

# The capital jury: is it tilted toward death?

*Preliminary findings from the Capital Jury Project indicate that jurors make life and death punishment decisions early in the trial, misunderstand sentencing guidelines, and often deny their responsibility for the punishment given to a defendant.*

by William J. Bowers

How the capital jury should make the grave life or death sentencing decision has been the subject of two decades of capital jurisprudence. The U.S. Supreme Court's dissatisfaction with what the plurality found to be the "arbitrary," "capricious," and "standardless" manner in which the decision to impose the death penalty was being made, as articulated in *Furman v. Georgia*,<sup>1</sup> brought the use of capital punishment to a halt in 1972. And it was the efforts of states to reform the capital sentencing process by guiding jurors' exercise of sentencing discretion that revived the death penalty and has become the focus of vastly expanding capital jurisprudence since *Furman*.

Whether the capital sentencing process has been sufficiently purged of arbitrariness by these reforms is a nagging constitutional question.<sup>2</sup> The chief challenge has been that the imposition of the death penalty remains arbitrary in one very specific respect: racial bias. Evidence of racial disparities, especially race-of-victim

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bias, was brought to the Court in *McCleskey v. Kemp*.<sup>3</sup>

The Court, in *McCleskey*, acknowledged the presence of victim based racial disparities in sentencing out-

comes, but it held 5-4 that these statistical disparities did not, in themselves, impeach the sentencing of capital jurors. Disparate sentencing outcomes were no substitute, the Court said, for knowing how individual jurors focus their collective judgment in particular cases. The Court implied that it would be necessary to look inside the "black box" of jury decision making to address the issue of arbitrariness—that knowing what comes out of the black box is no substitute for knowing what goes on inside the box.

This is what the Capital Jury Project (CJP) is doing—looking inside the black box of capital sentencing. It has taken the Court's view in *McCleskey* of what would be needed to demonstrate arbitrariness as a guide, finding out what real jurors do in actual cases to decide whether defendants should live or die. In each of 14 participating states,<sup>4</sup> Capital Jury Project investiga-

tors attempt to interview four randomly selected jurors from each of 20-30 full capital trials that had both guilt and sentencing phases. The trials are chosen to provide equal numbers with life and death verdicts; preference is generally given to more recent trials.

In 3-4 hour interviews, CJP investigators ask a common core of questions in all states, and additional questions tailored to the particular concerns of investigators in their own states. In the development and pretesting of the interview instrument, it was found that jurors often provided rich, detailed narrative accounts of their decision making, in addition to their briefer responses to structured questions. To capture this richness and detail, with jurors' permission (granted by four out of five), the interviews are tape recorded. Some of the findings of the Capital Jury Project to date are reported below.<sup>5</sup>

This research has been supported by grant NSF SES-9013252. The author thanks the members of the Capital Jury Project who helped bring together this partial overview of the work to date, and expresses appreciation to Patricia Igo for her able assistance.

1. 408 U.S. 238 (1972) (per curiam).

2. See Justice Harry Blackmun's dissent in the denial of cert. in *Callins v. Collins*, 114 S.Ct 1127 (1994).

3. 481 U.S. 279 (1987). The empirical evidence on which the *McCleskey* challenge was based is reported in Baldus et al., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (Boston: Northeastern University Press, 1990).

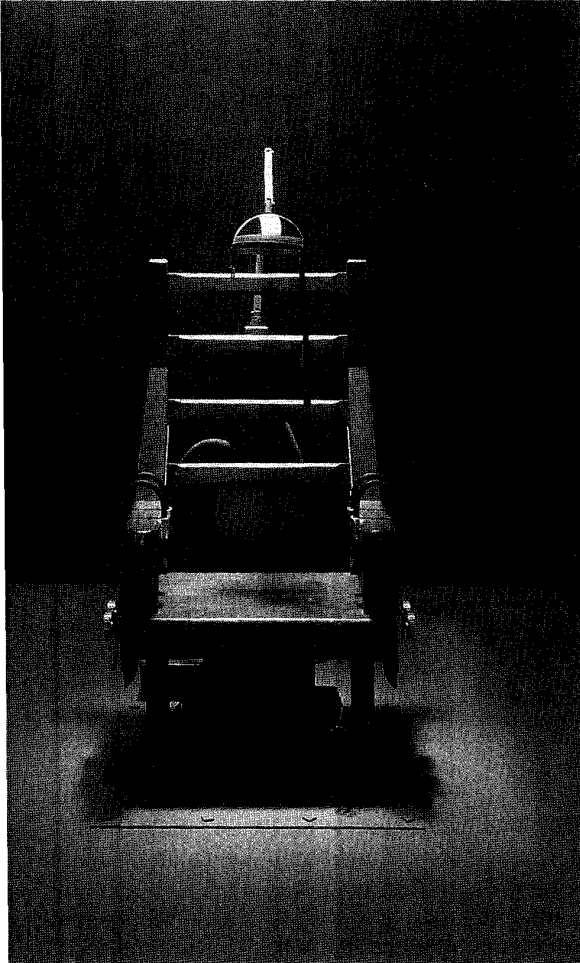
4. States have been chosen to represent the principal forms of guided discretion capital statutes, and to ensure regional diversification of the sample. See Bowers, *The Capital Jury Project: Ratio-*

*nale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) for a discussion of the state sample selection criteria and a listing of the participating states.

