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HOW JURORS DECIDE ON DEATH: GUILT IS OVERWHELMING; AGGRAVATION REQUIRES DEATH; AND MITIGATION IS NO EXCUSE*

Ursula Bentele[†] & William J. Bowers^{††}

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INTRODUCTION

Twenty-five years ago, the Supreme Court approved capital punishment schemes that contain mechanisms to guide the sentencer in making a rational choice between life and death. Specifically, the Court stressed the importance of a separate proceeding to focus solely on the matter of the appropriate sentence, once a defendant is found guilty of a capital crime;¹ it struck down laws that called for an automatic death sentence for even very narrow categories of murder;² and it has insisted that the capital sentencer consider, as a mitigating circumstance, any factor relating to the defendant's background, character, or circumstances of the offense that might call for a lesser penalty.³ The Court has assumed that these schemes and mechanisms succeed in guiding jurors' discretion—indeed, it is on that assumption that death sentences continue to be imposed and affirmed.

Yet interviews with jurors who participated in deliberations that resulted in a sentence of death reveal a pattern of capital decision making that appears to violate the constitutional principles established for this most momentous of decisions. Jurors who actually made the decision that a defendant should die report a decision-making process that departs from the legally prescribed standard in three respects: (1) the evidence concerning the defendant's guilt spills over into and dominates the sentencing deliberations; (2) jurors erroneously assume that aggravating factors require a death sentence to be imposed; and (3) jurors fail to understand, consider, and give effect to mitigating factors.

¹ See *Gregg v. Georgia*, 428 U.S. 153, 191-92 (1976).

² See *Sumner v. Shuman*, 483 U.S. 66, 78 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

³ See *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

I. THE LEGAL BACKGROUND

Every jurisdiction that authorizes capital punishment requires the penalty to be assessed at a separate phase of the trial following a conviction of a capital crime. This bifurcated procedure assumes that jurors can and do make independent decisions, first, about guilt, and then about punishment. The guilt phase decision involves assessing whether the prosecution has proven, beyond a reasonable doubt, facts that establish every legal element of the crime charged. A jury arriving at the decision that a defendant is in fact guilty of a crime that carries a possible death sentence has taken one important, and necessary, step towards imposing that penalty.

The second step, which occurs at the penalty phase of a capital trial, is not constrained by anything similar to the structure that exists in defining criminal offenses and establishing guilt. In fact, the United States Supreme Court has essentially abandoned its insistence that sentencing discretion be guided in a particular way, having approved a variety of different capital punishment schemes falling into three distinct categories.⁴ In some states, juries are instructed that they may impose death once they find an aggravating factor and after they consider evidence in mitigation (threshold statutes);⁵ in others, they are told to weigh aggravating against mitigating circumstances (weighing statutes);⁶ in yet others, jurors are focused on specific factors such as the defendant's future dangerousness and the deliberateness or heinousness of the crime in making their penalty decision (directed statutes).⁷ Accordingly, the Constitution does not dictate a particular model for determining whether death is the appropriate punishment.⁸ Yet the notion that the decision about penalty is

⁴ See William J. Bowers, *The Capital Jury Project: Rationale, Design, & Preview of Early Findings*, 70 IND. L.J. 1043, 1079 (1995).

⁵ See, e.g., the statutes of Kentucky, KY. REV. STAT. ANN. § 532.025 (Michie 1998), and South Carolina, S.C. CODE ANN. § 16-3-20 (1998).

⁶ See, e.g., the statutes of California, CAL. PEN. CODE §190.3 (1999), Missouri, MO. REV. STAT. § 565.030 (1999), and North Carolina, N.C. GEN. STAT. § 15A-2000(b) (1999).

⁷ See, e.g., the statute of Texas, TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1973).

⁸ See *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994); *Zant v. Stephens*, 462 U.S. 862, 875 (1983).

a separate one, one that entails a "reasoned *moral* response,"⁹ is inherent in modern capital sentencing.

In addition to the universal adoption of a bifurcated procedure for capital cases, the Supreme Court has required that to be subject to capital punishment a defendant must have committed an "aggravated" killing—a state may not make every killer eligible for the death penalty.¹⁰ At the same time, the Court has also insisted that such aggravated killings may not automatically result in a death sentence.¹¹ In keeping with this constitutional principle, jurors who are convinced that murder under particular aggravating circumstances should always call for the ultimate penalty are subject to challenge for cause.¹² To comply with the Constitution, jurors must at least consider any evidence in mitigation that might call for a sentence less than death.¹³ What it means to consider evidence in mitigation is by no means clear, but at the very least jurors must be willing to listen to such evidence, and while the weight to be given to any mitigating factor is up to the sentencer, it is not permissible to give mitigating evidence *no* weight.¹⁴

These principles of capital punishment jurisprudence have the following implications: First, jurors must approach the task of sentencing someone to death with a different frame of mind from that which resulted in the guilty verdict. The fact that the defendant is guilty of capital murder should not, in and of itself, be a reason that he or she must be executed. Moreover, even the presence of aggravating factors does not mandate the death penalty in any given case.¹⁵ Therefore, a

⁹ *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

¹⁰ *See Godfrey v. Georgia*, 446 U.S. 420, 433 (1980); *Gregg*, 428 U.S. at 189.

¹¹ *See Sumner*, 483 U.S. at 78; *Woodson*, 428 U.S. at 301.

¹² *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

¹³ *Lockett*, 438 U.S. at 604.

¹⁴ *Morgan*, 504 U.S. at 738; *Eddings*, 455 U.S. at 114-15.

¹⁵ On its face, the Texas statute, TEX. CODE CRIM. PROC. ANN. art. 37.071, before its amendment in 1991, seemed to call for automatic imposition of the death penalty if the two, or sometimes three, questions regarding matters in aggravation were answered in the affirmative. The Supreme Court approved this scheme on the assurance that, despite its facial narrowness, the second special issue regarding whether the defendant posed a future danger would permit the sentencer to consider any mitigating circumstances the defendant might offer. *Jurek v. Texas*, 428 U.S. 262, 272-73 (1976). When faced with a mentally retarded defendant, however, the Court had to acknowledge that the statute failed to provide a mechanism by which jurors could give effect to a belief that, despite the possibility of future acts of violence, a man

second requirement is that jurors be open to imposing a life sentence despite a finding of aggravating circumstances. And third, because it is "far more important"¹⁶ to treat the defendant in a capital case, as compared to the non-capital defendant, as a unique individual, the sentencer must consider any circumstance that might call for a sentence less than death. Individualized assessment of personal culpability based on the defendant's background and character is constitutionally required because of our society's long held belief that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."¹⁷ Accordingly, jurors are required to consider mitigating evidence even if it does not "relate specifically to the [defendant's] culpability for the crime he committed,"¹⁸ they may not dismiss out of hand mitigating factors on the basis that they do not "excuse" the crime.¹⁹ The concept of mitigation in capital sentencing is thus far broader than the notion of reduced responsibility in criminal law generally.²⁰ Capital jurors may assess the appropriate weight

with the mental capabilities of a six year old should not be executed. *Penry v. Lynaugh*, 492 U.S. 302, 320 (1989) [hereinafter *Penry I*]. Accordingly, Penry's death sentence was found to have been imposed without the consideration of mitigating circumstances required by the Eighth Amendment. During a new penalty phase conducted upon remand, the jury was told to give effect to mitigating circumstances in assessing the defendant's personal culpability when answering the special issues. If it found a life sentence to be appropriate, it should simply answer one of the special issues in the negative. See *Penry v. Johnson*, 215 F.3d 504, 509 (5th Cir. 2000). This instruction, essentially telling the jurors to say "no" even if the honest answer might be "yes," was recently also found to violate the requirement of the Eighth Amendment. *Penry v. Johnson*, 121 S. Ct. 1910, 1921 (2001) [hereinafter *Penry II*]. In the face of the Supreme Court's first *Penry* decision and other challenges on similar grounds, the Texas legislature added a separate question requiring the jury to consider mitigating circumstances in its penalty determination. See TEX. CODE CRIM. PROC. ANN. art. 37.071(e). (This provision did not take effect until after Penry's second penalty trial.) Some states, such as Pennsylvania, mandate death upon a finding of aggravating factors, but only if the sentencer concludes that no mitigating factors are present. See *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990).

¹⁶ *Lockett*, 438 U.S. at 605.

¹⁷ *Penry I*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

¹⁸ *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986).

¹⁹ *Edwards*, 455 U.S. at 113.

²⁰ See, e.g., GEORGE FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 104 (1996) (acknowledging lack of full responsibility and excuse as diminishing punishment, without any reference to mitigation).

to be given to particular evidence offered in mitigation, but under the Eighth Amendment "they may not give it no weight by excluding such evidence from their consideration."²¹

II. THE METHODOLOGY OF THE STUDY

To understand how jurors in fact make the decision to sentence a defendant to death, we examined transcripts of interviews with jurors who have made that decision. These interviews were conducted as part of the Capital Jury Project ("CJP"), a national study of the decision making of capital jurors.²² The CJP has conducted interviews with some 1,155 capital jurors from 340 trials in 14 states. The interviews are designed to chronicle jurors' experiences and decision making over the course of the trial, to identify points at which various influences may come into play, and to reveal the ways in which jurors reach their final sentencing decisions. Jurors were asked both structured questions with designated response options and open-ended questions seeking detailed narrative accounts of their experiences as capital jurors.

This study examines the interview responses of jurors who imposed death sentences in six states (California, Kentucky, Missouri, North Carolina, South Carolina, and Texas). These states were chosen on the basis of three considerations: (1) to represent the three principal forms of capital statutes: threshold (KY, SC), balancing (CA, MO, NC), and directed statutes (TX); (2) to take advantage of the extensive open-ended interview responses which were available from the jurors in these six states; and (3) to ensure regional diversity. Within these states, cases were selected for analysis if: (1) interviews were conducted with at least three jurors, and (2) the juror responses were sufficiently lengthy and detailed to permit thorough examination.²³ In all but a few of the cases, the analysis has also been informed by review of the opinion on

²¹ *Eddings*, 455 U.S. at 115.

²² For a more detailed description of the Capital Jury Project, see Bowers, *supra* note 4.

²³ The transcribed interview responses of all (three or more) jurors had to exceed 100 kilobites for the case to be included in this analysis. In the six states selected for the analysis, 58 death cases met this criteria and 36 death cases did not.

direct appeal,²⁴ which sometimes provided information independent of the interviews on aggravating and mitigating circumstances that had been presented to the jury. With these sampling restrictions, the study examined the transcripts of 240 juror interviews in a total of 58 cases,²⁵ distributed among the six states as follows: California 68 jurors (15 cases); Kentucky 37 (10); Missouri 23 (6); North Carolina 27 (7); South Carolina 49 (12); and Texas 36 (8).²⁶

This examination of the decision to sentence a defendant to death draws foremost upon jurors' responses to the following open-ended question that asks about how the jury made its sentencing decision:

In your own words, can you tell me what the jury did to reach its decision about [the defendant's name] 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?

The full transcripts of juror interviews were consulted to clarify and augment responses to this question and to learn what jurors recalled about the judge's instructions at the penalty phase of the trial. For further perspective on jurors' responses to this open-ended question, the study examined their answers to selected questions with structured or restricted response options used in the instrument. Jurors' responses to these structured questions appear in Tables 1-4 of the Addendum to this Article.

²⁴ Given the timing of the interviews, the first appellate review process was completed in almost all cases by the time the study commenced. The extensive delay in processing capital appeals in California, however, meant that in a few cases from that state no published opinions were available.

²⁵ The 240 transcribed interviews represent 96% of all 250 interviews conducted with jurors in these 58 cases. No transcription was available for interviews with ten jurors either because jurors were not willing to have the interview tape-recorded or because the tape recorder malfunctioned.

²⁶ The transcripts of juror interviews are on file with the authors. Excerpts are identified by state abbreviation and juror identification number. Quotations preceded by "J" refer to juror responses; those preceded by "Q" refer to questions from the instrument; those preceded by "I" refer to follow-up inquiries by the interviewer. To preserve the confidentiality of these interviews, jurors are not identified by name and cases are identified only where reference is also made to the appellate court opinion.

III. THE FINDINGS

Analysis of these interviews shows significant deviation from the fundamental constitutional principles governing the decision about whether a defendant should live or die. The first section below describes how, for many jurors, the decision about guilt appears to be so overwhelming that it prevents truly separate decision making about punishment. The second section focuses on the degree to which jurors feel constrained by what they view as a requirement to impose death if certain aggravating factors are present in the case. And finally, the third section explores the way in which mitigating evidence, even when it appears to have been extensive and credible, is ignored, devalued, or discredited.

A. *Preoccupation with Evidence of the Defendant's Guilt When Deciding Sentence*

Modern American constitutional theory posits two separate and independent decisions in cases in which death is a possible penalty.²⁷ According to this framework, the decision about the appropriate sentence is not supposed to enter into the determination of the defendant's guilt; and likewise, the decision that the defendant is in fact guilty should not, in and of itself, dictate the proper punishment. It has already been convincingly demonstrated that significant numbers of jurors do not wait for the sentencing phase to consider the appropriateness of the death penalty; they report thinking and talking about what the sentence should be during deliberations on guilt. Moreover, many are firmly convinced of their decision about punishment, particularly that the sentence should be death, before the penalty phase of the trial has even begun.²⁸ Looking now at the penalty phase deliberations, the same inability, or unwillingness, to keep the decisions separate appears to allow jurors to justify a death sentence simply by pointing to the evidence of the defendant's guilt.

²⁷ See *Gregg*, 428 U.S. at 191-92.

²⁸ See William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1486-89 (1998).

