introductory remarks that death meant electrocution. Simmons, 512 U.S. at 157 n.1 (plurality opinion). However, at no point during the trial did the judge (or anyone else) inform the jury that in this case “life imprisonment” would mean imprisonment for life without possibility of parole. Id. at 156-60 (plurality opinion).
for the plurality, Justice Blackmun joined by Justices Stevens, Souter, and Ginsburg, observed that Simmons’s jurors were likely to be mistaken about the alternative in this case,\(^1\) and thus might reasonably believe Simmons could be paroled if not given the death penalty. The plurality reasoned that this misunderstanding had “the effect of creating a false choice between sentencing [him] to death and sentencing him to [what jurors wrongly believed would be] a limited period of incarceration.”\(^2\)

The Court rested its constitutional objection to jurors not being informed of the death penalty alternative on the crucial role of the defendant’s alleged future dangerousness as a factor in the jurors’ sentencing decision.\(^3\) The Court further explained that future dangerousness is commonly alleged by South Carolina prosecutors\(^4\) and prominently

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171. See Simmons, 512 U.S. at 169 (plurality opinion) (“It can hardly be questioned that most juries lack accurate information about the precise meaning of ‘life imprisonment’ as defined by the States. For much of our country’s history, parole was a mainstay of state and federal sentencing regimes . . . .”).

172. Id. at 162 (plurality opinion). In support of the petitioner’s argument that his jurors were unlikely to believe he would spend the rest of his life in prison if not sentenced to death, Justice Blackmun relied upon the findings of a statewide public opinion survey conducted by the Institute for Public Affairs of the University of South Carolina and offered as evidence by Simmons:

> The survey had been conducted a few days before petitioner’s trial, and showed that only 7.1 percent of all jury-eligible adults who were questioned firmly believed that an inmate sentenced to life imprisonment in South Carolina actually would be required to spend the rest of his life in prison. Almost half of those surveyed believed that a convicted murderer might be paroled within 20 years; nearly three-quarters thought that release certainly would occur in less than 30 years. More than 75 percent of those surveyed indicated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer actually would have to spend in prison would be an “extremely important” or a “very important” factor in choosing between life and death.

Id. at 159 (plurality opinion) (citations omitted).

173. See id. at 171 (plurality opinion) (“Because petitioner’s future dangerousness was at issue, he was entitled to inform the jury of his parole ineligibility.”). Emphasizing the fundamental role of likely future dangerousness, Justice Blackmun also noted that “[t]his Court has approved the jury’s consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant’s future dangerousness bears on all sentencing determinations made in our criminal justice system.” \(^5\) Id. at 162 (plurality opinion) (citations omitted). He further explained the role of future dangerousness in the state’s sentencing scheme, clarifying that “[a]lthough South Carolina statutes do not mandate consideration of the defendant’s future dangerousness in capital sentencing, the State’s evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances.” \(^6\) Id. (plurality opinion); see also Barclay v. Florida, 463 U.S. 939, 948-51 (1983) (plurality opinion) (holding that considering aggravating circumstances not listed in the relevant Florida statute was not “so unprincipled or arbitrary as to somehow violate the United States Constitution”); California v. Ramos, 463 U.S. 992, 1008 (1983) (“Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.”).

174. Justice Blackmun described this practice as follows:

> [P]rosecutors in South Carolina, like those in other States that impose the death penalty, frequently emphasize a defendant’s future dangerousness in their evidence and argument at the sentencing phase: they urge the jury to sentence the defendant to death so that he will not be a danger to the public if released from prison.

Simmons, 512 U.S. at 163 (plurality opinion) (citation omitted).
considered in sentencing by South Carolina capital jurors. The plurality emphasized how underestimating the alternative may lead to a vote for the death penalty: "In assessing future dangerousness, the actual duration of the defendant’s prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not."  

Concurring in the judgment, Justice O’Connor, joined by Chief Justice Rehnquist and Justice Kennedy, conceded that Simmons’s jurors may not have understood the death penalty alternative, owing to the history of parole availability. She acknowledged the Court’s general deference to states’ decisions regarding what the jury should and should not be told about sentencing. In light of jurors’ evident ignorance about parole, however, she argued that due process requires that the defendant be allowed to inform the jury of his parole ineligibility when “the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.” She reasoned, “When the State seeks to show the defendant’s future dangerousness . . . the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State’s case.”

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175. See id. (citing Eisenberg & Wells, supra note 20, at 4). On the basis of interviews with 114 South Carolina capital jurors, Eisenberg and Wells established that future dangerousness was prominent in jurors’ sentencing considerations, and that it was related to the likelihood that the jury would impose a death sentence. See Eisenberg & Wells, supra note 20, at 3-7. They report:  

[Ol]ever three-quarters of the jurors believe that the evidence in their case established that the defendant would be dangerous in the future. And the more the jurors agree on this fact, the more likely they are to impose a death sentence. An average of ninety-five percent of the jurors in death sentence cases believe the evidence established future dangerousness compared with an average of seventy-four percent of jurors in life sentence cases.  

Id. at 7. These findings are drawn from the South Carolina component of the Capital Jury Project (CJP). For a description of the CJP’s overall function and research, see infra notes 185-91, 270.  

176. Simmons, 512 U.S. at 163 (plurality opinion).  

177. Justice O’Connor described the possible reasons for the misunderstanding:  
The rejection of parole by many States (and the Federal Government) is a recent development that displaces the longstanding practice of parole availability, and common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole. While it may come to pass that the “plain and ordinary meaning” of a life sentence is life without parole, that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison.  

Id. at 177-78 (O’Connor, J., concurring) (citation omitted).  

178. See id. at 176 (O’Connor, J.; concurring).  

179. Id. at 177 (O’Connor, J., concurring).  

180. See id. at 177 (O’Connor, J., concurring).
This common ground did not, however, reflect consensus on the constitutional question. Justice Souter, joined by Justice Stevens in a separate concurring opinion, advanced a less restrictive constitutional interpretation of the defendant’s right to have his jurors know what the death penalty alternative actually is, eschewing the requirements that the defendant be alleged dangerous and that the sentencing alternative be LWOP.\(^{181}\) In all capital cases, he argued, the Eighth Amendment makes accurate sentencing information “an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.”\(^{182}\)

Justice Souter’s concurrence in *Simmons* and Justice Stevens’s subsequent commentary in *Brown* set the constitutional and empirical stage for the present inquiry. Justice Souter eschews the limitations imposed by *Simmons* on informing capital jurors about the death penalty alternative. Justice Stevens observes that “poll data from various [s]tates support the conclusion that full information would have an impact on jurors’ decision-making,”\(^{183}\) and calls for “further study” of the issue.\(^{184}\) He asks, in effect, for more convincing empirical evidence on whether the false choice identified in *Simmons* is a broader problem, that is, whether it is also present when the punishment alternative is a life sentence with parole.

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181. *See id.* at 172 (Souter, J., concurring).

182. *Id.* (Souter, J., concurring). He outlines the broader constitutional context of his argument as follows:

I write separately because I believe an additional, related principle also compels today’s decision, regardless of whether future dangerousness is an issue at sentencing.

The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed.

The Court has explained that the Amendment imposes a heightened standard for “reliability in the determination that death is the appropriate punishment in a specific case.”


Souter continues:

That same need for heightened reliability also mandates recognition of a capital defendant’s right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives. Thus, whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having “arbitrarily or discriminatorily” and “wantonly and . . . freakishly imposed.”

*Simmons* 512 U.S. at 172-73 (Souter, J., concurring) (quoting Furman v. Georgia, 408 U.S. 238, 249 (1972) (Douglas, J., concurring) and *id.* at 310 (Stewart, J., concurring)).


184. *Id.* at 357 (opinion of Stevens, J., respecting denial of certiorari).
eligibility, and whether in such cases it makes capital jurors more likely to impose a death sentence. We now turn to these related empirical questions.

IV. Punishment Decisions and Jurors’ Estimates of the Alternative to Death

A. The Research Methodology

This Part now shifts to the empirical examination of what capital jurors actually believe about the alternative to the death penalty and what effect their beliefs have on their exercise of capital sentencing discretion. The data for this investigation is drawn from the Capital Jury Project (CJP), a national study of capital jurors’ sentencing decisions in fifteen states.\textsuperscript{185} Capital jurors have been selected for interviews in a three-stage sampling procedure: (1) fifteen states have been chosen to reflect the principal variations in guided discretion capital statutes;\textsuperscript{186} (2) within each state, twenty to thirty full capital trials\textsuperscript{187} conducted since 1987 have been selected to represent both life and death sentencing outcomes;\textsuperscript{188} and (3)

\begin{flushleft}
\textsuperscript{185} The CJP is organized as a consortium of university-based investigators—chiefly criminologists, social psychologists, and law faculty members—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. For comparison across states, the research is based on a common core of data collected from the participating states. State-specific data is used to address particular issues of interest in the respective states. Lengthy, in-person interviews with capital jurors are the chief source of data for this research. The investigators cooperatively developed a core juror interview instrument. They enhanced the use 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. 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 are guaranteed confidentiality.

The preparation of the interview data for state-level and project-wide analyses is carried out at the College of Criminal Justice, Northeastern University. This research began in 1990 with funding from the Law and Social Sciences Program of the National Science Foundation, grant NSF SES-9013252.

\textsuperscript{186} Eight states were initially selected to represent the principal forms of post-\textit{Furman} capital statutes, namely threshold, balancing, and directed statutes. \textit{See supra} notes 34-43 and accompanying text. States were also chosen to represent “traditional” and “narrowing” definitions of capital murder. \textit{See} Gillers, \textit{supra} note 34, at 16-19 (contrasting the different types of early post-\textit{Furman} capital statutes); \textit{supra} notes 34-43 and accompanying text. States were subsequently added to the study to enhance the representation of various statutory forms and to incorporate further distinctions between statutes, by which some states make jury sentencing decisions binding and others permit the judge to override the jury’s decision. \textit{See supra} note 44 and accompanying text; \textit{see also} Bowers, \textit{supra} note 5, at 1078-79 (describing further the sentencing schemes of the states sampled).

\textsuperscript{187} “Full capital trials” means trials with completed guilt and penalty stages 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.

\textsuperscript{188} The sampling plan for each state called for an equal representation of trials that ended in jury life and death decisions to maximize the potential for comparing and contrasting jurors within the same
for each trial a target sample of four jurors has been systematically selected for three-to-four-hour personal interviews. 189

The interviews are designed to chronicle the jurors’ experiences and thought processes over the course of the trial, identify points at which various influences may come into play, and reveal the ways in which jurors reach their sentencing decisions. 190 Jurors are asked structured questions with designated response options as well as open-ended questions seeking detailed narrative accounts of their experiences as capital jurors. 191 The findings presented below are based on interviews completed to date, with 916 jurors from 257 capital trials in 11 states. 192 These are states in which at least forty interviews have been completed with jurors from a minimum of ten different capital trials. 193

states. Throughout this Part, these are referred to as “life cases” and “death cases,” respectively. Investigators used various strategies to stratify and balance the representation of life and death cases in terms, for example, of regions within a state, and of urban and rural locations. See Bowers, supra note 5, at 1079, 1080 nn.200-03 (describing several sampling techniques used, such as a “strategy of matching pairs of life and death cases on independent variables” and “random sampling within categories of city size”). In three states, moreover, the selection of cases was not state wide. In California, Florida, and Texas, the original study design called for geographically restricted samples, owing to the large number of capital trials in each and the impracticalities of covering these entire states. See id. at 1080. In Kentucky, two death cases prior to 1988 were sampled to achieve a balance of life and death outcomes. See Marla Sandys, Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Limus Test for Sentencing Guidelines, 70 IND. L.J. 1183, 1189 (1995) (discussing the Kentucky component of the CJP); See generally Bowers, supra note 5, at 1080 (describing the sampling strategy within all CJP states).

189. See Bowers, supra note 5, at 1081 (explaining the juror interviewing process). Investigators exercised the discretion to conduct additional interviews in cases in which the initial interviews raised questions that further interviews might help to resolve. See id. In two states (Kentucky and Virginia), samples of more than four jurors were drawn from cases in which the minimum sample of trials with life or death outcomes could not be met within the initial time frame for data collection. See id. at 1079 n.198. 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 the unwillingness of some jurors to be interviewed. See id. at 1081 n.205, 1084 & n.211.

190. See id. at 1082.


192. These 11 states (listed in Table 1) were responsible for 64.3% of the 3269 persons on death row in the summer of 1997, and for 74.7% of the 403 who were executed between 1977 and the summer of 1997. See NAACP LEGAL DEFENSE AND EDUC. FUND, DEATH ROW, U.S.A. 1037-83 (1997).

193. See Bowers, supra note 5, at 1078-79. Interviews have also been conducted with capital jurors in Indiana, Louisiana, New Jersey, and Tennessee. They are excluded from this analysis, however, because at this time fewer than 40 jurors or fewer than 10 trials are represented in each of these states.
B. Jurors' Perceptions of the Death Penalty Alternative

The analysis in this Part draws on jurors' responses to the structured questions about their perceptions of the death penalty alternative and about their stands at various points during the trial on the appropriate punishment. The analysis establishes the nature and extent of their misperceptions of the death penalty alternative and assesses the effects of these misperceptions on their punishment decision-making. Part V then turns to the dynamics of capital sentencing as revealed through jurors' narrative accounts of their experience in making the life or death decision. These narrative accounts provide a case-focused perspective on the influence of jurors' misperceptions of the death penalty alternative—both in the give and take of deliberations and in ultimate decisions.

1. Estimates of the Death Penalty Alternative Among Capital Jurors.—How long capital offenders not given the death penalty actually spend in prison is not a matter of public record in most states.\(^{194}\) It might not be surprising, therefore, to find that jurors who are typically not informed on this matter by trial judges will usually be mistaken about the reality of their state's death penalty alternative. Research on public perceptions of criminal punishment shows that people generally underestimate how long offenders actually spend in prison for their crimes.\(^{195}\) Consistent with this finding, the CJP data shows that capital

194. Prompted by the findings reported below, the present authors undertook a survey of state parole boards to determine their parole practices with respect to persons convicted of capital murder but not sentenced to death, and to learn the extent of their record keeping and reporting of parole practice in such cases. See Benjamin D. Steiner, Laura Biringer, & William J. Bowers, The Parole of Capital, First Degree, and Second Degree Murderers: A Survey of State Parole Boards (November 18, 1998) (manuscript on file with the Texas Law Review). Survey responses for 46 states show that information on the parole of capital murderers not sentenced to death is virtually unavailable to the public. See id. at 9. Of 25 responding states which permit parole in such cases, only one state reports statistics on the parole of such prisoners. See id. at 9 tbl.3.

The record keeping systems of 9 out of 10 parole boards contain information on each applicant's time served before parole application and number of previous denials of parole. See id. at 7 tbl.2. Only about one-third of the state parole boards do, however, publish such statistics on the parole of prisoners incarcerated for murder, and roughly half of these reports treat murder as a single undifferentiated category. See id at 9 tbl. 3. Of the parole boards that do distinguish among degrees or levels of murder, the parole of first degree murderers is reported by less than 2 in 10 boards, the parole of second degree murderers by less than 1 in 10, and the parole of capital murderers not sentenced to death by only one of the responding parole boards. See id. Hence, the publicly available information on parole for murder buries the treatment of prisoners convicted of capital murder but not sentenced to death within broader categories of murderers considered for parole. On the basis of the meager information parole boards were able to provide from their record keeping systems on the parole of capital murderers not sentenced to death, first degree murderers and second degree murderers, it seems quite clear that the publicly available data on the parole of murderers grossly underrepresents the time usually served by capital offenders not sentenced to death. See id. at 5 tbl.1.

195. See Bowers, supra note 10, at 170 tbl.6 (showing jurors' estimates of how long capital murderers not sentenced to death usually spend in prison based on CJP data from California, Florida,
jurors believe murderers are back on the streets “far too soon.” Thus, 4 out of 5 CJP jurors (81.2%) agree with the statement that “persons sentenced to prison for murder in this state are back on the street far too soon”; more than one-half (54.6%) agree “strongly” with this view.  

To learn specifically what capital jurors think the alternative to the death penalty in their respective states actually is, they were asked, “How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?” Jurors’ estimates of the death penalty alternative are shown by state in Table 1. For each state, the table shows jurors’ median estimate of how long (in years) murderers not given the death penalty usually serve before parole or release, as well as the actual mandatory minimum sentence that must be served before a capital murderer not given the death penalty becomes eligible for parole.


196. The full distribution of jurors’ responses to the statement, “Persons sentenced to prison for murder in this state are back on the streets far too soon,” were: 54.0% agreed strongly; 16.9% agreed moderately; 9.4% agreed slightly; 1.8% disagreed slightly; 3.1% disagreed moderately; 2.8% disagreed strongly; and 11.9% were not sure. These percentages are based on 892 jurors, excluding the 24 who did not answer this question. For the distribution of responses to this question by state, see Steiner, Bowers & Sarat, supra note 195, at 22 tbl.2.

197. The medians are determined excluding “no answers” and “life” responses that do not also explicitly indicate the absence of parole. Of the 98 jurors who gave “life” responses, 37 specifically included words indicating the absence of parole, such as “without parole” or “rest of life in prison.” The remaining 61 life responses are indeterminate with respect to the availability or timing of parole.

198. Four states—Alabama, California, Missouri, and Pennsylvania—had LWOP as the only alternative to the death penalty during the sample period. See Ala. CODE § 13A-5-46(e) (1982); Cal. PENAL CODE § 190.3 (West 1988); Mo. REV. STAT. § 565.030.4 (1993); 61 Pa. CONS. STAT. ANN. § 331.21 (West 1964). South Carolina permitted parole after 30 years. See S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1990). The Florida and Virginia statutes allowed parole only after 25 years. See Fla. STAT. ANN. § 775.082(1) (West 1976); Va. CODE ANN. § 53.1-151(c) (Michie 1998). However, an analysis of Virginia parole policy as applied to capital murderers not sentenced to death indicates that such offenders can become eligible for parole after 21.75 years with “good” time. See Hood, supra note 152, at 1605. The North Carolina and Texas statutes allowed parole only after 20 years. See N.C. GEN. STAT. § 15A-1371(a)(1) (1988); Tex. CODE CRIM. PROC. ANN. Art. 42.18 § 8 (West 1979). Kentucky gave capital jurors 3 alternative sentencing options: a life sentence with parole eligibility in 12 years, a life sentence without parole for 25 years, or a prison term of any length, one-half of which must be served before eligible for parole. See Ky. REV. STAT. ANN. §§ 439.3401(2)-(3), 532.030(1) (Michie 1990 & Supp. 1996). Because Kentucky juries could recommend sentences of any duration (for example, 300 years), they could act to keep an offender in prison for life. See id. §§ 439.3401(3), 532.030. Kentucky trial judges could, however, reduce a jury’s recommendation to a sentence of 20 years before parole consideration. See Ky. REV. STAT. ANN. § 532.030 (Michie 1990).

The Georgia statute made “life” the alternative to death for convicted capital murderers, but did not mention parole eligibility. See GA. CODE ANN. § 17-10-32 (1982). In 1985, the Georgia State
Table 1 also shows for each state: the number of jurors on which the medians are based, the number of jurors interviewed, the number of cases sampled, and the period during which the sample cases were tried.

### TABLE 1

**JURORS MEDIAN ESTIMATES OF YEARS USUALLY SERVED IN PRISON BY CAPITAL MURDERERS NOT GIVEN DEATH, MANDATORY MINIMUM FOR PAROLE ELIGIBILITY, AND SAMPLE CHARACTERISTICS OF 11 STATES**

<table>
<thead>
<tr>
<th>State</th>
<th>Years in Prison if not given death</th>
<th>Sample Characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Median estimate*</td>
<td>Mandatory minimum**</td>
</tr>
<tr>
<td></td>
<td>N. of jurors</td>
<td>N. of trials</td>
</tr>
<tr>
<td>Alabama</td>
<td>15 (n=33)</td>
<td>LWOP</td>
</tr>
<tr>
<td>California</td>
<td>20 (n=125)</td>
<td>LWOP</td>
</tr>
<tr>
<td>Florida</td>
<td>20 (n=103)</td>
<td>25</td>
</tr>
<tr>
<td>Georgia</td>
<td>7 (n=68)</td>
<td>15</td>
</tr>
<tr>
<td>Kentucky</td>
<td>10 (n=73)</td>
<td>12.25, IND***</td>
</tr>
<tr>
<td>Missouri</td>
<td>20 (n=44)</td>
<td>LWOP</td>
</tr>
<tr>
<td>North Carolina</td>
<td>17 (n=77)</td>
<td>20</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>12 (n=40)</td>
<td>LWOP</td>
</tr>
<tr>
<td>South Carolina</td>
<td>17 (n=99)</td>
<td>30</td>
</tr>
<tr>
<td>Texas</td>
<td>15 (n=44)</td>
<td>20</td>
</tr>
<tr>
<td>Virginia</td>
<td>16 (n=36)</td>
<td>21.75</td>
</tr>
</tbody>
</table>

* The median estimates have been determined excluding "no answers" and "life" responses. The "life" responses do not typically indicate "life without parole" or "rest of life in prison" but more often suggest uncertainty or unwillingness to give an estimate in years. (See infra note 218).

** These are the minimum periods of imprisonment before parole eligibility for capital murderers not given the death penalty. (See infra note 198).

*** "IND" is defined as "indeterminate" to represent the third Kentucky sentencing option. See infra note 198 for a more definitive discussion of Kentucky’s mandatory minimum.

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Board of Pardons and Paroles explicitly indicated that persons sentenced to life in prison for capital crimes (Class I murderers) are required to serve a minimum sentence as follows:

- at least 15 years prior to parole, and may be required to serve at least 25 years, depending upon whether they are considered “excellent” (15 years), “good” (17), “average” (19), “fair” (21) or “poor” (25) risks. The level of risk is determined by objective criteria: age at first commitment (under 17 worst, over 26 best); prior convictions (four or more worst, none best); . . . parole and probation failure (both worst, neither best); opiate drug abuse (some worst, none best); . . . not fully/fully employed for six months prior to offense

Paduano & Smith, supra note 138, at 227 n.48 (citing Georgia State Bd. of Pardons and Paroles, Life Sentence Inmate Classification (inmate evaluation form, undated)).
Jurors grossly underestimate how long capital murderers not sentenced to death usually stay in prison. Table 1 shows that most jurors believe such offenders will usually be back on the streets even before they become eligible for parole.\textsuperscript{199} In fact, jurors' estimates are typically at least five years less than the mandatory minimum for parole consideration in their states. Among the six states with a single specific number of years before capital offenders can be considered for parole, only North Carolina and Texas are exceptions to the typical discrepancy of at least five years. In Kentucky, with several sentencing options, such a single discrepancy is indeterminate. Of course, discrepancies between perceptions and actual practice are far greater in the four states that do not permit parole.\textsuperscript{200}

Jurors typically think such offenders will be back in society in about 15 years (the average of the 11 state median estimates is 15.4 years). Moreover, jurors' estimates are relatively constant across states: they fall between 15 and 20 years in 8 states; Georgia, Kentucky, and Pennsylvania are the exceptions. Having parole or prohibiting it altogether makes relatively little difference in these estimates; 14.6 years is the average of the median estimates in the 7 states with parole, 16.3 years is the average in the 4 states that prohibit parole. Similarly, the length of the mandatory minimum has relatively little effect on jurors' release estimates, with the exception of Georgia. Thus, 17.7 years is the average of the estimate for the 3 states with mandatory minimums of more than 20 years; 16.0 years is the average for the 2 states with a mandatory minimum of 20 or fewer years. For Georgia, however, the seven-year median estimate is well below that of any other state.\textsuperscript{201}

The median estimates in Table 1 do not, of course, indicate whether jurors' misperceptions are widely scattered or narrowly concentrated at the medians in the various states. These estimates may reflect rough guesses

\textsuperscript{199} What meager data there is from a survey of state parole boards, see supra note 194, suggests that such offenders are extremely unlikely to be paroled, and when paroled, it usually comes long after initial parole eligibility. This survey confirmed that of capital murderers not given death (CMND) none have been paroled in two of the four CJP states (Alabama, California) with LWOP as the sole death penalty alternative (at least for as long as the survey respondents can recall). For Alabama, this was confirmed in publicly available information; for California, this is confirmed in publicly available information. see DATA ANALYSIS UNIT, CALIFORNIA DEPT OF CORRECTIONS, TIME SERVED ON PRISON SENTENCE FELONS FIRST RELEASED TO PAROLE BY OFFENSE CALENDAR YEAR 1995 & 1996, at 8 tbl.1 (1997). In the seven CJP states that did permit parole for CMND during the sample period, parole board respondents did not provide information on the parole of CMND prisoners. In 5 other states that did provide such information, however, 98% of the applications for parole made by capital offenders not sentenced to death were denied, and the one approved application had come after 50 years in prison and 7 previous denials of parole. see id.

