

The Capital Jury Project: Rationale, Design, and Preview of Early Findings

WILLIAM J. BOWERS*

INTRODUCTION

Now underway in fourteen states, the Capital Jury Project ("CJP") is a multidisciplinary study of how capital jurors make their life or death sentencing decisions.¹ Drawing upon three-to-four hour interviews with 80 to 120 capital jurors in each of the participating states,² the CJP is examining the extent to which jurors' exercise of capital sentencing discretion is still infected with, or now cured of, the arbitrariness which the United States Supreme Court condemned in *Furman v. Georgia*,³ and the extent to which the principal kinds of post-*Furman* guided discretion statutes are curbing arbitrary decision-making—as the Court said they would in *Gregg v. Georgia*⁴ and its companion cases.⁵

The research is being conducted by a consortium of university-based investigators—chiefly criminologists, social psychologists, and law faculty members—utilizing common data-gathering instruments and procedures. In addition, where available, trial transcripts are being used in the analyses. Interviews with judges, prosecutors, and defense attorneys are also being conducted in some of these cases. Interviews with jurors in the target samples are now virtually complete in seven of these states.

This Article introduces the Capital Jury Project and sets the stage for the contributions and commentaries that follow. Part I sketches out the legal context. It reviews the Supreme Court's condemnation of arbitrariness in capital sentencing, the responses by states to curb such arbitrariness, the Court's choice of "guided discretion" as the remedy to arbitrariness, and its subsequent "deregulation" of guided discretion. Part I also reviews legal criticism and empirical challenges to these reforms, as well as the Court's response to these arguments and this evidence.

Part II examines the tension between the legal assumptions about how jurors exercise their sentencing discretion and the empirical evidence of how jurors actually make their decisions. This entails an examination of contrasting

* Principal Research Scientist, College of Criminal Justice, Northeastern University. Ph.D., Columbia University, 1966; B.A., Washington and Lee University, 1957.

1. This research was initiated in 1990 with funding from the Law and Social Sciences Program of the National Science Foundation, grant NSF SES-9013252.

2. In each of the eight states where the study was initiated, the target sample is 120 capital jurors (four each from fifteen death cases and fifteen life cases). For the six states that subsequently joined the project, the target sample is eighty jurors (four each from ten death cases and ten life cases).

Cases in which the defendant was sentenced to death will be referred to throughout this Symposium as "death cases." Cases in which the jury imposed a sentence other than death, usually life imprisonment, will be referred to as "life cases."

3. 408 U.S. 238 (1972) (per curiam).

4. 428 U.S. 153 (1976).

5. *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

sentencing decision models suggested in the psychological literature on decision-making and those implicit in the guided discretion capital statutes enacted in the various states, and a review of previous empirical research on how jurors make their capital sentencing decisions.

Part III then describes the CJP's research enterprise: the Project's organization and objectives, the sampling and data collection strategies, the development of the juror interview instrument, the maturation of the research design, and the extension of the study beyond the initial sample of states. Part III also identifies previous presentations and publications that draw upon this research.

Part IV summarizes some provocative early findings of the CJP from states where data collection has been completed (or nearly so). The data now indicate, for example, that many jurors make their punishment decisions prematurely, well before the sentencing phase of the trial; that many misunderstand the judge's sentencing instructions in ways that favor the imposition of the death penalty; and that many jurors are unwilling to accept primary responsibility for their punishment decisions. These early findings raise unsettling questions about the operation of the post-*Furman* capital sentencing statutes—issues explored further in the contributions that follow in this Symposium.

I. LEGAL CONTEXT

In the last quarter century, the United States Supreme Court has displayed considerable ambivalence toward the capital jury. In 1971, the Court held that capital statutes need not, and probably could not, guide the sentencing discretion of capital jurors.⁶ One year later, the Court ruled that jurors' (unguided) exercise of such discretion under existing statutes was unconstitutionally arbitrary and capricious.⁷ After the states enacted new capital statutes with sentencing guidelines, the Court changed its mind about "guided discretion." It decided that these new statutes could, and would, remedy the unconstitutional arbitrariness it found under prior capital sentencing schemes.⁸ But then, the Court appeared to have second thoughts about guided discretion. It ruled that statutory guidelines must not restrict capital jurors' consideration of mitigation,⁹ and need not restrict their consideration of aggravation.¹⁰ Indeed, the Court later went on to broaden the scope of constitutionally acceptable aggravating considerations beyond the blameworthiness of the defendant to include the character of the victim and the impact of the crime on the victim's survivors.¹¹ This zig-zag pattern of renouncing, requiring, and then relaxing statutory guidance for capital sentencing discretion is, in

6. *McGautha v. California*, 402 U.S. 183 (1971).

7. *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (per curiam) (Stewart, J., concurring).

8. *Gregg v. Georgia*, 428 U.S. 153 (1976).

9. *Lockett v. Ohio*, 438 U.S. 586 (1978).

10. *Zant v. Stephens*, 462 U.S. 862 (1982).

11. *Payne v. Tennessee*, 501 U.S. 808 (1991).

broad terms, the legal context of the research being conducted by the members of the CJP.

A. The Constitutional Problem and Its Remedies

In the historic 1972 *Furman* decision, the United States Supreme Court, in a per curiam opinion, held that juries were imposing the death penalty in an arbitrary and capricious manner in violation of the Eighth Amendment's prohibition against "cruel and unusual" punishment.¹² States responded to the Court's invalidation of their existing statutes with new laws designed to remedy the arbitrariness in juries' life or death decisions. Some enacted "mandatory" capital statutes intended to eliminate arbitrariness by doing away with the jury's sentencing discretion; such statutes made death the only punishment for specified forms of murder.¹³ Other states adopted "guided discretion" capital statutes designed to control and direct jurors' exercise of discretion by setting out standards or guidelines—typically aggravating and mitigating considerations—to be applied by capital jurors in making their sentencing decisions.

The Supreme Court reviewed these statutory schemes in 1976 and decided that one kind, but not the other, would lawfully and effectively curb the arbitrariness forbidden by *Furman*. The Court rejected the mandatory statutes in *Woodson v. North Carolina*¹⁴ and *Roberts v. Louisiana*,¹⁵ declaring that because "death is different" in kind from lesser punishments, the Eighth Amendment requires "individualized treatment" in capital sentencing, and thus prohibits a death sentence fixed by law.¹⁶ On the same day, however, in *Gregg v. Georgia*,¹⁷ *Proffitt v. Florida*,¹⁸ and *Jurek v. Texas*,¹⁹ the Court endorsed "guided discretion" capital statutes that divided the trial into separate guilt and punishment phases and set forth guidelines and procedures for jurors to follow during the punishment phase of the trial in making their sentencing decisions.²⁰ The Court held that statutes with such sentencing guidelines for

12. The exercise of capital sentencing discretion by juries was variously characterized by the concurring Justices in *Furman* as "freakish," "wanton," "whimsical," "capricious," "random," "rare," "discriminatory," and "arbitrary." Justice Stewart, in particular, described the death penalty as "cruel and unusual in the same way that being 'struck by lightning' is cruel and unusual." *Furman*, 408 U.S. at 309 (Stewart, J., concurring). In effect, the Court's constitutional ruling was grounded in what capital juries actually do with "the discretion so regularly conferred upon them." *Id.* at 314 (White, J., concurring).

13. For example, North Carolina's statute made death the only punishment for a defendant convicted of murder in the first or second degree. See *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976). Likewise, Louisiana's statute provided for the automatic imposition of the death penalty on those defendants convicted of first-degree murder. See *Roberts v. Louisiana*, 428 U.S. 325, 329 (1976).

14. 428 U.S. 280 (1976).

15. 428 U.S. 325 (1976).