The instrument used for the interviews with jurors progresses from questions concerning the case, including the crime, the defendant, and the victim, through questions regarding the guilt phase of the trial to questions about the penalty phase, with clear demarcations indicating when the discussion is moving to the next stage.²⁹ Nonetheless, when the questions ask about the penalty phase of the trial, jurors overwhelmingly continue to dwell on how convincing they found the evidence of the defendant's guilt of the crime. Often jurors mentioned in their interviews that the physical evidence introduced at trial was on the table during their deliberations, and that they went over that evidence in detail as part of their discussion of the penalty. Indeed, at times, looking at the physical evidence was what persuaded a juror who had been holding out for a life sentence to go along with a decision for death.

For some jurors, this emphasis is simply the result of the fact that they had become "absolutely convinced" during the guilt phase that death was the proper sentence—nothing presented at the penalty phase could possibly change their minds. In other instances, however, even jurors who were undecided after the guilt phase, or actually favored a life sentence at that point, are persuaded to impose death because the defendant was, after all, guilty of murder. These jurors focus on the facts of the crime, and conclude that because the defendant intentionally took another person's life, he also should die.

The strong emphasis on the defendant's guilt during sentencing deliberations is quite evident in the two threshold states, Kentucky and South Carolina. In these states, jurors are told that they must find at least one aggravating factor in order to impose death, and that they must consider aggravating and mitigating circumstances in making their sentencing decision.³⁰ Despite such instructions, many jurors in these states fell back on the persuasive evidence of the defendant's guilt in describing how they had arrived at their penalty decision. While at times they refer to aggravating and

²⁹ Copies of the instrument used for the Capital Jury Project study are on file with the authors.

³⁰ See KY. REV. STAT. § 532.025 (1998); S.C. CODE ANN. § 16-3-20 (1998).

mitigating factors, their conclusion about punishment seems to result not from an analysis of these factors but from the finding of guilt itself.

Of the three balancing states in the study (CA, MO, NC), the statutes in Missouri³¹ and North Carolina³² contain lists of aggravating and mitigating factors that jurors are instructed to weigh against each other. In California, jurors are also told to balance aggravating and mitigating factors, but the special circumstances in the statute are not identified as either aggravating or mitigating.³³ Even in these states, rather than focusing on factors relevant to punishment, many jurors continue to dwell on guilt. The original Texas statute specifically directed jurors to answer two (sometimes three) questions; if the answers were "yes," the defendant would be sentenced to death.³⁴ Given the special issues in the Texas statute asking whether the killing was deliberate and whether the defendant presents a future danger to society, jurors' responses understandably focus on these aspects of the case.

The influence of facts showing the defendant's guilt in making the sentencing decision is prominent in interviews with jurors in the threshold state of South Carolina. Responding to the question that asks how jurors deliberated about what the penalty should be, one juror reported that they:

J: looked over all the evidence: pictures, etc. A lot of evidence linking [the defendant] to crime. Punishment should fit the crime.³⁵

A juror from another South Carolina case described the sentencing deliberation process as follows:

J: We reviewed the evidence. Everybody looked at the evidence on the table. You know, we all took a vote.³⁶

Another juror from the same case emphasized that the defendant had:

³¹ MO. REV. STAT. § 565.030 (1999).

³² N.C. GEN. STAT. § 15A-2000(b) (1999).

³³ CAL PEN. CODE § 190.3 (1999).

³⁴ TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (1973).

³⁵ SC-1201.

³⁶ SC-1254.

- J: told how he really done it himself you know. When he admitted to it.³⁷

Similarly, in a third case, two jurors reported on what happened during sentencing deliberations:

- J: [T]hey brought in the evidence, like the gun and different things that had been presented³⁸
- J: We sat around a table, kind of looking at each other and looking at the evidence, exhibits that were entered into evidence, on the table³⁹

Three jurors from another South Carolina case all began their description of the penalty phase deliberations with references to evidence of the defendant's guilt:

- J: We passed around the confessions.⁴⁰
- J: We looked over all the statements that he had written.⁴¹
- J: Basically we went back through most of the testimony. Everything that was in the evidence. We looked at the weapon We discussed the firing of the weapon, how it had to be held in order to be fired. There was no way to accidentally discharge the weapon⁴²

Other South Carolina cases show that jurors, at a time when their task was to determine the appropriate sentence, focused to a great extent on the persuasive evidence that the defendant had in fact committed the murder. One juror recalled:

- J: [W]e discussed the gun belonging to him, and his clothes, everything was there on the table in front of us as a reminder too, his overalls, his gun, his holster, the bullet shells, everything⁴³

³⁷ SC-1257.

³⁸ SC-1258.

³⁹ SC-1259.

⁴⁰ SC-1286.

⁴¹ SC-1287.

⁴² SC-1288.

⁴³ SC-1214.

Another juror in the same case began his description of their penalty phase deliberations as follows:

- J: Let's see, we had the evidence before us on the table, and we passed around the evidence and looked at it. We looked at the gun, we looked at the jeans and the blood stains. We talked about these items, and how they related to the incident.⁴⁴

In another case, the juror reported the same procedure:

- J: Ok, I guess we got started first again by getting all of the evidence that had been presented to us. The gun, some clothing, the trooper's book, the ticket book you know⁴⁵

This juror then described why the jury thought the defendant had committed a deliberate killing rather than just panicking, again demonstrating their emphasis on the defendant's guilt of a capital crime.

Jurors in two additional South Carolina cases also reported discussions at the penalty phase that stressed the guilt of the defendants. All four jurors interviewed in one case mentioned that the jurors reviewed the evidence at this stage:

- J: First we went back there and we just sat there for about five minutes, we sat, we really didn't want to get started, we didn't really, we just sat and looked at each other and the foreman said we've got to get this done, and so we talked about, and someone said, well, all of the evidence pointed to him being guilty and the only thing I can say is, you know, if he's guilty he should get the death sentence.⁴⁶

Other jurors in the same case also stressed the strength of the evidence against the defendant:

- J: Well, the first thing we did, is we decided to take a poll to write down where we thought we should be at. I think it was ten to two for death. The judge had the evidence brought in. We went through it. We talked about the number of gunshots and the male being shot twice, we talked a lot about him. He stole their goods and changed license plates. One pregnant

⁴⁴ SC-1216.

⁴⁵ SC-1217.

⁴⁶ SC-1234.

lady talked about her child growing up where people like [the defendant] were alive, but she changed her verdict. She said she had no doubt in her mind that he killed those people. We took another poll after an hour and voted for death.⁴⁷

J: We went over evidence, the photographs and the pistol and so forth⁴⁸

Finally, a juror in another South Carolina case gave the following description of their sentencing deliberations:

J: In the penalty phase the first thing we ended up doing was confirming the fact that there were the aggravating circumstances, we went through all the, we asked for all of the evidence to be brought back into the room which they were planning to do anyway. We got the Styrofoam mold, the view where the bullet went, that the aggravating circumstances were there, I think everybody knew deep down that we were going to find him guilty and give him the death penalty at that point in time.⁴⁹

Jurors in Kentucky reveal much the same pattern. One juror responded to the question about how the jury arrived at their death sentence by saying:

J: We thought with all the evidence presented there was no doubt that he did it The evidence was convincing. The neighbor's boy (about 10 or 11 years old) identified him and even pointed him out in court.⁵⁰

Similarly, asked about their sentencing deliberations, another Kentucky juror simply said:

J: Discussed he was guilty beyond a reasonable doubt.⁵¹

A juror in another Kentucky case reported:

⁴⁷ SC-1235.

⁴⁸ SC-1237.

⁴⁹ SC-1241.

⁵⁰ KY-607.

⁵¹ KY-748.

- J: [W]e went through a process, we had to review the whole, the forensic evidence again. Really to help these people [two holdouts] I guess to remove any doubt from their mind that the whole crime was intentional.⁵²

A similar concern about whether the defendant had committed a deliberate killing was reported in another case, with the same result:

- J: Well they couldn't decide whether to believe him when they said it was self defense . . . but then it kept coming back to the fact that he had taken a gun with him and there was no reason . . . to have a gun if he didn't intend to use it except maybe to threaten him . . .⁵³

Uncharacteristically, in one Kentucky case, a juror objected to the tenor of part of the discussion at the penalty phase:

- J: We went over the physical evidence, which seemed like a waste of time to me, because we all knew the physical evidence and we all knew that he was guilty and how bad it was and all that stuff. I think what I was looking for was just a discussion, but in my mind, everybody else had come back into the jury room with their mind made up. They had made their mind up out in the jury box, and there was not much discussion.⁵⁴

The other jurors in that case, consistent with the other findings reported here, seemed comfortable with having made their sentencing decision by relying on the evidence showing that the defendant was, in fact, guilty of the murder.

- J: We looked at some of the evidence, looked at the guns. We talked about it some more and discussed it.⁵⁵

Asked how the holdouts were persuaded to go along with the majority to vote for death, this same juror responded:

⁵² KY-694.

⁵³ KY-699.

⁵⁴ KY-727.

⁵⁵ KY-724.

- J: More or less just us discussing it, explaining, talking about the evidence and what happened.⁵⁶

One might anticipate that jurors who were specifically instructed to examine aggravating and mitigating factors, and to weigh them against each other, would be more likely to concentrate at the penalty phase on circumstances beyond the defendant's guilt of the crime. Yet the focus on guilt during punishment deliberations is present here too. For example, one juror in a California case reported:

- J: It was obvious that he's guilty . . . see, in this instance, to begin with, the kid is already guilty: We got bullets, you know . . . we get the kid went with intent, it was his gun; he used the same gun.⁵⁷

Similarly, in another California case, a juror answered the question about penalty deliberations as follows:

- J: And we all did the same things, went over the exhibits and that type of thing and of course we wanted to kind of, pretty much . . . prosecution's case was the evidence, we wanted to go over that, it was kind of ad hoc, everyone kind of reviewed the evidence . . .⁵⁸

Jurors in Missouri cases also reported that review of the evidence at the guilt phase played a major role in coming to a decision about sentencing. In one case, two jurors described how reviewing the evidence, particularly the taped confession, persuaded one juror who had voted for life to agree to the death sentence.⁵⁹

- J: 11 went for the death penalty—and one person wanted to try to hear some evidence—they wanted to hear the tape or watch the video again . . . there was some kind of going back and forth . . . the second vote everyone was for the death penalty . . .⁶⁰

⁵⁶ KY-724.

⁵⁷ CA-19.

⁵⁸ CA-27.

⁵⁹ MO-3029; 3031.

⁶⁰ MO-3029.

In another case, in response to the question about penalty deliberations, a Missouri juror said:

J: Um, I think we all had a real strong sense that he was guilty and it was a heinous act.⁶¹

A juror in a North Carolina case also focused on the strength of the evidence regarding the defendant's guilt. In response to the question about how the jury reached its penalty decision, this juror said:

J: Actual crime scene—how it was carried out, the circumstances—the choice the defendant had between hitting once, and running away but instead beat him severely. Point where the defendant had a choice—showed no compassion, didn't help him—intent on burning the safe. Tape recording backed up the crime scene evidence.

Articles placed at crime scene matched what he said on tape. (Defendant's shoe prints matched the one at the crime scene and followed the pattern described on the tape.) Went over evidence—to see what options were available—determined that it fit the guidelines for death.⁶²

The Texas statute invites, indeed requires, jurors to make a guilt related determination in arriving at their sentencing decision. Jurors, before amendment of the statute in 1991, were required to concentrate exclusively on answering the following questions:

Q: (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.

(2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.⁶³

⁶¹ MO-3026.

⁶² NC-1081.

⁶³ TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (1973), *amended by* TEX. CRIM. PROC. CODE ANN. art. 37.071(2) (1991). In some cases, the court might submit a third question asking whether the conduct of the defendant in killing the victim was an unreasonable response to the victim's provocation. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(3) (1973), *amended by* TEX. CRIM. PROC. CODE ANN. art. 37.071(2) (1991).

The first question has been the subject of numerous challenges on appeal because, on its face, it appears to convert into an aggravating factor what, in virtually all intentional killings, is necessarily also true. Many, indeed most, jurors who are asked on voir dire whether they understand the difference between "intentional" and "deliberate" at first respond that these terms are equivalent.⁶⁴ Only when it is explained that under the Texas statute they will not be permitted to serve as a capital juror unless they understand that there is in fact a difference, do they agree that there is a distinction.⁶⁵ In some cases, jurors reported that their

⁶⁴ See, e.g., *Mooney v. State*, 817 S.W.2d 693, 701 (Tex. Crim. App. 1991) (providing example of juror who initially expresses opinion that intentional and deliberate are the same).

⁶⁵ In one case, the defense had attempted to challenge three jurors for cause based on their failure to understand the difference between intentional and deliberate conduct. The colloquies, as reported by the Texas Court of Criminal Appeals, illustrate the difficulties:

When venireperson Zimmerman was originally asked by the prosecutor whether he saw a distinction between the two terms, he stated that he did, although admittedly, it was only a small one. However, he also stated that the comments being made during voir dire had shown him other possibilities. During questioning by the prosecutor, Zimmerman testified as follows:

"Q. Can you tell us and, more importantly, tell the Judge that you recognize the distinction between the word intentional and deliberate, and you will make the word deliberate mean something more than the word intentional?

A. Yes, I can say that.

...

A. Yeah. I'm not sure I can say that there's a vast difference between intentional and deliberate right now. I'm not saying that at all. I'm saying that I recognize there's some difference. How much, I don't know right now.

Q. It would depend upon the facts of the case?

A. I would say so.

...