\textsuperscript{200} Because these four states do not allow release on parole, any estimate of time served before release is necessarily an underestimate. The average median estimate for these 4 states is 16.75 years, and the lowest median estimate of these 4 is 12 years, for Pennsylvania.

\textsuperscript{201} For an analysis of the reasons for this discrepancy, see infra section IV(B)(3) (addressing Georgia as a special case).
jurors make that typically spread out around the medians, or they may reflect more commonly shared, if mistaken, impressions of just how long such offenders will usually spend in prison. There may, of course, be more consensus in some states than in others.

2. *The Divergence of Time Before Release Estimates.*—To see where and to what extent shared perceptions of the death penalty alternative may prevail, Table 2 shows the full distribution of jurors’ estimates for each of the eleven states. Jurors’ responses have been grouped into five-year intervals (except at the extremes). For the full distribution of responses, the percentages include “no answer” responses in this table.

**Table 2**

**JURORS’ ESTIMATES IN 5-YEAR INTERVALS OF TIME USUALLY SERVED BY CAPITAL MURDERERS NOT SENTENCED TO DEATH IN 11 STATES**

<table>
<thead>
<tr>
<th>State</th>
<th>0-9</th>
<th>10-14</th>
<th>15-19</th>
<th>20-24</th>
<th>25-29</th>
<th>30+</th>
<th>Life</th>
<th>NA</th>
<th>(N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>8.5</td>
<td>18.6</td>
<td>11.9</td>
<td>6.8</td>
<td>5.1</td>
<td>5.1</td>
<td>16.9</td>
<td>27.1</td>
<td>(59)</td>
</tr>
<tr>
<td>California</td>
<td>13.2</td>
<td>13.8</td>
<td>7.9</td>
<td>9.2</td>
<td>0.0</td>
<td>2.0</td>
<td>36.2</td>
<td>17.7</td>
<td>(152)</td>
</tr>
<tr>
<td>Florida</td>
<td>15.4</td>
<td>10.3</td>
<td>12.0</td>
<td>14.2</td>
<td>35.0</td>
<td>0.9</td>
<td>5.1</td>
<td>6.8</td>
<td>(117)</td>
</tr>
<tr>
<td>Georgia</td>
<td>61.0</td>
<td>9.1</td>
<td>5.2</td>
<td>9.1</td>
<td>0.0</td>
<td>1.3</td>
<td>2.6</td>
<td>11.7</td>
<td>(77)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>24.8</td>
<td>19.5</td>
<td>6.2</td>
<td>5.3</td>
<td>6.2</td>
<td>2.6</td>
<td>6.2</td>
<td>29.2</td>
<td>(113)</td>
</tr>
<tr>
<td>Missouri</td>
<td>16.1</td>
<td>12.5</td>
<td>7.1</td>
<td>12.5</td>
<td>17.9</td>
<td>12.5</td>
<td>14.3</td>
<td>7.1</td>
<td>(56)</td>
</tr>
<tr>
<td>North Carolina</td>
<td>10.8</td>
<td>25.3</td>
<td>15.7</td>
<td>30.1</td>
<td>4.8</td>
<td>6.0</td>
<td>0.0</td>
<td>7.1</td>
<td>(83)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>28.6</td>
<td>16.3</td>
<td>10.2</td>
<td>20.4</td>
<td>4.1</td>
<td>2.0</td>
<td>10.2</td>
<td>8.2</td>
<td>(49)</td>
</tr>
<tr>
<td>South Carolina</td>
<td>9.6</td>
<td>21.1</td>
<td>14.0</td>
<td>16.7</td>
<td>9.6</td>
<td>15.8</td>
<td>0.9</td>
<td>12.3</td>
<td>(114)</td>
</tr>
<tr>
<td>Texas</td>
<td>16.0</td>
<td>18.0</td>
<td>22.0</td>
<td>8.0</td>
<td>4.0</td>
<td>10.0</td>
<td>10.0</td>
<td>12.0</td>
<td>(50)</td>
</tr>
<tr>
<td>Virginia</td>
<td>10.9</td>
<td>21.7</td>
<td>8.7</td>
<td>17.4</td>
<td>8.7</td>
<td>8.7</td>
<td>2.1</td>
<td>21.7</td>
<td>(46)</td>
</tr>
<tr>
<td>All states</td>
<td>19.0</td>
<td>16.6</td>
<td>10.6</td>
<td>13.2</td>
<td>9.2</td>
<td>5.6</td>
<td>10.9</td>
<td>15.0</td>
<td>(916)</td>
</tr>
</tbody>
</table>

Jurors’ release estimates are widely divergent. They do not reflect a concentration or consensus of opinion around the median release estimate in most states. The one exception is Georgia, where 61.0% of jurors interviewed said the sentence usually served is less than 10 years (and the median shown in Table 1 is 7 years). There are no other states in which as many as one-third of the jurors are concentrated in the category where the median estimate falls. Texas comes closest, with 22.0% in the median category.

Nor is there much convergence around the mandatory minimums for parole eligibility. Among states that permit parole, Florida and North Carolina have the most estimates falling within the interval that includes the states’ mandatory minimums. Yet, only about one-third of all responses
fall into this interval: 35.9% in Florida and 30.1% in North Carolina. In the other states that permit parole, even fewer occupy the category that includes the mandatory minimum. Indeed, none of the 5-year intervals account for as many as 30% of the release estimates in these states.

Among the 4 states that have LWOP, only in California does the "life" response attract more jurors (36.2%) than any other single category. Even so, only one-half of those who say "life" also indicate that there is no parole. Thus, fewer than one in five California jurors affirmatively identifies LWOP as the death penalty alternative. In the other 3 states without parole, the life response is slightly more common than in any of the 7 states that permit parole, yet it is the response of only 16.9% (Alabama), 14.3% (Missouri), and 10.2% (Pennsylvania) of the jurors in these 3 states. Even if having LWOP prompted a few more jurors in these states to say that the death penalty alternative is life, there is virtually no indication that it promoted awareness that parole is unavailable. A total of only three jurors in these three LWOP states qualified his or her life response to indicate that there was no parole.

Thus, in most states most jurors' release estimates are ill-informed suppositions or speculations, not a reflection of consensus keyed to the mandatory minimum for parole or any other specific time interval. In the evident absence of knowing or agreeing on what the death penalty alternative actually is, most jurors gravitate to estimates even below the mandatory minimum for parole—in keeping with their widely held and boldly expressed sentiments that, in general, murderers get out of prison "far too soon." The one exception to this lack of consensus is Georgia, where there is conspicuous, albeit mistaken, agreement on the alternative as release in seven years.

3. Georgia as a Special Case.—Georgia stands in stark contrast to the other states. Most Georgia jurors (61.0%) fall into the single 0-9 year category. A more refined tabulation of the data reveals that one-half of them (49.3%) actually agree on the single specific estimate of parole in 7 years; excluding nonresponses, this is the estimate of a 56.0% majority. The concentration of estimates in a single category, the substantial agreement on a single estimated value, and the earliness of release it represents are all distinct to Georgia, unparalleled in any of the other states. The consensus on seven years, despite the fifteen year mandatory minimum for parole consideration in Class I (capital) murder cases.

202. See infra note 224.
204. See supra note 196.
205. See supra note 198 (citing the statutory parole policy in effect at the time of the capital trial sampled for CJP interviews in Georgia).
suggests that Georgia jurors' perceptions of release in seven years is a socially constructed illusion about parole. This seven-year release myth appears to be rooted in the history of parole policy, the political rhetoric over parole, and media coverage of news about murders in Georgia.

An examination of media coverage of murder cases and the politics of parole in Georgia reveals that throughout the 1980s and 1990s the media has repeatedly reported that murderers not given the death penalty will be eligible for parole in seven years. They have done so despite the Georgia State Parole Board's explicit indication in 1985 that Class I murderers, persons sentenced to life for capital crimes, are considered for parole only after fifteen years, despite official reports of the Parole Board indicating that Class II murderers who do become eligible for parole in seven years are extremely unlikely to actually be paroled in seven years, and despite legislation in 1994 that added LWOP as a sentencing option for capital offenders. The extremely infrequent use of parole in seven years for noncapital murderers, and explicit rejection of parole consideration before fifteen years for persons not given the death penalty, have received virtually no publicity and were thereafter ignored in political rhetoric and news accounts of murders. As a result, it had little chance of penetrating the consciousness of even the most attentive Georgian.

206. See Paduano & Smith, supra note 138, at 226 (referring to a widely acclaimed 1943 Georgia statute granting parole consideration after seven years for prisoners serving even the severest sentences).


208. See Steiner, Bowers, & Sarat, supra note 195, at 27 n.29 (providing examples of media coverage of Georgia murder cases in which the possibility of parole in seven years is presented).

209. Id. This study includes an examination of Georgia murder cases identified in a NEXIS search of Georgia's leading newspaper, the ATLANTA JOURNAL & CONSTITUTION, using the key words and phrases: "parole in seven years," "early parole," "parole," and "early release." This source is not, of course, representative of coverage in the local media in Georgia of what is essentially local crime news. The coverage of the more celebrated murder cases in the state's leading newspaper, however, suggests how the seven-year myth may have been articulated and reinforced, perhaps even more emphatically, in local coverage.

210. See Georgia Parole Bd. Annual Report, supra note 160, at 2. The Parole Board's annual report for fiscal year 1985 indicated that only 1% (12 out of 949) of all life-sentenced inmates were released upon their first application after seven years, Class II (noncapital) murderers were less likely than other lifers to be paroled, and none of those paroled were Class I (capital) murderers. See id.

211. See GA. CODE ANN. § 17-10-16 (1994). When the jury finds at least one aggravating factor, the jury can still recommend LWOP instead of death. See id. § 17-10-31.1.


213. See Mark Silk, Juries Prefer Alternative to Death Penalty, ATLANTA J. & CONSTIT., July 3, 1996, at B1 (reporting that parole boards' explicit rejection of parole in seven years for persons not given the death penalty received virtually no publicity and was thereafter ignored in political rhetoric and news accounts of murders).
The distinctively skewed pattern of release estimates in Georgia requires that Georgia be dropped from the portion of the statistical analysis that examines the effects of release estimates on punishment decision-making. Because the release estimates in Georgia are so concentrated at the low end of the distribution (61% in the 0-9 category) and the sampling design yields approximately equal numbers of trials with life and death outcomes in each respective state, to include Georgia in the analysis of data from all states would artificially inflate the number of life outcomes in the 0-9 year category, especially because Georgia alone accounts for 27.8% of all 0-9 year estimates. Thus, to include Georgia would tend to obscure the overall pattern of effect between early release estimates and pro-death stands on punishment.\textsuperscript{214}

C. The Pernicious Effect of Jurors’ Misperceptions

The focus now shifts from jurors’ perceptions of the death penalty alternative itself to how such perceptions affect whether jurors do or do not impose the death penalty upon a defendant they have convicted of capital murder. Specifically, the analysis will consider the effect of false choices between the death penalty and what jurors wrongly believe the alternative to be. This is precisely what concerned the U.S. Supreme Court in Simmons v. South Carolina;\textsuperscript{215} and continued to concern four of its members in Brown v. Texas.\textsuperscript{216}

The analysis in this subpart proceeds in several related steps. First, it examines the effect of jurors’ estimates of the death penalty alternative on their consideration of the defendant’s punishment at four points during the trial.\textsuperscript{217} Next, it addresses how these estimates are related to changes jurors make in their stands on punishment between successive points in the trial process.\textsuperscript{218} Finally, it analyzes how these release estimates affect the “decision pathways” which jurors follow in reaching their final punishment decisions.\textsuperscript{219} These steps provide complementary perspectives on how

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\textsuperscript{214} In fact, crime coverage continued to report that suspected or convicted murderers not given the death penalty would be eligible for, if not on parole, parole in seven years. Even after the legislature, in 1997, imposed a mandatory minimum of 14 years for capital murderers not sentenced to death and instituted LWOP, see GA. CODE ANN. §§ 17-10-6.1(c)(1), 17-10-16 (1994), recent political campaigns and editorials in the media continue to be laced with a rhetoric of early release, including explicit references to parole in seven years for convicted first-degree murderers not given the death penalty, see, e.g., Kathy Scruggs, Family Can’t Win Ex-Cop’s Freedom, ATLANTA J. & CONST., Jan. 20, 1998, at 6D.

\textsuperscript{215} The effects of the jurors’ specific release estimates are examined for Georgia in Steiner, Bowers. & Sarat, supra note 195, at 22 tbl.4.

\textsuperscript{216} 512 U.S. 154 (1994) (plurality opinion).

\textsuperscript{217} 118 S. Ct. 355 (1997) (opinion of Stevens, J., respecting denial of certiorari).

\textsuperscript{218} See infra notes 223-27, 229 and accompanying text.

\textsuperscript{219} See infra notes 227, 229-33. 305 and accompanying text.
jurors’ release estimates figure in reaching their ultimate punishment decisions.

Subpart IV(D) then turns to an examination of how the defendant’s future dangerousness, as alleged by prosecutors and as perceived by jurors, together with jurors’ estimates of the death penalty alternative, affect their sentencing decisions. This tests the future dangerousness predicate that Simmons required for informing jurors of the death penalty alternative. Finally, subpart IV(E) closes with an overview of the findings.

The analysis examines and compares 3 groups of jurors, those whose estimates of the time usually served by capital murderers not sentenced to death (“release estimates”) are: 0-9 years, 10-19 years, and 20 or more years.220 The 0-9 year estimates are well below the mandatory minimums for parole, and hence far below parole practice, in all 10 states (Georgia excluded).221 The 10-19 estimates are also below the mandatory minimums in 9 of these states, and below 2 of the 3 sentencing options in Kentucky.222 Only the estimates of 20 or more years includes some (indeterminate number of) jurors whose estimates are on or above the mark. With this three-fold breakdown of release estimates, the analysis demonstrates how jurors’ more or less mistaken perceptions of the death penalty alternative affect their punishment decisions. The first two of these categories reveal the effect of what is manifestly a "false choice" in capital sentencing.

1. Stands on Punishment at Four Points in the Trial.—In the CJP interviews, which trace jurors’ thinking and experiences over the course of the trial, respondents were asked what they had thought the defendant’s punishment should be at four distinct stages of the trial process. These four points were: (a) after the guilt decision, but before the sentencing stage of the trial; (b) after the sentencing trial, but before sentencing deliberations; (c) at the first jury vote on punishment; and (d) at the jury’s final punishment vote.223

220. The analysis is based on the three out of four jurors who gave an estimate in years of the time usually served before parole by capital murderers not sentenced to death. Excluded are the 15.0% of jurors who gave no answer to this question and the 10.9% who answered “life” or “life sentence” to this question. Most of the “life” responses are indeterminate with respect to parole (68 out of 106) and must be excluded for that reason. The small number of jurors who indicated the absence of parole are predominantly from California (28 out of 38), and would disproportionately represent that state in the sample as a whole. Thus, these exclusions focus the analysis solely on the three out of four capital jurors who believe such offenders are usually paroled and who say how soon they think this usually happens.

221. See supra notes 197-98 and accompanying text; Table 1.

222. See supra notes 197-98 and accompanying text; Table 1.

223. The precise wording of each of these four questions was:

(1) 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];
Jurors’ stands on punishment at these four points in the trial process are presented in Table 3 for those who estimated the alternative to be 0-9 years, 10-19 years, and 20 years or more. Specifically, the table shows the percentage who took a stand for death, for life, or were undecided on the defendant’s punishment at each of the first three points during the trial, and the percentage who voted for life or for death at the final decision point.

### Table 3

**JURORS STANDS ON PUNISHMENT AT FOUR POINTS IN THE TRIAL BY THEIR ESTIMATES OF THE DEATH PENALTY ALTERNATIVE**

<table>
<thead>
<tr>
<th>Stands on Punishment:</th>
<th>Estimates of years served by capital murderers not given death</th>
</tr>
</thead>
<tbody>
<tr>
<td>At guilt stage of trial</td>
<td></td>
</tr>
<tr>
<td>Death</td>
<td>39.2</td>
</tr>
<tr>
<td>Life</td>
<td>10.8</td>
</tr>
<tr>
<td>Undecided</td>
<td>50.0</td>
</tr>
<tr>
<td>(N. of Cases)</td>
<td>(120)</td>
</tr>
<tr>
<td>After sentencing instructions</td>
<td></td>
</tr>
<tr>
<td>Death</td>
<td>50.8</td>
</tr>
<tr>
<td>Life</td>
<td>15.9</td>
</tr>
<tr>
<td>Undecided</td>
<td>33.3</td>
</tr>
<tr>
<td>(N. of Cases)</td>
<td>(126)</td>
</tr>
</tbody>
</table>

(2) After hearing all the evidence and the judge’s instructions to the jury for deciding on the punishment, but before you began deliberating with the other jurors, did you then think [defendant’s name] should be given . . . [a death sentence; a life sentence; or were you undecided];

(3) When the first jury vote was taken on the punishment to be imposed, did you vote for . . . [a death sentence; a life sentence; or were you undecided]; and

(4) Was your final vote the same as your first vote . . . [yes, no].


Note that for jurors who were undecided at the first vote on punishment, a “no” response to the last question does not indicate whether their final vote was life or death. The sample of trials was restricted to cases in which the jury affirmatively made a life or death recommendation, with the exception of one California jury hung on punishment and excluded from the analysis. Because such recommendations must be unanimous in all states except Florida and Alabama, moreover, the final punishment votes of undecided first vote jurors were necessarily the same as the jury’s punishment recommendation, except in these two states. In Florida, the jury may recommend death or life with a 7-5 majority. *See* James v. State, 453 So. 2d 786, 791-92 (Fla. 1984) (holding that it is not a violation of due process to impose the death penalty on the basis of a nonunanimous jury recommendation). In Alabama, there must be a 10-2 majority to recommend death, but only a 7-5 majority for life. *See* ALA. CODE § 13A-5-46(f) (1994) (declaring that a jury must have a 10-2 majority in order to recommend the death sentence). Indeed, there are 14 Florida (7 death and 7 life) and 1 Alabama (1 life) cases, in which one sample juror’s final vote differed from the majority. Reviewing the full interviews of the jurors in question and those of their fellow jurors resolved this ambiguity in these two states.
At 1st vote on punishment

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death</td>
<td>66.7</td>
<td>60.8</td>
<td>45.5</td>
</tr>
<tr>
<td>Life</td>
<td>21.4</td>
<td>24.0</td>
<td>40.2</td>
</tr>
<tr>
<td>Undecided</td>
<td>11.9</td>
<td>15.2</td>
<td>14.3</td>
</tr>
<tr>
<td>(N. of Cases)</td>
<td>(126)</td>
<td>(237)</td>
<td>(244)</td>
</tr>
</tbody>
</table>

At final punishment vote

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death</td>
<td>68.5</td>
<td>65.1</td>
<td>43.1</td>
</tr>
<tr>
<td>Life</td>
<td>31.5</td>
<td>34.9</td>
<td>56.9</td>
</tr>
<tr>
<td>(N. of Cases)</td>
<td>(127)</td>
<td>(238)</td>
<td>(248)</td>
</tr>
</tbody>
</table>

Underestimating the death penalty alternative evidently encourages a pro-death stand on punishment, more so as the trial progresses. The initially modest, pro-death sentence effect becomes substantial during sentencing deliberations. Between estimates of 0-9 years and 20 or more years, the difference in percentage voting for death is 21 points at the first ballot (66.7% - 45.5%) and it rises to 25 points at the final ballot (68.5% - 43.1%).

Before the sentencing stage of the trial and before sentencing deliberations, the corresponding differences are ten and eleven percentage points.

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224. Although “life” and “LWOP” responses have been excluded from the statistical analysis to avoid, respectively, ambiguities of classification and the disproportionate influence of California jurors. See supra note 220, the California life and LWOP responses are consistent with this pattern. Thus, the final punishment vote of California jurors who believed the death penalty alternative to be LWOP (28 of the total 38 LWOP responses in the full sample) is comparable to that of all jurors who estimated the alternative to be at least 20 years. The final vote of California jurors who gave the “life” response without mentioning parole is comparable to that of jurors who said the alternative was less than 20 years, as the following tabulation shows:

<table>
<thead>
<tr>
<th>Final punishment vote</th>
<th>Life</th>
<th>LWOP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death</td>
<td>74.1</td>
<td>42.9</td>
</tr>
<tr>
<td>Life</td>
<td>25.9</td>
<td>57.1</td>
</tr>
<tr>
<td>(Number of jurors)</td>
<td>(27)</td>
<td>(28)</td>
</tr>
</tbody>
</table>

225. The data shows, moreover, that it is not jurors’ general impressions that murderers get out of prison too soon but their specific estimates of how soon murderers not given the death penalty get out of prison that are associated with their final punishment decisions. Thus, jurors’ final votes as related to their level of agreement that persons sentenced to prison for murder are back on the streets far too soon (corresponding to the figures in Table 3 Section D) are as follows:

<table>
<thead>
<tr>
<th>Final Punishment Vote</th>
<th>Percentage of jurors responding:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Strongly</td>
</tr>
<tr>
<td>Death</td>
<td>57.1</td>
</tr>
<tr>
<td>Life</td>
<td>42.9</td>
</tr>
<tr>
<td>(Number of jurors)</td>
<td>(436)</td>
</tr>
</tbody>
</table>
The jurors who most underestimate the death penalty alternative—those who believe release would usually come in less than ten years—are the ones most likely to take a pro-death stand at each stage of the trial. Over the course of the trial, however, the jurors who estimate 10-19 years tend to gravitate toward the stands of those with the more extreme 0-9 year estimates. Before the sentencing stage of the trial, the punishment stands of the 10-19 and the 20-or-more groups were on a par; by the final vote on punishment, nearly as many of the 10-19 group as of the 0-9 group voted for death. Hence, by the time of the final punishment decision, the extent of jurors' underestimates is of less consequence than the difference between jurors who definitely do and those who may not underestimate the death penalty alternative.

Among jurors who underestimate the alternative, the most pronounced pro-death boost comes early in sentencing deliberations; there are 17.3 and 16.5 percentage point increases in pro-death stands between sentencing instructions and first vote on punishment in the 0-9 and 10-19 groups. The increase in pro-death stands is less than five percentage points for each of these groups between first and final punishment votes. Among jurors with release estimates of twenty or more years, there is virtually no boost in pro-death stands during punishment deliberations. Such stands increase 6.5 points from sentencing instruction to first punishment vote, but then drop back 3.2 points at final punishment vote.

Among jurors whose release estimates are twenty or more years, sentencing deliberations actually boost pro-life stands. Here the increase in pro-life stands comes both early and late in punishment deliberations. The percentage taking a pro-life stand increases 17.0 points between the penalty trial and the jury's first punishment vote, and another 16.7 points between the first and final votes. Note that late in punishment deliberations there are also 10- and 11-point increases in the pro-life stands of jurors with early (0-9 year) and intermediate (10-19 year) release estimates. This pro-life movement late in deliberations among jurors who clearly underestimate the death penalty alternative perhaps is due to their failure to achieve unanimity for death together with their likely aversion to being a hung jury.

---

For the full distribution of responses to this question, see supra note 196. For a further analysis of how the belief that murderers are released far too soon affects capital jurors' punishment decision-making, see Steiner, Bowers, & Sarat, supra note 195, at 22, 40 & tbl.4.