16. See *Woodson*, 428 U.S. at 303-05 (joint opinion of Stewart, Powell, and Stevens, JJ.).

17. 428 U.S. 153, 188-95 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

18. 428 U.S. 242, 251-58 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

19. 428 U.S. 262, 268-76 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

20. In *Gregg*, the Court held that a state could not impose the death penalty under sentencing procedures that created a substantial risk of inflicting the penalty in an arbitrary and capricious manner.

capital jurors appeared, "[o]n their face," to remedy the arbitrariness ruled unconstitutional in *Furman*,²¹ the earlier opinion of the Court in *McGautha* to the contrary notwithstanding.²²

Different forms of guided discretion statutes, known as "threshold," "balancing," and "directed" statutes,²³ survived constitutional scrutiny in *Gregg*, *Proffitt*, and *Jurek*, respectively. Georgia's threshold statute requires jurors to find at least one aggravating factor from a list specified in the statute before imposing a death sentence,²⁴ once the jury finds the existence of an

The Court's lead opinion, delivered by Justice Stewart, reasoned that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189 (joint opinion of Stewart, Powell, and Stevens, J.J.). In announcing the judgment of the Court, Justice Stewart explained:

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

Id. at 206-07.

21. *Id.* at 198.

22. Notably, the Court's holding in *Gregg* represented a fundamental turnaround in the Court's stand on statutory standards to guide capital sentencing. One year prior to *Furman*, the Court had voiced serious doubts about whether standards for capital sentencing could actually be articulated, much less effectively guide jurors' exercise of capital discretion. *McGautha*, 402 U.S. at 196-208. In *McGautha*, the Court reasoned that:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

Id. at 204.

Arguably, in light of the Court's stand in *McGautha*, and in view of the broader historical trend toward the abolition of capital punishment, its 1976 decisions in *Gregg*, *Proffitt*, and *Jurek* were aberrant, both in terms of constitutional doctrine and in historical direction. See FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 26-76 (1986). For a discussion of the likely influence of public opinion about the death penalty on the Court's 1976 decisions upholding guided discretion statutes, see William Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 LAW & SOC'Y REV. 157 (1993).

23. For a discussion of the distinctions among these different types of early post-*Furman* capital statutes, see Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980), and Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1699-1712 (1974). Acker and Lanier provide a detailed discussion of the forms that these statutes now take. See James R. Acker, Jr. & C.S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299 (1994).

24. See GA. CODE ANN. § 17-10-30(b) (1990). The aggravating factors enumerated in Georgia's current capital statute are as follows:

- (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior conviction for a capital felony;
- (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery . . . ;
- (3) The offender [in the commission of murder, armed robbery, or kidnapping, knowingly created a risk to more than one person by employing a weapon normally hazardous to more than one person];
- (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

aggravator beyond a reasonable doubt, its discretion is unguided in considering additional aggravating and mitigating factors.²⁵ Florida's balancing statute requires jurors to weigh aggravating factors²⁶ against mitigating

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder . . . as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Id.

The above quoted statute is identical to that which was challenged in *Gregg v. Georgia*, 428 U.S. 153 (1976). See GA. CODE ANN. § 27-2534.1 (Supp. 1975); *Gregg*, 428 U.S. at 165 n.9 (discussing the aggravating factors listed in the Georgia statute).

25. The only qualification is that jurors may not ignore or disregard whatever relevant evidence of mitigation the defense proffers. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); see also *McKoy v. North Carolina*, 494 U.S. 433 (1990) (striking down a unanimity requirement for mitigating evidence in the Maryland death penalty statute); *Mills v. Maryland*, 486 U.S. 367 (1988) (invalidating North Carolina's unanimity requirement for mitigating circumstances). The standards set forth in *Eddings*, *McKoy*, and *Mills* differ from the pre-*Gregg* statutes, which allowed the jury to disregard mitigating evidence.

26. See FLA. STAT. ANN. § 921.141(5) (West Supp. 1995). The enumerated aggravating circumstances in the Florida statute are:

(a) The capital felony was committed by a person under sentence of imprisonment or placed on community control.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim . . . was a law enforcement officer engaged in the performance of his official duties.

(k) The victim . . . was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

Id.

Factors (a) through (h) of the current Florida statute are identical to the statute that was challenged in *Proffitt v. Florida*, 428 U.S. 242 (1976). See FLA. STAT. ANN. § 921.141(5) (West Supp. 1976-1977); *Proffitt*, 428 U.S. at 248 n.6 (listing the aggravating factors in the then-current Florida statute). Factors (i) through (k)—focusing on premeditation and the characteristics of the victim—were not part of the statute challenged in *Proffitt*.

factors²⁷ listed in the statute in making their sentencing decision; jurors then recommend life or death depending on the assessment of the relative "weight" of the aggravators and mitigators. Texas' directed statute restricts the death penalty to persons convicted of capital felonies under aggravating circumstances,²⁸ of the kind Georgia and Florida statutes use to guide jurors' sentencing discretion. Under Texas' statute, the jurors' imposition of a life or death sentence is then strictly determined by their findings on three propositions: the likely future dangerousness of the defendant, the defendant's intent to kill or level of responsibility for the victim's death, and the existence of any mitigating circumstances which would warrant a life sentence.²⁹

27. See FLA. STAT. ANN. § 921.141(6). The enumerated mitigating circumstances in the statute are:

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

Id. This list of mitigating factors is unchanged from the statute challenged in *Proffitt*. See *id.* § 921.141(6) (West Supp. 1976-1977); *Proffitt*, 428 U.S. 248 n.6 (reprinting the Florida statute).

28. TEX. PENAL CODE ANN. § 12.31 (West 1994). These aggravating circumstances include:

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

Id.

Since the decision in *Jurek v. Texas*, 262 U.S. 268 (1976), aggravators (6)-(8) were added; aggravator (2) replaced "forcible rape" with "aggravated sexual assault," and added "obstruction or retaliation" to the list of aggravators and dropped "robbery" from the list; aggravator (5) was expanded to include conspiracy (to commit murder) while incarcerated. See TEX. PENAL CODE ANN. § 19.03 (West 1974); *Jurek*, 428 U.S. at 268 (discussing the elements of the Texas Penal Code). Although these changes extend the variety of offenses that qualify as death-eligible murder, eliminating robbery as an accompanying felony circumstance decidedly restricted the number of offenders who could be convicted of capital murder, given the frequency of robberies in which a murder occurs.

29. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (West Supp. 1995). The Texas statute requires the jury to address these three issues in a proceeding that takes place after returning a guilty verdict against the defendant for any one of the enumerated categories of murder listed in footnote 28. *Id.* art. 37.071, § 2(a). Specifically, the jury must answer the following questions:

- (1) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (2) In cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty [for his own conduct or criminally responsible for the conduct of another],

Other states have adopted variations on the threshold, balancing, and directed statutes upheld in *Gregg*, *Proffitt*, and *Jurek*.³⁰ Several states, such as Virginia,³¹ Louisiana,³² and California,³³ following Texas' lead, have narrowed the definition of capital murder by restricting it to murders committed under specified aggravating conditions. A few states, such as Virginia³⁴ and Oklahoma,³⁵ also followed Texas' approach by making the defendant's future dangerousness a prominent sentencing consideration. Oregon has adhered most strictly to Texas' directed model.³⁶ Other states, including South Carolina³⁷ and Kentucky,³⁸ follow Georgia's threshold model and provide that the finding of a single aggravating circumstance is sufficient for the jury to impose a death sentence. Most states, however, have followed Florida's lead by having jurors weigh or balance aggravating and mitigating considerations.³⁹ Some of these states, including New Jersey⁴⁰ and

whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

Id. art. 37.071, § 2(b). If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of these two questions is "yes," *id.* art. 37.071, § 2(c), the jury must then answer the following question:

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

Id. art. 37.071, § 2(e). If the jury returns a negative finding to this question, the court shall sentence the defendant to death. *Id.* art. 37.071, § 2(g). If the jury returns a negative finding on either of the first two questions or an affirmative finding on the question of mitigating circumstances, the court shall sentence the defendant to life imprisonment. *Id.*

As under the current statute, at the time of the *Jurek* decision, the defendant's sentence was strictly determined by the jury's answers to three questions. The current questions, however, differ slightly from those which were at issue in *Jurek*. Question (1) (regarding future dangerousness) is the same as it was in the statute reviewed in *Jurek*. Question (2) (regarding criminal responsibility and responsibility for the killing) rephrased slightly the requirement regarding intent. Finally, question (3) explicitly incorporates the issue of mitigation (which was absent from the statute at issue in *Jurek*) in place of a question about victim provocation. For a discussion of the capital sentencing procedure challenged in *Jurek*, see 428 U.S. at 269. These changes in the sentencing procedure came about as a result of the Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989). See also Peggy M. Tobolowsky, *What Hath Penry Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 362-64 (1992).