Q. So I guess the bottom line is this: Let me just ask you again. Can you see that just because you found someone guilty of the intentional killing of someone, it does not necessarily mean that he did it deliberately, too? May have?

discussions did focus on this first special issue, although the intentional/deliberate distinction is far from clear. For example, one juror noted:

J: Well the way I recall the question, is I'm not sure of the exact wording but basically we had to answer to whether we felt he did what he did on purpose. And I took that to mean not did he deliberate what he did but more along the lines of when he took the action he took did he take it with the intent to have the outcome it had and I think that we discussed that a little bit about whether he knew when he started hitting her with that belt that he wanted to kill her and everybody said yeah
...⁶⁶

Regardless of these fine distinctions, given that intentional killings typically are also deliberate, in Texas the penalty discussions most often come down to the issue of the defendant's future dangerousness. As discussed in the next section, the statutory scheme in Texas has produced the most skewed results in sentencing, with the highest percentage of capital convictions resulting in death.⁶⁷

The unmistakable message that comes through these descriptions of penalty phase deliberations is the prominent role of the defendant's guilt of the crime. The interviews reveal

A. Yeah. I can see that. Yes. Yes."

When Zimmerman was questioned by appellant, he appeared to be confused by counsel's questions:

"Q. My question is: Do you as an individual feel that there's a difference between intentionally and deliberately, or do you think it's a meaningless distinction?

A. In my mind, it's—they're one and the same in my usage."

Ultimately, when asked by the trial court whether he could make a distinction between the two, Zimmerman responded affirmatively. *State v. Garcia*, 887 S.W.2d 846, 853 (Tex. Crim. App. 1994). Based on two other colloquies like this one, the appellate court held that the trial court's denial of three challenges for cause did not amount to an abuse of discretion. *See id.* at 853-56.

⁶⁶ TX-1581.

⁶⁷ In Texas, four out of five capital convictions end in death sentences. This is reported for periods before and after the Texas statute was changed to include the mitigating question. *See* Deon Brock et al., *Tinkering with the Machinery of Death: An Analysis of the Impact of Legislative Reform on the Sentencing of Capital Murders in Texas*, 28 J. OF CRIM. JUSTICE 343, 343-49 (2000).

that, for many jurors, the decision about guilt is so overwhelming that it precludes a separate decision about what the proper sentence might be. In response to questions about the jury's deliberations at the penalty phase of the trial, jurors often stressed the evidence that showed the defendant had in fact committed the murder.

The impression gained from reading jurors' narrative descriptions of how they arrived at their penalty decision is confirmed by their responses to structured interview questions. When asked about some thirty-seven topics that might have been discussed during the jury's punishment deliberations, jurors identified guilt-related topics as those most likely to be discussed.⁶⁸ Of the five topics discussed most when considering punishment, four concern the nature of the killing: the way the victim was killed, the defendant's role or responsibility, his planning or premeditation, his motive for the crime—matters that typically arise in making the guilt decision. The third most discussed topic makes guilt explicit: "how weak or strong the evidence of guilt was." The prominence of this topic, which should really be irrelevant to the decision about what punishment is appropriate for the crime, underscores dramatically how the penalty deliberations focused on the fact of the defendant's guilt.

For jurors deciding on death, both the narrative portions of the interviews and the statistical data show that the story of the killing is paramount. It is of course understandable, and indeed laudable, that jurors want to make sure that a defendant is guilty of the crime for which he might be executed. Yet guilt of a capital crime does not, by itself, call for the death penalty. Absent from the reported discussion, too often, is any reference to the defendant's life prior to the killing, or even any explanation of why the defendant, because he is guilty of this crime, deserves to be executed.

This obsessive focus on the defendant's guilt of the crime might stem from the defense's failure to present the jury with any relevant information regarding possible mitigation.⁶⁹ The pervasiveness of the phenomenon throughout the sample of cases suggests, however, that it is unlikely that no

⁶⁸ See *infra* Tbl. 1 in the Addendum.

⁶⁹ See *infra* Section III.C (discussing mitigating evidence).

mitigation evidence was introduced in any of these cases. Moreover, in some cases, the court's opinion on appeal describes such evidence. For example, in a Kentucky case described more fully in Section III.C below, two dissenting judges described the evidence demonstrating that the defendant suffered from mental illness exacerbated by drug and alcohol abuse, had exhibited bizarre behavior, and had been suicidal and depressed.⁷⁰ Yet jurors failed in their penalty phase discussion to address these extensive mitigating factors.

Jurors are, to be sure, free to assess the credibility of this evidence, and it is possible that jurors refused to consider mitigation because they simply did not believe that the defendant's background or character was as described by the defense witnesses. Yet the juror interviews do not reflect this kind of a reaction. The jurors do not appear to have grappled with the notion that, despite the defendant's clear guilt of an aggravated murder, they could decide that he deserved a sentence other than death. What is missing from these interviews is any real recognition of a separate choice, an independent decision about whether this defendant should suffer the ultimate penalty of death.

B. *Perception that Death is Required*

Just as a finding of guilt does not, alone, justify a death sentence, so a finding of aggravation does not compel a decision that the sentence must be death. Yet the presence of an aggravating factor, which should merely be a condition for making a defendant *eligible* for a possible death sentence, appears to operate for many jurors as a mandate requiring that the death penalty be imposed. With the possible exception of Texas before 1991,⁷¹ none of the statutes involved in this study required death to be imposed as the penalty, no matter what evidence has been presented in aggravation. Yet in their response to questions about how the jury arrived at its decision to sentence the defendant to death, jurors often asserted that

⁷⁰ *Bowling v. Commonwealth*, 873 S.W.2d 175, 180 (Ky. 1993).

⁷¹ See sources cited, *supra* note 15.

the law, or the judge's instructions, made clear that if an aggravating factor was present, the proper sentence would be death.

In their interviews, some jurors explicitly stated that it was their belief that aggravation required death; others used language that more indirectly conveyed the same impression. Accordingly, jurors reported that at the penalty deliberations, they arrived at a death sentence based on the presence of one or more aggravating factors that, to their minds, led necessarily to that penalty. Jurors in all the states in the study described this determinative role of aggravating factors. Even in California, where jurors are instructed to consider sentencing factors that are not designated as aggravating or mitigating and then to weigh aggravating against mitigating circumstances,⁷² a surprising number of jurors reported their belief that a particular fact in aggravation required a death sentence. Not surprisingly, in light of the structure of its statute, the perception that death was the mandatory sentence under certain circumstances, particularly if jurors thought the defendant would be dangerous in the future, was most prominent under the directed statute in Texas.

The laws of Kentucky⁷³ and South Carolina⁷⁴ *permit* a death sentence to be imposed if an aggravating factor is found to be present. Jurors are told that if they find such aggravation to be established, they must then consider mitigating circumstances in arriving at a decision about whether the defendant should actually be subject to that penalty.⁷⁵ Yet some jurors conveyed the distinct impression that finding an aggravating factor was the end of the inquiry. A Kentucky juror who described the overriding feeling among the jurors that the defendant should never be in a position to harm anyone else asserted:

J: In fact we had to according to the judge's instructions give capital punishment⁷⁶

⁷² CAL. PEN. CODE § 190.3 (1999).

⁷³ KY. REV. STAT. § 532.025 (1998).

⁷⁴ S.C. CODE ANN. § 16-3-20 (1998).

⁷⁵ *Id.*

⁷⁶ KY-678.

In another Kentucky case, a juror reported the judge's instructions at the penalty phase in the following manner:

- J: If there was no reasonable doubt he gave us our choices, there was no choice if there was no reasonable doubt. We could find him guilty I mean we already found him guilty.⁷⁷

Similarly, in South Carolina some jurors seemed to be convinced that the law required death if certain factors were present. For example, one juror recalled the judge's penalty phase instructions:

- J: Two major . . . robbery and murder. To South Carolina law, that would be sufficient reason to give him the death penalty.⁷⁸

Another described the instructions as follows:

- J: If you followed it and got yes for this part and yes for this part it all kind of fell in place it seemed like, . . . it just kind of progressed us into . . . there is really not much choice, well you always want to have a choice I guess but . . .⁷⁹

Explaining the process by which the jury arrived at its death sentence, another South Carolina juror focused on the aggravating factor of future dangerousness:

- J: What would the defendant do if set free? Would [the defendant] kill again? The law said the defendant must get death because he murdered—the solicitor explained that this was required by law.⁸⁰

Similarly, a juror in another South Carolina case described how the initial hesitation by a few jurors about imposing a death sentence was overcome:

- J: But after studying the law, what the law requires and her danger that she would be even if she was in prison, that another vote was taken and it was unanimous.⁸¹

⁷⁷ KY-708.

⁷⁸ SC-1287.

⁷⁹ SC-1288.

⁸⁰ SC-1240.

⁸¹ SC-1231.

In California, like in Kentucky and South Carolina, the death penalty statute requires a finding of at least one special circumstance before death would be a *possible* punishment.⁸² If a jury finds that such a special circumstance has been established, a penalty phase is conducted during which each side may submit additional evidence in aggravation or mitigation. The jury is then instructed to impose a death sentence if it concludes that the aggravating circumstances outweighed the mitigating circumstances; if it finds that mitigating circumstances outweighed aggravating, it is told to impose a sentence of life imprisonment without the possibility of parole.⁸³ Yet one California juror described the judge's instructions at the penalty phase as follows:

- J: What I understood was as an unbiased individual I was to weigh the evidence to find him guilty, and if I found him guilty beyond a reasonable doubt. Then I had to give him the death sentence.⁸⁴

Another juror in the same case reported that it took some convincing of a juror who wanted to impose a sentence of life without possibility of parole:

- J: But read instructions. If find this, then result must be by law death sentence. The judge's instructions led the way.⁸⁵

In another California case, a juror described the penalty phase decision as follows:

- J: [F]irst thing that we did was to determine what the requirements were for capital punishment and did the evidence substantiate for the requirements. Once we decided that all those items had been met, there really wasn't a lot of discussion.⁸⁶

In yet another California case, a juror recalled the judge's instructions at the penalty phase:

⁸² CAL. PEN. CODE § 190.3 (1999).

⁸³ *Id.*

⁸⁴ CA-9.

⁸⁵ CA-12.

⁸⁶ CA-16.

- J: That it was pretty well cut and dried. . . . You know, in order to get the death penalty, you got to have this to give support to the death penalty⁸⁷

Despite the absence, in the California scheme, of any statutory special or aggravating circumstance relating to the defendant's future dangerousness, a juror in still another California case described how a holdout for life was persuaded to agree with the majority on a death sentence:

- J: Kind of what it did was allow her to vote yes without, sort of it was the wording, it wasn't that we changed her mind, but somehow she was able to accept the argument, I think she finally had to admit that he would easily hurt someone else and that our instructions said in that case we were required to give death.⁸⁸

Asked what was the most important factor in the jury's decision to impose death, a juror in another California case responded:

- J: The instruction, what the law specified. From what I remember the law said if he's guilty of murder and the murder was committed with special circumstances that the death penalty was appropriate.⁸⁹

The special circumstance that made the defendant eligible for a death sentence was seen by this juror as virtually requiring death. Similarly, in another California case, jurors had the impression that if the special circumstance had been established, the sentence should be death. In the words of one juror:

- J: And our system has set up this way of taking care of criminals and so if they fit in these slots that are provided for us, and everything fits and the special circumstances are there, then execution is justifiable.⁹⁰

⁸⁷ CA-18.

⁸⁸ CA-90.

⁸⁹ CA-55.

⁹⁰ CA-37.

In the same case, another juror responded to the question:

Q: 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?

with:

J: What the law requires. And jurors agreed.⁹¹

The Missouri⁹² and North Carolina⁹³ statutes require jurors to weigh aggravating against mitigating factors, which are identified as such in the statute, and to impose a life sentence if the mitigating circumstances outweigh aggravation. One Missouri juror described the whole process of decision making as unexpectedly structured:

J: Well the main thing, I had never served on jury duty, until this one came up. And I had no idea of the structure . . . I didn't realize how structured it is. You get in there and the judge has a list . . . I thought you just went in there and everybody talked and decided, but it's very structured. We went right by that list. We went first step, we all decided on the first step before we'd go to the second step. It's very structured. It makes it . . . if the instructions are correct and people follow it . . . it's recipe . . . If you decide on this then it must be this . . .⁹⁴

At least some of the jurors in another Missouri case believed that if the jury was unanimous in finding the aggravating factors to have been proved, a death sentence was mandatory.⁹⁵ The jurors tried to get clarification from the judge, but were told that no further instructions could be given beyond those included in the original charge and the verdict sheet.

A number of jurors in North Carolina were under the impression, despite the instructions explicitly requiring a weighing of aggravating against mitigating circumstances, that death was the required penalty. In one case, asked to describe

⁹¹ CA-38.

⁹² MO. REV. STAT. § 565.030 (1999).

⁹³ N.C. GEN. STAT. § 15A-2000(b) (1999).

⁹⁴ MO-3030.

⁹⁵ MO-3009.

the judge's instructions to the jury for deciding what the punishment should be, a juror reported:

- J: It was clear cut the way he did it; too cut and dry. "If you say this happened-you must say this is going to happen."⁹⁶

In another North Carolina case, a juror similarly described a process that seemed to lead inevitably to death:

- J: Paper with guidelines to decide what the sentence should be. If I remember correctly there was a sheet that has a lot of questions on it. Like was the murder committed because she wanted to gain wealth.
- I: You mean pecuniary gains? A list of aggravating and mitigating circumstances?
- J: Yes.
- I: So he didn't give you much more than that?
- J: No. According to the paper, after you answer all the questions, if you answer two questions yes you have to give the death penalty. That would automatically require the death penalty.⁹⁷

As noted in Section III.A, the Texas statute before 1991 differed considerably in its penalty phase structure from the other schemes in our sample. Under the former Texas law, if jurors answered the special issues in the affirmative, a death sentence *did* automatically follow.⁹⁸ True, to satisfy constitutional standards the Supreme Court had held that the special issues in theory permitted jurors to give due consideration to any relevant mitigating circumstances,⁹⁹ yet on its face the statute mandated a death sentence once the aggravating factors were found to be present: there was simply no mention of mitigation in the statute.¹⁰⁰ Notwithstanding the Court's interpretation, this way of framing the sentencing decision understandably caused jurors to believe that death

⁹⁶ NC-1065.