226. Further analysis shows that this is chiefly the movement of jurors who were undecided on punishment before punishment deliberations. See infra Table 4, Panel B, and accompanying text.

227. Further analysis shows that this movement to a final life vote occurs substantially among jurors whose first punishment vote was for death (see infra Table 4), and indeed among jurors who had consistently taken a stand for death since the guilt stage of the trial (see infra Table 5).
This four-step picture of how jurors' perceptions of the death penalty alternative affect their punishment stands does not, however, reveal how changes come about between successive stages of the process, particularly how perceptions of the alternative may operate to move jurors from one stand to another. Nor does it reveal how stable or consistent their decision-making is, that is, whether jurors reach a punishment stand and stick with it thereafter or change stands during the decision process. The next two sections turn to these issues. After examining how movement between successive stages of the decision process is affected by perceptions of the death penalty alternative, it then addresses the timing and consistency of jurors' decision-making as reflected in the decision pathways they typically follow.

2. Movement Between Successive Points in the Trial Process.—This section examines how jurors' release estimates relate to changes in their stands on punishment between successive points in the trial process. The four decision points yield three successive transitions: (a) between the guilt trial and sentencing instructions; (b) between sentencing instructions and the jury's first vote on punishment; and (c) between the jury's first and final punishment votes. Table 4 shows how jurors' release estimates relate to changes (and consistency) in their stands on punishment over each of these transitions. For jurors who were pro-death, pro-life, or undecided at one point, Table 4 shows the association between their release estimates and their stands on punishment at the next point in the process.

**TABLE 4**

**CHANGES IN CAPITAL JURORS' STANDS ON PUNISHMENT BETWEEN SUCCESSIVE POINTS IN THE TRIAL BY THEIR ESTIMATES OF THE DEATH PENALTY ALTERNATIVE**

**A. MOVE FROM GUILT DECISION TO SENTENCING INSTRUCTIONS**

<table>
<thead>
<tr>
<th>Stand at guilt phase of trial</th>
<th>Death</th>
<th>Life</th>
<th>Undecided</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Stand after sentencing instructions</strong></td>
<td>0-9</td>
<td>10-19</td>
<td>20+</td>
</tr>
<tr>
<td>Death</td>
<td>80.9</td>
<td>87.9</td>
<td>88.1</td>
</tr>
<tr>
<td>Life</td>
<td>2.1</td>
<td>0.0</td>
<td>1.5</td>
</tr>
<tr>
<td>Undecided</td>
<td>17.0</td>
<td>12.1</td>
<td>10.4</td>
</tr>
<tr>
<td>N. of Cases</td>
<td>(47)</td>
<td>(66)</td>
<td>(67)</td>
</tr>
</tbody>
</table>

Estimates of years usually served by capital murderers not given death
### B. MOVE FROM SENTENCING INSTRUCTIONS TO FIRST VOTE ON PUNISHMENT

Stand after sentencing instructions

<table>
<thead>
<tr>
<th>Death</th>
<th>Life</th>
<th>Undecided</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stand at first vote on punishment</td>
<td>Estimates of years usually served by capital murderers not given death</td>
<td></td>
</tr>
<tr>
<td></td>
<td>0-9</td>
<td>10-19</td>
</tr>
<tr>
<td>Death</td>
<td>89.1</td>
<td>92.4</td>
</tr>
<tr>
<td>Life</td>
<td>6.3</td>
<td>3.8</td>
</tr>
<tr>
<td>Undecided</td>
<td>4.6</td>
<td>3.8</td>
</tr>
<tr>
<td>N. of Cases</td>
<td>(64)</td>
<td>(105)</td>
</tr>
</tbody>
</table>

### C. MOVE FROM FIRST TO FINAL VOTE ON PUNISHMENT

Stand at first vote on punishment

Estimates of years usually served by capital murderers not given death

<table>
<thead>
<tr>
<th>Stand at final punishment vote</th>
<th>Death</th>
<th>Life</th>
<th>Undecided</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0-9</td>
<td>10-19</td>
<td>20+</td>
</tr>
<tr>
<td>Death</td>
<td>82.1</td>
<td>81.9</td>
<td>72.1</td>
</tr>
<tr>
<td>Life</td>
<td>17.9</td>
<td>18.1</td>
<td>27.9</td>
</tr>
<tr>
<td>N. of Cases</td>
<td>(84)</td>
<td>(144)</td>
<td>(111)</td>
</tr>
</tbody>
</table>

The table yields the following general finding for each transition:

1. Prior to sentencing deliberations, shifts in jurors' stands on punishment are relatively independent of their release estimates. —— Jurors undecided at guilt moved to death over life after sentencing instructions by about two to one.\(^{228}\) Yet, this pro-death move after the guilt

---

\(^{228}\) Research on jurors' understanding of capital sentencing instructions indicates that there is a "tilt toward death" in their interpretations of the instructions. Eisenberg & Wells, supra note 20, at 12. In particular, their misunderstandings lead them disproportionately to accept evidence of aggravation and to reject that of mitigation. See James Lugminbuhl & Julie Howe, Discretion in Capital Sentencing: Guided or Misguided?, 70 IND. L.J. 1161, 1181 (1995) (concluding that jurors' poor understanding of the law reduces the likelihood that capital defendants will benefit from the built-in legal safeguards against arbitrariness); see also Shari Seidman Diamond & Judith N. Levi, Improving Decisions on Death by Revising and Testing Jury Instructions, 79 JUDICATURE 224, 231 (1996) (arguing for greater clarity in jury instructions because "Jury who understand the instructions better were less likely to lean towards a sentence of death"); Weisberg, supra note 60, at 329, 336 (contending that the mathematical nature of instructions that balance aggravating against mitigating factors desensitizes the death decision).
determination is associated with release estimates by only a modest ten point percentage difference between the 0-9 and 20+ categories. Few jurors who took a death or life stand during the guilt stage of the trial were moved to change their stand by the sentencing evidence, arguments, or instructions. When those jurors did change, it was more often to become undecided than to switch from death to life or from life to death, and such changes were essentially unrelated to jurors’ release estimates.

b. Early in sentencing deliberations jurors’, perceptions of the death penalty alternative are strongly associated with shifts in their stands on punishment, especially among jurors who were undecided about punishment after sentencing instructions.—Two out of three jurors who were undecided at sentencing instructions voted for life or for death on the first ballot, and the positions they took strongly mirror what they thought the death penalty alternative would be. Those who thought it would be 0-9 years moved to death over life by 5-1 (63.4% and 12.2%, respectively). Those who estimated 10-19 years moved to death over life by more than 2-1 (46.7% and 20.7%, respectively). Of those who thought it would be at least 20 years before release, many more took a life than a death stand (41.1% and 25.6%, respectively). Close to nine out of ten jurors who took a life or death stand after sentencing instructions voted that way on the first ballot; hence, there is little change to be accounted for by release estimates.

c. Late in sentencing deliberations, shifts in jurors’ punishment stands are associated with their release estimates, whatever their first votes on punishment.—Jurors who were undecided at the first punishment vote moved to life and death final votes substantially in line with their perceptions of the alternative punishment. Those undecided who thought the alternative would be 0-9 and 10-19 years cast their final vote for death over life by ratios of 2-1 (66.7% and 33.3%, respectively) and almost 3-1 (72.2% and 27.8%, respectively). Conversely, those undecided who thought the alternative was at least 20 years voted for life over death by a 54.3% to 45.7% margin. So too, at this late stage in punishment deliberations, crossovers from death to life and from life to death appear to be influenced by perceptions of the death penalty alternative. Thus, crossovers were most common (characteristic of one in four) among first-vote life jurors who saw the alternative punishment as 0-9 years (25.9%) and among first-vote death jurors who saw the alternative punishment as 20+ years (27.9%).

Conspicuously, the biasing effects of mistaken release estimates are felt most by those who would appear to conform best to the model of the ideal juror, who seeks to keep an open mind on punishment throughout the course of the trial and to be open to the perspectives and thinking of other
jurors during punishment deliberations. Thus, release estimates have their strongest effects upon jurors who enter sentencing deliberations undecided on punishment (Section B, Panel 3); there is a thirty-seven point difference in the percentage taking a stand for death and a twenty-nine point difference in the percentage for life at the jury’s first vote on punishment, between jurors with 0-9 and 20+ release estimates. Next most influenced by release estimates are jurors still undecided about punishment at the first vote on punishment (Section C, Panel 3); the difference is twenty-one percentage points between estimates of 0-9 and 20+ years for both life and death (none were undecided at the final punishment vote). Indeed, for these undecided jurors at the jury’s first vote on punishment, the difference is an even larger twenty-six points between the 10-19 and 20+ estimates, in which the base figures are larger, and thus more reliable.

Evidently, it is when jurors sit down to deliberate about what the punishment should be that their estimates of the alternative punishment come to the fore. Those who have formed an opinion of what the punishment should be before deliberations are relatively unchanged during the initial deliberations. It is chiefly those who were undecided about punishment before jury deliberations whose initial punishment vote is strongly affected by what they believe the alternative would be. The sooner they think the defendant would usually get out of prison, the more likely they are to vote for death on the first ballot. A similarly sizable pro-death move also appears later in deliberations among jurors who underestimate the alternative and were undecided at the first vote. Thus, mistaken estimates of early release appear to be decisive in the decision-making of jurors who have not made up their minds before deliberations begin or by the time of the jury’s first vote on punishment.

3. Punishment Decision Pathways.—The analysis now turns to the “decision pathways”229 jurors follow in making their punishment decisions—that is, the sequence of punishment stands they each took at the four points in the trial process examined in Table 3. For each level of release estimates, Table 5 shows the most common decision pathways, namely all those followed by at least five percent of the jurors.

---

229. These pathways are identified by a sequence of four letters indicating the juror’s stand at each step of the pathway. Thus, a juror could be for death (D), for life (L), or undecided (U) at the first three points, namely the guilt stage of the trial (P1), the sentencing instructions (P2), and at the first vote on punishment (P3), and for death or for life (but not undecided) at the final punishment vote (P4). For example, the pathway designated as “UULL” in Table 5 includes jurors who were undecided at guilt and at sentencing instructions, but voted for life at both the first and the final jury ballots on punishment.
## Table 5

**Most Common Four-Stage Punishment Pathways* Followed by Capital Jurors Grouped by Their Estimates of the Death Penalty Alternatives**

Estimates of years usually served by capital murderers not given death

<table>
<thead>
<tr>
<th></th>
<th>0-9 years (n=118)</th>
<th>10-19 years (n=229)</th>
<th>20+ years (n=235)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1234</td>
<td>%</td>
<td>Cum%</td>
</tr>
<tr>
<td>DDDD</td>
<td>24.6</td>
<td>24.6</td>
<td></td>
</tr>
<tr>
<td>UDDD</td>
<td>12.7</td>
<td>37.3</td>
<td></td>
</tr>
<tr>
<td>UDDL</td>
<td>11.0</td>
<td>48.3</td>
<td></td>
</tr>
<tr>
<td>LLLL</td>
<td>5.9</td>
<td>54.2</td>
<td></td>
</tr>
<tr>
<td>DDDL</td>
<td>5.1</td>
<td>59.3</td>
<td></td>
</tr>
<tr>
<td>UUUD</td>
<td>5.1</td>
<td>64.4</td>
<td></td>
</tr>
<tr>
<td>DUDD</td>
<td>5.1</td>
<td>69.5</td>
<td></td>
</tr>
</tbody>
</table>

* Includes all pathways followed by at least five percent of jurors in each category of release estimates. The percentages do not add to one hundred percent due to the exclusion of all pathways followed by fewer than five percent of the jurors.

Jurors who underestimate the death penalty alternative tend to follow a common set of decision pathways regardless of the level of their release estimates: they differ only a little by release estimate in the pathways they exhibit within this common set. In contrast, jurors whose estimates of the death penalty alternative are more accurate differ from their less realistic counterparts in the kinds of pathways they follow as well as in the proportions exhibiting particular pathways.

### a. Jurors who most underestimate the death penalty alternative (0-9 years) follow decision pathways dominated by relatively early and consistent pro-death decision-making

—The three most common pathways which are followed by almost one-half of these jurors (48.3%) differ only in how soon the jurors become committed to a consistent pro-death stand. Most common is the pathway that begins with a pro-death stand at guilt (DDDD), second is one that begins at sentencing instructions (UDDD), and third is one that starts at the first vote on punishment (UDDD). Conspicuously, a quarter (24.6%) of these jurors follow the solitary all-death (DDDD) pathway; it is the single most common pathway in the entire table, and it surpasses the all-life (LLLL) pathway among these early-release jurors by more than four to one. Note that the DUDD pathway appears only among these jurors with extremely low estimates, indicating that except for the sentencing trial experience the DDDD pathway would be even more common among these jurors with 0-9 year estimates.
b. Jurors whose underestimates are less extreme (10-19 years) follow similar decision pathways as jurors with extremely low estimates (0-9 years), but tend to wait longer before making a consistent pro-death commitment.—All six of the pathways followed by these jurors are also followed by at least five percent of the jurors with 0-9 estimates. Moreover, the three pathways most frequently followed are the same in both groups. The main difference is that the pathways which entail a longer wait before taking a pro-death stand are relatively more common here; DDDD is less frequent (by 7.1 points), UDDD and UUDD are more common (by 1.3 and 4.3 points, respectively) than among the jurors with 0-9 year estimates. Otherwise the pathways followed and the proportions of jurors following particular pathways are remarkably similar between these two groups of jurors who underestimate the death penalty alternative.

c. Jurors who most accurately estimate the death penalty alternative (20+ years) follow a more diverse and more balanced array of pathways that more often lead to life final votes.—In the six pathways followed by at least five percent of these jurors, there are twice as many life stands (10 vs. 5), and twice as many pathways that end in a final life vote (4 vs. 2), in contrast to both groups of jurors who manifestly underestimate the alternative. Additionally, more of these jurors with 20+ year release estimates follow the pathways that end in a life rather than in a death vote (37.0% vs. 26.0%), in sharp contrast to jurors with 10-19 year release estimates (13.5% vs. 52.9%) and particularly those with 0-9 year estimates (11.0% vs. 58.5%). Furthermore, only jurors with 20+ year release estimates move to a life stand after a period of indecision (the ULLL and UULL pathways, comprising 15.7%) through the relatively common pathways shown in Table 5. Perhaps these longer release estimates permit initially undecided jurors to seriously consider mitigation.

There is a disturbing pattern of premature decision-making in the decision pathways of jurors regardless of their release estimates. Jurors take a punishment stand at the guilt stage of the trial. In three of the pathways, the same three in each group, the consistent all-death (DDDD) pattern is the most common decision pathway in each group; the eleventh-hour conversion from a consistently held death stand to a final life vote (DDDL) is present in each group as is the all-life (LLLL) pathway also followed by more than five percent of the jurors in each release estimate group. Together, these three pathways account for about one-third of the jurors230 at each estimated level of the sentencing alternative.231

230. This combination of DDDD, DDDL, and LLLL pathways represents 35.6% of the 0-9 group, 31.0% of the 10-19 group, and 37.5% of the 20+ group. See supra Table 5.

231. In fact, virtually one-half (48.3%) of the jurors believed that they knew what the defendant's punishment should be during the guilt stage of the trial: 50.0%, 43.2%, and 50.8%, respectively, of
prevalence of jurors who formulate their position on the defendant's punishment before the sentencing stage of the trial begins, and stick with it thereafter, for all or most of the trial and deliberations, raises a serious question about the effectiveness of jury selection procedures. It is axiomatic that the capital justice system is compromised if it does not effectively screen out prospective jurors who, contrary to their duty as jurors, cannot or will not keep an open mind about what the punishment should be at least until they have heard the sentencing evidence, arguments, and instructions.

In various ways, then, the data demonstrates the pervasive pro-death effect of jurors' underestimates of time served before release on their approach to punishment. The influence of early release perceptions is evident throughout the process, but is especially felt early in sentencing deliberations—between the end of the sentencing phase of the trial and the jury's first vote on punishment. Jurors with the most exaggerated underestimates of the death penalty alternative disproportionately take a pro-death stand early, even before the sentencing stage of the trial. Those whose mistaken estimates are not as extreme also move disproportionately to a pro-death stand, but they tend to do so later in the process.

The relevance of these findings to the Supreme Court's decision in *Simmons v. South Carolina* is unmistakable. The data clearly shows...
that it is how soon jurors erroneously think such offenders usually return to society, not simply whether or not they wrongly believe such offenders will serve the rest of their lives in prison, as the Supreme Court's Simmons decision supposes, that influences capital jurors' thinking and voting on a defendant's punishment. When jurors underestimate the death penalty alternative, they are making a "false choice," whether the true alternative is life with or without parole. Whether parole is possible or release actually occurs in twenty years, thirty years, forty years, or never, when jurors mistakenly believe that capital offenders are usually back on the streets in less than twenty years, especially less than ten years, they are far more likely to vote for death.

D. Dangerousness, Release Estimates, and False Choice

What about the requirement in Simmons that future dangerousness be argued before a capital defendant is entitled to have his jurors know what his alternative sentence would actually be? In Simmons, the defendant was alleged to be dangerous and the Court held that a false choice in sentencing would deprive him of the right to protect himself against such allegations. But what about defendants, unlike Simmons, who are not alleged to be dangerous by the prosecution or not thought to be dangerous by jurors? Do they not also need protection against a false choice in sentencing? To address this issue, this subpart now turns to whether jurors' misperceptions of the sentencing alternative affect their punishment decision-making only in cases of alleged or perceived future dangerousness, or in all capital cases regardless of the defendant's dangerousness.

1. Underestimates of Release Lead to Death Sentences Apart from Dangerousness.—To examine the role of claims and beliefs about the defendant's possible dangerousness, jurors were asked questions concerning: (a) prosecution allegations of the defendant's future dangerousness; and (b) their own perceptions and concerns about whether the defendant would be a danger to society in the future. The specific wording of these two kinds of questions and the response options available to jurors appear respectively in Panels A and B of Table 6. The table shows the percentage of jurors casting a final vote for death, classified both by their responses to these questions and by their release estimates.

236. See id. at 161-62 (plurality opinion) (noting that one influencing factor is whether or not jurors incorrectly believe that offenders will not spend the rest of their lives in prison).
237. See id. at 168-69 (plurality opinion).
238. See id. at 161-62 (plurality opinion).
### TABLE 6

**Percent of Jurors Whose Final Vote Was For Death** by Estimates of the Death Penalty Alternative and Indicators of Defendant’s Alleged and Perceived Dangerousness

#### A. Prosecution Allegations of Dangerousness

How much did the prosecutor’s evidence and arguments at the punishment stage of the trial emphasize . . . that the death penalty will keep [defendant’s name] from killing again?

**Estimates of years usually served by capital murderers not given death**

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Great deal</td>
<td>73.2</td>
<td>65.5</td>
<td>43.6</td>
</tr>
<tr>
<td></td>
<td>(41 )</td>
<td>(87 )</td>
<td>(94)</td>
</tr>
<tr>
<td>Fair amount</td>
<td>65.5</td>
<td>72.1</td>
<td>46.7</td>
</tr>
<tr>
<td></td>
<td>(29 )</td>
<td>(68 )</td>
<td>(60)</td>
</tr>
<tr>
<td>Not much</td>
<td>63.2</td>
<td>52.9</td>
<td>44.1</td>
</tr>
<tr>
<td></td>
<td>(19 )</td>
<td>(34 )</td>
<td>(34)</td>
</tr>
<tr>
<td>Not at all</td>
<td>73.1</td>
<td>69.4</td>
<td>43.8</td>
</tr>
<tr>
<td></td>
<td>(26 )</td>
<td>(36 )</td>
<td>(48)</td>
</tr>
</tbody>
</table>

How much did the prosecutor’s evidence and arguments at the punishment stage of the trial emphasize . . . danger to the public if [defendant’s name] ever escaped or was released from prison?

**Estimates of years usually served by capital murderers not given death**

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Great deal</td>
<td>81.5</td>
<td>66.1</td>
<td>49.1</td>
</tr>
<tr>
<td></td>
<td>(27 )</td>
<td>(62 )</td>
<td>(57)</td>
</tr>
<tr>
<td>Fair amount</td>
<td>81.0</td>
<td>69.8</td>
<td>46.7</td>
</tr>
<tr>
<td></td>
<td>(21 )</td>
<td>(63 )</td>
<td>(60)</td>
</tr>
<tr>
<td>Not much</td>
<td>69.2</td>
<td>63.0</td>
<td>43.5</td>
</tr>
<tr>
<td></td>
<td>(26 )</td>
<td>(46 )</td>
<td>(46)</td>
</tr>
<tr>
<td>Not at all</td>
<td>58.1</td>
<td>63.3</td>
<td>39.0</td>
</tr>
<tr>
<td></td>
<td>(43 )</td>
<td>(60 )</td>
<td>(77)</td>
</tr>
</tbody>
</table>

#### B. Jurors’ Perceptions and Considerations of Dangerousness

After hearing all of the evidence, did you believe it proved that . . . [defendant’s name] would be dangerous in the future?

**Estimates of years usually served by capital murderers not given death**

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>68.7</td>
<td>71.5</td>
<td>48.6</td>
</tr>
<tr>
<td></td>
<td>(99 )</td>
<td>(186 )</td>
<td>(181)</td>
</tr>
<tr>
<td>No, undecided</td>
<td>70.0</td>
<td>41.2</td>
<td>28.4</td>
</tr>
<tr>
<td></td>
<td>(20 )</td>
<td>(51 )</td>
<td>(67)</td>
</tr>
</tbody>
</table>
In deciding on what [defendant’s name] punishment should be, how important for you was . . . keeping [defendant’s name] from ever killing again?

Estimates of years usually served by capital murderers not given death

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very important</td>
<td>72.6</td>
<td>66.0</td>
<td>44.7</td>
</tr>
<tr>
<td></td>
<td>(84 )</td>
<td>(147 )</td>
<td>(141)</td>
</tr>
<tr>
<td>Fairly/not very</td>
<td>50.0</td>
<td>62.9</td>
<td>43.0</td>
</tr>
<tr>
<td></td>
<td>(24 )</td>
<td>(70   )</td>
<td>(79)</td>
</tr>
<tr>
<td>Not at all</td>
<td>72.2</td>
<td>66.7</td>
<td>39.1</td>
</tr>
<tr>
<td></td>
<td>(18 )</td>
<td>(21   )</td>
<td>(23)</td>
</tr>
</tbody>
</table>

When you were considering the punishment, were you concerned that [defendant’s name] might get back into society someday, if not given the death penalty?

Estimates of years usually served by capital murderers not given death

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greatly</td>
<td>80.4</td>
<td>68.0</td>
<td>45.0</td>
</tr>
<tr>
<td></td>
<td>(56 )</td>
<td>(97 )</td>
<td>(80)</td>
</tr>
<tr>
<td>Somewhat/slightly</td>
<td>64.1</td>
<td>65.4</td>
<td>50.5</td>
</tr>
<tr>
<td></td>
<td>(39 )</td>
<td>(81 )</td>
<td>(91)</td>
</tr>
<tr>
<td>Not at all</td>
<td>48.0</td>
<td>61.0</td>
<td>32.9</td>
</tr>
<tr>
<td></td>
<td>(25 )</td>
<td>(59 )</td>
<td>(76)</td>
</tr>
</tbody>
</table>

*In this table the number upon which each percentage is based appears in parentheses immediately below the percentage. Omitted are the percentages voting for life (equal to 100% minus the percentage voting for death).

First, considering prosecution allegations of the defendant’s dangerousness (Panel A), it is evident that jurors’ release estimates are a strong predictor of their final punishment vote, quite apart from prosecution claims of dangerousness. At each level of prosecution stressing the need to “keep the defendant from killing again” and the “danger to the public if the defendant ever escaped or was released from prison,” jurors who estimate release in 20 or more years are consistently and substantially less likely to vote for death than those who thought release would come in 0-9 or 10-19 years. In every category of alleged dangerousness, they were at least nineteen percentage points less likely to vote for death than one or (usually) both groups of their more mistaken counterparts. Quite evidently, jurors’ perceptions of the death penalty alternative affect their punishment decisions whether or not the prosecution stresses the defendant’s dangerousness.