5. Previously published CJP research appears in the *Indiana Law Journal* 1995 CJP symposium issue, and other sources including: Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 IND. L.J. 1333 (1993); Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 LAW & SOC'Y REV. 157 (1993); Eisenberg and Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L.J. 1, 4 (1993); and Hoffmann, *How American Juries Decide Death Penalty Cases: The Capital Jury Project* in Bedau, ed., *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* (forthcoming, 1997).

## Premature decision making

What jurors tell researchers about their thinking and deliberations during the guilt stage of the trial indicates that many began taking a stand on what the defendant's punishment should be well before they were exposed to the statutory guidelines for making this decision. In response to



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the question "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 sen-

6. Luginbuhl and Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1170 (1995).

7. *Id.* at 1173.

8. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

9. Oregon and Texas make the defendant's possible future dangerousness a prominent aggravating factor in the punishment decision, though not to the exclusion of mitigating considerations, see *Penry v. Lynaugh*, 492 U.S. 302 (1989).

tence, [or were you] undecided?" virtually half of the jurors said that they thought they knew what the punishment should be before the sentencing stage of the trial began, and those for death outnumbered those for life by 3-2. A follow-up question to the jurors who thought they knew what the punishment should be at this point asked, "How strongly did you think so?" Of all jurors, more than 3 out of 10 said they were "absolutely convinced" of what the punishment should be and nearly 2 in 10 were at least "pretty sure."

Why are so many jurors absolutely convinced or at least pretty sure what the punishment should be even before the sentencing stage? One possibility is that they talk about what the punishment should be when they are supposed to be deliberating on guilt. When asked, "*How much did the discussion among the jurors [during guilt deliberations] focus on...jurors' feelings about the right punishment?*" half of the jurors said "a great deal" and almost two thirds said at least "a fair amount."

On the assumption that discussion of the "right punishment," might not necessarily mean that considerations of punishment actually figured in the guilt decision, jurors were asked a more pointed question

specifically about the death penalty as a consideration in the jury's guilt decision. It read, "*In deciding guilt, did jurors talk about whether or not the defendant would, or should, get the death penalty?*" Four out of 10 jurors conceded that in deciding guilt the jury explicitly discussed whether the defendant would or should be sentenced to death.

Thus, some who said the jury discussed the "right punishment" a great deal during guilt deliberations did not mean to say that they talked specifically about the death penalty or that such discussion actually

figured in their guilt decision. But more notable is the fact that so many jurors claimed that in deciding guilt they talked about whether the death penalty would or should be the defendant's punishment.

## Misunderstanding guidelines

CJP investigators for North and South Carolina have found that jurors misunderstand how the capital sentencing decision should be made; which factors can and cannot be considered, what level of proof is needed, and what degree of concurrence is required for aggravating and mitigating factors. And, they do so in a way that leads them to improperly accept aggravating and improperly reject mitigating considerations. The bias is especially pronounced for mitigating factors.<sup>6</sup> The North Carolina investigators also examined how jurors understood the procedure for weighing aggravating against mitigating factors and for deciding what the punishment should be. "[I]t is disturbing that roughly one-fourth of the jurors felt that death was mandatory when it was not and approximately one-half of the jurors failed to appreciate those situations which mandated life."<sup>7</sup>

More fundamental to capital sentencing than which factors can be considered, what level of proof is needed, whether unanimity is required, or how the weighing of factors must be conducted and interpreted, is the prohibition against having a "mandatory" death sentence; that is, requiring jurors to impose a death sentence without considering mitigation.<sup>8</sup> Hence, no state "requires" the death penalty simply or solely upon the finding of a particular aggravating factor.<sup>9</sup>

To test jurors' understanding of this basic principle, they were asked, "After hearing the judge's [sentencing] instructions, did you believe that the law required you to impose a death sentence if the evidence proved" that the defendant's "conduct was heinous, vile or depraved," or if it proved that the defendant "would be dangerous in the future?" Four out of 10 capital jurors wrongly believed that they were "required" to impose the death penalty if they found that the crime was heinous, vile, or depraved, and

nearly as many mistakenly thought the death penalty was "required" if they found that the defendant would be dangerous in the future.