⁹⁷ NC-1078.

⁹⁸ TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1973).

⁹⁹ See *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *Jurek*, 428 U.S. at 272-73.

¹⁰⁰ TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (1973).

was the required sentence if the jurors believed that the defendant committed a deliberate killing and that there was a probability that he would commit future acts of violence.¹⁰¹ One juror in a pre-1991 Texas case described the judge's instructions as follows:

J: I don't remember the specifics, but he made it very clear to us what the law prescribed. It was like, "if . . . , then this."¹⁰²

Another juror in the same case recalled:

J: I think I can come close to quoting what he said or at least summarize accurately. He said that if you found him guilty in committing a murder while in the act of a burglary, therefore, it's a capital murder case and, as I remember, the only question we had to answer is whether he was a threat to society and, was it danger, was a danger to society, would likely do this again. He'd been found sane, which is an issue we didn't discuss. We found him guilty of murder and the remaining question was would he do it again?¹⁰³

The other result of this statutory scheme, and one which persists even under the revised version, is that jurors see themselves as simply answering factual questions, instead of actually making a decision about whether the defendant should live or die. The structure of the Texas law, thus, makes it easy for jurors to shift responsibility for the defendant's death from themselves to the law or to the court. Jurors in Texas are never faced directly with the question of what the defendant's sentence should be. Instead, they are asked to respond to factual questions that, depending on the answer, dictate the sentence imposed by the court. Yet Texas courts have not been persuaded by the claim that because jurors in Texas may not be aware of the inevitable effect of their responses to the special issues, they mistakenly believe that actual responsibility for the defendant's sentence lies with the law or the judge.¹⁰⁴

¹⁰¹ See *supra* text accompanying note 67.

¹⁰² TX-1613.

¹⁰³ TX-1614.

¹⁰⁴ This claim was raised in *Curry v. State*, 910 S.W.2d 490 (Tex. Crim. App. 1995), but not decided because it had not been properly preserved. *Id.* at 496-97. The most extensive discussion related to this point appears in *Draughon v. State*, 831

In a case tried under the original Texas statute, jurors reported convincing two jurors who voted in favor of life to go along with the majority on the basis that they were not in fact imposing a death sentence. One juror described the process of convincing them to go along with the majority:

- J: We were using persuasive tactics by saying, you are not sentencing him to death. They did that all by themselves, and the judge is the one who will pronounce the sentence.¹⁰⁵

This juror described the best thing about the give and take of jury deliberation on punishment as:

- J: How everyone came together to try to explain to this one lady that she was not sentencing this man to death.¹⁰⁶

In another pre-1991 Texas case, several jurors mentioned the feature of Texas law that confined their decision making to simply answering factual questions as decisive to their deliberations at the penalty phase. One juror recalled that the best thing about the deliberations was:

- J: [I]t was easier—thought it would be harder than just answering questions.¹⁰⁷

S.W.2d 331 (Tex. Crim. App. 1992). The issues there were whether the jury should be told of the consequence of failure to agree on special issues, and whether jurors might be misled into thinking that they could impose a life sentence only if at least ten jurors answered no to one of the special issues. *Id.* at 337. The court held that there is no constitutional requirement that the jury be told of the consequences of a hung jury at the penalty phase (in Texas, a hung jury results in a life sentence), because their impression that there would be a new penalty trial would simply make them take their task, and their wish to come to a unanimous verdict, more seriously. *Id.* at 337-38. It may be noteworthy that the Louisiana Supreme Court has come to a different conclusion, finding that the pressure to arrive at a unanimous verdict, in order to avoid the perceived necessity of a retrial, injected an element of arbitrariness into the decision-making process. *See State v. Williams*, 392 So.2d 619, 634-35 (La. 1980). Regarding the second issue, the Texas court decided that the instructions given are not reasonably subject to an interpretation that would violate *Mills v. Maryland*. *Draughon*, 831 S.W.2d at 338.

¹⁰⁵ TX-1611.

¹⁰⁶ TX-1611.

¹⁰⁷ TX-1650.

Another juror criticized the Texas law for this feature, which he characterized as "an extreme mind game"¹⁰⁸ in which the jury did not decide on life or death but rather just answered questions. This juror would have preferred it if the jury had been required to make the decision in a straightforward way. Another juror in the same case, however, took great comfort in the fact that the jury was simply answering questions. This juror mentioned specifically the instructions from the court that explained that the jury was not in fact deciding whether to sentence the defendant to die:

J: [The judge] said that he wanted us to understand that we were not choosing whether somebody should get the death penalty or not as far as being responsible if he ends up dying as a result of getting the death penalty. That it was up to us to answer yes or no to, I think it was three, questions. And based on the way we answered those questions. The death penalty would be assigned or not assigned, according to Texas law. The defense tried to make us feel as though we would be responsible for [the defendant] dying if we gave him the death penalty so I think that the judge maybe took some of that sting away.¹⁰⁹

Even in one Texas case¹¹⁰ tried under the amended statute,¹¹¹ the jury interviews reveal in a dramatic way how the jurors in favor of death were able to effectively use the argument that the jury was simply answering questions, rather than imposing a death sentence. According to one juror:

J: One lady could not sentence anyone to death.

I: How was this resolved?

¹⁰⁸ TX-1575.

¹⁰⁹ TX-1573.

¹¹⁰ *Curry v. State*, 910 S.W.2d 490 (Tex. Crim. App. 1995).

¹¹¹ The revised Texas statute adds 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?

TEX. CODE CRIM. PROC. ANN. art. 37.071(e)(Supp. 1999). A negative answer to this question, along with affirmative answers to the others, requires the court to impose a death sentence. TEX. CODE CRIM. PROC. ANN. art. 37.071(g) (Supp. 1999).

- J: The judge did that sentencing; the jury only had to say [the defendant] was guilty of capital murder.¹¹²

The majority assured this holdout that:

- J: she wasn't pronouncing [death] . . . we had the instructions right in front of us.¹¹³

It was only by convincing this woman that she was not in fact sentencing the defendant to death that the jury was able to report a unanimous verdict on the special issues.

Consistent with jurors' narrative accounts, statistical analysis of the Capital Jury Project data confirms that a substantial proportion of jurors who voted for a death sentence believed that the law required death when in fact it did not. Close to five of ten jurors on death cases believed that they must impose a death sentence if the evidence proved that the crime was heinous, vile, or depraved.¹¹⁴ Four of ten thought death must follow a finding that the defendant would be dangerous in the future.¹¹⁵

Jurors assigned the task of deciding whether a defendant should live or die must not assume that the law sanctions only the most severe penalty. Yet too many jurors report that they arrived at a death sentence because the law required it, or that the responsibility for the sentence in some other way rested elsewhere.

C. *Failure to Consider Mitigating Circumstances*

Finally, the interviews reflect a pattern in which mitigating factors play a disturbingly minor role in jurors' deliberations about whether a defendant should be sentenced to death. In stark contrast to the prominence of reported discussion of guilt and factors in aggravation, evidence that might tend to mitigate the offense is often entirely absent from the description of the process leading to imposition of the death

¹¹² TX-1581.

¹¹³ TX-1581.

¹¹⁴ See *infra* Addendum, Tbl. 2.

¹¹⁵ *Id.* For an early report of responses to these two questions among jurors from both death and life cases see Bowers, *supra* note 4, at 1091, Tbl. 7.

penalty in these cases. It is difficult to imagine that jurors are able to make the "individualized assessment of the appropriateness of the death penalty"¹¹⁶ mandated by the Constitution without consideration of circumstances that would mitigate against that sentence. Even when jurors do report a discussion of mitigating factors, their understanding of what the law defines as mitigation is extremely limited. In the relatively rare instance when mitigating evidence is mentioned, jurors either seem not to understand what they are to do with such evidence or they dismiss it out of hand as no excuse for the murder. The impression conveyed is that unless the evidence in mitigation either proves that the killing was not deliberate or furnishes an excuse for the killing, such as insanity or duress—factors that would invalidate the capital murder conviction—it does not provide adequate reason to impose a sentence other than death.¹¹⁷

Of course various explanations are possible for the lack of reported discussion of mitigating evidence during the penalty phase deliberations, not all of which suggest problems with the capital decision-making process. First, in some cases no evidence of mitigation may have been presented at trial, either because there was none available, or because counsel simply did not seek it or present it effectively. This possibility was taken into account by examining both the entire transcript of the jury interviews and the appellate opinions in these cases to discover any mitigation that was introduced. In a significant number of cases, this process revealed that mitigating evidence had in fact been presented, despite the absence of any reported discussion at the penalty phase deliberations. In those cases where no mitigation was presented, the problem rests with defense counsel and admittedly does not pose the kind of issue regarding jurors' devaluation of such evidence that we are considering here.

¹¹⁶ *Penry I*, 492 U.S. at 317; see also *Morgan*, 504 U.S. at 736.

¹¹⁷ It is important to recall here that mitigation in the death penalty context has a broader meaning than what might be considered to reduce culpability in traditional criminal law theory. See *supra* text accompanying notes 19 & 20.

Second, it is conceivable that evidence in mitigation was introduced, but the jurors either did not find it credible and worthy of discussion or did in fact discuss it, but failed to mention that discussion during their interviews. It is certainly plausible that jurors, who had agreed to a death sentence, would concentrate on the evidence that would justify that sentence. Notwithstanding these possibilities, the fact that the omission of mitigation in the interviews is so consistent suggests that discussion of the topic was not central to the decision making in most cases.

By far the most likely explanation, given the strong and consistent overall pattern, is that jurors tended to focus on the evidence in aggravation; they simply did not seriously address any themes in mitigation that were presented by the defense. This conclusion is supported by statistical data from the CJP interviews documenting the misperception among almost half the jurors that mitigating factors must be proven beyond a reasonable doubt to be considered, and the misperception by more than half the jurors that mitigating factors may be considered only if all jurors agree.¹¹⁸ This pattern raises serious concerns that jurors arrive at death sentences without the required consideration of mitigating circumstances. Under cases interpreting the Eighth Amendment, "the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk."¹¹⁹

The interviews support the conclusion that many jurors fail to consider evidence in mitigation or, if they do "consider" it, they lack clear understanding of what the law asks them to do with such evidence. There is virtually no recall of any instructions regarding what consideration is required of evidence in mitigation. In some cases, the jurors recognize that evidence in mitigation has been presented, but do not know what the law allows, or requires, them to do with such evidence. When discussion of potentially mitigating evidence is

¹¹⁸ See *infra*, Addendum, Tbl. 3. The Supreme Court has held that such a unanimity requirement violates the Eighth Amendment. *McKoy v. North Carolina*, 494 U.S. 433, 439-40 (1990); *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988).

¹¹⁹ *Mills*, 486 U.S. at 384.

mentioned, a frequent response is that the evidence cannot excuse the crime. If the defendant was an adult, and knew right from wrong, he could not avoid responsibility for the killing; and that responsibility, implicitly, meant paying with his life.

The very word "mitigation" is foreign to most jurors¹²⁰—and indeed a number of the jurors who were interviewed obviously did not understand the term, at times actually confusing it with aggravation.¹²¹ Even jurors who did seem to understand the term often dismissed evidence that clearly should be considered mitigating, such as childhood abuse and mental impairment, as not "excusing" the defendant's conduct or reducing responsibility.

Some jurors expressed confusion about the proper function of mitigation in making a capital sentencing decision. For example, one juror in a California case¹²² regretted that the jury:

J: had no instructions or didn't ask as to what role childhood should play. Didn't know if defendant's childhood was valid reason. Should have asked judge if that was valid reason to deny death.¹²³

Yet the California Supreme Court in that case rejected the claim that the jury should have been provided with definitions of the terms "aggravating" and "mitigating," finding it well

¹²⁰ See Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1223, 1229 (1995) (reporting that less than half the study subjects could give even a partially correct definition of mitigation); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 10-22 (describing studies and anecdotal data regarding juror confusion over mitigation).

¹²¹ See, e.g., one Missouri juror, who recalled the judge's instructions as follows:

J: He said that you could have a mitigating circumstance that outweighed aggravating circumstances in which case death penalty would be advised. If there was no mitigating then there was no death penalty.

MO-3032.

¹²² At the first trial, this case ended in a hung jury on the penalty; at a second penalty phase trial, the defendant was sentenced to death. Jury interviews were conducted with five jurors, two of whom voted for life, from the first trial and one from the second. Quotations are drawn exclusively from the interview transcripts of jurors who voted for death.

¹²³ CA-133.

established that these terms are "commonly understood terms that the trial court need not define for the jury."¹²⁴ The defendant had relied on the mitigating effects of his violent upbringing.¹²⁵ His father, frequently drunk, beat the defendant and his mother.¹²⁶ One juror described the defendant's family as "a little crazy," and then added:

J: The parents were kind of fairly normal, they do things . . . the father . . . like waking him up in the morning by shooting a gun by his head.¹²⁷

His mother was imprisoned for a federal offense when the defendant was four years old, resulting in his being placed first in foster homes and then sent to his father, who continued to beat him and use guns in the house in the presence of his children.¹²⁸ The defendant's father admitted that he sometimes had locked the defendant in the house, the basement, or the closet to prevent him from running away.¹²⁹ None of this childhood abuse, however, persuaded the jurors that the defendant might deserve a sentence less than death.

Jurors in some of the cases also seemed to find that the evidence offered did not adequately prove the mitigating facts, perhaps because of common misperceptions about the burden of proof on such evidence. In one North Carolina case,¹³⁰ for example, one of the jurors reported that while the defense said that the defendant had been neglected and that his mother had taken drugs while pregnant, these facts were never "proven."¹³¹ Another juror also suggested that more could have been done in presenting the mitigating factors when he said that he might have changed his mind about the penalty if he had been given more information about the defendant's upbringing and family.¹³² A third juror, who seemed rather

¹²⁴ *People v. Hawkins*, 897 P.2d 574, 600 (Cal. 1995) (quoting *People v. Kirkpatrick*, 874 P.2d 248, 265 (Cal. 1994)).