30. A few states have adopted capital statutes that give sentencing authority to the trial judge rather than the jury. See, e.g., ARIZ. REV. STAT. ANN. § 13-703(B) (West 1987 & Supp. 1994-1995); IDAHO CODE § 19-2515 (1987). Although the Supreme Court has found these few "judge only" statutes constitutionally acceptable, see *Walton v. Arizona*, 497 U.S. 639 (1990), the statutes are an anomalous subgroup which falls beyond the scope of the CJP's research on how jurors exercise capital sentencing discretion.

31. VA. CODE ANN. § 18.2-31 (Michie 1988 & Supp. 1994).

32. LA. REV. STAT. ANN. tit. 14, § 30 (West 1986 & Supp. 1995).

33. CAL. PENAL CODE § 190.2 (West 1988 & Supp. 1995).

34. VA. CODE ANN. § 19.2-264.2 (Michie 1990).

35. OKLA. STAT. ANN. tit. 21, § 701.12(7) (West 1983).

36. OR. REV. STAT. §§ 163.095, 163.105, 163.150 (1990 & Supp. 1994).

37. S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 1993).

38. KY. REV. STAT. ANN. § 532.025 (Michie/Bobbs-Merrill 1990).

39. Twenty-one of 36 death penalty states employ some type of balancing statute. See Steven Hornbuckle, *Capital Sentencing Procedure: A Legal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 448 n.38 (1994).

40. N.J. STAT. ANN. § 2C:11-3c (West 1982 & Supp. 1994).

Pennsylvania,⁴¹ require or prohibit a death sentence depending on the balance between aggravating and mitigating factors, while others, including Tennessee⁴² and North Carolina,⁴³ leave the jury's life or death decision open, to be informed but not dictated by the balance of factors. Notably, in some states with balancing statutes such as Alabama,⁴⁴ Florida,⁴⁵ and Indiana,⁴⁶ the jury's sentencing decision is not binding, and the trial judge may override the jury's sentence.⁴⁷

B. The Court's Misgivings About the Remedies

Following its decision in *Gregg*, the Supreme Court appeared to have second thoughts about statutory guidelines. After requiring that state statutes guide sentencing discretion, the Court then began to discount such guidelines in a series of decisions that Robert Weisberg has aptly labeled "deregulating death."⁴⁸ In *Lockett v. Ohio*, the Court first lifted the statutory restrictions on what could be considered by a jury in mitigation.⁴⁹ The Court in *Lockett* ruled that the constitutional requirement of "individualized treatment" in capital sentencing, as articulated in *Woodson v. North Carolina*,⁵⁰ meant that jurors could consider any mitigating factor, not just those set forth as standards in the statutes.⁵¹ Since deciding in *Lockett* that non-statutory

41. 42 PA. CONS. STAT. ANN. § 9711(c)(iv) (1982 & Supp. 1994).

42. TENN. STAT. ANN. § 39-13-204(e)(1) (1991 & Supp. 1994).

43. N.C. GEN. STAT. § 15A-2000(b) (1983 & Supp. 1994).

44. ALA. CODE § 13A-5-47 (1994).

45. FLA. STAT. ANN. § 921.141(3) (West 1985 & Supp. 1995).

46. IND. CODE § 35-50-2-9(e) (1993 & Supp. 1994).

47. Of the states referred to in this paragraph, only Oklahoma and Oregon are not under study as part of the CJP. See *infra* Part III.B.1.a for a discussion of the participating states and the criteria for sampling states.

48. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

49. 438 U.S. 586, 604-05 (1978) (plurality opinion).

50. 428 U.S. 280, 304 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.") (citation omitted).

51. According to the *Lockett* plurality, "The sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (plurality opinion) (emphasis in original) (footnote omitted); see also *Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding that it was reversible error to exclude evidence of the defendant's ability to make a peaceful adjustment to prison life as an aspect of his character that is by its nature relevant to the sentencing determination). In *Woodson*, Justice Stewart stated that any exclusion of the "compassionate or mitigating factors stemming from the diverse frailties of humankind" that are relevant to the sentencer's decision would fail to treat all persons as "uniquely individual human beings." *Woodson*, 428 U.S. at 304 (joint opinion of Stewart, Powell, and Stevens, JJ.).

Excluded from consideration in mitigation have been factors such as the death penalty's deterrent efficacy. See *Illinois v. Yates*, 456 N.E.2d 1369 (Ill. 1983), cert. denied, 466 U.S. 981 (1984); see also *Lockett*, 438 U.S. at 604 n.12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.") (emphasis added). Jurors are also precluded from considering descriptions of execution methods in mitigation. *Underwood v. Indiana*, 535 N.E.2d 507 (Ind. 1989); *LeVasseur v. Virginia*, 304 S.E.2d 644 (Va. 1983), cert. denied, 464 U.S. 1063 (1984).

factors may be offered in mitigation in order to provide "individualized treatment" as required by the "death is different" doctrine articulated in *Woodson*,⁵² the Court has held that non-statutory mitigating factors must not be ignored by jurors,⁵³ that (according to some members of the Court) trial judges must actually instruct juries to consider non-statutory mitigators,⁵⁴ and that such factors need be proven only by a preponderance of the evidence to a single juror in order to block a unanimous verdict for imposition of a death sentence.⁵⁵ These decisions thus effectively removed juror consideration of mitigation from the guidance of the statutory provisions and from the monitoring of the appellate courts.

The Court then relaxed the guidance of statutory aggravating considerations as well. In *Zant v. Stephens*,⁵⁶ the Court set a minimum requirement for statutory aggravating considerations and opened the door to the consideration of non-statutory aggravators. The Court in *Zant* held that only a single statutory aggravator need be found for a death sentence to be imposed;⁵⁷ thereafter, the jury's exercise of sentencing discretion could be virtually unguided.⁵⁸ Under state law, jurors might still be prohibited from considering non-statutory aggravators in making their sentencing decisions,⁵⁹ but no such guidance is constitutionally required.

Indeed, the Court also extended the scope of non-statutory aggravators to include previously unacceptable considerations. In *Payne v. Tennessee*,⁶⁰ the Court held that personal characteristics of the victim and the emotional impact of the killing on the victim's family, friends, and community can be presented to jurors during the sentencing phase of the trial.⁶¹ By permitting "victim

52. *Woodson*, 428 U.S. at 305 (joint opinion of Stewart, Powell, and Stevens, JJ.).

53. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

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

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

56. 462 U.S. 862 (1983). For an insightful discussion of the way in which *Zant* restructured the role of statutory aggravating factors in capital sentencing, see Weisberg, *supra* note 48, at 349-50.