In every aspect of sentencing guidelines CJP investigators have so far examined, then, there is a "tilt toward death" in jurors' understanding. Some of this may be a "carryover" of the rules for decision making from the guilt to the sentencing phase of the trial. But some of it may reflect a tendency among jurors to hear sentencing instructions in a way that justifies or reinforces decisions that many have already made. One question bears on this latter point, "Would you say the judge's sentencing instructions to the jury...simply provided a framework for the decision most jurors had already made?" Three out of four jurors said "yes."

### Alternative punishment

The most common question jurors ask judges during sentencing deliberations, according to an analysis of Georgia capital trial transcripts, is how long would the defendant actually spend in prison if not given the death penalty.<sup>10</sup> Judges usually respond that the law prohibits them from answering this question; soon thereafter, the jurors typically return a death sentence.<sup>11</sup>

With the data now available from more than 800 jurors in 11 states the CJP has further documented jurors' considerable ignorance and consistent underestimation of the death penalty alternative, and the connection between their erroneous perceptions of the alternative and their decisions to impose the death penalty. When asked, "How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?" in only 2 of 11 states are most estimates within a 10-year interval, and in all seven states where interviewing is now complete a majority of the jurors who give an estimate believe such offenders usually get out of prison even before the law makes them eligible for parole. What is more, jurors most mistaken about the death penalty alternative are the ones most apt to vote for the death penalty in all seven states where the CJP data collection has been completed.

The evidence from juror interviews

thus indicates that it is not simply whether or not, but *how soon*, jurors think the defendant will get out of prison that influences their final punishment decision. Since life without parole is the alternative to the death penalty in only a small fraction of cases, to inform jurors only when it is the alternative, as provided by *Simmons v. South Carolina*, does relatively little to remedy the arbitrariness introduced by the widespread ignorance and consistent underestimation of the alternative punishment.<sup>12</sup>

What about the other limitation in *Simmons*, namely, that future dangerousness be advanced as a reason for the death penalty before the defendant may have the jurors know what the alternative punishment really is? This issue was addressed by examining whether jurors' perceptions of the alternative punishment are associated with their sentencing decisions only when the defendant's possible dangerousness is an issue, or, as well, when dangerousness is not a factor.

As expected, jurors' perceptions of the alternative punishment are a strong predictor of a final vote for the death penalty when the prosecutor argues that the defendant would be dangerous in the future, when jurors believe the evidence proves this to be true, and when jurors are concerned in their sentencing deliberations about the possibility that the defendant will return to society someday. But, there is also a statistically reliable association between jurors' perceptions of the alternative punishment and their likelihood of voting for the death penalty, when these respective indications of dangerousness are not present. That is to say, the decision to impose the death penalty is definitely a function of what the alternative punishment is thought to be even when

dangerousness is not an issue. Hence, the application of *Simmons* only to cases of alleged dangerousness, like its application only when the alternative is life without parole, makes it a very minor corrective to a major problem in the exercise of capital discretion.

Further analysis reveals that: (1) it is early in sentencing deliberations (at the first vote on punishment) that underestimating the alternative is most strongly associated with favoring death as punishment; and (2) it is among those who were undecided about what the punishment should be before sentencing deliberations began that underestimating the alternative is especially apt to yield a vote for death on the first jury ballot. The data thus indicate that it is primarily at the point when jurors sit down to deliberate about what the punishment should be that their typically mistaken underestimates of the death penalty alternative come into play.

### Denying responsibility

It is an "intolerable danger" for jurors to believe that "the responsibility for any ultimate determination of death will rest with others," the Supreme Court said in *Caldwell v. Mississippi*.<sup>13</sup> Yet, as Robert Weisberg has argued,<sup>14</sup> sentencing guidelines, by appearing to provide jurors with an authoritative formula that yields the "correct" or "required" punishment, may actually diminish their sense of responsibility for the awful punishment they may be called upon to impose.

To see where capital jurors place foremost responsibility for the defendant's punishment, jurors were asked to rank five options from "most" through "least" responsible for the defendant's punishment. The five options, together with the percent saying each option was "most responsible," are:<sup>15</sup>

10. Lane, *Is There Life Without Parole?: A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 *LOV. L.A. L. REV.* 327 (1993); also see, Paduano and Stafford-Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 *COLUM. HUM. RTS. L. REV.* 211 (1987).

11. Lane, *id.* at 338ff.

12. In *Simmons v. South Carolina*, 114 S.Ct. 2187, 2193 (1994) the Supreme Court ruled that a capital defendant was entitled to have the jury know what the alternative to the death penalty would actually be under two conditions: (1) when the alternative was a life sentence with no chance of parole, and (2) when the prosecution argued that the

defendant's possible danger to society was a reason for imposing the death penalty.

13. 472 U.S. 320 (1985) at 333.