¹²⁵ *Id.* at 582.

¹²⁶ *Id.*

¹²⁷ CA-130.

¹²⁸ *Hawkins*, 897 P.2d at 582.

¹²⁹ *Id.*

¹³⁰ *North Carolina v. Lyons*, 468 S.E.2d 204 (1996).

¹³¹ NC-1141.

¹³² NC-1140.

sympathetic to the defendant, confirmed the thinness of the defense's case. She described the defendant as:

J: [L]ost in the system. Pitiful background. Basically a street kid. I'm not so sure he knows right from wrong like the rest of us. They don't go into a great detail even though they have a psychologist.

It was a very sad situation all the way around, he was black, raised in the ghetto, and so on.¹³³

The mitigating evidence presented in this case seems to have consisted largely of testimony by the defendant's expert psychologist. According to this expert, the defendant suffered from bipolar disorder, caused by his mother's consumption of alcohol while she was pregnant with him, and antisocial personality disorder; he was also a substance abuser. Several of the jurors noted, however, that the psychologist was a poor witness who was not well prepared.

Despite their expressed reservations about the quality of the evidence presented in mitigation, the jury in this case, according to the appellate court opinion, did mark in its verdict that mitigating factors were present:

The jury found one statutory mitigating circumstance, that the offense was "committed while defendant was mentally or emotionally disturbed," and four nonstatutory mitigating circumstances: (1) the defendant was emotionally abused as a child, (2) the defendant was abandoned by his mother as a child, (3) the defendant's current psychological disorders are related to his mother's abuse of drugs, and (4) the defendant has a long history of alcohol and drug abuse. The jury also found the statutory catchall mitigating circumstance.¹³⁴

Given these findings, the jurors' decision that the defendant should be sentenced to death seems to reflect their opinion, as expressed in the interviews, that mitigating circumstances such as abuse during childhood or mental impairment simply do not provide an "excuse" for the killing. Regarding his upbringing, as one female juror put it:

¹³³ NC-1142.

¹³⁴ *Lyons*, 468 S.E.2d at 215 (citations omitted).

- J: Most felt background was horrendous but that it did not make up for what he did. There are people who had just as bad of circumstances and didn't do what he did.¹³⁵

Another female juror agreed:

- J: We all thought, well he was abused but you can't keep using that as an excuse.¹³⁶

A male juror displayed a highly dismissive attitude towards the mitigating evidence:

- J: They was coming up with some disorder that he had that was brought on, that was induced by his mother's drinking during pregnancy, and he was brought up in an abusive home [The defense] tried to pawn off on defendant's family and upbringing . . . bipolar disorder.¹³⁷

Another juror in the same case was most emphatic in rejecting the "abuse excuse." He reported:

- J: Everyone's got a rough childhood. Everyone's abused now The defense tried to say he was abused, all that standard nonsense There is so much stupid crime. It's ridiculous, you know. We have so many liberal "do wells" those bleeding heart liberals, this is nonsense.¹³⁸

In their interviews, all four of the jurors noted some evidence of the defendant's mental disturbance—quite aside from testimony regarding his mental condition, he "went a little crazy" during the trial itself.¹³⁹ At one point the defendant threw a Rolodex at the judge, and he apparently acted up in various other ways, some of which the jurors weren't supposed to know about.¹⁴⁰ One juror had learned that the defendant tossed urine and water on the jail guards.¹⁴¹

¹³⁵ NC-1142.

¹³⁶ NC-1141.

¹³⁷ NC-1140.

¹³⁸ NC-1143.

¹³⁹ NC-1141.

¹⁴⁰ NC-1140.

¹⁴¹ NC-1140.

Yet the jurors seemed to believe that psychological impairment had to rise to the level of insanity to warrant a lesser sentence. According to one juror, the mitigating circumstances focused on:

- J: [the defendant's] background, he was abused, . . . he was neglected, a drug addict, abandoned by this mother, etc. In my opinion he was very much a product of his environment, but [the] psychologist who testified said he knew the difference, right from wrong. . . .¹⁴²

This juror identified as the strongest factor for death:

- J: He didn't have a mental illness. He knew right from wrong.¹⁴³

Another juror echoed the same theme:

- J: He had personality disorder, he was antisocial. He wasn't insane.¹⁴⁴

The defendant's reaction to the jury's announcement of its penalty decision gave some jurors pause regarding his mental condition. What kept sticking in one juror's mind is the defendant's laughing when the sentence was announced:

- J: When that happened hair stood up on the back of my neck and I knew the man just wasn't right.¹⁴⁵

Another juror reported that the defendant:

- J: gave out this big laugh and said he didn't mean to do it. This left jurors wondering if they made the right decision.¹⁴⁶

In a Kentucky case the defense had also presented extensive evidence of the history of mental illness in the defendant's family as well as the defendant's own mental condition, which deteriorated in the period leading up to the killings. Only one of the jurors interviewed even mentioned any

¹⁴² NC-1141.

¹⁴³ NC-1141.

¹⁴⁴ NC-1140.

¹⁴⁵ NC-1140.

¹⁴⁶ NC-1141.

evidence of the defendant's emotional or mental disturbance, and these were his reactions:

J: [T]he feeling is that someone talked about his mental state somewhat, but there was no evidence saying that he was insane or anything. I think they presented some evidence or some testimony that he might have some emotional problems at the time, a possible sleep deprivation, but it wasn't, it just wasn't presented well or it wasn't a good defense. It obviously didn't work, so. The feeling is again that there was some kind of presentation

I think there was some mention of that, that he'd had some kind of a possible troubled childhood, maybe an alcoholic father or something. I know the general feeling was they were trying to promote sympathy toward the defendant

I do remember they hinted at there was some possible, a possible bad gene line in the family somewhere, that there was, I do remember a hint of that, but there was never any formal presentation of it. To me, it was a poor defense strategy. It's just a hint of it, well, let's get some real evidence up here. Let's see some disturbed family members. They didn't do that.¹⁴⁷

Yet from the appellate opinions, it would seem that the sentencing decision in this case was a result of a weighing of the aggravating factor (multiple killing) against the mitigating evidence. On direct appeal, the Kentucky Supreme Court (with two justices dissenting) rejected defense claims that the defense was not permitted to introduce mitigating evidence and that the trial court improperly failed to charge the jury regarding mitigation and the extreme emotional disturbance defense.¹⁴⁸ In its subsequent opinion denying post-conviction relief, the court denied an ineffective assistance of counsel claim that was based on defense counsel's failure to investigate potential mitigation evidence:

In the penalty phase, counsel introduced extensive evidence pertaining to Appellant's family history of mental illness, his childhood, his marital history, and his deteriorating mental condition in the period leading up to the murders. Counsel presented

¹⁴⁷ KY-695.

¹⁴⁸ *Bowling*, 873 S.W.2d at 180.

strong evidence upon which the jury could have reduced Appellant's sentence, had it seen fit to do so. The jury simply weighed the evidence and chose not to reduce the sentence.¹⁴⁹

The interviews with jurors give a very different impression, suggesting that hardly any evidence of mitigation had been presented at all.

The mitigating evidence presented in another Kentucky case, which some jurors seemingly found persuasive, similarly failed to prevent imposition of a death sentence. One of the jurors appeared to have quite a bit of sympathy for the defendant, describing him as:

J: [A] sad person—never had much love.¹⁵⁰

Yet this juror characterized the defense's mitigation evidence as claiming that the defendant's background—his poor upbringing—caused him to commit the crime. She immediately added:

J: At some point as an adult, you have to take responsibility for your actions.¹⁵¹

She also quickly tied the evidence of abuse to the issue of whether the defendant knew right from wrong. In her response to the question about penalty deliberations, she repeated the same two themes of responsibility and ability to distinguish right from wrong:

J: I think the biggest thing we talked about, because some said, we, he was abused, and there were two, in fact, that just felt like that had a big factor in the person that he was. But then the rest of us said that there comes a time in everybody's life when you have to take care of your own responsibilities and you know right from wrong, and we just thought that he did.¹⁵²

¹⁴⁹ *Bowling v. Commonwealth*, 981 S.W.2d 545, 550 (Ky. 1998).

¹⁵⁰ KY-723. This juror's perception may have been affected by an exchange she overheard in the restroom during the trial. Apparently, in a conversation between the defendant's mother and his sister, his mother said that she hated the defendant, to which his sister responded that she had to act as though she loved him. *Id.*

¹⁵¹ KY-723.

¹⁵² KY-723.

Two other jurors interviewed in the same case also seemed to equate the evidence in mitigation regarding the defendant's poor upbringing with the notion he did not know right from wrong. One reported:

- J: [T]he whole discussion here on this thing was the mitigating circumstances as regards how he was raised. Did the person know right from wrong. And that's what the defense was trying to say, perhaps he didn't. I just couldn't handle that.¹⁵³

Another juror characterized the defense as:

- J: [W]anting to use his childhood as a defense, as far as his upbringing. Not knowing right from wrong.¹⁵⁴

These same patterns are evident in cases from other states. The notion that mental impairment must rise to the level of insanity to be considered mitigating is particularly prevalent. As one Texas juror reported:

- J: They talked about some of the things he did as a boy in a deprived environment, and you can give some leniency there, but being an adult and doing such a heinous thing . . . I think he knew right from wrong, I just don't think he cared. I guess that's what I am trying to say.¹⁵⁵

A juror in another Texas case sounded the same theme:

- J: [I]t was pretty weak argument that his background should excuse him. You know that is a weak argument if you wanna look at it in that way. It's a weak argument because you haven't had a good childhood or you haven't had advantages that it excuses you from killing somebody.¹⁵⁶

In a North Carolina case, jurors similarly quickly rejected the notion that neglect or abuse in childhood should be considered mitigating.

¹⁵³ KY-725.

¹⁵⁴ KY-726.

¹⁵⁵ TX-1613.

¹⁵⁶ TX-1582.

J: There were no arguments except that one time when one woman thought that his childhood might possibly be a mitigating circumstance and we all agreed that he was 18—he could make his own decisions and you can't use that as a crutch forever. You can't go around killing people and saying "well I'm sorry." . . . And they were in Baltimore for just 3 weeks when they were living out of trash cans and that's about the worst thing that happened to him so¹⁵⁷

In another North Carolina case,¹⁵⁸ jurors also apparently discussed the effect of childhood upbringing in terms of whether the defendant should still be held responsible. Jurors never addressed the notion of reduced responsibility, however, rather than a total lack of responsibility.

Here, as with the other findings, jurors' responses to structured questions about what was discussed during the penalty deliberations corroborate the information gained from their narrative descriptions. Of the topics jurors reported discussing the least, almost all are factors that would be considered mitigating.¹⁵⁹ Fewer than a quarter of the jurors said that "the defendant's background or upbringing" received a "great deal" of discussion in determining the sentence, despite its central importance to the individualized examination of the defendant's character and background that the Constitution requires in capital cases.¹⁶⁰ Of course, topics such as drug or alcohol use, and mental ability or mental illness are not likely to be relevant in every case, but the fact that they are among the six least discussed of the thirty-seven topics means that they receive relatively little attention in most death cases. Ironically, "what moral values require," the topic that jurors might be expected to discuss extensively if they understood that their mission in the penalty phase of the trial is to make a "reasoned moral choice," ranks thirty-fourth among the full list of thirty-seven topics of discussion.¹⁶¹

These interviews show that evidence in mitigation is often ignored in the penalty deliberations. When jurors do discuss such evidence, they simply do not take seriously the

¹⁵⁷ NC-1096.

¹⁵⁸ NC-1092.

¹⁵⁹ See *infra* Addendum, Tbl. 1, Panel B.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

idea that the tragic lives experienced by these defendants might *mitigate* their culpability. Rather, the prevalent notion is that imposition of a sentence of life imprisonment, often life without parole, would amount to a decision "excusing" the defendant for the crime.

IV. WHY DO JURORS MAKE THESE DECISIONS IN THIS WAY?

Since jurors do engage in decision making that is contrary to what the law prescribes, two questions should be addressed: "Why do jurors make these decisions in this way?" and "Can anything be done to conform capital decision making to the constitutional model?" In answer to the first question, this Article will offer some tentative ideas, and in answer to the second one, consider some changes in the way the penalty trial is conducted and in the way juries are selected and instructed that might improve the quality of capital justice.

One explanation for the overwhelming impact of the evidence presented at the guilt phase of the trial derives from the work of Reid Hastie and Nancy Pennington. Their research has shown that jurors faced with even the seemingly logical, algebraic question at issue in determining guilt resort largely to a Story Model in arriving at a verdict.¹⁶² In a criminal trial, the prosecution's story is the central story; it goes first, and it is presented with much fanfare. If the trial were a play, it would consume the entire first act, and set the stage for what followed. And in a murder trial, the prosecution's story is inevitably one of violence, violence at the hands of the defendant.¹⁶³

As we have seen, this evidence regarding the crime looms large at the penalty phase of the trial; for example, jurors often describe the physical presence of the weapon used, or photographs of the victim, in the jury room during the

¹⁶² See Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision-Making*, in *INSIDE THE JUROR* ch.8 (Reid Hastie ed., 1993).

¹⁶³ See Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 *IND. L.J.* 1103, 1124-25 (1995).

deliberations. In the hands of the prosecutor, the story of the killing will be linked to the conclusion that the sentence should be death.

A South Carolina murder case, involving two defendants who were tried separately, vividly illustrates how the prosecutor's story dramatically calls for death as punishment.¹⁶⁴ The defendants, two young men in their early twenties from lower middle class families, had robbed a movie theater where one of them had previously been employed. In the process they killed two teenaged workers at the theater, shooting them both in the head. One victim was found in the woods in a position that the prosecutor portrayed as showing that he was on his knees, with his hands together, begging for his life.¹⁶⁵ This image dominated the discussions at the penalty phase of the trials of both defendants.