57. *Zant*, 462 U.S. at 873-80. The narrowing of the class of convicted murderers to those eligible for a death sentence could be accomplished either at the guilt or punishment phase of the trial. For example, the Texas statute accomplished this at the guilt stage by requiring death-eligible murderers to be convicted of at least one of eight kinds of aggravated murder. TEX. PENAL CODE ANN. § 12.31; see also *supra* note 28 and accompanying text. Florida and Georgia do so by enumerating aggravators, at least one of which must be found by the jury during the sentencing stage of the trial. FLA. STAT. ANN. § 921.141(5); GA. CODE ANN. § 17-10-30(b); see also *supra* notes 24, 26, and accompanying text.

58. *Zant*, 462 U.S. at 880. The jury's discretion is not, however, entirely unguided; it must not ignore evidence and arguments presented in support of statutory or non-statutory mitigators, as required by *Lockett* and *Eddings*. See *supra* notes 49-53 and accompanying text.

59. See FLA. STAT. ANN. § 921.141(5) (stating that "[a]ggravating factors shall be limited to the following") (emphasis added); see also *id.* § 921.141(3) (stating that "[n]otwithstanding the recommendation of the majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death") (emphasis added).

60. 501 U.S. 808 (1991).

61. *Id.* at 827.

impact” evidence and arguments, the *Payne* Court thus reversed earlier rulings⁶² that were explicitly intended to insulate the sentencing process from the arbitrary effects of emotional, inflammatory, or prejudicial influences, apart from the defendant’s blameworthiness.⁶³

Finally, the Court decided not to require that the jury’s sentencing decision be monitored for compliance with state statutory guidelines by means of a “proportionality review.” In *Pulley v. Harris*,⁶⁴ the Court confirmed that the relaxation of guidance in *Woodson* and *Zant*, together with the general absence of a record of jury findings of aggravation and mitigation, means that the jury’s sentencing decisions cannot be meaningfully reviewed for proportionality. This conclusion was aptly foreshadowed by then-Justice Rehnquist in his *Woodson* dissent:

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

Identical defects seem inherent in the systems of appellate review provided in Texas and Florida, for neither requires the sentencing authority which concludes that a death penalty is inappropriate to state what mitigating factors were found to be present or whether certain aggravating factors urged by the prosecutor were actually found to be lacking.⁶⁵

In effect, the Supreme Court’s opinions since *Gregg*, *Proffitt*, and *Jurek* have relaxed both statutory restraints on, and judicial scrutiny of, guided discretion in capital sentencing.⁶⁶

62. The *Payne* decision reversed the Court’s explicit ban on “victim impact statements” announced in *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled by Payne*, 501 U.S. 808, and on prosecutorial argument to the same effect in *South Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by Payne*, 501 U.S. 808. Writing for the Court in *Payne*, Chief Justice Rehnquist explained this reversal by declaring that *Booth* and *Gathers* unfairly tipped the scales in favor of the defendant in a capital trial. *Payne*, 501 U.S. at 822.

63. In his *Payne* dissent, Justice Stevens declared that the Court had abandoned the fundamental constitutional requirement that sentencing in a capital case be the product of a reasoned assessment of the defendant’s blameworthiness as reflected in the characteristics of the crime and of the defendant, insulated from emotional influences associated with the victim’s identity and how the victim’s family feels about the crime. *Payne*, 501 U.S. at 856-57 (Stevens, J., dissenting).

64. 465 U.S. 37 (1984).

65. *Woodson v. North Carolina*, 428 U.S. 280, 318 (1976) (Rehnquist, J., dissenting).

66. For an insightful analysis of the failure of the Court’s past two decades of death penalty jurisprudence to narrow, channel, and individualize the capital sentencing decision, see Carol S. Streiker & Jordan M. Streiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. (forthcoming, 1995). For a further perspective on the Court’s role in monitoring the application of state law, including exceptions to the overall deregulation trend, see Louis D. Bilionis, *Legitimizing Death*, 92 MICH. L. REV. 1643 (1994). For the implications of this jurisprudence on the substantive law of murder, particularly the shift from purpose and motive to act and result in grading murder, see Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375 (1994).

C. Doubts About the Remedies

The solutions that the Court approved in *Gregg*, *Proffitt*, and *Jurek* (to the arbitrariness it found unconstitutional in *Furman*) focused squarely on the capital jury. Statutory sentencing guidelines were the "cure." They could vary widely—from the narrowly restrictive directed statutes, to the various shades of the balancing statutes, to the minimal requirements of the threshold statutes.⁶⁷ Although the Court later decided that the Constitution required only the minimal guidance of a threshold-type statute, more restrictive standards could be required under state law. The Court's supposition that the pre-*Furman* arbitrariness could be remedied by these jury-centered statutory reforms, however, ran headlong into unsympathetic argument and evidence from several sources: namely, the reasoning of legal critics, evidence of biased sentencing outcomes under the new statutes, and research showing prosecution effects of death-qualification jury selection procedures.

Critics have charged that the arbitrariness condemned in *Furman* still exists under the guided discretion statutes endorsed in *Gregg*; indeed, some argue that these statutory reforms may have actually added to the arbitrariness of capital jury decision-making. The critics fault various statutory aggravating circumstances. Some aggravating factors (for example, the fact that the crime was heinous, vile, or wanton, or that the defendant will be dangerous in the future) are said to be too vague, ambiguous, or uncertain to provide any meaningful guidance to the jury.⁶⁸ Some factors listed as mitigators (for example, mental or emotional disturbance, or drug/alcohol involvement) may actually be regarded by jurors as aggravators, owing to their presumed contribution to future violence.⁶⁹ The role of factors listed as aggravators (for example, the existence of an accompanying felony or the fact that the crime was perpetrated for financial gain) permit the same element of a crime to be considered twice in aggravation.⁷⁰ The legal terms "aggravation" and "mitigation" are unfamiliar and confusing to many jurors,⁷¹ and jurors are

67. See *supra* notes 23-47 and accompanying text.

68. See, e.g., CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed. 1981); George F. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343 (1977); James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC'Y REV. 449 (1989); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases: The Standardless Standard*, 64 N.C. L. REV. 941 (1986).

69. See, e.g., Ellen F. Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291 (1989).

70. See, e.g., JOHN KAPLAN & ROBERT WEISBERG, *CRIMINAL LAW: CASES AND MATERIALS* 452-53 (1986); Neil Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 STETSON L. REV. 263, 314-17 (1986) (discussing "doubling"—which may twice penalize the defendant on the identical evidence).

71. See, e.g., James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 278 (1988); Lorelei Sontag, *Deciding Death: A Legal and Empirical Analysis of Penalty Phase Jury Instructions and Capital Decision-Making 111-12* (1990) (unpublished Ph.D. dissertation, University of California (Santa Cruz), reprinted by UMI Dissertation Services).

typically confused by the court's instructions about how to weigh aggravating against mitigating factors.⁷²

Indeed, there is conjecture⁷³ and some evidence⁷⁴ that the guided discretion statutes actually create a "tilt" toward death, or a presumption in the minds of jurors that death is the appropriate punishment. Thus, a vigorous denial of guilt in the first phase of the bifurcated trial tends to nullify a convincing demonstration of remorse before the same jury at the punishment stage.⁷⁵ The defendant's prior record of crime and violence may be used as an aggravating factor in what can be a dramatic courtroom retrial of past offenses.⁷⁶ Furthermore, the prosecution's argument for the death penalty can be given a veneer of legal authorization in the form of a tally of aggravation minus mitigation.⁷⁷ This mechanistic counting of factors may actually diminish the jurors' personal sense of moral responsibility for their sentencing decisions.⁷⁸ There is also evidence that the new statutes with many specific aggravators and at least one catch-all aggravator may serve more as a foil than as a guide for jurors' exercise of sentencing discretion.⁷⁹

Almost imperceptibly, the guided discretion statutes appear to have created a "new law of murder,"⁸⁰ in which objective indicators of actions and results

72. See, e.g., *Free v. Peters*, 12 F.3d 700, 705-06 (7th Cir. 1993), cert. denied, 115 S. Ct. 433 (1994); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L.J. 1, 4 (1993); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995); Luginbuhl & Middendorf, *supra* note 71, at 266.