Moving from prosecutors’ allegations to jurors’ own perceptions and concerns about the defendant’s dangerousness (Panel B), again jurors’ release estimates relate to their punishment votes, both when dangerousness is and is not an issue in the trial. On all three questions, release estimates influence final punishment votes. This holds true whether or not jurors
think the evidence proved that the defendant was dangerous, however
important jurors feel it is to keep the defendant from killing again, and
however concerned jurors are about the defendant’s possible return to
society.

It is true, as Simmons implies, that underestimates of the alterna-
tive punishment are a strong predictor of a final vote for death when
dangerousness is alleged or perceived—when the prosecutor argues that the
defendant would be dangerous in the future, when jurors believe the evi-
dence proves this, and when jurors are concerned that the defendant will
return to society someday and possibly even kill again. Yet the data
presented here indicates that these claims or beliefs are not necessary for
mistaken early release estimates to promote death as punishment. There
are also clear and sizable associations between jurors’ misperceptions of the
alternative and their voting for death when these issues of dangerousness
are absent. When jurors believe such offenders will return to society
sooner, they are moved to vote for death without having to believe that the
offender will be dangerous to others in the future. Perhaps considerations
of retribution, beyond mere incapacitation, are indeed relevant to these
jurors’ decision-making.

2. Underestimates of Release Breed Judgments of Dangerousness.—
Consider the possibility that jurors’ underestimates of the death penalty
alternative may actually cause them to overestimate the defendant’s
dangerousness. Judging a person’s likely future dangerousness is far from
foolproof; indeed, those who have examined such assessments find that
they are often unreliable because they are subject especially to “false
positives” or predictions of dangerousness that do not materialize. It
is axiomatic that however dangerous a convicted capital murderer may
appear to be in terms of objective indicators such as his past record of
criminal violence, the sooner he is released from prison, the more oppor-
tunity he will have to harm others in society. Hence, jurors who
wrongly believe that such an offender would be released in less than ten
years may well see him as a greater potential threat to society, as more

239. See id. at 161-62 (plurality opinion).
240. See Barefoot v. Estelle, 463 U.S. 880, 900 n.7 (1983) (citing John Monahan, Predicting
“false positive”)); James W. Marquart & Jonathan R. Sorensen, A National Study of the Furman-
Committed Inmates: Assessing the Threat to Society from Capital Offenders, 23 Loy. L.A. L. Rev. 5,
26 (1989) (showing that the capital murderers whose death sentences were commuted to life nationwide
by Furman posed relatively little risk of violence in prison or after release).
241. The Supreme Court itself has essentially made this observation. See Simmons, 512 U.S. at
163 (plurality opinion) (“In assessing future dangerousness, the actual duration of the defendant’s prison
sentence is indisputably relevant.”).
"dangerous," than those who believe release will come only after twenty or more years. In this way, mistaken estimates of the defendant's early parole or release from prison may be bootstrapped into capital sentencing by being surreptitiously incorporated into the constitutionally authorized judgment of future dangerousness.

Table 6 suggests this effect. The base figures for the percentages reveal, for example, that the jurors who most underestimate the death penalty alternative are also the ones most likely to be greatly concerned about the defendant's return to society.242 To carry the examination of this issue a step further, Table 7 presents the responses jurors gave to the dangerousness questions examined in Table 6, broken down by their release estimates.

**TABLE 7**

**DEFENDANT'S ALLEGED AND PERCEIVED DANGEROUSNESS BY JURORS' ESTIMATES OF THE DEATH PENALTY ALTERNATIVE**

**A. PROSECUTION ALLEGATIONS OF DANGEROUSNESS**

How much did the prosecutor's evidence and arguments at the punishment stage of the trial emphasize . . . danger to the public if [defendant's name] ever escaped or was released from prison?

Estimates of years usually served by capital murderers not given death

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Great deal</td>
<td>23.1</td>
<td>26.8</td>
<td>23.8</td>
</tr>
<tr>
<td>Fair amount</td>
<td>17.9</td>
<td>27.3</td>
<td>25.0</td>
</tr>
<tr>
<td>Not much</td>
<td>22.2</td>
<td>19.9</td>
<td>19.2</td>
</tr>
<tr>
<td>Not at all</td>
<td>36.8</td>
<td>26.0</td>
<td>32.1</td>
</tr>
<tr>
<td>N. of Cases</td>
<td>(117)</td>
<td>(231)</td>
<td>(240)</td>
</tr>
</tbody>
</table>

How much did the prosecutor's evidence and arguments at the punishment stage of the trial emphasize . . . the death penalty will keep [defendant's name] from killing again?

Estimates of years usually served by capital murderers not given death

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Great deal</td>
<td>35.7</td>
<td>38.7</td>
<td>39.8</td>
</tr>
<tr>
<td>Fair amount</td>
<td>25.2</td>
<td>30.2</td>
<td>25.5</td>
</tr>
<tr>
<td>Not much</td>
<td>16.5</td>
<td>15.1</td>
<td>14.4</td>
</tr>
<tr>
<td>Not at all</td>
<td>22.6</td>
<td>16.0</td>
<td>20.3</td>
</tr>
<tr>
<td>N. of Cases</td>
<td>(115)</td>
<td>(225)</td>
<td>(236)</td>
</tr>
</tbody>
</table>

---

242. For instance, Table 6 indicates that of those jurors who believed the alternative was incarceration of less than 10 years, 56, were "greatly" concerned about the defendant's return to society, as opposed to 25 who were "not at all" concerned with this prospect. By contrast, among those who believed the alternative to be at least 20 years in prison, the numbers "greatly" and "not at all" concerned were not much different (80 versus 76).
B. JURORS' PERCEPTIONS AND CONSIDERATIONS OF DANGEROUSNESS

After hearing all of the evidence, did you believe it proved that [the defendant] would be dangerous in the future?

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>83.2</td>
<td>78.5</td>
<td>73.0</td>
</tr>
<tr>
<td>No</td>
<td>10.9</td>
<td>16.9</td>
<td>17.7</td>
</tr>
<tr>
<td>Undecided</td>
<td>5.9</td>
<td>4.6</td>
<td>9.3</td>
</tr>
<tr>
<td>N. of Cases</td>
<td>119</td>
<td>237</td>
<td>248</td>
</tr>
</tbody>
</table>

In deciding on what the defendant's punishment should be, how important for you was "keeping [defendant's name] from ever killing again?"

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very important</td>
<td>66.7</td>
<td>61.8</td>
<td>58.0</td>
</tr>
<tr>
<td>Fairly important</td>
<td>12.7</td>
<td>17.2</td>
<td>19.7</td>
</tr>
<tr>
<td>Not very important</td>
<td>6.3</td>
<td>12.2</td>
<td>12.8</td>
</tr>
<tr>
<td>Not at all important</td>
<td>14.3</td>
<td>8.8</td>
<td>9.5</td>
</tr>
<tr>
<td>N. of Cases</td>
<td>126</td>
<td>238</td>
<td>243</td>
</tr>
</tbody>
</table>

When you were considering the punishment, were you concerned that [the defendant] might get back into society someday, if not given the death penalty?

<table>
<thead>
<tr>
<th></th>
<th>0-9</th>
<th>10-19</th>
<th>20+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greatly</td>
<td>46.7</td>
<td>40.9</td>
<td>32.4</td>
</tr>
<tr>
<td>Somewhat/slightly</td>
<td>32.5</td>
<td>34.2</td>
<td>36.8</td>
</tr>
<tr>
<td>Not at all</td>
<td>20.8</td>
<td>24.9</td>
<td>30.8</td>
</tr>
<tr>
<td>N. of Cases</td>
<td>120</td>
<td>237</td>
<td>247</td>
</tr>
</tbody>
</table>

There are two noteworthy findings. First, there is virtually no association between jurors' perceptions of the death penalty alternative and prosecution allegations of the defendant's dangerousness. Jurors who believe the defendant would return to society sooner are not more likely to report that prosecutors claimed the defendant was dangerous. Evidently jurors are being exposed to essentially the same degree of prosecution evidence and arguments concerning the defendant's dangerousness, regardless of their perceptions of the alternative punishment. Second, when it comes to jurors' own perceptions of, and concerns about, the defendant's dangerousness there is, indeed, an association with their estimates of the death penalty alternative. That is, jurors who believe release will come earlier are more likely to believe the evidence "proved" the defendant dangerous, to regard keeping the defendant from killing again as "very
important” in their sentencing decision, and to be “greatly concerned” about the defendant’s possible return to society in deciding on punishment.

These ten, eleven, and sixteen percentage-point overall differences are modest compared to the effects of release estimates on final punishment votes. Yet the fact that they are absent from prosecutors’ allegations but present for jurors’ impressions and concerns is a strong indication that they are not due to differences in the cases being heard by jurors with different beliefs about the death penalty alternative. The clear implication is that jurors’ release perceptions bear on their judgments of the defendant’s dangerousness, and in turn, on their decision-making on punishment. Mistaken release estimates evidently promote the perception that the defendant will be dangerous in the future.

The issue of how jurors’ judgments of dangerousness are formed and, particularly, how misperceptions of early release may taint these judgments, calls for further exploration, beyond the scope of this Article. The relationships reflected in Table 7 signal the need for further analysis which may reveal how mistaken impressions about the defendant’s release operate under the guise of legally sanctioned judgments of dangerousness.

E. Overview of Part IV Findings

The illusion of early release is pervasive. In every state examined here, capital jurors vastly underestimate the time that convicted first-degree murderers not given the death penalty will stay in prison. More than one-half of the capital jurors in each of the states that permits parole say murderers not given the death penalty will usually be back on the streets even before they become eligible for parole. See supra Table 1 and text accompanying notes 234-235: see also supra note 194 (identifying states with and without an LWOP alternative).

For the sample, as a whole, a sizable 15.0% of the jurors were unwilling to venture any estimate of the alternative sentence; another 10.9% said “a life sentence” without either giving a specific estimate in years or saying that parole was unavailable. In effect, even among persons who have served as capital jurors, and thus have actually chosen between death and its alternative punishment, only a small minority gave an estimate that is not far below the release practice for such offenders in their states. See supra note 203 and accompanying text; Table 1.

For the sample, as a whole, a sizable 15.0% of the jurors were unwilling to venture any estimate of the alternative sentence; another 10.9% said “a life sentence” without either giving a specific estimate in years or saying that parole was unavailable. In effect, even among persons who have served as capital jurors, and thus have actually chosen between death and its alternative punishment, only a small minority gave an estimate that is not far below the release practice for such offenders in their states. See supra text accompanying notes 197-98 and accompanying text; Table 1.
can they be expected to know what the actual parole practice is for such offenders, as this information is unavailable in nearly all states.\textsuperscript{246}

Jurors' mistaken beliefs about the death penalty alternative are a substantial influence on their sentencing decisions, prominent at the first vote on punishment and even stronger by the final punishment verdict. When jurors engage in the give and take of deliberations, the effect of their misperceptions becomes most pronounced. This is when the rhetoric of early release can become the currency of persuasion. Early in deliberations, the most substantial movement occurs among the previously undecided, whose life or death votes on the first jury ballot are strongly in accord with their mistaken release estimates. Later in deliberations there are cross-overs between life and death as well as confirmations from undecided to life or death, again consistent with jurors' typically mistaken release estimates. The end result of this allocation process is a substantial difference between death votes by jurors who believe the alternative yields only 0-9 years served (68.5\%) and death votes by those who believe it is 20 years or longer (43.1\%).

Moreover, jurors who underestimate the alternative are more likely to vote for death, whether the alternative does or does not permit parole. In fact, it is when jurors think the defendant will return to society in less than twenty years, regardless of \textit{how much longer} he will actually serve, that they are substantially more likely to vote for death. Thus, the bias owing to jurors' mistaken release estimates is not confined to those states in which LWOP is in fact the alternative. The resulting false choices are equally common and equally pernicious in states that permit parole.\textsuperscript{247} The data also shows that the greater tendency of jurors who underestimate the alternative to vote for death is not restricted to cases in which the defendant is alleged to be dangerous, nor indeed to defendants they thought were proved dangerous or whose possible return to society greatly concerned them. Moreover, the data suggests that jurors' release estimates influence their judgments of the defendant's dangerousness. That is, jurors who think such offenders will return to society sooner are more likely to believe that the defendant is dangerous than are those who have a more realistic view of the death penalty alternative. In this way, jurors' mistaken release estimates tend to taint their judgments of a critical element of aggravation, whether statutory or not, in the life or death decision.

V. Jurors' Accounts of the Decision-Making Process

The analysis now shifts from statistical patterns to jurors' narrative accounts of the decision-making process. The purpose here is to examine

\textsuperscript{246} See supra note 194 and accompanying text.
\textsuperscript{247} See supra Table 1; see also supra note 198 (identifying states with and without an LWOP alternative).
the thinking of individual jurors and the decision-making dynamics of juries—the stories behind the statistics. The particular focus is on the role of jurors' thinking about the death penalty alternative in their own decision-making and in their efforts to influence the punishment decisions of other jurors. The analysis reveals how this issue figures in their thinking and deliberations about what the punishment should be, and thus it fleshes out the reasoning and behavior responsible for the statistical patterns outlined in Part IV.

Jurors' narrative accounts from the CJP interviews come primarily from their responses to unstructured questions about how they personally decided what the punishment should be and how the jury reached its final punishment decision. To identify instances in which the death penalty alternative is acknowledged to have been an issue, cases were selected in which one or more jurors indicated that the likelihood or timing of the defendant's release from prison was discussed "a great deal" during the jury's punishment deliberations. To obtain several perspectives on the

248. It became evident to the CJP early in the development and pretesting of the juror interview instrument that unstructured questions, which asked jurors to describe and explain both what happened during jury deliberations and what steps they took to reach their sentencing decision, would yield revealing accounts of both individual and group decision-making. Moreover, the jurors themselves expressed the need to elaborate and refine their responses to the various structured questions asked throughout the interview. The CJP thus adapted its interviewing strategy by inviting jurors to interrupt with further details, explanations, and whatever else they thought the interviewer should know to aid in understanding their answers. The decision to tape record and transcribe the interviews (with jurors' permission) has yielded the narrative accounts and other comments volunteered during the interviews upon which this portion of the analysis is based. For further discussion of the sampling and interviewing technique used by CJP, see supra notes 185-93 and accompanying text.

249. In a structured question that asked how much the discussion during the jury's sentencing deliberations focused on specific issues, 2 of the 37 matters listed dealt specifically with the defendant's possible return to society: (1) "how likely [the defendant] would be to get a parole or pardon" and (2) "how long before [the defendant] would get a parole or pardon." Juror Interview Instrument. supra note 191, 270. at 28. Three out of four jurors said each of these matters was discussed to some extent, two out of four said a "fair amount," and one in four said a "great deal." Id. at 28. The figures below show jurors' responses to each question, broken down by the eventual sentence imposed by the jury on which they served:

**DISCUSSION DURING SENTENCING DELIBERATIONS OF TWO RELEASE-RELATED ISSUES, AS REPORTED BY JURORS IN LIFE AND DEATH CASES**

<table>
<thead>
<tr>
<th>Jurors' reports of discussion of defendant's release during jury deliberations</th>
<th>How likely to get a parole or pardon</th>
<th>How long before a parole or pardon</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of jurors who said the issue was discussed:</td>
<td>Death</td>
<td>Life</td>
</tr>
<tr>
<td>a great deal</td>
<td>27.6</td>
<td>30.2</td>
</tr>
<tr>
<td>a fair amount</td>
<td>27.4</td>
<td>31.2</td>
</tr>
<tr>
<td>not much</td>
<td>22.1</td>
<td>17.0</td>
</tr>
<tr>
<td>not at all</td>
<td>22.9</td>
<td>21.6</td>
</tr>
<tr>
<td>(Number of jurors)</td>
<td>(485)</td>
<td>(407)</td>
</tr>
</tbody>
</table>
role of jurors' release estimates in a given case, the search was restricted to cases in which at least three jurors had been interviewed. The likelihood or timing of the defendant's release was discussed a great deal according to at least one juror in 136 cases, or nearly two-thirds (64.8%) of the 210 such cases. 250

At the time of this analysis, transcriptions of the tape-recorded juror interviews had been completed for 108 of the 136 cases in which at least one juror said release was discussed a great deal. The analysis is based on an examination of the narrative accounts of all jurors from these 108 cases for which jurors' tape-recorded interviews have been transcribed. 251 With these data, the research team sought to identify the major elements or themes in jurors' discussions—referred to as the "anatomy" of the early release issue—and to assess how these themes play out in the dynamics of jury decision-making. The analysis below draws upon the accounts of 62 jurors from some 33 of the 108 capital cases subjected to review. 252

The analysis proceeds in several steps. First it sketches out the "anatomy of early release in capital sentencing" with excerpts from juror interviews in a wide variety of cases. 253 These accounts reveal the main elements or themes in the thinking and arguments of jurors that serve both as rationale and as tactics of persuasion in jury decision-making. Next it turns to a detailed examination of the dynamics of decision-making in six specimen cases that show how jurors' thinking about the likelihood and

250. See infra note 252, under the heading "All cases."

251. See infra note 252, under the heading "Transcribed cases." Transcriptions of tape-recorded juror interviews were not yet available for some jurors in Missouri, Pennsylvania, and Texas.

252. The jurors' accounts presented in this analysis come from cases in which jurors were more likely (than in all cases or in transcribed cases) to say that the likelihood of timing of release was discussed a great deal during punishment deliberations. In particular, among the 27 cases from which jurors' accounts are drawn, the 10 life cases overrepresent those with 2 jurors, and the 17 death cases overrepresent those with 3 or more jurors, as shown below.

**AMONG CASES WITH AT LEAST THREE JUROR INTERVIEWS**

<table>
<thead>
<tr>
<th>Number saying &quot;a great deal&quot; on either question*</th>
<th>All cases</th>
<th>Transcribed cases</th>
<th>Selected cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Death</td>
<td>Life</td>
<td>Death</td>
</tr>
<tr>
<td>One</td>
<td>57.5</td>
<td>55.7</td>
<td>50.9</td>
</tr>
<tr>
<td>Two</td>
<td>21.2</td>
<td>21.5</td>
<td>25.4</td>
</tr>
<tr>
<td>Three+ (No. of cases)</td>
<td>21.1</td>
<td>22.8</td>
<td>23.6</td>
</tr>
</tbody>
</table>

*Excluded from the tabulation of all cases represented by at least 3 jurors are 39 death cases and 35 life cases, and from the transcribed cases are 32 death and 31 life cases, in which no jurors said release was discussed a great deal.

253. See supra subpart V(A). For this purpose, 27 passages from interviews with 23 jurors in 18 cases are included.
timing of the defendant's release figures in their decisions.\textsuperscript{254} Cases 1 through 3—from Georgia, Virginia, and Texas, respectively—demonstrate how the rhetoric of early release and the dynamics of persuasion culminate in a jury vote for death. Cases 4 through 6—from South Carolina, Virginia, and North Carolina, respectively—show how early release arguments are neutralized and countered in cases that ended with a life sentence. Then it examines the role of jurors' release estimates in two different legal contexts, drawing upon accounts from cases in which different understandings of the death penalty alternative confront jurors with difficulties in meting out the punishment they regard as appropriate.\textsuperscript{255} In particular, we examine three Kentucky cases (Cases 7-9) where state law provides jurors with several alternative sentencing options,\textsuperscript{256} and six California cases (Cases 10-15) where LWOP is the only death penalty alternative.\textsuperscript{257} Finally, it concludes with an overview of the principal insights this qualitative interview data yields.\textsuperscript{258} Many of the excerpts from juror interviews presented below come from jurors' responses to an open-ended question which asked: "In your own words, can you tell me what the jury did to reach its decision about [the 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?"\textsuperscript{259}

A. The Anatomy of Early Release: Themes in Jurors' Thinking and Arguments

When the defendant's possible return to society becomes the focus in jury deliberations, the discussion appears to emphasize certain elements or themes. The accounts are grouped below under headings intended to capture the essence of the feelings and arguments they express.

1. Confusion and Frustration at Not Being Informed About Parole.— Many jurors are confused or uncertain about the death penalty alternative. They ask the judge whether and when the defendant can be paroled. They

\textsuperscript{254} See infra subpart V(B). For this purpose, the accounts of some 22 jurors, at least 3 from each of the 6 cases are examined.

\textsuperscript{255} For this purpose, the accounts of some 17 jurors from 9 cases are examined.

\textsuperscript{256} See infra section V(C)(1).

\textsuperscript{257} See infra section V(C)(2).

\textsuperscript{258} See infra subpart V(D).

\textsuperscript{259} Juror Interview Instrument, supra note 191, 270, at 27. This several part question is not repeated prior to excerpts reflecting responses to it, but when jurors' comments were made in response to other questions, the corresponding question is paraphrased in the text or reproduced verbatim along with the response. To identify the speaker in the quoted excerpts, "I" represents the interviewer and "J" the juror. All excerpts reproduced below have been verified for accuracy by a second listening to the tape recorded interviews from which they came. Factual details that might permit the identification of jurors have been altered.
ask whether they can impose a life sentence without parole, and why not. The judge's responses often leave them confused, frustrated and angry.

A Georgia juror complained that jurors were disheartened by the judge's response to their questions about parole:

J: [We asked the] question: why not life without parole? [We] sent a note to [the] judge [an] hour or two after [it] started. [The] judge marched us in. They [presumably the judge and attorneys] expected the question earlier . . . . [We were] told [it was] not [an] option, [and we] asked when [he would be] paroled. [He] wouldn't tell us that either . . . . [The] judge said [we had] two choices. [So,] we put our tails between our legs and [went] back in [the] jury [room].

A North Carolina juror commented on jurors' frustration at the judge's admonition not to worry about parole:

J: [We] went back with questions. [We] asked if life was life without parole. [He] told [us] to vote one or the other—don't worry about aspects of either one. We didn't like that, jurors didn't like that. It made a difference.

A Texas juror expressed aggravation at the judge's instruction not to consider parole:

J: [The] most aggravating remark from [the] judge was the fact that parole could not be considered in the decision making process. I thought this was bullshit.

2. Jurors Taking Recourse to Specious Authority.—In the absence of authoritative information about the death penalty alternative, jurors turn to dubious sources, especially to friends or acquaintances who seem or claim to know about how long the defendant would serve.

A North Carolina juror cited another member of the jury as an authority:

J: We had a lady on the jury that works for the district court judge. She knew what life meant. . . . But that was one of our questions and if he got life in prison could it be life without parole. There again you know, she knew about that.

A Virginia juror mentioned former jurors as sources of information about the meaning of a life sentence:

J: Several of us knew a few things of what a life sentence meant because some of us knew people who had been on juries where you sentence them to life yet they are on parole, eligible for parole in 13-15 years. And so a few of us, and I was one of those, knew if you just gave [an] individual life term that really wasn't giving a whole lot. But there is no instruction from the judge as to what means what. And as I recall there was almost nothing—you can give
him this or give him that, they don’t ever tell you—or they didn’t tell us when is this person eligible for parole—what does this actually mean.

One Virginia juror relied upon his wife’s experience as a juror:

J: My wife had been on [a jury] two years before me, very, very similar, and that jury gave him life and he was subject to parole in about twelve years. So I knew that, [and] that knowledge is what helped me base my decision.

A South Carolina juror cited her boyfriend’s mother and street talk as her sources:

J: We were discussing our prisons are so overcrowded now it’s already a fact that there are people being released that would’a been there a lot longer had we not had an overcrowding situation. And if it gets worse who know what’s gonn’a happen with the next 10-15. [or] 25 years in our prisons. . . . [M]y boyfriend’s mother works at the South Carolina department of corrections, and I mean just knowing what 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. I mean, you know, good behavior or whatever. It just alarms me, it really alarms me . . . .