Even jurors who felt some sympathy for the defendants and their families kept coming back to the dead boy on his knees:

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

J: [T]he other boy begged for his life and they shot him while he was begging for his life.¹⁶⁶

In response to three different questions about what were the most important factors in the jury's decision about what the defendant's punishment should be, another juror in the same case stressed the fact that the victim was begging the defendant not to kill him.¹⁶⁷ A third juror also noted that this aspect of the case made her feel that the punishment should be death:

¹⁶⁴ SC-1213 & SC-1258.

¹⁶⁵ The prosecutor in one of these cases mentioned this kneeling position of the victim no less than five times in his closing argument. *See* trial transcript on file with the authors, at pp. 1618, 1621, 1643, 1644.

¹⁶⁶ SC-1213.

¹⁶⁷ J: I think when he shot the boy and him begging him not to . . . SC-1214; *see also* responses to Questions IVA4A and IVA4B.

- J: The other young man was taken out in the country. It appeared that he was on his knees with his hand folded in front of him begging for, you know, he might have been saying his last prayers.¹⁶⁸

All four jurors interviewed in the other defendant's case also recalled the praying or begging position of the victim in describing the crime.¹⁶⁹

For any hope of a life sentence, the defense must produce a strong counter story to dislodge this kind of imagery—a picture crying out for the ultimate punishment. Yet the defendant's life story of mitigation has the initial disadvantage of being the side story, hardly a competing story. It follows rather than precedes the prosecution's story. Its details are less dramatic and more complex than the story of the killing. To present this story effectively is an extraordinarily complicated and difficult task that requires the skillful blending of lay and expert testimony.¹⁷⁰ Most lawyers, even the most competent ones, are not trained to tell such stories; many do not understand the importance of telling the intricate story of the defendant's background and upbringing to help jurors make the moral choice assigned to them.¹⁷¹

Defense lawyers in the two South Carolina cases presented mitigating evidence on behalf of their defendants that was intended to show their reduced culpability during the crime and to demonstrate psychological and character traits calling for a sentence less than death. Evidence from twenty-seven character witnesses attested to one defendant's strong Christian upbringing and suggested that the robbery and killings were aberrational—a result of excessive drinking and

¹⁶⁸ SC-1215.

¹⁶⁹ SC-1258-1261.

¹⁷⁰ In his insightful article, also relying on data from the Capital Jury Project, Scott Sundby suggested that the trial attorney approach the presentation of this kind of evidence in much the way a composer would approach a musical score; lay and expert testimony need to play solo and accompanying roles harmonized so as to take account of jury biases favoring certain types of lay witnesses and viewing some experts suspiciously as "hired guns." Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1115 (1997).

¹⁷¹ See Craig Haney, *Mitigation and the Study of Lives: On the Roots of Violent Criminality and the Nature of Capital Justice*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* ch.13 (James R. Acker et al. eds., 1998).

pressure from the co-defendant. On behalf of the other defendant, evidence showed that he did not in fact kill either victim, that he had no previous record, and that he had suffered from depression, borderline schizoid personality, and alcoholism since the age of thirteen. Ironically, this defendant's abuse of alcohol and his submissive personality, argued in mitigation by the defense, actually became aggravating factors in the eyes of some jurors who asserted that such characteristics would tend to make the defendant more likely to present a future danger to society:

J: The reason I think he would be dangerous in the future is because of the fact that I think he was very easily influenced by others, and because of the fact of his dependence on alcohol.¹⁷²

Neither defendant's story was told in a way that was persuasive to the juries deciding whether these young men should be executed. In effect, the prosecutor's story so overwhelmed the defense story that jurors actually converted arguments offered to show reduced culpability and diminished responsibility into elements of the prosecution story of the defendant's inhumanity to the victim and danger to society.

In the same way that the Story Model helps to explain how jurors deal with the evidence of guilt by constructing their own cognitive understanding of the crime with links to the "appropriate" punishment, Irving Janis's "groupthink" model of group decision making helps to account for the reluctance of jurors to switch gears when they move from the guilt to the penalty phase of the trial—to explain why jurors become fixated on guilt and aggravation while paying little attention to mitigation. Janis's theory holds that a group operating under a norm of consensus, or unanimity, in reaching a decision will ignore or discredit information that does not contribute to what seems to be an emerging consensus.¹⁷³ The group will resist

¹⁷² SC-1213.

¹⁷³ See IRVING JANIS, *DECISION-MAKING* ch. 8 (1977). In the context of jury decision making, such patterns with respect to the deliberations of mock juries operating under majority vs. unanimity decision rules are documented in the work of Reid Hastie and Charlan Nameth. See generally STEVEN D. PENROD ET AL., *INSIDE THE JURY* (1983); Charlan Nameth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. APP. SOC. PSY. 38 (1977).

arguments or information that appear to threaten the original understandings on which the initial consensus was forged.

In the case of a capital trial, when unanimity has been reached on guilt, the agreed-upon issues and arguments concerning guilt are apt to dominate subsequent thinking about punishment. Jurors will tend to feel that the punishment is dictated by guilt considerations, particularly the presence of aggravating factors, and even see the discussion of mitigation as irrelevant, if not subversive, to the group's mission. Jurors who are not willing to impose death will be angrily challenged as having violated their oaths as jurors.

Having the penalty phase of the trial open by addressing the question of whether an aggravating factor is present encourages the jury to think about the evidence in the same way it was told to view it at the guilt phase.¹⁷⁴ It follows from this continuation of guilt-phase thinking that jurors may perceive, once they have found aggravation to have been proved, that death is the prescribed punishment, just as jurors are told that if they find all the elements of a crime proven beyond a reasonable doubt, they must convict.

In addition, the way evidence of aggravation is presented may play a role in elevating the impact of that evidence. The prosecution is permitted, in most jurisdictions, to introduce such additional evidence at the penalty phase, including evidence considered so prejudicial that it is excluded at the guilt phase (e.g., prior crimes, gruesome photographs, victim impact). Introduction of such evidence immediately before the jurors start their deliberations about sentencing may give the evidence particular significance in the minds of the jurors and set the stage for what feels to them like a continuation of a guilt type of trial.

The instruction to capital jurors that they must "consider" any mitigating circumstances involves a different kind of thinking, distinct from the way jurors (and lawyers, for that matter) are taught to evaluate facts. There is no model for dealing with such evidence; no guidance on what it means to

¹⁷⁴ Indeed, some statutes, such as those in Louisiana and New York, designate aggravating factors as elements of the crime, so that the jury's task in assessing whether the murder is in some way "aggravated" simply reaffirms a decision the jury already made at the guilt stage of the trial. See LA. REV. STAT. ANN. § 14.30 (West 1988); N.Y. PENAL LAW §§ 60.06, 125.27, 400.27 (McKinney 1995).

"consider" it, what might be the appropriate weight of particular kinds of mitigation, or how, in making a reasoned moral choice, such evidence might properly weigh against aggravating factors. The lack of guidance regarding how to think about mitigation obviously compounds the problems associated with presenting such inherently complex evidence in an effective way. Moreover, defendants and jurors often do not share the same norms or experiences, so that even a well-told story does not really get heard.¹⁷⁵ And, of course, some jurors will refuse to listen to the defendant's story, having made up their minds during the guilt phase that death was the proper sentence.

In the absence of an understanding of how to take mitigation into account in capital decision making,¹⁷⁶ jurors naturally turn to the analogy provided by the guilt trial, namely defenses that may serve as an excuse or justification for a crime. When jurors do discuss evidence presented in mitigation, they often reject it because it does not measure up to what they would consider an adequate excuse—a viable guilt defense. In this light it is not surprising that lingering doubt about the defendant's guilt, though not sufficient to forestall a capital murder conviction, is the factor that makes jurors most likely to reject a death sentence.¹⁷⁷ Thus their approach is again guilt oriented, involving the elements of a crime—jurors are thinking in legal categories, rather than making a reasoned judgment about whether the defendant is deserving of the ultimate penalty.

Like the Story Model and groupthink, a third factor known as an "agentic shift" may also help account for our

¹⁷⁵ Social psychologists recognize the possible effects, conscious and unconscious, of bias in making legal judgments: "If legal facts are reconstructed as stories whose plausibility depends on understandings drawn from experience, then jurors who come from different social worlds may disagree about the meaning and the plausibility of the same stories." W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM—JUSTICE AND JUDGMENT IN AMERICAN CULTURE 171 (1981).

¹⁷⁶ Even the procedural rules that mitigating factors need not be proven beyond a reasonable doubt to be considered, and that not all jurors must agree on the presence of a mitigating circumstance in order for it to be taken into account, are misunderstood by jurors. See *infra*, Addendum, Tbl. 3.

¹⁷⁷ See Bowers et al., *supra* note 28, at 1535, Tbl. 12 (showing that lingering doubt makes jurors less likely than mental retardation, mental illness, youth (less than eighteen years of age), and extreme childhood abuse, to impose death).

findings. In his controversial experiments on responsibility and authority, Stanley Milgram found that ordinary citizens were willing to inflict what they believed to be excruciating pain on another human being, if reassured that they were not the ones responsible for the suffering of those they believed they were shocking with electric current.¹⁷⁸ The term "agentic shift" refers to the tendency to transfer responsibility for one's actions from oneself to some other agent, usually an authority figure or the rules one is supposed to follow. Such an agentic shift, according to Milgram, appears to be a normal human response among careful and conscientious people confronted with an anxiety provoking action in an unfamiliar situation with dire consequences.

A juror making a life or death sentencing decision is in the kind of situation that might well be expected to induce an agentic shift.¹⁷⁹ Indeed, our three main findings are consistent with such an agentic shift on the part of jurors who impose death as punishment. Certainly, the fact that many jurors who vote for the death penalty believe that death is the presumptive punishment for aggravated murder or that the law requires the death penalty when aggravated factors are present is consistent with shifting responsibility from themselves to the law as the responsible agent for the defendant's punishment. Less obvious, focusing extensively on the defendant's guilt and the aggravation of the crime in making the death decision is likewise consistent with transferring responsibility for the punishment, but in this instance to the defendant, himself. There are shades here of blaming the victim.¹⁸⁰ And to the extent that the defendant and the law are responsible for a death sentence, jurors may feel

¹⁷⁸ See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 132-34 (1974).

¹⁷⁹ Robert Weisberg first drew attention to the parallel between Milgram's subjects confronted with inflicting pain on others and capital jurors confronted with imposing a death sentence. See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 391-92.

¹⁸⁰ While the defendant's crime and the law that makes the death penalty available for it are necessary conditions, the decision of the jury and, since it must be unanimous, the decision of each individual juror are the sufficient conditions for a death sentence. The jurors appear to accept the causal or determinative notion of responsibility; they reject the moral notion of responsibility that makes them first and foremost the ones responsible for the consequences of their actions, in this case their vote to impose the death penalty.

little need to take mitigation seriously, and thus avoid assuming responsibility themselves for making a reasoned moral choice.

Such an agentic shift is also consistent with jurors' responses to a structured question in the Capital Jury Project interview protocol that asked them who or what was most responsible for the defendant's punishment. Jurors' responses reveal that relatively few jurors see themselves as most responsible for the defendant's punishment.¹⁸¹ Only one in ten say the jury as a group and another one in ten say the juror as an individual are most responsible for the punishment. The agents most responsible for the death sentence, in their minds, are the defendant who committed the crime and the law that provides for death as punishment. More than half of the jurors name the defendant himself as the one most responsible for his punishment; another three out of ten jurors say the law is most responsible for the punishment. In effect, jurors who have imposed a death sentence are ready, if not eager, to place responsibility for their decision elsewhere.¹⁸²

V. WHAT CAN BE DONE?

The ultimate question is what, if anything, can be done to ensure that jurors do what the law requires in the penalty phase of capital cases. Both from reading these transcripts and from other research and experience, it is our belief that most jurors take their tasks seriously and make every effort to fulfill their obligations with honesty and diligence. The problem lies not with individual jurors, but with a system that fails to cultivate or harness jurors' ability to perform their functions in accordance with the law.

While the bifurcated trial provides some procedural protections, jurors' accounts of the decision process have shown that it simply does not ensure that capital jurors will make a

¹⁸¹ See *infra* Addendum, Tbl. 4.

¹⁸² The tendency for jurors to avoid personal responsibility for the life or death punishment decision is well documented by Joseph Hoffmann in his study of Indiana capital jurors' accounts of how they personally viewed the sentencing decision. See Joseph L. Hoffman, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1142-55 (1995).

"reasoned moral choice." More fundamental changes will be required if jurors are to engage in truly independent decision making about whether a defendant should live or die. A different kind of sentencing hearing is needed, with a new jury not committed to the prosecution's story from the outset, and with the defense taking the stage first to present its story of mitigation in terms of the defendant's character and background. Such a new penalty phase would redefine the decision-making process in the minds of jurors assembled strictly for the purpose of making a reasoned moral judgment about punishment and thus purge it of the pro-death leaning produced by what Craig Haney has identified as the structural aggravation of the guilt trial.¹⁸³

Beyond such restructuring of the penalty trial, changes are needed to make certain that jurors approach the penalty phase with a truly open mind. Voir dire questioning should work to remove jurors who believe death is the only proper penalty for murder, rather than just removing those who would always vote for life.¹⁸⁴ The questioning of prospective jurors should be conducted so as to avoid giving the impression that being able to consider the death penalty means being willing to impose it in the present case. Several jurors noted in their interviews that they were surprised to have been accepted for service in light of their strong pro-death penalty views. For example, one Texas juror recalled:

J: I was hoping I'd never hear from them. 'Cause they badgered me, the defense did, about the death penalty. And . . . and I told them, basically, that when a person took the opportunity of robbing them and they were finished and everything was fine, but then they decide to take them to . . . shoot them because they can identify . . . this old lady and I found out that's what happened. I couldn't believe I was chosen for

¹⁸³ Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1450-51 (1997).