73. See, e.g., Weisberg, *supra* note 48, at 330-31.

74. See, e.g., William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 25 (1987-88) (studying jurors' use of statutory aggravating and mitigating factors in ten Florida trials).

75. Coordinating the defense used in the guilt phase with the mitigation case put forward in the penalty phase is a difficult matter. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 328-34 (1983).

76. Weisberg has illustrated this point as follows:

[Since] crimes such as rape and armed robbery include violence to the person as an essential legal element, . . . the state need not demonstrate the particular violence with which the defendant committed the old crime. But rather than rely on the cold formality of the conviction record, the state nevertheless tries to exploit the dramatic form of the minitrial to impress the sentencer with the colorful underlying facts of the old conviction. The defendant frequently tries to "plea-bargain" his way out of this minitrial by stipulating to the conviction for the old violent crime. But some state courts have permitted the state to hold the minitrial anyway, partly for the ironic reason that the minitrial requires the state to prove the aggravating circumstance beyond a reasonable doubt. But in an infinite regress of the penalty trial, they also permit the defendant to put on evidence specifically mitigating the old crime. The penalty trial then contains a mini-guilt trial which contains elements of a mini-penalty trial.

Weisberg, *supra* note 48, at 338 (footnotes omitted).

77. See *id.* at 321.

78. See *id.*

79. Glenn Pierce and I found that the death penalty was imposed in Georgia and Florida for killings of roughly equal aggravation (when gauged by objective indicators), but that juries in Florida—where aggravating factors must outweigh mitigating factors—(1) found more statutory aggravating factors, and (2) more often found the catch-all "wanton, vile, and outrageous" aggravator, than did juries in Georgia—where a single aggravator is sufficient for a death sentence. William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 626-29 (1980); see also WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, at 353-58 (1984).

80. See Givelber, *supra* note 66. Givelber observes that "[t]he very proposal that the drafters of the Model Penal Code rejected—a new class of capital murder plus discretionary sentencing—on the

have largely displaced subjective considerations of motive and purpose in the capital sentencing decision. This shift from premeditated to aggravated killing as death-eligible murder purports to make the sentencing decision more objective and rational.⁸¹ But the objective aggravators with the broadest reach, such as felony murder, tend to “legalize” otherwise impermissible disparities (e.g., by race of perpetrator and victim) in who is death-eligible.⁸² To the extent that such aggravators predominate in jurors’ thinking about the appropriate punishment, they threaten to undermine the fundamental role of moral judgment in assessing mitigation.⁸³

Most weighty of the doubts about the *Gregg*, *Proffitt*, and *Jurek* cures to the *Furman* ills are surely those of former Justice Blackmun. Although he endorsed these remedies in 1976, he concluded before retiring from the Court in 1994 that two decades of experience with guided discretion capital statutes shows that the nation’s “death penalty experiment has failed.”⁸⁴ In his *Callins* dissent, he observed:

[T]he consistency promised in *Furman* and the fairness to the individual demanded in *Lockett* are not only inversely related, but irreconcilable in the context of capital punishment. Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer’s discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token,

grounds that it gave ‘disproportionate significance to the enumeration of aggravating circumstances’ has become the constitutionally approved law of the land.” *Id.* at 402 (quoting MODEL PENAL CODE § 201.6 commentary at 71-72 (Tentative Draft No. 9, 1959)).

81. Givelber notes that “[w]ith the exception of the ‘heinousness’ circumstance, none of them requires the jury to *evaluate* what the defendant did. Jurors simply need to find that she did it.” *Id.* at 394 (emphasis in original) (footnotes omitted).

82. Givelber reports, for instance, that making felony murderers death-eligible whether or not their killings were planned, intended, or accidental, greatly increases the ranks of African-Americans convicted of killing whites among the death-eligible. He reports that between 1976 and 1989, 4% of non-felony murders, as compared to 18% of felony murders, and 27.4% of robbery/felony murders, involved African-American defendants and white victims. *Id.* at 417.

Givelber then goes on to state:

Because felony murder is the quintessential aggravated homicide and because it is also the murder most likely to involve African American perpetrators and white victims, the prominence of white victims in capital cases is not surprising. Indeed, the law of aggravating circumstances encourages applying the death sentence to those who kill whites.

Id. (footnote omitted).

83. In this connection, Givelber concludes,

The new law emphasizes behavioral as opposed to psychological criteria for imposing death. This emphasis defeats any effort to articulate a theory of why it is appropriate to kill some murderers and not others. To the extent that a unifying theme exists, it appears to be that society renders subject to execution those whose conduct proves most frightening to the potential sentencers. This criterion invites rather than diminishes the very subjectivity and inconsistency which plagued the earlier law. Moreover, this test—translated into specific aggravating circumstances—virtually assures that the race of the victim will be a powerful and prominent determinant of who is prosecuted, convicted, and executed. Felony murder no longer stands as an exception to the general rule of criminal responsibility based on conscious choice to take life. Now, it is the paradigm of such responsibility, the worst crime in our lexicon.

Id. at 420 (footnote omitted).

84. *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (mem.) (Blackmun, J., dissenting), *denying cert.* to 998 F.2d 269 (5th Cir. 1993).

any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would "thro[w] open the back door to arbitrary and irrational sentencing." All efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death.⁸⁵

Justice Blackmun faulted the Court for the character of its retreat from the challenge.

In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field, allowing relevant mitigating evidence to be discarded, vague aggravating circumstances to be employed, and providing no indication that the problem of race in the administration of death will ever be addressed.⁸⁶

D. Outcomes-Based Assessment of the Remedies

The Supreme Court's endorsement of guided discretion statutes in *Gregg*, *Proffitt*, and *Jurek* provoked empirical challenges as well as doubts and criticisms. In response to the Court's conclusion in *Gregg* that "on their face . . . [guided discretion capital statutes] seem to satisfy the concerns of *Furman*,"⁸⁷ came a succession of increasingly refined and rigorous empirical studies of the application of these statutes. Some studies examined the overall or cumulative processing of homicide cases from the occurrence of the crime through the sentence imposed and/or appellate review.⁸⁸ Other studies focused on one or more discrete stages in the handling of such cases.⁸⁹

85. *Id.* at 1136 (second alteration in original) (quoting *Graham v. Collins*, 113 S. Ct. 892, 912 (1993) (Thomas, J., concurring)).

86. *Id.* at 1136-37.

87. *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

88. See SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989) [hereinafter GROSS & MAURO, DEATH AND DISCRIMINATION]; Bowers & Pierce, *supra* note 79; Sheldon Ekland-Olson, *Structured Discretion, Racial Bias and the Death Penalty: The First Decade After Furman in Texas*, 69 SOC. SCI. Q. 853 (1988); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 J. OF CRIM. JUST. 279 (1987).