3. **Believing a Life Sentence Means Early Release and Recidivism.**—What jurors believe or learn about the death penalty alternative through these informal, unofficial channels leads them to think that the defendant will be back on the streets far too soon. They foresee and fear the defendant’s recidivism and even possible retaliation against his jurors. They say life means early parole, too early, and thus they have no real choice.

An Alabama juror linked her vote for the defendant’s death to news reports of the recidivism of released offenders:

J: 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.

A Florida jury foreperson was overwhelmed by other jurors’ concern about the defendant’s likely recidivism, if not given death:

J: I was the foreman for the jury. The jury . . . wanted the death penalty right away. I wanted to go back to the judge to see if he could give us the option of life without parole but they didn’t want me to do that. They were all afraid he’d get out and do it again.

A Virginia juror tied the defendant’s likely recidivism to a desire for vengeance:
J: We discussed the fact to our understanding that putting someone into jail for life didn't mean that they were going to stay there. That they were eligible for parole in twenty years, in some cases seven years, and that this individual . . . would come out with vengeance and try to go after those who had been involved in the crime or [otherwise] involved.

A South Carolina juror said jurors, themselves, feared retaliation:

J: There were, I think, about three women [who] were afraid of the man. . . . One of them actually feared that the man might get out and come back after her. I remember one of them was saying that. The girl lives right not far from the shooting. So that was discussed. And I remember, . . . that's when I got to thinking about it, the death penalty.

A Missouri juror who believed a life sentence offered no chance of parole commented:

J: I decided well if he is put away for life at least we know that he's not gonn'a hurt anyone else outside, outside the prison. I don't know what goes on in there, but at least he's not going to be out there with our children and trying to catch kids in the park . . . .

4. Thinking the Right Punishment Would Have Been LWOP.—Some jurors who voted for death say that the defendant did not deserve to die, but deserved a true life sentence. They say that they did not believe death was the appropriate punishment, that they wanted LWOP, but that death was their only option in view of what they knew about parole. They say the defendant deserved life; the jury wanted life, but that was not an option.

A Georgia juror observed that the verdict would have been unanimous for LWOP if it had been an option:

J: Unanimous[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 . . . . We all felt like that he did not deserve . . . [that] there wasn't enough evidence to feel like he deserved . . . I mean death. [But] I think it's awful, my personal opinion, that people get life and then get out soon. I really do think that's awful.

A North Carolina juror recounted that the jury imposed death only because they could not be certain that the defendant would not get out of prison:

J: 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. Because we were afraid that he was a menace to society and that he'd get out if we didn't give him the death penalty.

A South Carolina juror said she would not have voted for death if a life without parole option had been available:

J: And I made it known at that time that if this state had a life sentence law, I'd go along with it. Life means life. You stay in there until you die . . . . I wasn't interested in a man being executed. I was interested in him being off the street . . . .

I: Most of the jurors justified their decisions by saying they didn't want [defendant's name] on the street again?

J: Yeah that's the main reason.

5. Arguing that the Death Penalty Means LWOP.—Some jurors who voted for death did so in the belief that this was the way to come closest to an LWOP sentence, that it was the only way to keep the defendant in prison for the rest of his life. They became convinced that sentencing the defendant to death would not really mean his execution, but would ensure that he stays in prison for life.

A Kentucky juror said that seeing the death penalty as the way to keep the defendant in prison for the rest of his life was a deciding factor:

J: Knowing this, and I think this main factor, knowing that death sentence prisoners, capital murder prisoners hardly ever die [in prison]. In other words, if we give [the defendant] life, which means what, five years, and if we give him the death sentence that means he will be spending the rest of his life in prison. [This was] one of the deciding factors.

A juror from a different Kentucky case explained that two holdouts voted for death when they realized that imposing the death penalty was the only way to get a life sentence:

J: 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. Because if we can give him life, even without the possibility of parole, I think he could still come up for parole at a certain time because of some reason or another, I don't remember exactly. But the death penalty was the only way that he could stay in jail, as far as we were concerned. And I think they finally realized that.

Another juror from this case said that a death sentence doesn't mean an execution:
J: You know, even if he got the death sentence, which we gave him, that doesn't mean that he's going to the electric chair anyway soon. And [it] doesn't guarantee the fact that he's going to end up in the electric chair, because there are people there that have got to go before him, and I think there [are] something like 39 or 40 people in front of him. So he's looking at what, another 25, 30 years.

6. Wanting Clarity About Parole and Wanting LWOP as An Alternative.—Jurors are not only confused and frustrated about not knowing what the death penalty alternative is, but they also voice the need to know what the punishment would actually be if they did not impose a death sentence.

A Kentucky juror complained that jurors should not have to guess about what life means:

I: Do you remember if the judge read you the instructions, or you received a copy?
J: Yes, he did . . . saying it was our job to read them. I don't think they were that difficult, it's just that you got twelve different people there and some people feel that they know what life in prison means, but in fact everybody's just guessing. And in fact you shouldn't have to guess, you should know exactly what the law states and what the law requires as a penalty.

A Virginia juror commented on the need for clarity about the death penalty alternative:

J: The major thing [is] . . . saying exactly what life/death [means] . . . [and the] parole aspect. That needs to be changed in my opinion for jurors to know, so they can make a reasoned decision. So many times you hear on the news, oh the jury gave him this 40 years, but he'll be out in 10.

A North Carolina juror recounted the jury's reaction to not having LWOP as an alternative:

J: [Y]ou look in the paper everyday and you see somebody[’s] been paroled after x number of years in prison. . . . I don't understand why life without parole in a case like this is not an option. We were going to try to get things changed, the foreman is working real hard, she's meeting with all kinds of people.

Recurrent themes in these accounts include jurors' ignorance and underestimation of the alternative punishment. They are upset, disturbed, or angry about not being told how long the defendant must and usually would serve before being released. They believe that knowing if and when the defendant might return to society is essential in making their life or death decision. They are distressed about not having, or not being told
they have, the option of LWOP. Lacking authoritative information, they rely upon what they have heard or read and upon what is said by other people who seem or claim to know. This exposes them to prevailing misinformation about the release of persons not given the death penalty, which further convinces them of the need for the death penalty and which they use to persuade others to vote for it.

Many jurors said they felt compelled to impose death in view of what they believed the alternative to be. In fact, many said they would have voted for LWOP instead of death if it had been available, and some explicitly indicate, that despite their vote for death they thought life was the punishment the defendant deserved. Some, indeed, voted for death because they believed it would keep the defendant in prison for the rest of his natural life. Overwhelmingly, these interview responses convey the impression that permanent incapacitation is the foremost sentencing goal of many capital jurors, that they impose death not because they regard it as necessary for retributive reasons but because they see it as the only way to be sufficiently sure that the defendant will not return to society where he would have a chance to victimize others.

B. The Dynamics of Decision-Making: Six Specimen Cases

The foregoing themes and arguments come alive in the give and take of jury deliberations. They are the rationales jurors use in their own minds and the currency with which they persuade others. Center stage, of course, are the impressions jurors have of the death penalty alternative. This section of the analysis seeks to reveal how the themes comprising the anatomy of early release are triggered and how they come to bear in the dynamics of jury deliberations and decision-making. It examines these themes in selected cases in which jurors' narratives provide word pictures of their own thinking and of the exchanges and confrontations among jury members. The juxtaposition of several (at least three) juror accounts from each case yields both divergent and complementary perspectives on the decision-making process. In particular, this subpart presents lengthier excerpts from three death and three life cases that reveal how jurors' perceptions of early release come to bear in their own decision-making and how the themes illustrated above emerge in punishment deliberations.

1. Death Cases: The Rhetoric of Early Release.—

a. Case 1: "He deserved more than just six or seven years in prison".—Four jurors in a Georgia case all believed the alternative meant release in less than ten years (six, seven, seven, and nine years). They opposed such early release on both incapacitative and retributive grounds.
One saw alcohol and drug use as aggravating, a likely indication of recidivism; one reported that jurors feared the defendant’s possible retaliation; and one said reluctant jurors were reassured by the many opportunities the defendant would have to appeal his death sentence.

One juror argued that the death penalty was needed for incapacitative reasons and interpreted the defendant’s past problems with alcohol and drugs not as mitigation but as aggravation because it was likely to promote recidivism:

J: Um . . . in what I said to them and these are not my exact words, was you know, that there was no reason in the world why somebody under the influence of alcohol or drugs should take anybody else’s life. Why should he be different? Um . . . If we let him get by he might go out and do it again . . . . That was my big point. [With] life in imprisonment he’d be available for parole in seven years and he could still get out and do it again . . . . In my opinion, I was like, hey, I’m not going to let this guy out now. I would feel the same way if he was getting electrocuted later on and they found him innocent I would feel bad, but if we let him ha[ve] life imprisonment and he got out and killed two or three more people for the crime again, I’d really feel bad.
I: So you talked about him killing again?
J: You know, I heard that he was known to be a habitual alcoholic abuser and an occasional drug abuser, and I think that’s what I stated before. He might mix ’em up and . . . do it again.
I: Mix them up?
J: He had mixed the drugs and alcohol.

A second juror reiterated the incapacitative justification and cited another juror’s apprehension about the defendant’s possible retaliation against his jurors:

I: What else did you talk about?
J: That if we didn’t give him the death penalty, if he [got] back out into society, would he hurt someone else? . . . The little old lady who’s passed away now that was on our jury, she was scared that if he didn’t get the death penalty and he got out would he remember the people on his jury. And would he possibly, you know come after us.

A third juror succinctly indicated that her chief reason for advocating the death penalty was not incapacitation but retribution, that the defendant simply deserved more than six, seven, or eight years in prison.

J: I don’t think that I thought necessarily that he would be dangerous in the future. I just personally felt that he was guilty and that he had to be punished and I felt like 6, 7, 8 years and then out was not
punishment enough was my own personal feelings, after I, you know, looked at the evidence and after I finally decided that he was guilty and whatever.

A fourth juror who echoed the retributive justification was reassured—and said several others were too—by arguments that the jury’s decision was only one step in a process of review and appeals that would not necessarily end in the death of the defendant:

J: We talked about the difference between those two [malice murder and felony murder] and the fact that if we gave the man life that he probably would go to jail and behave himself and in six or seven years he would be back on the street and we felt that the fact that he shot this man twice . . . showed that he intentionally wanted him to die. That he deserved more than just six or seven years in prison. We also talked about [how] the fact . . . that we voted for death did not necessarily mean that [defendant’s name] would die at the hands of the state. And I think that 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 several opportunities to appeal. I think all of that was discussed. And I think probably that discussion probably helped me more than anything, probably persuaded the four that was holding out because just because . . . we voted that way didn’t necessarily mean that he was going to die at the hands of the state.

b. Case 2: “We knew we could give him three to four life sentences but we were never sure what that meant.”—A Virginia jury imposed a death sentence after giving the defendant three life sentences for related crimes. Jurors whose release estimates were ten, thirteen, fifteen, and forty-five years feared that a fourth life sentence would not ensure the defendant’s permanent imprisonment. The judge’s refusal to answer their questions, the misimpressions conveyed by law-trained jurors, and the observation that the defendant would be deliberately well behaved in prison appear to have exacerbated their concerns.

One juror explained that the jurors did not know the meaning of a life sentence, asked the judge, and learned only that they could not impose a sentence of LWOP:

J: There were a lot of discussions on giving him life or not. For example, one of the women on the jury was a third year law student and [there were also] two attorneys, a woman and guy. One of the women, I think the law student, mentioned that she knew a case in Texas where a guy got life and was on the street in ten years. Which prompted the woman next to her to say “well, we don’t want
to give him life, we want to give him a hundred years.” The next woman said “a hundred, hell, give him five hundred years.” We talked for a long time about whether we should give this guy life or five hundred. We eventually asked the court what the minimum sentence would be if he got life. The answer was the court can’t tell you . . . . We asked if these life sentences could be served serially rather than concurrently . . . and we were told, “can’t answer.” I don’t know why they didn’t answer that one. The other one we asked can we give him a life sentence without parole. That was not an option. We were so sure, we knew we could give him 4 to 5 life sentences but we were never sure what that meant. . . . [We] argued what [the] minimum sentence would be if he got life, it was a concern of everybody’s that this guy should never come back in society. . . . Most [were] concerned with how to keep him out of society—no way. we didn’t know how to do that except by executing him.

One of the law-trained jurors told how she conveyed the impression that a life sentence means ten years or less in prison, that the defendant's life sentences would be served concurrently, and that the judge would override the jury’s punishment decision if he thought it was too harsh:

J: I said normally life sentences are just ten years, and that's not even with parole. So, unfortunately for [defendant’s name] he had people on the jury who knew what that meant because, that really . . . does a disservice for the jurors not to know what life means. Also one of the questions was would he serve the [life] sentences concurrently or consecutively . . . . I knew the answer, it's up to the judge's discretion, he could serve them all at one time or he could stagger them, but normally they're going to serve them all at one time. Just why, to get these people out of the court system, because the jails are all backed up. I hate to say it, but that's the reality versus, you know, what's on the paper.

I: What were the strongest factors for and against a life (or the alternative) sentence?

J: If . . . a life sentence were, you know, 80 years without parole, we might have given him life. But with the possibility that this guy's going to see, to get out of prison in probably fewer than 10 years, we just felt that, um that was too big a risk to take . . . . The thing is, we, I and also the other attorney, had said that um, what we say is a recommendation, that means we're making the decision but the judge, he can, he can say, you know was the jury crazy you're being too tough, um and let, and he can override our decision and give this guy life.

A third juror confirmed that keeping the defendant from getting out of prison became the chief focus of deliberations, and the jurors decided that “they had no choice”: 
J: [The] main context of the discussion about whether he would get the death penalty was whether he would be able to get out of jail or not, if we gave him life instead of death? And . . . everything evolved around that initially. There were some that were in favor of death penalty at that stage to begin with, but um, the main discussion revolved around that. . . . There was at least one guy in there who was ready to string him up, and um, he had to be shouted down a little bit. . . . We had to make the assumption that if he got life he would be out in time to commit another crime like that. And people decided that they had no choice.

A fourth juror observed that the defendant was the kind of person likely to be paroled:

J: We all knew that he's 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 . . . .

I: What were the strongest factors for and against a life (or the alternative) sentence?

J: The thing that was most against life sentence and more for capital punishment absolutely in my mind was the fact that we were not assured that he wouldn't be able to get back out onto the street again. Totally our motivation for not going for a life sentence the thing that was for giving him a life sentence was if in fact there was no chance of parole that it might be considered and seeing if you could find out why he did what he did, see if you could find out more about [defendant's name] see it would help in the future instances where people might do the same thing. Why should we as a society, once we had determined that he had done something, have to pay for him to stay in prison instead of executing him? That was discussed.

c. Case 3: "We all had to persuade him . . . that life in prison doesn't mean life in prison."—When a juror in a Texas case argued that the defendant would not be a danger to society if sentenced to life in prison, the issue of parole became the sole focus of deliberations, despite the judge's instructions and the jurors' recognition that they must not consider parole. The release estimates of the five jurors interviewed from this case were ten, twelve, thirteen, twenty, and thirty years.

One juror set the stage and introduced the holdout:

J: There was a disagreement. . . . This is where we had a lot more discussion. We were also told that you weren't allowed to talk about how long you stayed in jail. You know, when you got a life
sentence. Which I also think you ought to be able to talk about. There actually was I guess a little bit of talk about that anyway. But we were trying not to. But there was one [foreign juror] and as we got in discussing things we could tell that he interpreted life in prison to mean that this guy would never ever come out again. That came out because one of the things was that the guy could be a danger to society and we said well if he’s gonna spend the rest of his life in prison then the answers got to be “no,” so we had to spend a lot of time just discussing if that’s what that means.

A second juror sketched in the incapacitative motivation of the majority and their view of the death penalty as “the only option”:

J: I think we were all pretty unanimous in the beginning about the death penalty basically for the reasons I’ve cited that most of us knew that a life sentence didn’t mean a life sentence and that if we were going to keep this person off the street then the only way we saw that we were going to be able to do that was to give him the death sentence and so I think we were pretty well all agreed on that . . . .

I: Even the [foreigner] guy?
J: No except him. He’s the one that could not understand why a death, a life sentence didn’t mean just that: a life sentence, that he would be put in for the rest of his natural life. And so we all had to persuade him that the way the judicial system is, is that’s not the case, that life in prison doesn’t mean life in prison. It means some amount of time and then you’re out again. And so the only option that we saw to prevent this man from ever doing what he had done twice before, was to give him the death sentence . . . and I remember it was a horrible feeling. But that’s the only thing we could figure out to do. And I know that’s not the way juries are supposed to make the deliberations. But it sure was the reality of the situation.

This juror then described how the majority dealt with the holdout:

J: One of the jurors held out. And this is where it kind of gets squirrely cause this guy, was [foreign]. He was an engineer from IBM. 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. I: Really wh . . .
J: Seriously, because I kind of felt kind of like the jury badgered him to the point to where he changed his vote. Does that make sense?
I: Oh, absolutely.
J: He thought that life meant life, your whole life . . . . It’s probably not one of the things that you discuss or are supposed to discuss legally. In fact, I think there [are] instructions against that
. . . . This guy, I think he really thought that you could sentence someone to life and he would be never released from society. Into society. And that was a problem.  
I: So how did you all convince him?  
J: Boy I don't know. Like I said we probably broke all the rules, you know, honestly, we probably, we had to like give him a quick lesson in criminal justice 101.  
I: Was it mostly just verbal arguments? Kind of body language? Posturing?  
J: All of it.  
I: Any hostility? Verbal threats?  
J: 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.  
I: In your face kind of stuff?  
J: Yes kind'a. . . . 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?" You know. But I think that we all understood that he was very intelligent, reasonable, compassionate person. Not that the rest of the jury weren't but he was willing to exercise on the other side, a little more caution than the rest of the people who were ready to string him up. And he was more willing from a rational point of view to say "well you know maybe we shouldn't give this guy the death penalty."

A third juror commented on the tenor of jury deliberations:  
J: Well I know there was a lot of arguing and, um, it seemed like most everyone had already made up their mind . . . .  
I: They made up their mind about what . . . ?  
J: I don't remember how it began, but I know it was scary. I mean the people were arguing and carrying on and wanting out of there . . . .  
I: They wanted out of there? Did they say that?  
J: Yes, yes. But one fellow just got up and walked back and forth in the room and  
I: What was he upset about? Do you remember?  
J: Well he thought . . . [he] [the defendant] was, you know, guilty and of capital punishment, and you know get out of there. As far as he was concerned it was over. Then it just got. It got wild. But I, I remember that so well but as far as what they . . . That's all I remember is the arguing and the, well people were walking around.

A fourth juror thought he would have joined the holdout if the alternative had been LWOP:  
I: What was the single most serious area or point of disagreement?  
J: The definition of life. Did they pass that law? About parole?  
Life without the possibility of parole?
I: I honestly have no clue.
J: It might have been an option for him. Might have been . . .
I: What do you think you would have voted if it had been different?
J: Yeah I probably could have voted along with that right along with the [foreigner] guy . . . I really didn’t want him back in the community . . . Definitely. That was the main concern. And if you had to take him out like that. You had to take him out like that. Anyway you can take him out—whether it’s without parole. That would have been acceptable to me, but it was not acceptable for him to serve 20 years and be released. That was not an option.
I: Back to when you guys were deciding on the definition of life, how strongly did you guys disagree?
J: Very.
I: And you said there was shouting and name calling?
J: Eh, kind of under your breath name calling, you know what I mean. (kind of imitates under his breath) “like this engineer [foreign juror] he doesn’t know what the hell he is doing; he doesn’t know what he is talking about.”
I: Foreign, racial slurs?
J: No it wasn’t anything racial or anything like that. It was just like “you don’t understand” it was more like “you are ignorant of reality” it had nothing to do with race and nothing to do with . . . disrespecting anybody. It had everything to do with “you have not lived in this country long enough to understand that life does not mean life.”
I: How did the jurors finally resolve their differences over this question?
J: Shouting, intimidation . . . I don’t know what to tell you. Probably explaining to the hold out that life is not life, life is 20, 30 years. Eligible for parole. That took a lot of convincing. I think at that point we were probably breaking the law or something.

These three death cases present various situations in which jurors imposed death not because it was deemed retributively appropriate but for the incapacitative purpose of keeping the defendant from returning to society. Even in the Georgia case, in which jurors said that the defendant deserved more than a life sentence, this was based on their view that returning to society in less then ten years was retributively inappropriate, not because the death penalty was retributively appropriate. In each of the three cases one or more of the jurors explicitly said that the punishment the juror would have preferred is LWOP, if it had been available. Indeed, several jurors who voted for death because LWOP was not available made it clear that they felt the defendant did not deserve to die but that they had no alternative. One juror voted for death hoping the result would be LWOP. These cases reveal that LWOP was unmistakably jurors’ retributive preference, the punishment most believe is “right” or “deserved.”
These cases also illustrate different decision-making dynamics. In the Georgia case (Case 1) in which all four jurors believed the alternative was less than ten years, they reached the same decision for different reasons. While two stressed incapacitative purposes, two cited retributive reasons for their death votes. Notably, the retributivist explanations were phrased not as the rightness of death, but as the wrongness of the alternative. They wanted a more severe punishment that would also yield effective incapacitation, but not necessarily the death penalty. In the Virginia case (Case 2), jurors were uncertain about what the alternative would be. The absence of authoritative information from the judge, and seemingly reliable misinformation from law-trained jurors apparently fueled the jury’s desperation to guarantee incapacitation, whatever the sacrifice in retribution. In the Texas case (Case 3), the incapacitative rationale was galvanized by what the majority saw as a foreign influence in the most fundamental sense—a juror whose view did not reflect their culturally based understanding of the meaning of a “life sentence.” They knowingly violated the legal requirement not to consider parole in order to counter the assumption that undermined their view of what is required for incapacitation. They chose the punishment they felt was needed, not necessarily the one they believed was deserved.

2. Life Cases: Neutralizing the Early Release Argument.—This section presents excerpts from three cases from various states in which the juries ultimately gave life sentences. Just as with the death cases, jurors’ thought processes and group dynamics illuminate the critical role of the death sentence alternative.

a. Case 4: “We thought he would get life for each of the killings, plus the kidnapping, plus the larceny”. — South Carolina jurors with relatively long release estimates (twenty, twenty-five, and thirty years) hoped to achieve LWOP by imposing a life sentence together with additional life sentences for other crimes, despite the judge’s admonition not to be concerned about parole.

One juror explained that the decision was “hell, pure hell” because the jurors thought a life sentence would keep the defendant “in there for life” because of other killings and a kidnapping, but the judge told them that their only concern should be “whether we’re going to send him to the chair or not”:

J: What do you remember about the judge’s instructions to the jury for deciding what the punishment should be?

I: That was a case by itself. After we could not come to a conclusion . . . we asked to be brought out again and we asked the judge about the sentencing. Cause we thought that he would get life
for each of the killings, plus the kidnapping, plus the larceny. We thought the guy would be in there for life. And the judge flatly told us that that was none of our concern and it was his decision to make and for us not to worry about it more or less. For us not to concern ourselves with it. Our only decision is whether we're going to send him to the chair or not. And it was hell, pure hell.

A juror who wanted life after hearing the judge's sentencing instructions voiced indignation over not having LWOP explicitly available as an alternative:

J: I would think that if someone is brought to trial on a crime such as this and one alternative is the death penalty then the other alternative has got to be life without parole, and even you know, something to the order of solitary confinement, or that he would be, and could be used as a psychological specimen to try to determine, you know, why some humans can get drawn this far into wickedness and evil.

I: In your own words, can you tell me what the jury did to reach its decision about defendant's punishment?

J: We decided the vote had to be taken . . . and there were some . . . and I probably was the first one to speak, in favor of a life sentence as opposed to the death penalty. But, I was concerned about that void between the death sentence [and the alternative] and a lot of other people were too. And with that we actually went back and asked for clarification on that, cause the judge couldn't really tell us because later on we found out that was improper legal practice for him to disclose what life imprisonment meant. Now I'm reading [I read] this document that says life imprisonment and to me that means for the rest of his natural life. But in fact, I think that's what it read, for the rest of his natural life. But legally that means he could be eligible for parole in x number of years. And that's what concerns me. And that concerned others too.