¹⁸⁴ The Supreme Court has held that the impartiality requirement of the Due Process Clause entitles a capital defendant to challenge for cause any prospective juror who will automatically vote for the death penalty in every case. *Morgan*, 504 U.S. at 729. The Court's opinion noted that South Carolina and Missouri appeared to follow the Illinois practice, struck down in this case, of refusing to mandate inquiry regarding so-called "reverse-Witherspoon" views as long as jurors swore that they would be fair and impartial and follow the law. *Id.* at 725 n.4.

it . . . I would have given facetious answers but I was giving what I felt about the system and there I was called to come.¹⁸⁵

In addition to being more sensitive to jurors who find death to be the only proper punishment for murder, judges and lawyers should avoid requiring jurors to commit to being able to impose a death sentence. It should be sufficient for jurors to say that they can *consider* the death penalty as one of the possible options. Forcing jurors, in the public setting of the courtroom where they will perform their jury service, to affirm that they can sentence the defendant to death has two consequences. For some jurors, the statement during voir dire seems to operate as a presumption of death—they see their role, their duty from the start, as one involving a willingness and ability to perform the specific task of imposing a death sentence. Perhaps even more significantly, getting an assurance from all jurors that they can vote for death provides a powerful tool for pro-death members of a jury in persuading more reluctant members. In several cases, jurors reported that their fellow jurors holding out for a life sentence were confronted with their statements on voir dire that they “could” impose death; failure to agree to a death sentence was seen as tantamount to violating their oath.¹⁸⁶

Better sentencing instructions are needed. As Peter Tiersma, Phoebe Ellsworth, Craig Haney, and others have shown, jurors do not understand instructions about mitigation, and simplifying the language of instructions can improve their understanding.¹⁸⁷ Critical in this respect is the need to have jurors understand the different rules that govern the sentencing as opposed to the guilt decision. The self conscious contrast the Supreme Court itself has drawn between the two decisions in terms of the rules governing the level of proof and the role of individual consideration should signal to jurors that different rules apply to the decision about punishment. In the penalty decision, jurors act not primarily as fact finders, but as human beings responsible for making an individual judgment, as a matter of conscience, about the defendant’s life or death.

¹⁸⁵ TX-1616.

¹⁸⁶ See, e.g., CA-10, 85; KY-646, 679, 700; SC-1232; TX-1583.

¹⁸⁷ See, e.g., Tiersma, *supra* note 120, at 43-47; Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONT. PROB. 205, 218-23 (1989).

Yet the courts have generally rejected attempts to reduce juror confusion about what the law requires, and what it permits, in making the capital sentencing decision. In *Buchanan v. Angelone*,¹⁸⁸ the Supreme Court held that the Eighth Amendment does not require jury instructions on mitigating evidence generally, or on any particular statutory mitigating factors included in a statute.¹⁸⁹ By this decision, the Court sanctioned Virginia instructions that, as dissenting Justice Breyer put it, "tell the jury that evidence of mitigating circumstances (concerning, say, the defendant's childhood and his troubled relationship with the victims) is not relevant to their sentencing decision."¹⁹⁰ And, despite convincing evidence that jurors in Illinois failed to understand the pattern jury instructions on how to weigh aggravating against mitigating circumstances, and that a change in those instructions improved comprehension, the courts have rejected claims that death sentences imposed pursuant to jurors' mistaken interpretation of the law violate the Eighth and Fourteenth Amendments.¹⁹¹

Even if the reforms we have discussed above were in place, the reality may be that deciding whether someone will live or die is not something people can willingly do without making an agentic shift in their thinking about responsibility

¹⁸⁸ 522 U.S. 269 (1998).

¹⁸⁹ *Id.* at 276.

¹⁹⁰ *Id.* at 282 (Breyer, J., dissenting).

¹⁹¹ See, e.g., *Free v. Peters*, 12 F.3d 700, 703-04 (7th Cir. 1993). The Illinois Pattern Jury Instructions at issue in this case were virtually incomprehensible. In the face of Illinois law requiring that a capital sentencing jury "weigh" the aggravating and mitigating factors to determine whether to sentence the defendant to life or death, the instructions told jurors: "[I]f from your consideration of the evidence and after due deliberation you unanimously find that there are no mitigating factors sufficient to preclude the imposition of the death sentence then you should return a verdict that the defendant be sentenced to death." *Id.* at 704. A comprehensive study by Hans Zeisel, accepted as statistically valid and accurate by the district court, had demonstrated that this "sufficient to preclude" language failed to make clear the jurors' ability to consider non-statutory mitigating circumstances and the burden of proof on such mitigating factors. U.S. *ex rel.* *Free v. Peters*, 806 F. Supp. 705, 731-732 (N.D. Ill. 1992). The Court of Appeals for the Seventh Circuit reached out in the notorious case involving serial killer John Wayne Gacy to hold that, regardless of the Zeisel study, defendants are not entitled to relief in light of the legal "presumption" that juries understand and follow the instructions given. *Gacy v. Welborn*, 994 F.2d 305, 313 (7th Cir. 1993); see also Kimball R. Anderson & Bruce R. Braun, *The Legal Legacy of John Wayne Gacy: The Irrebuttable Presumption that Juries Understand and Follow Jury Instructions*, 78 MARQ. L. REV. 791, 797 (1995).

for the defendant's punishment. Jurors' reluctance to be the ones most responsible for the defendant's punishment might still make them think foremost about the defendant's guilt as the key to his punishment, believe that the law makes death the correct punishment, and refuse to accept the story of the defendant's life, character, and upbringing as matters that they must consider in deciding between life and death as punishment.

Ensuring that jurors approach the penalty phase of a capital trial from a neutral position, with an openness to imposition of a life sentence based on serious consideration of mitigating circumstances, rather than tilted toward death from the outset by the finding of guilt and aggravation, presents what may be an insurmountable challenge. The awesome responsibility of the capital sentencing decision and the resulting tendency of jurors to think of responsibility for the punishment in causal rather than moral terms may continue to make them fail to meet the constitutional standards, despite any changes that might be implemented. We simply may not be able to design procedures that will make it possible for jurors consistently to make a truly reasoned moral decision that another human being should die.

ADDENDUM

I. JURORS' RESPONSES TO STRUCTURED QUESTIONS
CONCERNING THE CAPITAL SENTENCING DECISION IN
DEATH CASES

The purpose of this Addendum is threefold. First, it will provide an independent statistical test of some of the major inferences drawn from the preceding qualitative analysis of jurors' narrative accounts describing how juries decide whether to impose a death sentence. Second, it will afford a systematic comparison of decision making under the principal forms capital statutes take: threshold, weighing, and directed statutes. A third aim is to establish the representativeness of the cases selected for the preceding qualitative analysis with respect to the full compliment of death cases in the CJP database.

The substantive areas addressed in this Addendum include (A) topics of discussion during the jury's punishment deliberations, (B) jurors' beliefs about when the law requires them to impose a death sentence, (C) jurors' beliefs about legal restrictions on their consideration of mitigation, and (D) jurors' beliefs about responsibility for the defendant's death sentence. The tabulations presented below show the distribution of responses in each of these areas separately for states with threshold, weighing, and directed statutes (as represented by Texas alone). To see how jurors in the cases chosen for the foregoing analysis may differ from those in the larger sample from which they were drawn, responses are shown for (1) all 662 jurors from the 204 death cases in the fourteen state CJP sample,¹⁹² and (2) the 240 jurors from the 58 death cases in six states examined in the foregoing qualitative analysis.

¹⁹² These data represent 57.3% of the 1,155 jurors who served on 60.0% of the 340 capital cases currently available in the full CJP database.

A. *Topics of Discussion During Penalty Deliberations*

If jurors are overwhelmed with considerations of the defendant's guilt and the aggravation of the crime, and are relatively unconcerned about aspects of mitigation when they deliberate on the defendant's punishment, one might expect this to be reflected in the topics they say the jury discussed during its sentencing deliberations. In the section of the CJP interview instrument devoted to the jury's deliberations on the defendant's punishment, one question asked, "How much did the discussion among the jurors focus on the following topics?" It then listed some thirty-seven specific topics or issues that might have been the subject of jury deliberations. For each topic, jurors could indicate that discussion focused on it a "great deal," a "fair amount," "not much," or "not at all."

The six most and six least discussed topics¹⁹³ appear in Table 1, Panels A and B, respectively. The table shows the percent reporting "a great deal" of discussion of each topic in states with threshold statutes, with weighing statutes, and the directed statute in Texas. Responses appear separately for jurors in the full sample of death cases and in the cases selected for the foregoing qualitative analysis.

¹⁹³ The six most discussed and six least discussed topics were determined on the basis of jurors' reports in the full sample of death cases. The six topics receiving the most attention were discussed "a great deal" according to more than half of these jurors, and the six receiving the least attention were discussed "a great deal" according to less than a quarter of these jurors.

TABLE 1: Percent of jurors reporting “a great deal” of discussion during punishment deliberations on selected topics by type of statute

Panel A. Topics Discussed Most: Guilt and Aggravation					
ALL DEATH CASES			SELECTED DEATH CASES		
Threshold	Weighing	Directed	Threshold	Weighing	Directed
The defendant's role or responsibility in the crime					
86.1	81.7	82.1	84.5	76.1	88.2
The way in which the victim was killed.					
73.2	71.3	62.3	72.6	64.3	76.5
How weak or strong the evidence of guilt was					
70.7	67.7	59.0	71.4	61.7	70.6
The defendant's motive for the crime					
57.2	59.2	55.1	54.8	51.3	73.5
The defendant's planning or premeditation					
54.1	57.5	41.3	65.9	55.2	45.5
The defendant's dangerousness if ever back in society					
55.3	43.8	82.1	54.1	49.1	94.1

ALL DEATH CASES			SELECTED DEATH CASES		
Threshold	Weighing	Directed	Threshold	Weighing	Directed
The defendant's background or upbringing					
20.5	25.5	24.7	12.9	35.0	24.2
Drugs as a factor in the crime					
12.7	15.7	17.6	8.4	12.9	9.4
What moral values require					
18.7	15.2	6.3	19.0	11.2	8.3
The defendant's IQ or intelligence					
13.1	12.0	17.9	12.9	9.5	11.8
Alcohol as a factor in the crime					
15.2	*7.3	12.2	10.8	6.9	9.1
Mental illness as a factor in the crime					
9.9	9.2	9.2	8.2	6.9	3.0

* The percentages in each of the six columns are based on numbers of jurors that vary slightly owing to differences in the number of jurors who reported on each topic. The base figures for the percentages in columns one through six fall within the following ranges: 155-161; 405-411; 74-80; 83-85; 114-117; 32-36.

Quite obviously, the most discussed topics have to do with issues that typically arise in deciding on the level of the defendant's guilt. The fact that "how weak or strong the evidence of guilt was" ranks third among the thirty-seven topics discussed, with two of three jurors affirming that it received a great deal of discussion, demonstrates the guilt-related character of punishment deliberations.¹⁹⁴ The only one of these topics not explicitly related to the killing or the question of guilt is "the defendant's dangerousness if ever back in society," which is prominent as an aggravating factor in the minds of many jurors.¹⁹⁵

At the other extreme, nearly all of the least discussed topics are arguably issues of mitigation. The defendant's background or upbringing is broad enough to encompass much of what the Supreme Court meant to include in its reference to "an individualized examination of the defendant's character."¹⁹⁶

¹⁹⁴ Although this statement of the topic does not distinguish between strength and weakness of guilt evidence, since these are cases that end in a death sentence, it seems likely that the chief focus of discussion is on the strength of the evidence. In any case, this represents concern with guilt during deliberations on punishment.

¹⁹⁵ See William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 668-69, Tbl. 7 (1999); see also Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 7, Tbl. 2 (1993); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559, Tbl. 4 (1998).

¹⁹⁶ For discussions of character as a mitigating factor, see Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 846 (1992) (book review); see also James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 304-09 (1994). Professor Garvey has further refined the issue of character as follows:

Penalty-phase culpability is not the same as guilt-phase culpability. A defendant's culpability may be great enough to convict, yet not great enough to sentence him to death. Evidence that reduces a defendant's culpability for purposes of the penalty phase can be broken down into two basic categories, which I'll call "proximate" and "remote." Evidence of "proximate" reduced culpability is evidence that "suggests an impairment of a defendant's capacity to control his or her criminal behavior, or to appreciate its wrongfulness or likely consequences." Evidence of "remote" reduced culpability, in contrast, focuses on the defendant's character. It includes such things as abuse as a child and other deprivations that may have helped shape the defendant into the kind of person for whom a capital crime was a conceivable course of action. In short, proximate reduced culpability speaks to the defendant's lack of responsibility for what he has done; remote reduced culpability speaks to his lack of responsibility for who he is.

Most of the other topics in this section of the table pertain to specific areas of mitigation that may not always be present, yet the fact that fewer than one in five jurors report that any of these factors receive a great deal of discussion is consistent with the finding that they occupy a minor place in most sentencing deliberations. Notably, "what moral values require," is very low on the list of discussed topics.

Between threshold and weighing states there is virtually no difference in what jurors talk about during punishment deliberations. The differences in the percent of jurors saying topics were discussed a great deal between the three threshold and the ten weighing states are less than five points for ten of the twelve topics in Table 1. Moreover, the exceptions are not substantial; the difference is 11.3 points in discussion of the defendant's future dangerousness, and 7.5 points for alcohol as a factor in the crime.