89. See, e.g., DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) [hereinafter BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY]; BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (1987); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986); Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27 (1988); William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. OF CRIM. L. & CRIMINOLOGY 1067 (1983); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. OF CRIM. L. & CRIMINOLOGY 754 (1983); Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985); Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. &

Virtually all of these studies revealed sizable and statistically significant disparities in sentencing outcomes by the race of the victim.⁹⁰ Some studies found sentencing disparities based on the race of the defendant, although these findings were less consistent or substantial than those pertaining to the race of the victim.⁹¹ Most of the studies that examined sentencing outcome by location within a particular state also found sizable and significant regional disparities within states.⁹²

The most rigorous and exhaustive of these investigations, known as the Baldus study,⁹³ examined the effects of some 400 factors that might have influenced the sentencing outcomes of more than 2400 persons arrested for criminal homicide in Georgia between 1973 and 1978.⁹⁴ The Baldus study found that in otherwise comparable cases, the death sentence was 4.3 times more likely to be imposed upon convicted murderers whose victims were white than on those whose victims were black.⁹⁵ This evidence of victim-based racial disparity in sentencing outcomes was presented to the Supreme Court on behalf of petitioner Warren McCleskey.⁹⁶

The research prompted judicial vacillation at successive stages of McCleskey's appeal. The federal district court rejected the findings of the Baldus study on the ground that the data and statistical analysis were faulty.⁹⁷ The Court of Appeals for the Eleventh Circuit assumed the validity

SOC. CHANGE 743 (1990-1991); Jonathan R. Sorensen & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 11 BEHAVIORAL SCI. & LAW 61 (1995); Gennarof F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period*, 79 J. OF CRIM. L. & CRIMINOLOGY 483 (1988).

90. See, e.g., BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY, *supra* note 89; GROSS & MAURO, DEATH AND DISCRIMINATION, *supra* note 88; Bowers & Pierce, *supra* note 79.

91. See, e.g., BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY, *supra* note 89; GROSS & MAURO, DEATH AND DISCRIMINATION, *supra* note 88; Bowers & Pierce, *supra* note 79.

92. See BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY, *supra* note 89, at 40-79 (reporting on disparities in Georgia); Bowers & Pierce, *supra* note 79, at 601-07 (reporting disparities between state judicial circuits in Georgia and Florida); Paternoster, *supra* note 89, at 778-83 (reporting a disparity between urban and rural areas of South Carolina).

93. The Baldus study was acclaimed as "'far and away the most complete and thorough analysis of sentencing.'" *McCleskey v. Kemp*, 753 F.2d 877, 907 (11th Cir. 1985) (quoting Dr. Richard Berk, a member of the Federal Sentencing Commission), *aff'd*, 481 U.S. 279 (1987). The Baldus study received the Law and Society Association's prestigious Kalven Award. The study is fully reported in BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY, *supra* note 89.

94. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY, *supra* note 89, at 1-3. Among the factors included in the study were the race of the defendant and the race of the victim, the age of the defendant and the age of the victim, the defendant's role as a leader in the offense, whether there were multiple victims, the commission of additional crimes after the murder, geographic factors, whether the defendant resisted arrest, and whether the defendant had any prior convictions at the time of the murder conviction. *Id.* at 140-85.

95. *Id.* at 143.

96. *McCleskey v. Kemp*, 481 U.S. 279 (1987). McCleskey was a black man convicted of the murder of a white police officer during the armed robbery of a furniture store. *Id.* at 283.

97. *McCleskey v. Zant*, 580 F. Supp. 338, 379 (N.D. Ga. 1984). In rejecting this evidence, the district court stated:

A persistent race of the victim effect is reported in the state-wide data on the basis of experiments performed utilizing models which do not adequately account for other neutral variables. These tables demonstrate nothing. . . . [T]here is no statistically significant evidence produced by a reasonably comprehensive model that prosecutors are seeking the death penalty or juries are imposing the death penalty because the defendant is black or the victim is white.

of the racial disparities found by Baldus and acknowledged these disparities to be "systematic and substantial," but held that they were not pronounced enough to render Georgia's death penalty statute unconstitutional.⁹⁸ The Supreme Court itself sidestepped the troubling questions raised by the scientific evidence⁹⁹ and ruled by a narrow 5-4 margin that McCleskey must show that jurors or other decision-makers intended to discriminate in his particular case in order to prevail.¹⁰⁰

The majority opinion drew ardent dissents from Justices Brennan, Blackmun, Stevens, and Marshall, each of whom declared that the majority had misinterpreted the Baldus findings and misapplied Eighth Amendment doctrine.¹⁰¹ Justice Brennan, in particular, wrote that the Baldus study

Further, the petitioner concedes that his study is incapable of demonstrating that he, specifically, was singled out for the death penalty because of the race of either himself or his victim. Further, his experts have testified that neither racial variable preponderates in the decision-making and, in the final analysis, that the seeking or the imposition of the death penalty depends on the presence of neutral aggravating and mitigating circumstances.

Id. at 379-80.

98. *McCleskey v. Kemp*, 753 F.2d 877, 895 (11th Cir. 1985), *aff'd*, 481 U.S. 279 (1987).

99. In a footnote, the Court explained:

Although the District Court rejected the findings of the Baldus study as flawed, the Court of Appeals assumed that the study is valid and reached the constitutional issues. Accordingly, those issues are before us. As did the Court of Appeals, we assume the study is valid statistically without reviewing the factual findings of the District Court. Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia. Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision.

McCleskey, 481 U.S. at 292 n.7 (emphasis in original). The Court also stated:

At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is "a far cry from the major systemic defects identified in *Furman*." As this Court has recognized, any mode for determining guilt or punishment "has its weaknesses and the potential for misuse." Specifically, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" Despite these imperfections, our consistent rule has been that constitutional guarantees are met when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible." Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

Id. at 312-13 (citations omitted) (footnotes omitted).

100. Specifically, the Court stated:

[T]o prevail under the Equal Protection Clause, *McCleskey* must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.

Id. at 292-93 (emphasis in original) (footnotes omitted).

Regarding guided discretion statutes, the Court declared, "[W]hile some jury discretion still exists, the discretion to be exercised is controlled by clear and objective standards so as to produce nondiscriminatory application." *Id.* at 302-03.

101. All four of the dissenting Justices were quite convinced by the Baldus analysis of sentencing outcomes. Indeed, Justices Brennan, Blackmun, and Stevens based their dissents chiefly on the implications of Baldus' empirical research. And Justice Blackmun's recent conclusion that capital

unmistakably showed an intolerable risk of racial bias in capital sentencing, and that the Eighth Amendment protects defendants against such an arbitrary and irrational system, in part precisely because of "the difficulty of divining the jury's motivation in an individual case."¹⁰²

E. The Court's Affirmation of a Process-Based Assessment

In *McCleskey*, the Court focused on the process by which capital jurors make decisions rather than the outcomes of their decisions. The majority affirmed its belief in the integrity of jurors' capital sentencing decisions and denied that the Baldus analysis of sentencing outcomes impeached the exercise of sentencing discretion by capital jurors in Georgia:

The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity, and flexibility into a legal system."¹⁰³

The Court made it clear one year earlier that it was concerned with the decision-making of "real" rather than "mock" jurors. In *Lockhart v. McCree*,¹⁰⁴ the Court rejected an empirically based Sixth Amendment claim that "death qualification" jury selection procedures—which eliminate

punishment in the post-*Furman* era is "a failed experiment" is grounded in the empirically demonstrated arbitrariness of its application. *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (mem.) (Blackmun, J., dissenting), *denying cert. to* 998 F.2d 269 (1993).

102. *McCleskey*, 481 U.S. at 323 (Brennan, J., dissenting). Justice Brennan also stated:

[T]he Court's observation that McCleskey cannot prove the influence of race on any particular sentencing decision is irrelevant in evaluating his Eighth Amendment claim. Since *Furman v. Georgia*, the Court has been concerned with the risk of the imposition of an arbitrary sentence, rather than the proven fact of one. *Furman* held that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."