I: Is there anything about this case that sticks in your mind, or that you keep thinking about?

J: I'm not smart enough to know how to fix it, but it just doesn't seem right that the alternative to the death penalty is life imprisonment, but not life imprisonment without parole.

A juror who believed the defendant "does not deserve to ever be a free man again," described her frustration with other jurors over the meaning of "for the rest of your natural life":

J: I mean, the thing that's such an injustice that the jurors have no clue as to what the sentence would be. And that's so important in making that decision. I mean we're talking about a man's life here. I mean, and that's important . . . that's real important. And I just didn't want the jury to be hung, so, after much deliberation and me
trying to tell them a life sentence does not mean actually what it says “for the rest of his natural life.” It doesn’t really mean that, but I couldn’t convince . . . [them]. At times, I had [several of] them, there were several that were going “what if he didn’t stay in there, then I don’t think he should live” . . . [b]ut because of the way that charge or whatever you call it is written. They were sure that what that paper said, meaning imprisonment for the rest of his natural life meant that he was never going to get out. Well what that says and what that actually is, is two different things. And I think . . . that that itself is a crime. I really, really do. And so that’s when I switched over, just hoping that if we all voted life sentence that it would be stronger in the judge’s mind . . . .

I: Is there anything about this case that sticks in your mind, or that you keep thinking about?

J: Well what I was sitting in there arguing with them was, I said . . . “If you give this guy a life sentence or he gets a life sentence he can be out on parole in 25 years.” . . . [W]ell they kept saying, no, it says on here . . . and they would read it again. That he will serve a life sentence for the rest of his natural life and they would read it very specifically like that and draw it out just like that. It says n-a-t-u-r-a-l l-i-f-e that meant for as long as he lives. I said, “Well that might be what that paper says and I can read that too. But that is not what that means.” And they said, “Yes it is.” And I said, “No it isn’t. He could be out on the street in 25 years.” . . . I don’t know in my heart that he does not deserve to ever be a free man again.

b. Case 5: “He was older, crippled . . . wouldn’t be dangerous to anyone.”—Jurors from a Virginia double murder case tried to impose a sentence of “life and a day” to keep the defendant from returning to society. They were reassured by the defendant’s crime-related disability and by the judge’s apparent indication that his chances of release would be slight if he got a life sentence for each victim. Four of the six jurors interviewed in this case gave estimates of three, twenty, twenty, and life; two gave no estimate.

One juror gave a rundown of the jury’s considerations:

J: There were several of the jurors, they were so strongly set on the fact that they did not want him out of prison ever that they were concerned that a life sentence wasn’t enough simply because he might get out of prison. There was some talk about whether we could recommend his sentence as life and a day. We didn’t know what the jury could do as far as the sentencing part. As to whether it’s was cut and dry, whether what was written down was all that we could do. Whether we had to decide on one of those or [whether]
we could write something down on there possibly we could give him
a life sentence and a day so he could never get out of prison.
Something else that was brought up, the fact that he would be tried
for shooting at [victim's name]. That he had another trial to go
through so they felt like the life sentence plus whatever he got for
shooting at [victim's name] would be enough to keep him in prison
for life. That was the deciding factor. If he hadn't been up for that,
he would have been given the death sentence. But since he had an
injury too, that was brought up. That he would be in such bad shape
after a few years with arthritis. He'd been shot and he couldn't walk
very well. Because of his injury, they felt like he would spend the
rest of his life in prison and even if he didn't that he would be in
such poor physical shape, he wouldn't be able to do anything.

A second juror said that recidivism was the strongest factor for a death
sentence but indicated that the judge told the jury that if the defendant got
two life sentences he'd probably never get out:

I: What were the strongest factors for and against the death penalty?
J: For: you hear of so many that they get out and do the same thing
again. That just hangs in my mind there—that they do crime again,
it's a fairly high percentage.
I: During your sentencing deliberations, did the jury stop to ask the
judge for information on how long before the defendant could be
released if not given a death sentence? What was the judge's
response and what was the jury's reaction?
J: He couldn't give a definite answer. About what the life sentence
consisted of—when would he be eligible for parole. He said it had
to go through [the] courts to see if it would come up for parole and
how many people would object to it. He said he would be eligible
for parole. All of them were afraid he'd get out and he'll go and do
the same thing again. . . . He explained . . . if we give him double
a life sentence [if he gets a life sentence for each crime], there was
probably no way in his lifetime that he could get out.

A third juror expressed confidence that the judge would put the defendant
away for a long time, that he would be old, crippled, and relatively harm-
less if he did get out, and that most jurors did not think he deserved to die:

J: We talked about that. We talked about—it entered into our
deliberations a lot whether we should allow him back out into society
ever and how long he would be put away if we didn't impose the
death penalty. We felt judge [name] would put him away [for] a
long time.
I: Among the topics you did discuss, what was the single most
important factor in the jury's decision about what defendant's
punishment should be?
J: He was older, crippled, and we could put him away and keep him away from society and he wouldn't be dangerous to anyone.
I: Can you think of anything more we haven't talked about yet that was important in understanding the jury's punishment decision?
J: I do remember one woman who ... originally brought up the death penalty, said that her main thing was that she would feel real concerned that he would be let out and kill somebody again and she would feel guilty ... you know, that she allowed him to live then get out and kill again and that was the main thrust of that. It wasn't that this man deserves to die, you know, none of us really felt that way—in a real adamant [way]—ah . . .

A fourth juror reiterated concern that the defendant might get out despite two life sentences:
J: [W]e was most concerned, that if we give him life, 2 life sentences, if he could get out anyway and what he could do if ever lived to get out? And ah, we all sit there and try to imagine what he'd do or how he could get out of prison.

c. Case 6: "You heard the judge, life means life".—Three North Carolina jurors, each with release estimates of twenty years, found the judge's instruction to assume that life means life not credible, but a pro-life juror took it literally and blocked a death verdict. One juror expressed the feeling that the jury was manipulated by the ambiguity of the judge's instruction.

A juror described how one pro-life juror and a question to the judge about the meaning of "life in prison" affected jury deliberations:
J: When it got to the unanimous part that's where everything kinda fell apart. There again, it was [one pro-life juror] trying to lead the show. Our initial vote was 10-2 and at that point in time we had a couple of questions for the judge. As far as what does life in prison mean? [The judge] said we had to take life as life [inaudible] but we had a lady on the jury who works for the district court judge. She knew what life meant. But that was one of our questions and if he got life in prison could it be life without parole. There again she knew about that. That was the end of the first day. The second day we came back we were all furious, and mad and everything and basically really and truly think it was that [the juror for life] knew he wasn't going to vote for the death penalty and he just wanted to run the show for a while. Took control of everybody, of course by that time the other guy who wasn't sure changed his mind, which changed it to 11-1. But initially it started out very calm. Real calm, real organized, real friendly even, if you can say that. And then it turned very, very, very hostile.
A juror who said, "I don't understand why life without parole in a case like this is not an option," was asked:

I: During your sentencing deliberations, did the jury stop to ask the judge for information on how long before the defendant could be released if not given a death sentence? What was the judge's response and what was the jury's reaction?
J: The judge instructed as far as were concerned life meant life. [A pro-life juror] knew that too, but we went back in the room he said, "you heard the judge, life means life," and everyone said [to him], you know that life doesn't mean life, you look in the paper everyday and you see somebody been paroled after x number of years in prison. I don't understand why life without parole in a case like this is not an option.

Another juror underscored that life does not mean life and committed himself to oppose the defendant's parole. if and when that time comes:

I: How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?
J: I know, they spend 20 years less time served, I [have] friends who are married to attorneys and he discusses that, and I'd say well, he got life and they say life is 20 years. Time off for good behavior or time off because of the prison cap, but this man is not supposed to be eligible for parole until 2011, but I think parole is going to be fairly automatic unless people show up and say no. We're writing letters if I'm still alive in twenty years. I told my child if I'm not alive, they have to take all my documents to testify.

As in the death cases, the incapacitative rationale also dominates the life cases. But in these latter cases enough jurors managed to satisfy themselves that it would be served by imposing a life sentence. Other than the drastic difference in outcome, there is surprisingly little that distinguishes the life cases from the death cases. In both, jurors wanted clarity about the death penalty alternative. They also wanted LWOP, and were angry that it is not available. They felt compelled to consider death not because it was deserved but because it may have been necessary for incapacitation. Jurors in life cases faced complicated circumstances that made life imprisonment seem likely. Thus, they decided in Case 4 that the defendant would never be released because of other convictions, and in Case 5 that a likely second life sentence and the defendant's physical disabilities would forestall parole and render the defendant harmless if it were granted. Despite the similar circumstance of having three other life sentences in a death case (Case 2), nonetheless the outcome was very different. Indeed, the two Virginia cases (Cases 2 and 5) are not much different in the concerns and arguments jurors expressed about the defendant's punishment.
Perhaps the most consistent difference between the life and death cases is in the release estimates of their respective jurors, as recounted in the interviews and as expressed in the heat of jury deliberations.260

These life cases also illustrate how the ambiguity in judges’ instructions about the death penalty alternative encourages disingenuous manipulation in jurors’ deliberations. The fiction that a life sentence means “the rest of the defendant’s natural life in prison,” together with the instruction that jurors must not consider parole, permitted a life holdout to block a death verdict by maintaining that the defendant would stay in prison (Case 6). By the same token, it enabled a majority for life to confront a death holdout concerned about incapacitation with similar legal language and judicial instructions, to the effect that the defendant would not get out of prison and, in any case, this should not be considered, even when the jurors themselves do not honestly agree (Case 4).

C. Different Understandings of the Death Penalty Alternative in the Same Legal Contexts

This subpart addresses the decision-making of jurors in two states—Kentucky and California—that differ drastically in what they offer jurors as alternatives to the death penalty. In both states, jurors can impose a sentence that provides permanent incapacitation. In Kentucky this can be accomplished by only one of the state’s three alternative sentencing options;261 in California it is the one and only death penalty alternative.262 The purpose here is to examine how jurors actually make their decisions in these very different legal contexts—situations that effectively provide them with the LWOP option that many jurors in the life and death cases examined above emphatically desire.

1. Kentucky: For the Same Reason, Some Get Life, Some Get Death.—At the time of the CJP juror interviews, in Kentucky, as an alternative to death, convicted capital defendants could be given (a) a life

260. The difference in release estimates between the life and death cases is a stark reflection of the findings of the statistical analysis in Part IV. See supra notes 137-61 and accompanying text. None of the jurors in the three life cases gave a release estimate of less than twenty years, whereas most or all of the jurors in each of the death cases gave estimates of less than twenty years. The six cases in this section and the excerpts from their jurors’ interviews were selected without reference to the jurors’ release estimates.

261. See KY. REV. STAT. ANN. § 532.030(1) (Michie 1996) (giving jurors the option of recommending a “life” sentence, a life sentence without parole eligibility for 25 years, or a term of not less than 20 years as an alternative to death in capital cases). In Kentucky, moreover, this sentence is subject to judicial revision. See Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980) (explaining that Kentucky judges are not bound by the term of years recommended by the jury).

262. See CAL. PENAL CODE § 190.3 (West 1988) (providing that LWOP is the only sentencing alternative to death for capital murder).
sentence with parole eligibility in twelve years; (b) life without parole for twenty-five years; or (c) a term of years of any length greater than twenty years (for example, three hundred years), half of which must be served before parole eligibility. The following excerpts from three Kentucky cases illustrate how jurors' concern with keeping the defendant from returning to society and confusion about these death penalty sentencing options led one jury to spare the defendant's life and two others to impose the death penalty. Parenthetically, two jurors explained that a defendant's relative youthfulness was an aggravating consideration, contrary to Kentucky law.

a. Case 7.—In one Kentucky case the jurors rejected both a death sentence and a life sentence in favor of a term of years.

One juror explained:

J: The main reason we didn't go for a life sentence [instead of a term of years] was that we felt if he got a life sentence he would get paroled. The jury, as a whole, did not ever want him back on the street. . . . What we did—we gave him ninety-five years . . . instead of a life sentence on account of the parole possibility. The way the laws are written, I believe you got'ta serve at least half. So, we knew if we gave him that, then he would never get out anyway. And the judge gave him exactly the way we brought it out, too.

Another juror in this case remarked:

J: [S]ince [the defendant] was 55 years old, [we knew] that if we impose 95 years on him, he could not, he'd have to serve 45 years even before he could get out the door, even before he'd come up for parole, he'd have to serve 45 years. And, at that rate, he'd be 100 years old, or thereabouts. At 100 years old he's not going to hurt a flea.

b. Case 8.—In a second case that ended in a death sentence, jurors believed they could postpone parole for thirty years but felt, because of the defendant's youthfulness, that this was not long enough.

One juror explained:

J: I would think the convincing of some of the jurors that yes, this man would still be dangerous if he gets out of prison at age 65. I

263. See KY. REV. STAT., ANN. §§ 439.3401(2)-(3), 532.030 (Michie 1996). In 1998 Kentucky amended its statute to provide a fourth option: LWOP. See id. § 532.030(1) (Michie 1996) (amended 1998). The amendments also changed option (c). Rather than imposing a term of unlimited length (which is now presumably unnecessary because of the LWOP option), jurors can impose a term of not less than 20 years and not more than 50 years. See id.

264. See id. § 532.025(2)(b)(8) (Michie 1996) (establishing the defendant's youthfulness at the time of the crime as a mitigating consideration).
think that without a doubt, if the jury could've been assured that he would be given life without any possibility of parole, the jury would've voted to do that.

Another juror in the same case gave further details:

J: [A]ccording to the judge's instructions, [we can] give capital punishment [or] I think the next level of punishment was thirty years with, life with no parole for thirty years, which would have put him out on the streets. he was 35, at the age of 65. There were some of us who were willing to do that, only a couple of us, but the majority were not. So, we went back in to the judge and asked him, "Is there no other level of punishment that could be imposed, specifically life with no chance of parole?" He simply said, "I've given you the only instructions I can give you by law." We had to go back in and make our decision. So, I think that was the overriding factor that we pretty much agreed that he shouldn't be allowed to be out where he could harm someone again.

c. Case 9.—In still another death case, the jurors wanted to keep the defendant from returning to society but seemed to believe that their only option other than death was a life sentence that would mean parole consideration in twelve years.

One juror explained:

J: At that time there was a law, they weren't allowed to know but some of us already knew it: The law was with [a] life [sentence], [the defendant gets] parole in 12 years. If given life in prison, [the] main factor [was] . . . if we could just give him life in prison and he would be kept behind bars for the rest of his life without ever having [a] chance of parole. That's what we'd go for, cause even though we believed in the death penalty, we really hated it too. Some of us knew of that law and we said would you feel comfortable if you knew he was going to get paroled in twelve years?

Whether the defendants in these cases were sentenced to death, and most were, appears to have been largely a function of jurors' misinformation about the alternatives to the death penalty. Jurors did not mention changes in their understanding of the evidence of aggravation or mitigation in making their punishment decisions. Instead, they were concerned about keeping the defendant off of the streets, and they resolved this concern based on a mistaken assessment of their options. Ironically, the jurors who imposed death (Cases 8 and 9) appear to have wanted the punishment imposed by the life jury (Case 7) but simply did not know how to achieve it. Note also the irony that youthfulness becomes aggravating rather than mitigating because it increases the defendant's chances of surviving long enough to be paroled. It is hard to miss the arbitrariness in capital
sentencing resulting from the confusion and misunderstanding of Kentucky jurors about the several death penalty alternatives in that state. It is equally difficult to overstate the gravity of this confusion, since most jurors voted for death because they wanted LWOP, not because they determined that death was the appropriate or deserved punishment on the basis of aggravating and mitigating considerations.

2. California: When Does Life Without Parole Mean What it Says?—In California, the only alternative to the death penalty is LWOP. However, fewer than one in five California jurors actually believe such defendants will usually spend the rest of their lives in prison. Most jurors in the cases examined above—both jurors who voted for death and for life—complained that LWOP should have been an option and claimed they would have voted for it if it had been available. The following six California cases—three death and three life—serve to illustrate how having LWOP as the sole death penalty alternative and, presumably, jury instructions to this effect, affects the decision-making process.

a. Case 10.—In a death case, one of the jurors recalled that the jury was convinced that the defendant could get out of prison even if the sentence was LWOP:

J: [W]e worked together and wrote out a question. . . . [O]ne I recall was, was it possible for, if, the verdict was life imprisonment without parole. Was it possible for that sentence to be commuted to a less sentence than life in prison? That's the one issue that I recall vividly. And the judge, we had to kind of stop and wait, there was a couple hour break there while he reviewed that with the attorneys and what not. And called us back together and basically said, “sorry, but I'm by law restricted to not tell you anything about this issue.” And so we thought, okay. That was a question someone wanted to know. “well, gee, if we give him life in prison is that a guarantee, is that a sure thing, or is it a vague, can it be changed?”

A juror, who believed capital murderers not sentenced to death are usually paroled in thirteen years, commented:

J: We were not in total agreement that he should have death penalty but we were in total agreement that he should not be back in society and if we could have given a verdict that would not have been overturned by a California Supreme Court in some future days, that would have kept him in prison forever then I believe the jury would not have given him the death penalty. So we asked for the judge

265. See supra note 224 and accompanying text.
... to instruct us again on ... whether this man, if we didn't give him the death penalty, [would] have a possibility of parole. And he, for some reason, could not, there's some sort of ruling by the U.S. Supreme Court that he could not answer the question that we wanted. He couldn't answer it. And he told us that. So given that we believed that given the history of California of overturning the death penalty and god knows what would have happened, you know, Charles Manson could be out again, or anybody could be out again cause they've overturned the death penalty. We did not want to give him life in prison because we thought perhaps he might be paroled. Given that option we had to give him the death penalty and just hope they wouldn't overturn it and parole him. It's like the lesser of two evils. We would have given him life in prison if we thought he would never get out, like this fellow Dahmer. Where they have given him so many consecutive life sentences that he will never get out. If there had been a [sentence] possibility of that then we would have done that on Mr. [defendant's name].

b. Case 11.—In a second California death case, a juror who thought release would usually come in fifteen years observed that the official alternative is:

J: Life imprisonment, but even though now it says without possibility of parole, we were still concerned that some day he'd get out on parole. We didn't want him out again at all.

A juror who believed the alternative to be a life sentence, but not LWOP, said:

J: I was undecided. I had a personal problem with the life sentence, but then the judge explained to me that if he gets a life sentence there was absolutely no chance that he would get out. I thought he might get out. I still don't trust anybody about it. You can do anything you want to if you're crooked enough or whatever.

c. Case 12.—In a third California death case, a juror who estimated release in seventeen years simply did not believe that LWOP meant what it said. He also worried that the defendant might escape even if given a true life sentence with no chance of parole:

J: Some of the people were very upset. People cried. And not just the women. It was a hard decision and we all took it very seriously. There was one woman who was a holdout. She just couldn't decide to commit to the sentence. She went back and forth. Even when the judge finally read the sentence, she got all upset. I could see her start . . . like she wanted to take it back. We talked about life without parole, too. The holdout wanted life without parole. But we
knew if we gave him that he would get parole. I was concerned that
he could escape. For instance, if there was an earthquake. Most
importantly we decided that these crimes by their nature . . . were
too dangerous, that [defendant’s name] is a menace to society.

The unmistakable theme in these California death cases is that the
jurors simply did not believe that a defendant sentenced to LWOP was sure
to stay in prison. Some were not satisfied with the judge’s answer to their
question about the defendant’s possible release; others simply did not
believe what the judge told them. Some believed that the defendant could
be paroled, some believed that even if there were no parole the defendant
would be likely to get out through reversal or a commuted sentence, and
still others imagined that a natural disaster might free the defendant. All
decided upon death for incapacitative rather than retributive reasons; they
did not trust that the alternative would keep the defendant in prison for life.

In three California life cases, jurors who voted for life did not neces-
sarily believe that the death penalty alternative would be a true life
sentence. In two of the three cases, jurors remained concerned that the
defendant might get out but translated these concerns into different inter-
pretations of the punishment options.

d. Case 13.—A juror who voted for life indicated that other
jurors decided on life because they thought the defendant was more likely
to get out of prison if sentenced to death than to LWOP:

J: [S]ome of them were afraid if given the death penalty he would
appeal it and they didn’t want him out.
I: You do have more chances to appeal for death since it’s so final.
J: So I think more or less it changed the minds and okay we’ll go for
life.
I: What was the single most important factor in the jury’s decision
about what defendant’s punishment should be?
J: That he may get out someday.

e. Case 14.—In another California life case two jurors rejected
the judge’s indication that the death penalty alternative would be LWOP,
but one of them said that because some jurors trusted the judge’s statement,
the defendant got life:

I: How long did you think someone not given the death penalty for
a capital murder in this state usually spends in prison?
J: Not for whole life, they do get out.

In response to the same question a second juror answered:

J: I did not think he would serve a life term. [He] would get out
because [he is] young—[the] jury shared [this] opinion. I might have
had a different opinion if [the] defendant was 70 or so. Youth hurt because [he’d] probably get out of jail when he’s 35.

The second of these jurors went on to fault the judge, as he saw it, for not leveling with the jury on parole when the judge said there was no chance of parole:

J: The judge was unhelpful. Wouldn’t answer accurately. It may have been different decision if judge said life without parole does not actually mean no possibility of parole. . . . I think the judge had a major influence on the jury’s decision. If he had answered the questions that we had raised, the jury might have—I don’t want to exaggerate this, but—if he had answered the questions that we had raised in a truthful and honest manner. . . . I think the jury might have reached a different decision.

f. Case 15.—In a final California life case, the judge’s affirmation that life meant the rest of the defendant’s life in prison overcame jurors’ doubts. As one juror who was unsure of the alternative observed in response to the question:

I: During your sentencing deliberations, did the jury stop to ask the judge . . . for other information or instructions?
J: The judge said [Defendant] wouldn’t get out of prison if he got life. . . . That made the jury more comfortable giving the life verdict.

I: What were the strongest factors for and against a life sentence?
J: The strongest thing for a life sentence was that we were told that [Defendant] would not get out of prison.

California capital jurors who voted for a life sentence did not all do so because they believed the judge’s instructions concerning LWOP. Indeed, in only one of the three life cases above did most jurors appear to accept the judge’s instruction to this effect. Jurors in these cases ended up not voting for the death penalty for other reasons. In one case, they convinced themselves that the chances of the defendant getting back into society were actually greater if they imposed the death penalty, owing, as they saw it, to the many reversals of death sentences upon appeal. In another, they could not muster a unanimous vote for death because, in one juror’s view, of the judge’s failure to “tell the truth” about parole.

D. Overview of Part V Findings

Jurors’ accounts of their sentencing decisions yield insights beyond what the statistical analysis discloses. One revelation is that in many cases their punishment preference would have been a true life sentence without parole. They complain that (they thought) it was not available and
emphasize that for a decision of this gravity it is difficult to understand why they did not have such an option. Many say they would not have imposed death if they could have imposed LWOP. In the absence of LWOP, they felt they had no other choice; they imposed death by default.

Another revelation from these narrative accounts is how incapacitative concerns overshadow retributive ones. Jurors may impose a less severe punishment for a more egregious crime if it is sufficient to keep the defendant off of the streets in perpetuity. Thus, when the defendant also has other sentences to serve, such as in Case 5, jurors will sometimes settle on a life rather than a death sentence as sufficient for incapacitation, though they unapologetically admit that they would have imposed death if it had not been for these additional offenses and accompanying sentences. The primacy of incapacitative over retributive considerations is also manifest in cases where the supposedly mitigating youthfulness of the defendant is instead seen by jurors as increasing the likelihood that he might survive in prison long enough to be paroled, and thus cited as the main reason for a death rather than a life sentence, as in Cases 8 and 9.

Jurors' accounts provide a picture of how uncertainty and underestimates figure in their decision-making. While underestimates of the sentencing alternative make the death penalty seem more imperative, being denied information on the alternative provokes expressions of frustration and invites abuses of other jurors' ignorance. When some members of a jury are uncertain, others may be tempted to assume the mantle of authority by invoking the alleged "knowledge" of friends or acquaintances in the legal system, corrections, or police, or by claiming to know the actual meaning of statutory sentencing language.