14. *Deregulating Death*, 1983 *SUP. CT. REV.* 305, at 343. Weisberg posits that sentencing instructions give no real guidance, but have the appearance of legal rules. He argues that these pseudo-instructions dilute the jury's sense of responsibility, rather than guide discretion.

15. The following percentages are based on the responses of the 729 jurors who ranked all five options, so that the ranks sum to 15. The percentages add to 100.1 percent because of rounding error.

- 47.2 the defendant because his/her conduct is what actually determined the punishment
- 34.0 the law that states what punishment applies
- 9.1 the jury that votes for the sentence
- 6.0 the individual juror since the jury's decision depends on the vote of each juror
- 3.8 the judge who imposes the sentence

Eight of 10 jurors assign foremost responsibility to the defendant or to the law. While the defendant is more often seen as "most responsible," for the punishment, the law more consistently outranks the defendant in responsibility for the punishment.<sup>16</sup> By contrast, jurors overwhelmingly deny that they individually or as a group are primarily responsible for the defendant's punishment. Altogether, only 3 in 20 said that the jurors as a group or individually were the most responsible. The jury ranked third, the individual juror fourth, and the judge fifth in punishment responsibility.<sup>17</sup>

The *Caldwell* Court speculated that when jurors minimize the importance of their role, "[O]ne can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in."<sup>18</sup> One question bears on this issue. It asked jurors whether during their sentencing deliberations they thought responsibility for deciding what the defendant's punishment should be was shared with trial or appellate judges or was strictly

the jury's. Two of three jurors think of themselves as sharing responsibility with trial or appellate judges in states where the jury's decision is binding on the trial judge, and nearly all do so in states where the trial judge can override the jury's sentencing decision.

The data also show that jurors who see the punishment decision as shared with judicial authorities were more likely to vote for death than those who take sole responsibility for the decision. Moreover, this greater readiness to vote for death among those who see the decision as shared comes at or near the end of sentencing deliberations, as the *Caldwell* Court surmised. Thus, it is

to move from being for life or undecided to a death vote.

Most capital jurors disclaim primary or sole responsibility for the awesome life or death decision they must make. They want the cover of law for their decision, although they often make their decision before learning what the law says they should consider, often misunderstand what the law requires of them after being told by the judge, and often do not know what the alternative punishment actually is because the law prohibits the judge from telling them. Yet, most jurors still want to see the law as more responsible than they themselves for the defendant's punishment.

Significantly, this tendency to deny full responsibility for the defendant's punishment appears to make it easier for jurors to vote for death.<sup>19</sup> Joseph Hoffman's examination of Indiana jurors' narrative accounts of their sentencing decisions documents the importance to jurors of "higher authority" for guidance in the momentous life or death decision, not infrequently including "divine guidance"—hardly what the Supreme Court had in mind as "guided discretion."<sup>20</sup>

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The findings at this still early stage of research present a picture of capital sentencing afflicted with a "tilt toward death." It will take longer to learn just how decisions are being made, what dynamics are at work, and what model or models of decision making best fit the way jurors think and act in making their life or death decisions. As the work proceeds, it should become clearer in what ways and to what extent the operation of modern capital statutes do and do not conform to constitutional requirements. The inevitable questions will be, just how arbitrary can the system be and still remain constitutionally acceptable, and how much impropriety of what kinds by how many jurors can the Constitution tolerate—especially in light of the constitutionally mandated higher standard of care and reliability for capital cases?<sup>21</sup> ☞

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### ***Most capital jurors disclaim primary or sole responsibility for life or death decisions.***

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between their first and final vote on the defendant's punishment that jurors who feel the decision is shared or passed on to judicial authorities as compared to those who accept sole responsibility for the decision were especially likely to cross over from life to death, especially unlikely to cross over from death to life, and far more likely than others to move from undecided to death than to life. In other words, as jurors move closer to the final life or death decision, those who deny full or strict responsibility for the defendant's punishment are more apt to impose the death penalty, indeed are more apt

16. See Bowers, *supra* n. 4, Table 10 for the full distribution of jurors' responsibility rankings of these five agents in 7 of the 11 states examined here.

17. In three states (Alabama Florida and Indiana) that permit the judge to override the jury's sentencing decision, the judge ranks third, the jury fourth, and individual jurors fifth in responsibility for the defendant's punishment. See Bowers *supra* n. 4, at note 233 and accompanying text.

18. *Supra* n. 13.

19. Weisberg, *supra* n. 14, at 391, draws a parallel

between capital jurors and Stanley Milgram's experimental subjects who were willing to impose painful shocks so long as they could remain convinced that it was the experimenter not they themselves who were responsible for the suffering. See Milgram, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 132-134 (New York: Harper & Row, 1974).

20. Hoffman, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995).

21. Woodson, *supra* n. 8, at 305.