Id. at 322 (emphasis in original) (citation omitted) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980)). Brennan went on to note: "Once we can identify a pattern of arbitrary sentencing outcomes, we can say that a defendant runs a risk of being sentenced arbitrarily. It is thus immaterial whether the operation of an impermissible influence such as race is intentional." *Id.* n.1.

Brennan continued:

Defendants challenging their death sentences thus never have had to prove that impermissible considerations have actually infected sentencing decisions. We have required instead that they establish that the system under which they were sentenced posed a significant risk of such an occurrence. McCleskey's claim does differ, however, in one respect from these earlier cases: it is the first to base a challenge not on speculation about how a system *might* operate, but on empirical documentation of how it *does* operate.

....

Close analysis of the Baldus study . . . reveals that the risk that race influenced McCleskey's sentence is intolerable by any imaginable standard.

Id. at 324-25 (emphases in original).

103. *McCleskey*, 481 U.S. at 311 (citations omitted) (quoting HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 498 (1966)).

104. 476 U.S. 162 (1986).

prospective jurors who are opposed to capital punishment—tend to bias juries toward a sentence of death.¹⁰⁵ The petitioner relied upon some fifteen studies that examined the process and effects of death qualification.¹⁰⁶ These studies found that death-qualified jurors are disproportionately police-, prosecution-, and conviction-prone; that they favor crime control over due process values; and that death qualification questioning itself leads prospective capital jurors to believe that death would be the appropriate sentence.¹⁰⁷

In light of this evidence, the federal district court¹⁰⁸ and the Court of Appeals for the Eighth Circuit¹⁰⁹ held that death-qualified juries were unconstitutionally biased against the defendants. The U.S. Supreme Court, however, rejected the evidence of jury bias owing to death qualification procedures¹¹⁰ and reversed the holdings of the lower courts. The Court went

105. "Death qualifying" a jury is the removal for cause of any prospective juror whose views regarding the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

106. See *Lockhart*, 476 U.S. at 169-70 nn.4-6 (citing, among others, HANS ZEISEL, *SOME DATA ON JUROR ATTITUDES TOWARD CAPITAL PUNISHMENT* (1968); Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control*, 8 LAW & HUM. BEHAV. 121 (1984); Faye Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53 (1970); George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1970); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness*, 8 LAW & HUM. BEHAV. 95 (1984)). For evidence that the death qualification standard established in *Witt* fails to remove these biases, see Michael L. Neises & Ronald C. Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared*, 5 BEHAV. SCI. & L. 479 (1987).

107. See *Grigsby v. Mabry*, 569 F. Supp. 1273, 1291-1304 (1983) (describing the district court's interpretation of the studies and their findings), *aff'd*, 758 F.2d 226 (1985) (per curiam), *rev'd sub nom.* *Lockhart v. McCree*, 476 U.S. 162 (1986).

108. See *id.* at 1324 ("[T]his court has found and concluded that, through the death qualification practices permitted by the State of Arkansas in the guilt-determination phase of capital trials, petitioners were denied their right to a neutral jury and to a representative jury."):

109. *Grigsby*, 758 F.2d at 229 ("Based on the overall exhaustive record, we find . . . substantial evidence supports the court's finding that a capital jury, with ["*Witherspoon* excludables"] stricken for cause, is in fact conviction prone and, therefore, [constitutes a Sixth Amendment violation]."):

110. *Lockhart*, 476 U.S. at 168-73 (noting that the majority of the studies were, at best, "marginally relevant" to the constitutionality of *McCree*'s conviction; that of the remaining studies, several were "insufficient" to make out a claim; and that several were not based on data gathered from jurors in actual capital cases and, thus, the studies provided doubtful support). The dissenters in *Lockhart* also read the empirical evidence of the biasing effects of death qualification procedures quite differently. See *id.* at 189-92 (Marshall, J., dissenting) ("The evidence thus confirms [the bias of death-qualified jurors], and is itself corroborated by, the more intuitive judgments of scholars and of so many of the participants in capital trials . . ."). For a social science perspective on the empirical evidence of jury selection, and particularly on the Court's treatment and critique of the evidence regarding death-qualified juries, see Phoebe C. Ellsworth, *Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment*, in *CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES* 177 (Kenneth C. Haas & James A. Inciardi eds., 1988). See also Rogers Elliott, *Social Science Data and the APA: The Lockhart Brief as a Case in Point*, 15 LAW & HUM. BEHAV. 59 (1991) (criticizing the evidence upon which the American Psychological Association based its assertions in its amicus brief in *Lockhart*); Rogers Elliott & Robert J. Robinson, *Death Penalty Attitudes and the Tendency to Convict or Acquit*, 15 LAW & HUM. BEHAV. 389 (1991) (discussing three studies dealing with the effect of juror

on to affirm its faith in the decision-making of real jurors in actual cases involving real defendants. The trouble with the empirical studies, the Court complained, was that the study participants "were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant. [The Court has] serious doubts about the value of these [mock jury] studies in predicting the behavior of actual jurors."¹¹¹

Thus, in both *McCleskey* and *Lockhart*, the Court looked to the decision-making process, rather than to the outcomes of that process, to ascertain how real capital jurors in actual cases exercise their sentencing discretion. In *McCleskey*, the Court found that statistical patterns of sentencing outcomes were no substitute for knowing how individual jurors focus their collective judgment.¹¹² In *Lockhart*, the Court asserted that the behavior of mock jurors is no substitute for knowing how real jurors will behave when deciding actual cases.¹¹³ These cases thus imply that it is necessary to look inside the "black box" of jury decision-making to address the issue of arbitrariness in capital sentencing—that knowing what comes out of the black box (sentencing outcomes) is no substitute for knowing what goes on inside the box (sentencing decisions).

The Supreme Court's concern in *McCleskey* with how actual jurors in real cases focus their collective judgment is an articulated indication of what the Court regards as relevant to the assessment of arbitrariness in the exercise of capital sentencing discretion. Indeed, the Court indicated in *McCleskey* that the motives and reasoning of jurors would have been directly relevant to the determination of arbitrariness.¹¹⁴ The State might have rebutted Baldus' findings with direct evidence from the *McCleskey* jurors—but such evidence was unavailable because jurors cannot be called to testify about their verdict in court.

Yet, such courtroom testimony is not the only way, or even the best way, to learn from jurors about the risk of arbitrariness under guided discretion capital statutes. While such testimony might have been vital to *McCleskey* and

attitudes toward the death penalty on issues such as conviction or acquittal, changes in the threshold for finding guilt, and the amount of evidence required to find guilt when death as compared with life imprisonment was the potential sentence); Phoebe C. Ellsworth, *To Tell What We Know or Wait for Godot?*, 15 LAW & HUM. BEHAV. 77, 78-79 (1991) (discussing then-Justice Rehnquist's "failure to understand" the implications of the studies introduced by the petitioner in *Lockhart*).

111. *Lockhart*, 476 U.S. at 171. Faulting death qualification research for failing to study actual jurors in real cases is a preemptive criticism since, by its nature, the death qualification process prevents the "scrupled" subjects of interest from serving on actual juries in capital cases, absent mistake.

112. See *McCleskey v. Kemp*, 481 U.S. 279, 292-97 (1987).

113. See *Lockhart*, 476 U.S. at 171.

114. The Court stated:

Another important difference between the cases in which we have accepted statistics as proof of discriminatory intent and this case is that, in the venire-selection and Title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity. . . . Here, the State has no practical opportunity to rebut the Baldus study. "[C]ontrolling considerations of . . . public policy" . . . dictate that jurors "cannot be called . . . to testify to the motives and influences that led to their verdict."