Since the Texas directed statute makes the defendant's likely future dangerousness a principal consideration in reaching a penalty verdict,¹⁹⁷ it is not surprising to see that Texas jurors are much more likely than their counterparts under other statutes to discuss this issue in death cases. The percent of Texas jurors saying that this topic receives a great deal of discussion is greater by 26.8 and 38.1 points than in the threshold and weighing states. On the other hand, Texas jurors in death cases are somewhat less likely than those under other statutes to report a great deal of discussion about "the defendant's planning or premeditation," "the way in which the defendant was killed," "how weak or strong the evidence of guilt was," and "what moral values require." Perhaps their concern with future dangerousness diverts them from thinking or talking about these other matters.

The cases selected for the analysis reported in the body of this Article are generally representative of the full sample from which they were drawn in terms of topics discussed during jury deliberations. Among the most discussed topics, five of the eighteen possible comparisons between the

Garvey, *supra* note 195, at 1562 (footnotes omitted).

¹⁹⁷ TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1973), amended by TEX. CODE CRIM. PROC. ANN. art. 37.071(2) (Vernon 1991).

full and selected samples yield differences of ten percentage points; only one reaches fifteen points. Not surprisingly, four of these five differences, including the largest one, are differences between Texas jurors in the full and selected samples; the selected sample of only thirty-four Texas jurors from eight cases is much smaller, and hence more subject to random sampling error, than the selected samples of jurors from threshold and weighing states. In all instances, more selected than full sample Texas jurors say there was a great deal of discussion of these guilt and aggravation related issues.

Among the least discussed topics, none of the differences reach ten percentage points; only five comparisons exceed five points. The selected thirty-four Texas jurors are again the most volatile. Here they tend to report less discussion of mitigation related topics than the full Texas sample; in three instances the differences reach five points. In one instance, discussion of the defendant's background or upbringing, the relatively modest differences between full and selected samples in threshold and weighing states, are in opposite directions, thus producing a difference of 22.2 points between these two kinds of statutes in the selected sample, as compared to a five point difference in the full sample.¹⁹⁸ But since the qualitative analysis makes no inferences about the relative frequency of such discussions between threshold and weighing states, this sampling discrepancy creates no problems for the analysis.

B. *Jurors' Beliefs About a Mandatory Death Sentence*

Since many jurors explained that "the law requires death for this kind of killing" in their narrative descriptions of how the jury reached its sentencing decision, one should expect to find that many of them personally believe that death is required when a common aggravating factor is proved by the evidence. One question in the CJP interview asked jurors

¹⁹⁸ An examination of the six states from which the selected cases were drawn reveals that none of the discrepancy in threshold states is due to the choice of states (20.5 in the full sample vs. 20.6 in the selected states), but that roughly half of the difference in weighing states is due to the choice of the three of ten weighing states (25.5 in the full sample vs. 30.9 in the selected states).

whether they believed the law required the death penalty if certain facts about the crime were proved. Specifically, the question asked, "After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that (a) the defendant's conduct was heinous, vile or depraved, and (b) the defendant would be dangerous in the future?" Jurors' responses appear in Table 2, again broken down by types of statute for both the full and selected samples of death cases.

Mistakenly, half of the capital jurors in death cases believed that the law required them to impose a death sentence if the evidence proved the defendant's conduct was heinous, vile or depraved, and four out of ten believed that the death penalty was required by law if the evidence proved the defendant would be dangerous in the future. The fundamental misunderstandings about what the law requires of jurors if the evidence proved that the defendant's conduct was heinous, vile, or depraved are about equally present under threshold, weighing and directed statutes. The misunderstanding that the law required death if the evidence proved that the defendant would be dangerous in the future is, however, decidedly more common under Texas' directed statute than under threshold or weighing statutes: differences of 24.8 and 28.9 percentage points, respectively. No doubt, the special consideration accorded dangerousness under Texas' directed statute explains why Texas jurors are well ahead of others in believing that the death penalty is required by law if the evidence proves that the defendant would be dangerous in the future.

Note that these two factors were among the six topics most likely to be discussed a great deal during punishment deliberations.¹⁹⁹ Apparently, extensive discussion of these topics is not a corrective to misunderstandings. Instead, it appears to be the mechanism through which these pro-death misunderstandings of the law become a legal reality for capital defendants.

¹⁹⁹ See *supra* Tbl. 1, Panel A, items 2 and 6. Discussion of "the way in which the victim was killed" (Tbl. 1, item 2) would seem to encompass evidence that "the defendant's conduct was heinous, vile, or depraved." The correspondence between the discussion of "the defendant's dangerousness if ever back in society" (Tbl. 1, item 6) and evidence that "the defendant would be dangerous in the future" is obvious.

TABLE 2: Percent of jurors who believed the law required them to impose a death sentence if the evidence proved the presence of specified aggravating factors.

ALL DEATH CASES			SELECTED DEATH CASES		
Threshold	Weighing	Directed	Threshold	Weighing	Directed
Believed that the law required a death sentence if the evidence proved that the defendant's conduct was heinous, vile or depraved					
47.2 (159)	49.7 (396)	44.3 (79)	43.5 (85)	45.9 (111)	60.0 (35)
Believed that the law required a death sentence if the evidence proved that the defendant would be dangerous in the future					
41.6 (161)	36.8 (402)	65.8 (79)	43.0 (86)	32.5 (114)	77.1 (35)

* The numbers on which percentages are based appear in parentheses below the percentages.

In threshold and weighing states, jurors' responses to these two questions in the full and selected samples are quite close; differences do not exceed five points. In the relatively small number of Texas cases selected for the qualitative analysis jurors are even more likely than in the full Texas sample to believe the law requires death when either of these factors is proved. In both instances the differences between full and selected samples exceed ten percentage points. Since Texas is the only state in our full sample with a directed statute, these discrepancies are not attributable to a state selection bias.

C. *Jurors' Beliefs About Restrictions on Mitigation*

There is evidence that jurors misunderstand the constitutionally prescribed standards and rules for considering mitigating evidence in a way that promotes the imposition of the death penalty.²⁰⁰ Indeed, most jurors appear to think that the punishment decision is governed by the same standards and procedures that apply to the guilt decision; they fail to appreciate that the sentencing decision is subject to less stringent standards of proof and decision rules deemed appropriate by the Supreme Court for a reasoned moral choice as opposed to a fact finding inquiry.

Two questions in the CJP interviews dealt specifically with rules governing the consideration of mitigation. One asked, "For a factor in favor of a life or lesser sentence to be considered, did it have to be proved (a) beyond a reasonable doubt, (b) by a preponderance of the evidence, or (c) only to a juror's personal satisfaction?" The other question asked, "For a factor in favor of a life or lesser sentence to be considered, did (a) all jurors have to agree on that factor, or (b) did jurors not have to agree unanimously on that factor." The correct answers for guilt decision making and manifestly incorrect answers for decision making on punishment are that such factors have to be proven beyond a reasonable doubt and that all jurors had to agree on that factor. Table 3 shows the extent to which jurors

²⁰⁰ See James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1163, 1165-66, Tbl. 1 (1995).

TABLE 3: Percent of jurors who believed that reasonable doubt and unanimity were required for the consideration of mitigating evidence

ALL DEATH CASES			SELECTED DEATH CASES		
Threshold	Weighing	Directed	Threshold	Weighing	Directed
For a factor in favor of a life sentence to be considered it had to be proved beyond a reasonable doubt.					
53.8 (160)	46.6 (401)	70.6 (34)	57.6 (85)	43.1 (116)	---
For a factor in favor of life to be considered, all jurors had to agree on that factor					
71.3 (160)	48.1 (405)	50.0 (34)	70.9 (86)	45.3 (117)	---

* The numbers on which percentages are based appear in parentheses below the percentages.

are mistaken about these rules for the consideration of mitigation. Again the table shows responses of jurors under threshold, weighing, and directed statutes for both the full and selected samples.

Overall, half of the jurors in death cases mistakenly believed that a mitigating factor had to be proved beyond a reasonable doubt and that all jurors had to agree on that factor for it to be considered in mitigation. Hence, just as jurors erroneously believe that proof of commonly argued aggravating factors requires them to impose the death penalty (Table 2), so too, jurors wrongly believe that the stringent fact finding rules for decision making about guilt and aggravation apply as well to the reasoned moral decision making about punishment (Table 3).

In this case, the extent of jurors' misunderstandings varies with the form of the statute. Under the directed statute, Texas jurors are more likely than others to believe that mitigating factors must be proved beyond a reasonable doubt. With no mention of mitigation in the Texas statute for the period when most Texas cases in our sample were tried, Texas jurors appear to have been least aware of a different standard of proof for mitigation than for guilt or aggravation. Under threshold statutes, Georgia, Kentucky, and South Carolina jurors are more likely than others to wrongly believe that unanimity is required for the consideration of a mitigating factor. With no explicit requirement to weigh mitigating against aggravating factors, they appear to ignore the decision rules for considering mitigation. Under weighing statutes, jurors are less mistaken on each of these issues. But more critical is the fact that close to five out of ten jurors, even in the weighing states, which comprise more than two thirds of the full sample, are mistaken on each of these rules for the consideration of mitigating factors.

The responses of jurors selected for this intensive qualitative analysis closely correspond with those in the full sample of death cases, except in Texas where these questions were omitted from a large portion of the interviews. Questions in the "Sentencing Guidelines" section of the interview instrument, where these two question appear, were found to be difficult to answer or not applicable by many Texas jurors. Consequently, at a certain point in the data collection this

entire section was deleted from the interviews conducted in that state. In none of the Texas cases that met the sampling criteria were jurors asked these questions.

D. *Responsibility for the Defendant's Punishment*

Of course, jurors acting as a group are the ones who decide what the defendant's punishment should be, and the Supreme Court has ruled that arguments that would diminish jurors' sense of responsibility for the punishment decision are unconstitutional.²⁰¹ The beliefs of a good many jurors that the death penalty is required by law under specified conditions (as shown in Table 2) might be expected to make jurors believe that it is not they themselves as jurors but the law that is responsible for the defendant's punishment. Beyond this, the preoccupation of many jurors with the defendant's guilt in deciding on punishment might lead them to think that because he has been proven responsible for the crime he is also the one responsible for his punishment.

To learn how jurors assigned responsibility for the defendant's punishment, the CJP interview included a question that asked jurors to rank the following from "most" through "least" responsible for the defendant's punishment. The questions then listed the following options: (a) the law that states what punishment applies, (b) the judge who imposes the sentence, (c) the jury that votes for the sentence, (d) the individual juror since the jury's decision depends on the vote of each juror, and (e) the defendant because his/her conduct is what actually determined the punishment. The percentage of jurors assigning foremost responsibility to each of these options appears in Table 4, again broken down by type of statute and shown for both the full and selected samples of death cases.

Above all, jurors see the defendant himself as the one most responsible for his punishment; more than half of the jurors under each type of statute pick this option. Next in line is the law that provides for death as punishment; here under each type of statute at least three out of ten jurors say the law

²⁰¹ The Supreme Court has held that it is an "intolerable danger" for jurors to believe that "the responsibility for any ultimate determination of death will rest with others." *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985).

TABLE 4: Percent of jurors saying various agents were most responsible for the defendant's punishment*

ALL DEATH CASES			SELECTED DEATH CASES		
Threshold	Weighing	Directed	Threshold	Weighing	Directed
The defendant because his/her conduct is what actually determined the punishment					
55.1	57.0	53.8	58.3	55.0	55.6
The law that states what punishment applies					
30.8	34.7	35.0	27.4	36.0	27.8
The jury that votes for the sentence					
9.0	9.9	7.5	4.8	11.7	5.6
The individual juror since the jury's decision depends on the vote of each juror					
10.9	5.6	5.0	13.1	6.3	2.8
The judge who imposes the sentence					
3.2	3.3	7.5	1.2	1.8	8.3

* The percentages are based only on jurors who ranked all five alternatives so that the "most responsible" rank sums to 100% over the five alternatives. The number of jurors for the percentages in the respective columns are: 156, 395, 80, 84, 111, 36.

is most responsible for the defendant's punishment. Few jurors see themselves as most responsible; roughly one in ten say the jury as a group and another one in ten say the juror as an individual are most responsible for the punishment. In no case do the percentage of jurors saying that primary responsibility lies with jurors as a group and individually combined reach the percent saying that the law is primarily responsible; and in no case does the percent saying that the law is most responsible exceed the percent who assign primary responsibility to the defendant himself. Quite evidently, jurors are not inclined to claim foremost responsibility for the life or death decision. Nine out of ten deny individual personal responsibility, and as many deny responsibility in their role as members of the jury charged with making the punishment decision.

This pattern is relatively unaltered by type of statute or between the full and selected samples of death cases. Threshold jurors are slightly more likely than others to see themselves individually as primarily responsible, and the directed Texas jurors are slightly more likely than others to see the judge as primarily responsible; yet these are differences on the order of only five percentage points in the full sample. The jurors in the selected cases track those in the full sample quite closely; in only one of fifteen comparisons do the selected and full samples differ by as much as five percentage points.

The way jurors assign responsibility for the defendant's punishment echoes the principal findings of this research. The data show that jurors are preoccupied with guilt in making their punishment decisions. Of course, in rendering a guilty verdict they find that the defendant is the one responsible for the crime. They appear to extend responsibility for the crime to responsibility for the punishment, perhaps because they genuinely believe that the defendant's punishment is ordained by his crime, that their job is simply to affirm the inherent or preordained punishment which the convicted defendant has brought upon himself. Beyond this, the data show jurors believe the law requires death as punishment for such crimes. For instance, many say that death is required if the evidence proves the atrocious character of the crime or the future dangerousness of the defendant. In this view, the law is the authority, the responsible agent that ordains or dictates death as punishment for those who commit

such crimes. By contrast, the data show that jurors discount and ignore mitigation in making their death decisions. The relatively minor role jurors report that mitigating considerations play in such jury deliberation is consistent with the finding that few jurors see themselves as primarily responsible for the death decision. The fact that they see themselves as less responsible than the defendant or the law points to their failure to engage as responsible agents, ready to make a "reasoned moral choice."