These cases reflect the rhetorical power of the early release issue in the deliberative sentencing process. It is an effective tool of persuasion that capitalizes upon widely shared and hard to correct misperceptions of parole or release practice, and it appeals to prevailing public fears that violent criminals are irremediable predatory miscreants.266 The belief that such offenders will be out of prison far too soon leads jurors to impose

266. Over three decades of research has amply demonstrated that the public sees courts as too lenient. See JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 2 (1997) ("Most people view the criminal justice system as excessively lenient and tilted towards protecting the offender . . . ."). Public attitudes regarding the belief in early release and parole board leniency is less well documented in the U.S. owing to the absence of questions, not to contrary findings. However, one U.S. report found that over 80% of the public who were surveyed in 1993 supported a proposal to make parole more difficult. See BUREAU OF JUST. STAT., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 192 tbl.2.44 (Kathleen Maguire & Ann L. Pastore, eds. 1994) (indicating that 82% of white respondents and 84% of black respondents favored making parole more difficult). In another study, an evaluation of focus group members' views revealed substantial support for the view that an inefficient criminal justice system, including early release, contributed to the crime problem. See THEODORE SASSON, CRIME TALK 37-38 (1995).
death for incapacitative reasons, unless they believe that a life sentence, even with the possibility of parole but augmented by sentences for other offenses, would keep the defendant in prison for the rest of his life. The irony is especially striking when jurors want permanent incapacitation but not death as punishment and when LWOP is thought not to be legally available. They will often feel forced to settle for death; they will sometimes persuade themselves that they can achieve permanent incapacitation with a life sentence; and they will occasionally try to persuade the trial judge to accept their own improvised version of LWOP, such as “life and a day.”

VI. Implications and Conclusions

To address the specific issue raised in Brown, this study has sought a more general understanding of the extent and effect of jurors’ misperceptions of the death penalty alternative in capital sentencing. This concluding section of the Article pulls together the broader understanding gained regarding the role of the death penalty alternative in capital sentencing decisions, as well as the answer to the more specific question raised in Brown. First, it examines the implications of the foregoing empirical findings for the Court’s stand on “false choice” as articulated in Simmons. It then considers the related issue of “forced choice” and its consequences for retributive standards and excessiveness in capital sentencing, as revealed in jurors’ accounts of their decision-making. With this framework, it then turns to the implications for the administration of capital punishment and to aspects of the challenge that social scientists can highlight for those in the legal community who must grapple directly with the problems this data reveals.

A. False Choice: The Misunderstanding of Death Penalty Alternatives

The findings of this research speak directly to the views voiced by concurring and dissenting justices in Simmons. Concerning the

267. The jury’s desire to improvise a life sentence without parole when it is not statutorily available is also reflected in the transcript of the Westbrook case. See Lane, supra note 111, at 342. 268. 118 S. Ct. 355 (1997) (opinion of Stevens, J., respecting denial of certiorari). Brown addressed an “obvious tension” between Texas law and the Court’s ruling in Simmons. Id. at 355. The Court in Simmons held that when a capital defendant is alleged to be dangerous and the death penalty alternative is LWOP, jurors should be informed of the alternative to keep them from making a false choice between death and what they were likely to wrongly suppose the alternative would be. See Simmons v. South Carolina, 512 U.S. 154 (1994) (plurality opinion). Brown asked a further question: Shouldn’t jurors be similarly informed when the alternative is something other than LWOP, specifically in Brown’s case, when it is thirty-five years in prison before parole eligibility? 269. See supra subpart III(C). 270. Most obviously, they confute the view expressed by Justice Scalia that it is “quite farfetched” to suppose that in imposing the death penalty, Simmons’s jurors would be influenced by the possibility
availability of parole, letting jurors know what the alternative is only when the defendant cannot be paroled, as Simmonds does, presumes that jurors’ punishment decisions respond to whether or not, but not to how soon, he might return to society. The data shows, however, that jurors’ punishment decisions are markedly influenced by their perceptions of when, as well as if, the defendant would be released from prison. The data demonstrates that the sooner jurors think a defendant will be released from prison, the more likely they are to vote for death and the more likely they are to see the defendant as dangerous. For most jurors, then, the life or death decision responds to whether they wrongly think the defendant will be back on the streets in five, ten, or fifteen years, whether or not the law will keep him in prison for thirty-five years, as in Brown’s case, or for the rest of his life, as in Simmons’s. This is not to say that the difference between thirty-five years and LWOP would be irrelevant to jurors, but rather that what most jurors think about the death penalty alternative is so different from either of these parole realities that failing to correct their mis impressions in both instances will contribute to the excessive imposition of the death penalty.

The evidence thus speaks more favorably for Brown than for Simmonds; it supports the proposition that jurors should know both if and when a defendant not sentenced to death might be released from prison. Jurors underestimate the death penalty alternative in states with parole eligibility in twenty, twenty-five, and thirty or more years, just as they do in states without parole. The data shows that it is these mistaken estimates that dispose jurors toward the death penalty regardless of the true legal provision concerning parole. That is to say, the effects of jurors’ mistaken views of the alternative are obviously not confined to those states or instances in which LWOP is the only alternative. In fact, the resulting false choices are equally common, equally pernicious, and better documented with the more ample empirical data for states that permit parole after a mandatory minimum period of at least twenty years.

Concerning dangerousness, informing jurors of the death penalty alternative only if the defendant is alleged to be dangerous, the other restriction of Simmonds, presumes that information about parole is relevant only for

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that he might be released on parole. See Simmonds, 512 U.S. at 184 (Scalia, J., dissenting). Justice Scalia did not question the point that Simmonds’s jurors were unlikely to know that he could not be paroled, but simply doubted that this would influence their decision-making. See id. at 181 (Scalia, J., dissenting) (noting that it was the depravity of the crime rather than any “fear of the future” that led the jury to assign the death penalty). What Justice Scalia imagines is quite farfetched about Simmonds’s jurors’ decision-making is, in fact, exactly what the statistical data on jurors’ decision-making show is generally true, and what jurors’ own accounts of their decision processes confirm.

271. See supra Table 3.
272. See supra Table 7.
273. See supra Table 1.
purposes of incapacitation. The data shows, however, that jurors’ release estimates influence the punishments they impose whether or not defendants are alleged or believed to be dangerous.²⁷⁴ Evidently, jurors are concerned about the duration of imprisonment for reasons in addition to incapacitation. Indeed, this is what a number of them said in their interviews.²⁷⁵ Other jurors also emphasized that they voted for death because the defendant deserved more than what they thought the alternative would be. The unmistakable implication is that jurors often want lengthy imprisonment for reasons of retribution as well as incapacitation. They may be choosing death for retributive reasons when they would have chosen its alternative instead if they had correctly understood its severity.

The data thus speaks against a ruling in Brown like that in Simmons, relying upon the defendant’s alleged dangerousness as a necessary condition for informing jurors of the death penalty alternative, one that might otherwise be prompted by the fact that under Texas law all capital defendants, including Brown, are alleged to be dangerous.²⁷⁶ The empirically demonstrated prevalence of false choice indicates that the due process reasoning the Court applied in Simmons, and its possible extension in Brown, to cases in which the defendant is alleged to be dangerous and the alternative is less than LWOP,²⁷⁷ is too narrow. This reasoning does not appreciate or accommodate the full extent of false choice, beyond the particularities of Simmons and possibly Brown. The issue is not simply a matter of the defendant’s right to respond to allegations of dangerousness or some other aggravator, it is the broader question of ensuring reliability and curbing excessiveness as required for a reasoned moral judgment in capital sentencing.²⁷⁸

²⁷⁴. See supra Table 6.
²⁷⁵. For example, in Case 1 a juror said, “I don’t think that I thought necessarily that he would be dangerous in the future. I just personally feel that he was guilty and that he had to be punished and I felt like 6, 7, 8 years and then out was not punishment enough . . . .”
²⁷⁶. See Jurek v. Texas, 428 U.S. 262, 270 (1976); see also supra note 40 (describing the 1994 revision of the Texas statute).
²⁷⁷. This would hold only if a Supreme Court ruling in Brown or a similar case were limited to defendants alleged to be dangerous, as is required of all capital defendants under Texas law. See supra note 41.
²⁷⁸. Conspicuously, the findings here accord with Justice Souter’s view in Simmons, that jurors’ failure to understand the death penalty alternative, regardless of dangerousness or LWOP, compromises their ability to make a “reasoned moral judgment” as constitutionally required in capital sentencing. Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring). Justice Souter observed, “[t]he Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed,” id. (Souter, J., concurring), and because “the Amendment imposes a heightened standard for reliability in the determination that death is the appropriate punishment in a specific case,” id. at 172 (Souter, J., concurring) (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion)). It thus “requires provision of accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.” Id. (Souter, J., concurring) (citing Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion)).
It is critical here not to miss the forest for the trees. In addition to unreliability in sentencing, there is also a tilt toward death, or a pro-death bias in capital sentencing. The false impressions jurors have of the death penalty alternative are not simply random mistakes of the kind pure ignorance or chance would be likely to yield; rather, they are systematic mistakes of the kind bias would produce—they are overwhelming underestimates. In other words, jurors’ mistakes, whatever their sources, are raising defendants’ chances of being sentenced to death. In effect, capital defendants under the circumstances are deprived of an impartial jury. Defendants do not simply face the unreliability of a crap shoot, they are confronting the bias of dice loaded for death.

B. Forced Choice: The Unavailability of Appropriate Alternatives

The empirical evidence, especially the accounts jurors give of their own punishment decision-making, reveals that the absence (real or imagined) of an LWOP option figured prominently in the decisions of many jurors to impose death. Jurors explained that they voted for the death penalty because the available alternative did not rule out parole; they chose the death penalty not because they thought it was the most appropriate punishment, but because it was preferable to what they believed the alternative would be.\textsuperscript{279} The jurors imposed death not as the appropriate, but as the least inappropriate of the available punishment options. In such cases, defendants are sentenced to death and executed because their jurors believe they cannot impose the punishment they deem most appropriate.\textsuperscript{280}

\textsuperscript{279} In the words of a Georgia and a North Carolina juror, respectively: “Unanimously, 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” and “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.” See discussion supra subsection V(A)(1)(d).

\textsuperscript{280} The evidence that many capital jurors who impose death would not have done so if LWOP were available, and they understood this to be the case, is consistent with the findings of surveys on the punishment preferences of citizens. See Bowers et al., supra note 10, at 107 (indicating that most people polled would prefer to impose LWOP plus restitution, if such an option were available, rather than the death penalty); see also Marla Sandys & Edmund F. McGarrell, Attitudes Toward Capital Punishment: Preference for the Penalty or Mere Acceptance?, 32 J. RES. CRIM. & DELINQ. 191, 197-99, 208 (1995) (showing that Indiana residents’ support for capital punishment, consistent with findings of other studies, decreases when sentencing options such as LWOP are available). Moreover, jurors in both life and death cases in this study have also confirmed equal or greater preferences for alternatives to the death penalty, namely life without parole (LWOP) and especially a sentence of LWOP with work in prison for restitution to victims’ families (LWOP+R). See Bowers, supra note 10, at 165 tbl.2 (presenting preliminary CJP data from California, Florida, and South Carolina). These findings also hold for capital jurors in the full complement of 11 states examined in this Article, as shown below:
A further consequence of not having an LWOP option or not believing it is available is an evident sacrifice of the primacy of retributive standards. Indeed, the reasons jurors gave for imposing the death penalty in many of the cases examined here may be said to stand retributive principles on their head. Conventional mitigating considerations become the reason for imposing death not life. The defendant’s youthfulness, for example, is sometimes seen as a reason for death rather than life.\textsuperscript{281} Probably the starkest contradictions of retributive standards are instances in which jurors impose life when the defendant is guilty of multiple killings or a crime spree, but assert that they would have imposed a death sentence if he had committed only one murder.\textsuperscript{282}

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**AS AN ALTERNATIVE TO THE DEATH PENALTY, WOULD YOU PREFER:**

Life in prison without the possibility of ever being released on parole (LWOP).

<table>
<thead>
<tr>
<th>Jurors in:</th>
<th>Death Cases</th>
<th>Life Cases</th>
<th>All Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>38.6%</td>
<td>46.5%</td>
<td>42.2%</td>
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<tr>
<td>No</td>
<td>49.2%</td>
<td>38.8%</td>
<td>44.4%</td>
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<tr>
<td>Not sure</td>
<td>12.2%</td>
<td>14.6%</td>
<td>13.3%</td>
</tr>
<tr>
<td>(No. of cases)</td>
<td>(492)</td>
<td>(417)</td>
<td>(909)</td>
</tr>
</tbody>
</table>

Life without parole and a requirement to work in prison for money that would go to victims’ families (LWOP+R).

<table>
<thead>
<tr>
<th>Jurors in:</th>
<th>Death Cases</th>
<th>Life Cases</th>
<th>All Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>54.6%</td>
<td>64.0%</td>
<td>59.0%</td>
</tr>
<tr>
<td>No</td>
<td>32.1%</td>
<td>25.2%</td>
<td>28.9%</td>
</tr>
<tr>
<td>Not sure</td>
<td>13.3%</td>
<td>10.7%</td>
<td>12.1%</td>
</tr>
<tr>
<td>(No. of cases)</td>
<td>(496)</td>
<td>(420)</td>
<td>(916)</td>
</tr>
</tbody>
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Clearly, many jurors prefer LWOP and especially LWOP+R to the death penalty. Jurors are almost evenly split between LWOP (42.2%) and death (44.4%) and by a two-to-one margin they prefer LWOP+R (59.0%) to the death penalty (28.9%). Moreover, jurors who served on life and death cases do not differ much. The percentage difference does not exceed ten points for any of the comparisons. Hence, these punishment preferences appear to be relatively independent sentiments, not rationalizations of the punishments they imposed.

281. Jurors say, “Youth hurt because he’d probably get out of jail when he’s 35[,]” see discussion supra subsection V(B)(2)(e), or “. . . I just knew he would get out someday. Because he was only like 26 at the time of the trial.” See discussion supra subsection V(A)(3)(a). The flip side is that advanced age mitigates the punishment: “[S]ince [the defendant] was 55 years old, [we knew] that if we impose 95 years on him, he could not, he’d have to serve 45 years even before he could get out the door . . . .” See discussion supra subsection V(B)(1)(a) (latter two brackets in original). Or again, a defendant’s likely good behavior and cooperation in prison is treated as aggravation because it will make parole more likely: If not executed, “he would end up being a model prisoner and be out in 15 to 20 years.” See supra subsection V(A)(2)(b) (discussing Case 2).

282. For example, one juror said, “[We imposed life] cause we thought that he would get life for each of the killings, plus the kidnapping, plus the larceny. We thought the guy would be in there for life.” See supra subsection V(A)(3)(a) (discussing Case 4); supra subsection V(A)(3)(b) (discussing
Incapacitation appears to have trumped retribution in these cases. Jurors are sacrificing retributive for incapacitatively goals, contrary to the Court’s affirmation of retribution as the primary grounding of the capital sentencing decision.283 The reason, we submit, is the absence of LWOP as a sentencing alternative, and one understood by jurors to be an available option.284 If LWOP was constitutionally required to be available as a punishment option when the death penalty might be imposed, and jurors were made to understand this fact, the death penalty would no longer be the only way to achieve permanent incapacitation; it would then be unique only for its retributive harshness. In other words, LWOP and death are essentially equivalent for incapacitative purposes,285 the choice between them is fundamentally a retributive judgment.286 The two are arguably indistinguishable with respect to incapacitation, but worlds apart in retributive harshness.287 With LWOP as an available and known

Case 5). Another juror in the same case affirmed that “[t]hat was the deciding factor. If he hadn’t been up on the other crimes, he would have been given the death sentence.” See supra subsection V(A)(3)(b) (discussing Case 5). A juror in another case said, “[H]e had another trial to go through so they [the jurors] felt like the life sentence plus whatever he got for shooting at [Victim’s name] would be enough to keep him in prison for life.” Id. (discussing Case 5). Another juror in the same case affirmed that “[t]hat was the deciding factor. If he hadn’t been up on the other crimes, he would have been given the death sentence.” Id. (discussing Case 5).

283. See supra note 84 and accompanying text (describing cases in which retribution rather than incapacitation was characterized as the jury’s function).

284. It might be that banning dangerousness as a sentencing consideration would return retributive standards to the fore, or at least that prohibiting capital statutes from making dangerousness a necessary aggravating consideration (as those of Texas and Oregon do) would redeem some loss of retributive standards in sentencing. See Perlmutter, supra note 94, at 61-75 (explaining how dangerousness as a sentencing consideration causes the sentence to focus “on the need to incapacitate the offender, rather than on the penalty that the defendant deserves”). Disallowing or even downgrading dangerousness as a sentencing consideration seems improbable, however, because the Court has explicitly accepted, and repeatedly affirmed, dangerousness as a capital sentencing consideration. See, e.g., Johnson v. Texas, 509 U.S. 350 (1993); Graham v. Collins, 506 U.S. 461 (1993); Franklin v. Lynaugh, 487 U.S. 164 (1988); California v. Ramos, 463 U.S. 992 (1983); Barefoot v. Estelle, 463 U.S. 880 (1983); Estelle v. Smith, 451 U.S. 454 (1981); Jurek v. Texas, 428 U.S. 262, 275 (1976) (all allowing the prediction of future conduct to be considered in capital sentencing). Requiring that LWOP be available when a state makes dangerousness a sentencing consideration is consistent with the Court’s view in Simmons that “[h]olding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not.” Simmons v. South Carolina, 512 U.S. 154, 163 (1994) (plurality opinion). It follows that by failing to make LWOP available as a punishment option when it prescribes dangerousness as a sentencing consideration, the state arbitrarily inflates the risk of death by withholding the lesser punishment that would serve the incapacitative purpose. In this way, states may statutorily create a forced choice which is biased toward death.

285. This assumes that differences in incidence of prison escape or harm to guards and other inmates by capital prisoners sentenced to LWOP as compared to death are negligible.

286. Except when motives of vengeance or racism override more objective considerations of desert and proportionality in making such a judgment. This is what statutory provisions for guiding the exercise of sentencing discretion are supposed to prevent.

287. As the Court has observed, “the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” Woodson v. North Carolina, 428 U.S.
alternative to the death penalty, the defendant’s perceived dangerousness would then lose its force in undermining retributive standards in sentencing. LWOP could answer the desire for permanent incapacitation, and the death penalty would be reserved for defendants whose jurors think they deserve to die for retributive reasons.

Most states with the death penalty now provide LWOP as a sentencing option, and in most of these states jurors are expressly informed of this option, though very few jurors believe that LWOP is the punishment usually served by those not given death. The increasing availability of LWOP would appear to reflect a growing recognition that the absence of LWOP represents a retributive gap in the available punishments for capital murder. The failure of states to make LWOP available for capital murder appears to be due, in part, to legislators’ lack of

280. 305 (1976) (plurality opinion). The public also draws a sharp distinction between the death penalty and LWOP in terms of the harshness of the punishment. See Bowers et al., supra note 10, at 111 tbl.8 (illustrating that New York and Nebraska citizens agree that the death penalty is harsher punishment than LWOP). Whether the greater harshness of the death penalty is properly understood as constitutionally acceptable retribution also has been questioned. See, e.g., ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS 151 (1990) (claiming that the just and humane aspects of retribution are lost with the use of the death penalty); James O. Finckenauer, Public Support for the Death Penalty: Retribution as Just Deserts or Retribution as Revenge?, 5 JUST. Q. 81, 92 (1988) (implying that retribution acceptable to the Supreme Court is designed to make the criminal pay society back for his or her crimes); Mary Ellen Gale, Retribution, Punishment, & Death, 18 U.C. DAVIS L. REV. 973, 974 (1985) (asserting that capital punishment is neither morally nor constitutionally acceptable).

288. See ALA. CODE § 13A-5-46(e) (1994); ARK. CODE ANN. § 5-4-603(a)-(c) (Michie 1997); CAL. PENAL CODE § 190.3 (West 1988); CONN. GEN. STAT. § 53a-46a(f)-(g) (Supp. 1998); DEL. CODE ANN. tit. 11, § 4209(a) (1995); FLA. STAT. ANN. § 921.141 (West Supp. 1999); I.A. CODE CRIM. PROC. ANN. tit. 905.6 (West 1997); MO. REV. STAT. § 565.030.4 (1993); N.H. REV. STAT. ANN. § 630:5 (1986); WASH. REV. CODE ANN. § 10.95.030 (West Supp. 1999). In eight states the jury is allowed “to specify whether the defendant should or should not be eligible for parole.” SIMMONS, 512 U.S. at 167 n.7 (plurality opinion); see also GA. CODE ANN. § 17-10-31.1 (1997); IND. CODE § 35-50-2-9 (1998); MD. CODE ANN., [Crimes and Punishments] § 413(c)(3) (Supp. 1998); NEV. REV. STAT. § 175.554(2) (1997); OKLA. STAT. ANN. tit. 21, § 701.10(A) (West Supp. 1999); OR. REV. STAT. § 163.105 (1997); TENN. CODE ANN. § 39-13-204(a) (Supp. 1998); UTAH CODE ANN. § 76-3-207(4) (Supp. 1998). Statutory or decisional law in four states requires that the sentencing jury be informed of the defendant’s ineligibility for parole in appropriate cases. See Simmons, 512 U.S. at 167 n.7 (plurality opinion) (citing COLO. REV. STAT. § 16-11-103(1)(b) (Supp. 1998); People v. Gacho, 522 N.E.2d 1146, 1165-66 (Ill. 1988); Turner v. State, 573 So. 2d 657, 675 (Miss. 1990); and State v. Robinson, 451 S.E.2d 196, 205-06 (N.C. 1994). Three states have not considered the question. See Simmons, 512 U.S. at 167 n.7 (plurality opinion); FLA. STAT. ANN. § 775.0823(1) (West 1999); S.D. CODIFIED LAWS § 24-15-4 (Michie 1998); WYO. STAT. ANN. §§ 6-2-101(b), 7-13-402(a) (Michie 1997).

289. LWOP was the sole alternative to the death penalty in four of the eleven CJP states studied, yet remarkably few jurors seemed to know this. A total of only three jurors in Alabama, Missouri and Pennsylvania said LWOP was the alternative. See supra section IV(A)(1) (discussing the CJP study responses). Only in California did as many as eighteen percent believe the alternative was truly LWOP. See supra section IV(A)(1) (discussing the CJP study responses).

290. This same logic implies that jurors should be able to impose a sentence of life with the possibility of parole in cases where the assessment of aggravating and mitigating considerations leads the jury to believe that such a sentence is retributively appropriate.
appreciation of the public's desire for the LWOP alternative,\textsuperscript{291} to their apprehension that having LWOP would mean a reduction in the use of the death penalty,\textsuperscript{292} and, for some, in the presumed deterrent advantage of more executions.\textsuperscript{293} Should states be permitted, however, to withhold a punishment jurors want for retributive purposes and thus confront them with a forced choice which inflates the risk of death?\textsuperscript{294}

The imposition of the death penalty because the state does not provide the less severe alternative that many jurors would prefer is manifestly "excessive" punishment. There are surely punishments a jury might wish to impose that the state does not provide because they are cruel or unusual, but LWOP is not one of them; it is an imprisonment option well within the longstanding tradition of acceptable criminal sanctions in our society.\textsuperscript{295} Additionally, it is a punishment thought to be at least as appropriate as the death penalty for capital murderers by citizens at large and by citizens who

\textsuperscript{291} See Bowers et al., \textit{supra} note 10, at 131-32; Sandys & McGarrell, \textit{supra} note 280, at 208-10 (both reporting data on legislators’ perceptions of citizens’ punishment preferences).

\textsuperscript{292} See Bowers et al., \textit{supra} note 10 at 137 (noting that New York legislators defeated an LWOP proposal on the grounds “that it would be harder to pass a death penalty bill if LWOP were in place”). In South Carolina, a state senator voiced concern about life without parole as a death penalty alternative during debate on the Senate floor: “If we pass [life without parole], let’s close the death house . . . [and] transfer the chair to the state museum.” G. Riggsby, \textit{Senate OKS Amended Crime Bill}. THE \textit{STATE} (Columbia, S.C.), Mar. 20, 1986, at 8C. This senator explained that “a juror considering the death penalty will think, ‘I can put that person away forever, and my conscience will be clear.’” \textit{Id.}

\textsuperscript{293} For example, a South Carolina legislative proposal in 1986 to abolish parole for life-term inmates who had been convicted of murder with aggravating circumstances was opposed by a Fifth Circuit solicitor who insisted that providing juries with an LWOP option “objectively, over the long haul, would do away with the death penalty.” David F. Kern, \textit{Anders Argues Against Life Without Parole}. THE \textit{STATE} (Columbia, S.C.), Mar. 16, 1986, at 4B (noting solicitor Anders’s criticism that LWOP would burden the State with the expense of feeding, clothing, and housing inmates for a lifetime). A coalition of high-ranking state law enforcement officials asserted in a letter to the legislature that enacting an LWOP sentence “will increase the risk of major crime by encouraging juries to refrain from applying the existing death penalty.” \textit{Crime Bill Stalemate Continues}, THE \textit{STATE} (Columbia, S.C.), Mar. 20, 1998, at 8C.

Even legislation to impose LWOP for child molestation in Texas has recently been opposed by “[m]any prosecutors . . . for fear that it will be expanded to capital murder and reduce the number of death sentences imposed by juries.” Clay Robison, \textit{Prosecutors Fight Molester Statute}. HOUS. CHRON., Feb. 15, 1995, at A17. Harris County District Attorney John B. Holmes, Jr. stated, “When you start passing throw-away-the-key bills, you’re effectively eliminating the death penalty.” \textit{Id.}

\textsuperscript{294} The Supreme Court has acted to bar an analogous forced choice, in \textit{Beck} v. \textit{Alabama}, 447 U.S. 625, 638 (1989). While \textit{Beck} permitted to forced choice at the guilt stage, the Court found that it also had Eighth Amendment capital sentencing implications, which it later summarized as follows: “Restricting the jury in \textit{Beck} to the two sentencing alternatives . . . in essence placed artificial alternatives before the jury, . . . By contrast, the Briggs Instruction does not limit the jury to two sentencing choices, neither of which may be appropriate.” California v. Ramos, 463 U.S. 992, 1007 (1983). Absent LWOP, many capital sentencing juries are similarly forced to choose between two alternatives, neither of which they regard as appropriate. \textit{See Lane, supra note 109, at 334-43.}

\textsuperscript{295} \textit{See} Julian H. Wright, Jr., \textit{Note, Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?}, 43 \textit{VAND. L. REV.} 529, 532 (1990) (noting that many states have enacted LWOP, and that the heritage of LWOP extends back to the Bastille and the Tower of London).
have served as capital jurors. This research demonstrates, moreover, that LWOP was the punishment that would have been chosen by many jurors who imposed the death penalty precisely because LWOP was not, or they thought it was not, available to them. There is a growing number of states that do provide a sentence of LWOP as the alternative to capital punishment. This would appear to reflect an increasing recognition that it is unacceptable to impose death as punishment without giving those who bear responsibility for the decision the punishment option many of them believe is most appropriate.\textsuperscript{296} Not doing so subjects the defendant to death as an expedient rather than a just desert, as the less inappropriate of two wrong punishments rather than the right one, and as a punishment they would be less likely to suffer if their jurors were accurately informed about the alternative.

\section{The Challenge is Formidable}

If jurors' misimpressions of the death penalty alternative were simply random reflections of ignorance that fluctuate around the actual values of time usually served before release, then accurate information, clearly presented, might be expected to correct such chance misimpressions. The fact, however, that jurors' mistaken estimates consistently fall far short of the actual alternative indicates that they are the product of biased misimpression, not simply ignorance. The bias in these misimpressions appears to be generated, sustained, and reinforced by culturally embedded perspectives on crime and punishment, selective media coverage and reporting of crime, political posturing on the crime problem, and the sheer inaccessibility of factual information that demonstrates the contrary.

The cultural influence is evident in the widely held and strongly felt sentiment that murderers get back on the streets "far too soon."\textsuperscript{297} Other studies confirm a pervasive public mistrust of the criminal justice system,

\textsuperscript{296} Just as there should not be a gap in the range of punishments, as represented by the absence of life without parole, neither should there be a lack of coverage at the lower end of the severity continuum because it also leaves no appropriate punishment for some persons charged and convicted of this category of crime. The point here is that states should not routinely abandon life with parole when providing life without parole. Statutes that currently provide for parole are presumably predicated on the premise that a sentence of life with parole is the appropriate sentence for a defendant convicted of such crimes but not sentenced to death. Justifying the restriction of punishment options to only the most severe may first require more refined statutory definitions of capital murder. See Steiker, supra note 5, at 2621-22 (suggesting that the pool of death-eligible cases should be limited by narrowing definitions of capital murder and by abandoning consideration of the heinousness of aggravating circumstances and of the separate felony factor).

\textsuperscript{297} See supra note 196. In each of the 11 states we have examined, at least 7 of the 10 jurors agreed with the proposition. Persons sentenced to prison for murder in this state are back on the streets far too soon, "and most who agreed did so strongly." Steiner, Bowers, & Sarat, supra note 195, at 22 tbl.2.
which is especially manifest in perceptions that convicted criminals spend too little time in prison. 298

Media crime coverage undoubtedly bolsters the illusion of early release by what it selectively reports 299 and ignores, 300 and by how this is interpreted by the public. 301 News accounts of murderers released to rape or kill again are surely effective in confirming the impression of predatory criminals being released too soon. The Willie Horton narrative

298. See, e.g., Roberts & Doob, supra note 195, at 454 (noting a five-country survey that revealed the public’s highly negative view of sentencing outcomes as too lenient); Tom R. Tyler, Public Mistrust of the Law: A Political Perspective, 66 U. Cin. L. Rev. 847, 849 (1998) (analyzing dissatisfaction with the criminal justice system based on a widespread belief that sentences are too lenient). For a review of studies showing mistrust of parole, see ROBERTS & STALANS, supra note 266, at 217-18. What jurors believe about the time murderers not given the death penalty will usually spend in prison may be grounded in a cultural perspective that blames the crime problem on a breakdown in the criminal justice system, especially the lenient punishments of criminals, see SASSON, supra note 266, at 52-53, and a “myth of crime and punishment” that views criminals as predatory strangers for whom severe punishment is the only effective response. STUART SCHEINGOLD, THE POLITICS OF STREET CRIME 22 (1991). The haunting apprehension many feel that prisoners are getting out too soon may be seen as a component of the myth of crime and punishment, identified as the “tenet of early release.” Steiner, Bowers, & Sarat, supra note 195, at 9.

299. The media’s predilection for [murder] stories of criminal violence against the person is well documented. See, e.g., RICHARD V. ERICSON ET AL., REPRESENTING ORDER: CRIME, LAW, AND JUSTICE IN THE NEWS MEDIA 244-47 (1991) (discussing a study that shows stories about violence against the person constitute at least one-third of popular newspaper, television, and radio stories); PHILIP SCHLESINGER & HOWARD TUMBER, REPORTING CRIME: THE MEDIA POLITICS OF CRIMINAL JUSTICE 140 (1994) (“Of the totality of crime covered by the press and television in Britain, violent crime against the person is given disproportionate attention by all news outlets.”). This is especially true in cases involving serial killers. See, e.g., PHILIP JENKINS, USING MURDER: THE SOCIAL CONSTRUCTION OF SERIAL HOMICIDE 220-23 (1994) (explaining that serial murder stories are especially attractive to media because they create an emotional response, communicate a threat, and have shock value).

300. Kathleen Hall Jamieson’s commentary on the Bush campaign’s use of the Willie Horton advertisements during the presidential campaign of 1988 is especially illustrative of this point. See generally KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY (1992). For example, Jamieson describes the media’s unwillingness to report untruths depicted in the Horton ads:

What is unique about [Republican Senator Arlen] Specter’s statement at that press conference is that under questioning from the press he is the only spokesperson for the Bush campaign who admitted that 268 first-degree murderers did not escape. That admission, however, did not filter into print press reports or broadcast news. Instead, the reporters present at the press conference accepted the “form” of proof—thick factsheets, one large chart, and three experts—as proof.

Id. at 39.

301. The tendency of people to blur, forget, or ignore distinctions in crime news may be a further source of mis impressions. The news reader thus may come to think of a person who kills after being released from prison for aggravated assault or armed robbery simply as another murderer who was released too soon, not remembering that he was released for something other than murder. Thus, news accounts of murders committed by persons who have previously served prison terms for other crimes, or by persons who were charged with first-degree murder but convicted of lesser offenses and later paroled, may contribute to the false impression that convicted first-degree murderers are back on the streets far sooner than they actually are. Of course, such selective blurring, forgetting, and ignoring make these stories more consonant with the early release tenet of the myth of crime and punishment. See ROBERTS & STALANS, supra note 266, at 76-77.
is perhaps the most striking example. It illustrates both selective media coverage and "get tough" political posturing in the presidential electoral process. Similar scenarios are, of course, replicated at the state level, especially at election time. The consistent and repetitive reporting of this false information about parole can even build a mistaken consensus about early release, as Georgia's seven-year release myth illustrates.

The absence of official statistics on parole and other forms of release from prison that distinguish between offenders convicted of capital murder but not given death, and those sentenced to prison for other categories of murder or levels of criminal homicide, keeps fallacious claims of early release from being directly debunked. Without such reality testing, the misunderstandings about early release go essentially unchallenged in the media and on the campaign trail. People's understanding of parole practice for capital and noncapital murder continues to be confounded.

If the capital sentencing process is to be purged of false and forced choice jurors must correctly understand the death penalty alternative. They must know how long offenders not sentenced to death will usually spend in prison, as nearly as that can be determined or estimated. In

302. See JAMIESON, supra note 300, at 31-33 (demonstrating the substantial effect of the Horton early release narrative in an analysis of focus group attitude change). The principal elements of the Horton narrative that focus group members identified and attributed to various media sources were the fearful horror of such crimes, the need to keep such criminals in prison or execute them, and the premium on avoiding early release from prison. See id. at 36. Jamieson observes that the Horton narrative has a powerful resonance with the public's fear of violent crime and desire for a simplistic explanation. See id. at 41-42; see also SCHEINGOLD, supra note 298, at 32-33 (noting the media's selective reporting of crime and the impact on public fear of crime). The evidence Jamieson presents, both on the changed attitudes of focus group members and on their rejection of contrary factual data, demonstrates the captivating power of such narratives. Jamieson blames the media for doing little to disabuse the public of misimpressions about Horton's release. See JAMIESON, supra note 300, at 28-31.


304. See supra section IV(A)(3); see also Steiner, Bowers, & Sarat, supra note 195, at 24-39, 40 & tbl.4.

305. See supra note 194.


307. Informing jurors about parole is complicated by the fact that the question of how long the defendant will spend in prison can be answered only in approximate terms with information about parole eligibility and past parole practice with such prisoners. The mandatory minimum for parole consideration establishes the lower bound, and the state parole board's practice of granting or denying parole in such cases provides a further indication. At a minimum jurors must be informed of: (1) the mandatory minimum for parole eligibility; (2) the percentage of such inmates paroled when first eligible and in successive years after initial eligibility; (3) the average time served beyond the mandatory minimum for all such inmates, not merely those eventually paroled; and (4) the chances (in percentages) that persons given this punishment will get out of prison before serving the mandatory minimum by (a) escaping from custody, (b) commutation, and (c) clemency. For the sentence of LWOP, only the information on commutations, pardons, and escapes (listed in (4)(a)-(c)) would be relevant.

308. Information on the parole of capital murderers not sentenced to death is currently published in only one state, although it is routinely compiled in a number of states, and could readily be drawn
addition to the law on parole eligibility, they must have factual information about parole practice with respect to capital offenders not sentenced to death and they must understand and believe what they are told. To accomplish this, we submit, will require: (1) the presentation to the jury of an official state report on the parole of murderers that indicates how long capital murderers not sentenced to death, as compared to first degree, and second (or lesser) degree murderers, usually spend in prison before being paroled; (2) the appearance before the jury of an expert on the parole report who can clearly explain both the substance of the report and the meaning of language or terms used to describe its contents; and (3) the opportunity for jurors to question the expert about parole practices, the meaning of statistics, and the terms used to present the information in order to clarify any misunderstandings and to dispel any remaining misconceptions they may have.

from records of parole boards and corrections departments in all states. See Steiner, Biringer, & Bowers. supra note 194. at 23-25.

309. The findings of this research are based on jurors’ estimates of the time offenders would actually serve in prison before returning to society if not given the death penalty, not on the time they must serve to first become eligible for parole consideration. Moreover, this data indicates that confining instructions to parole eligibility fails to win credibility with jurors. For example, very few jurors, even in the four states with LWOP, actually believe that offenders are not paroled. See supra Table 1. In the narrative accounts of jurors, many indicate that they were told, but did not believe, that LWOP was true in practice. As one California juror recounted, “[T]he judge explained to me that if he gets a life sentence there was absolutely no chance that he would get out. I thought he might get out. I still don’t trust anybody about it.” See supra subpart V(B) (from case 11).

310. This report would be prepared and regularly updated from the records of the state parole board and the state corrections department in accord with the minimum guidelines outlined above. supra note 208. 309.

311. The parole report should be available to the jurors for reference especially during sentencing deliberations. The data shows that jurors’ misperceptions of the death penalty alternative have the strongest effect on the stands they take on punishment at the first and final votes during sentencing deliberations. See supra Table 3.

312. The expert’s function is to help the jurors get a correct and complete understanding of the practice of parole with respect to the death penalty alternative. The expert is in effect an agent of the court, ideally perhaps serving as a master for the trial judge. Of course, the trial judge, as the ultimate authority in the courtroom, should be the one to inform jurors clearly, accurately, and completely of the punishment options as provided by law, a point well articulated by Justice Souter, in Simmons v. South Carolina. 512 U.S. 154, 173 (1994) (Souter, J., concurring) (citing Boyd v. California, 494 U.S. 370, 384 (1990)). But, since this is a description of administrative practice, not a matter of law, it should not be the province of the trial judge who is typically not trained and perhaps not comfortable answering questions about probabilities and reporting on the results of statistical analyses.

313. In addition to a clear and compelling presentation of parole practice, jurors need to be told that most capital jurors mistakenly believe that a capital defendant not sentenced to death will return to society far sooner than in reality they actually do, that this is because information has not generally been available on the parole of capital murderers and that people naturally, but mistakenly, assume that what they have heard about the parole of murderers in general is also true of capital murderers not sentenced to death.

314. Enabling jurors to question the expert directly, perhaps through written questions read aloud by the judge, promises to create a situation in which the jurors feel empowered to address the issue of parole until their questions are resolved. For an example of questioning that has proven to enhance the
Testimony of the need for these steps is to be found in the experience of California courts when they self consciously persevered longer than most other states in informing jurors about parole.\textsuperscript{315} The demise of the commitment in California came when the state supreme court discerned that the purpose was being subverted by the practice. As the California Supreme Court observed in \textit{People v. Morse}\textsuperscript{316}:

When we opened the door a slight crack to allow an instruction, and to admit an evidentiary showing, as to the realistic consequence of a sentence of life imprisonment, we had in mind a limited and legitimate objective. But various maneuvers have pushed the door so widely ajar that too many confusing elements have entered the courtroom.\textsuperscript{317}

The court indicated that the evidence concerning parole in Morse's case included "[s]tatistical evidence of the median and average time served by defendants convicted of first degree murder and of the legal minimum period of incarceration . . . ."\textsuperscript{318} This evidence was presented to the jury by means of a stipulation that read:

"Mr. Stahl and I are in agreement that if Mr. Joseph Spangler of the Bureau of Criminal Statistics in Sacramento, California, were called to the witness stand he would testify that studies made in the previous three year periods concerning people convicted of first degree murder would be as follows: In the year 1959 there were thirty-two cases of persons paroled. Median time served was 136.5 months, average time served was 144.3 months. In the year 1960 there were sixteen cases of parole. The median time served was 139 months, the average time served 164 months. In the year 1961 there were twenty-two cases of parole. The median time served was 141 months, the average time 152 months. These figures of male prisoners for time served before first parole. The absolute legal minimum for both sexes, men and women, before eligibility for parole is seven calendar years."\textsuperscript{319}

understanding and concentration of jurors in experiments conducted in the trial context. see Larry Heuer & Steven Penrod. \textit{Increasing Jurors Participation in Trials Through Note Taking and Question Asking}, 79 \textit{Judicature} 256 (1996). For a discussion of Arizona's procedure in which jurors are now permitted to submit questions to both the judge and witnesses, see B. Michael Dann & George Logan III. \textit{Jury Reform: The Arizona Experience}, 79 \textit{Judicature} 280 (1996).

315. See supra notes 130-31 and accompanying text.
316. 388 P.2d 33 (Cal. 1964).
317. Id. at 38.
318. Id. at 36.
319. Id. at 36 n.1 (quoting the stipulation). The court further commented, "As Justice Peters points out in \textit{People v. Purvis}, these statistics . . . raise a serious question of reliability in omitting 'the time being served by those still confined under a life sentence and not released.'" Id. (quoting People v. Purvis, 384 P.2d 424, 443 (Cal. 1963)) (citation omitted).
The court then explained how the defense and prosecution responded to this evidence:

The very introduction of the fact that a prisoner sentenced to life imprisonment became eligible to parole after seven years inevitably led to ramifications. Confronted with this bare instruction, defense counsel first countered by adducing evidence that the average and median sentences of defendants sentenced to life terms actually ran longer than the minimum of seven years. This evidence, in substance, may have induced some juries to weigh the alternative of a sentence of a particular number of years, rather than a life sentence, against the death penalty. In any event, the fear that such was the case induced defense counsel to attempt to reassure the jury that the Adult Authority properly performed its task of deciding whether a defendant should be paroled, and if so, when he should be granted parole. Thus defense counsel developed the practice of calling officials from the Adult Authority as witnesses to testify to the qualifications and background of its membership, the procedures and considerations involved in granting paroles, and the statistical showing of recidivism of prisoners released on parole.

The reaction by prosecuting attorneys to these developments took the form of an attempt to emphasize to the jury the possibility of error by the Adult Authority and the potential grievous harm that might result from the inadvertent parole of a defendant convicted of murder. Thus the apparently innocuous step of giving instructions of the operation of the parole laws has resulted in the jury’s attempted evaluation of the competency of the Adult Authority to administer the parole system. The jury sometimes lamentably has "tried" the Adult Authority.320

In light of the resulting confusion for jurors and the untoward consequences for defendants, the California Supreme Court abandoned its commitment to having capital jurors informed about how long a capital defendant not sentenced to death would usually serve in prison, concluding:

Our original purpose in permitting the court to instruct the jury that, if it found for life imprisonment rather than the death penalty, the defendant could possibly be paroled, was to afford the pertinent facts "to assist it in assessing the significance of a life sentence." Although such information may have been relevant, the instruction, abetted by the introduction of evidence as to the possibility of parole, has brought about untoward consequences to defendants. It has brought in its wake a trend of unremitting expansion in the scope of

320. Id. at 37 (footnote omitted).
argument and evidence presented to the jury that has coincidentally produced and augurs future confusion. 321

Just as Georgia's jurors' questions to trial judges about parole practice recounted early in this Article 322 foreshadow the profound bias in capital sentencing documented here, the experience of the California Supreme Court voiced in Morse may serve as a forewarning of perils in the necessary but difficult task of informing jurors about parole. Clearly, providing jurors with a statistical report was insufficient. Having the defense and prosecution interpret the statistical evidence to the jury obviously runs the risk of partisan distortion. Having an expert in the service of the court who can disinterestedly interpret the parole statistics to the jury and giving the jurors the opportunity to question the expert to their satisfaction offers an alternative to what has proved unworkable in the past. Whether this alternative can survive presently unforeseen snares and pitfalls is an open question.

The mid-century movement to guard against jurors basing their decisions on distorted impressions of parole practice, by barring adversarial argument or discussion of parole and by instructing jurors not to consider parole, 323 failed because jurors are unwilling to ignore the issue of parole in making the punishment decision, and because they are making those decisions on the basis of mistaken impressions about parole. The legacy is that jurors' decision-making is still based on distorted impressions of parole practice and on the unavailability of sentencing options, now best understood as false choice and forced choice. There is surely a lesson in the earlier effort to purge confusion and distortion by barring information about parole. Telling jurors not to consider parole was easy; getting them to do so was not. Telling them about the realities of parole will be harder; getting them to believe it will be the real challenge.

D. Summation

The faults in capital sentencing which this data reveals are formidable and may be irreparable. There is a pervasive misimpression among jurors that convicted first-degree murderers not given the death penalty will be released on parole well before they actually are, or possibly could be under the law—a kind of hegemonic myth of early release that infects the capital sentencing decision with excessiveness, in the use of death as

321. Id. at 36-37 (footnotes and citation omitted) (quoting People v. Purvis, 346 P.2d 22, 30 (Cal. 1959)).

322. See supra notes 109-14 and accompanying text.

323. See supra notes 132-36 and accompanying text (discussing the rationale advanced for not telling jurors about parole).
punishment. In order for jurors to correctly understand the true death penalty alternative in reaching their punishment decision, they will need to be convinced that their current beliefs about parole are mistaken; indeed, what they regard as mistaken is in fact true. In order to purge capital punishment decisions of unreliability and excessiveness, and to ensure the primacy of retributive purposes, jurors must have retributively appropriate sentencing options available. They must also be able to rely upon objective information about parole practices in their state in place of the erroneous personal impressions that now clearly factor into their decisions. Otherwise, they cannot make a reasoned moral judgment based on a clear understanding of the alternatives—as is constitutionally required in noncapital cases.324

The evidence of false and forced choices presented here is more than a showing of disparities in sentencing outcomes; it is a demonstration of fundamental faults in the decision-making process.325 It is a revelation of flaws that compromise the ability of real jurors in real cases with real defendants326 to make reasoned moral punishment decisions. It shows that guiding jurors’ discretion in the assessment of aggravating and mitigating circumstances is insufficient to curb arbitrariness and excessiveness because jurors’ decisions are befouled by false and forced choices. Fundamentally, it reveals that these flaws have undermined the retributive core of the capital sentencing decision. We submit that the capital jury’s “difficult and uniquely human” decisions require that the Court correct these flaws or recognize that they are sufficiently pernicious and irremediable to render the enterprise of capital punishment constitutionally unworkable.

324. In noncapital cases, the Supreme Court has held that due process requires that sentencers fully understand all available sentencing options. See Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980) (holding that a sentence cannot withstand constitutional scrutiny if it is based on a misunderstanding of the sentencing alternatives). The Fifth Circuit has set forth a clear and simple standard for evaluating a Hicks claim. See Dupuy v. Butler, 837 F.2d 699, 703 (5th Cir. 1998). Specifically, the court required that “the state criminal defendant must show . . . that the sentencing authority lacked knowledge and understanding of the range of sentencing discretion under state law and . . . that there was a substantial ‘possibility’ that prejudice was thereby caused.” Id. Prejudice is established “by showing that the sentencing authority was . . . ignorant of one or more less severe options,” and that “a substantial possibility exists that the sentencer, if properly informed, would have chosen one of these less severe sentencing options.” Id. Lane further argues that “this standard should be applied in the capital context.” Lane, supra note 109, at 360.

325. The Court stressed in McCleskey v. Kemp, 481 U.S. 279 (1987), that infirmities in the sentencing “process” and not merely disparate sentencing “outcomes” would be essential to a holding that remedial action was required. See id. at 306, 307 & n.28.

326. The Court in Lockhart v. McCree, 476 U.S. 162 (1986), faulted empirical studies of bias in jury selection because the study participants “were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant. [The Court has] serious doubts about the value of these [mock jury] studies in predicting the behavior of actual jurors.” Id. at 171.