McCleskey, 481 U.S. at 296 (citations omitted). By recognizing that the state might have rebutted the Baldus findings with direct evidence from *McCleskey* jurors but for its inability to call them to testify, the Court indicated that the jurors' motives and reasoning were relevant to the determination of arbitrariness.

others who have been executed, its accumulation would yield an unsystematic patchwork of evidence selected for advocacy purposes. A better method of learning about the risk of arbitrariness would be to select jurors at random in large numbers from a diverse sample of cases tried under different types of sentencing statutes; to interview them independent of the parties to the case on which they served; and to ask them about their motives, their reasoning, and the influences on their sentencing decisions under conditions of strict confidentiality. This would yield systematic evidence of how jurors in real cases actually make their life or death decisions under the various capital sentencing systems now in effect. These are the objectives and methods of the Capital Jury Project.

In summary, the capital jury is the focus of the Supreme Court's thinking about how to cure the arbitrariness that led to the invalidation of pre-*Furman* capital statutes. The Court-approved remedies were statutes intended to guide jurors' exercise of sentencing discretion, but the Court did not strictly monitor their enforcement. Critics have challenged the efficacy of guided discretion statutes as a cure for this arbitrariness. In addition, research on racial disparities in sentencing outcomes and on death qualification during jury selection suggests that bias and arbitrariness remain, even under guided discretion statutes. Yet, the Court is unwilling to acknowledge that the remedy has failed without first seeing how actual jurors make their sentencing decisions in real cases. This is what the CJP intends to do.

II. THE EXERCISE OF SENTENCING DISCRETION

To appreciate how arbitrariness might enter jurors' capital sentencing decisions, it is necessary to look more closely at what the law says about how such decisions should be made and what the social science research on decision-making suggests about how jurors will actually make these decisions. Part II turns first to the legal view and then to the social science evidence on such decision-making. This Part concludes with a review of the limited but provocative empirical evidence on how capital jurors actually make their life or death decisions.

A. The Algebraic Model: The Legal Ideal for the Sentencing Decision

Once the Supreme Court decided that the guided discretion capital statutes of Florida, Georgia, and Texas would curb arbitrariness in capital sentencing, it had, in effect, endorsed a more or less coherent legal theory or model of capital sentencing. The legislatures of these states had drawn upon existing assumptions about how jurors make the guilt decision and extended them, or at least their logic, to the sentencing process. The lead of the American Law

Institute's Model Penal Code in articulating such a sentencing decision model was followed to some degree in most states.¹¹⁵

The result can be seen as a generic model in which jurors make findings of fact with respect to aggravating and mitigating factors and then decide the defendant's punishment by some more or less explicit weighing or balancing of the one against the other. Such an "algebraic approach" to decision-making emphasizes the determination of facts, the assignment of weights to these facts, and the use of a combination strategy to arrive at a final judgment.¹¹⁶ In this model, individuals are assumed to follow an averaging strategy (anchor-and-adjust) in which each fact plays a part in the ultimate decision. Valerie Hans has observed that such

[a]n algebraic model of jury decision processes seems to reflect rather closely the legal assumptions underlying guided discretion statutes and penalty phase jury instructions. If jurors decide death in this manner, then judicial instructions to evaluate and weigh aggravating and mitigating evidence and to reach a summary judgment would reflect their natural decision processes. The instructions would be comprehensible and perhaps even effective in guiding juror discretion.¹¹⁷

Of course, the legal assumption is narrower than the generic model; the law assumes that there are limited types of legally relevant evidence to be considered in the determination of punishment. Arbitrariness is present in the sentencing process when legally relevant considerations are misunderstood, mistakenly applied, or ignored due to vagueness, ambiguity, unnecessary complexity, or improper instruction in the legal standards.¹¹⁸ There is no explicit recognition in the algebraic model of external influences or pressures, or of the predispositions and capabilities jurors bring to the decision-making task.

The algebraic formulation fits some capital statutes better than others. It comes closest to the most common "balancing" statutes,¹¹⁹ which list both aggravating and mitigating factors and ask jurors to weigh one against the other when making their punishment decision. The "threshold"¹²⁰ and "directed"¹²¹ statutes stretch the algebraic formulation. They may be interpreted as special cases of this model that identify death-eligible

115. See MODEL PENAL CODE § 210.6 (1980); see also *id.* cmts. 5, 6.

116. See generally NORMAN H. ANDERSON, FOUNDATIONS OF INFORMATION INTEGRATION THEORY (1981); Hillel J. Einhorn & Robin M. Hogarth, *Ambiguity and Uncertainty in Probabilistic Inference*, 92 PSYCHOL. REV. 433 (1985).

117. Valerie P. Hans, *Death by Jury*, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES, *supra* note 110, at 149, 161.

118. For a discussion of how business organizations and other professionals have adopted analogous approaches to decision-making to enhance the reliability of their decisions, see generally JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER (Hal R. Arkes & Kenneth R. Hammond eds., 1986). Typically, however, the same decision-makers employ such a model over multiple, successive decisions. Hans has noted that the situation is quite different when the decision-maker is a capital jury—a group, rather than an individual, without prior experience in such decision-making, that is charged with making a single, very high-stakes decision. Hans, *supra* note 117, at 151-53.

119. See *supra* notes 26-27, 39-47 and accompanying text.

120. See *supra* note 24, 37-38 and accompanying text.

121. See *supra* notes 28-29, 36 and accompanying text.

defendants by a single finding of statutory aggravation—at the guilt stage of the trial under a directed or other narrowing statute, and during the sentencing stage of the trial under threshold statutes. For those found death-eligible, the jury then conducts a kind of factfinding and weighing of the evidence to arrive at the appropriate punishment, though in different ways under the different types of statutes.

For example, under Georgia's threshold statute, there are no enumerated mitigating factors and no mention of methods or procedures for weighing.¹²² Indeed, the statute contains no explicit statement that weighing is required, only the indication that the jury's sentencing decision should be informed by considerations of aggravating and mitigating circumstances.¹²³ Under Texas' directed statute the sentencing decision is explicitly dictated by a factfinding procedure in which the evaluation of the death-eligible defendant's future dangerousness is the critical element.¹²⁴ The statute calls for the consideration of mitigating factors, but any weighing of aggravation or mitigation is left unexplicated.

Whatever protection from arbitrariness the algebraic decision process might provide under the various statutory forms of guided discretion, it may not accurately reflect the way in which most jurors make their sentencing decisions. One reason lies in subsequent Supreme Court rulings about the exercise of sentencing discretion. Another lies in what psychological research shows about how jurors make their decisions. The discussion now turns to these points.

B. The Court's Deregulation of the Capital Sentencing Decision

The algebraic formulation as a model for capital sentencing did not survive in any strict sense as a constitutional requirement. It was undermined as the official understanding of how the sentencing decisions should be made, by the series of Supreme Court decisions which Robert Weisberg characterized as "deregulating death."¹²⁵ The Court first exempted mitigating considerations from the algebraic formula in *Lockett v. Ohio*,¹²⁶ and extended that exemption to aggravating circumstances in *Zant v. Stephens*.¹²⁷

Drawing upon the *Woodson* "death is different" doctrine that requires "individualized treatment" in sentencing, a plurality of Justices in *Lockett* agreed that jurors must be able to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the

122. See GA. CODE ANN. § 17-10-30 (1990); see also *supra* note 24.

123. See GA. CODE ANN. § 17-10-30.

124. See TEX. CODE CRIM PROC. ANN. art. 37.071, § 2; see also *supra* notes 28-29.

125. See Weisberg, *supra* note 48.

126. 438 U.S. 586 (1978) (plurality opinion).

127. 462 U.S. 862 (1983).

defendant proffers as a basis for a sentence less than death"¹²⁸ and that they must give independent weight to such mitigation in the decision process.¹²⁹ In essence, the *Lockett* decision established that the capital sentencing task is a unique moral decision different in kind from the factfinding of the guilt determination.¹³⁰ As Goodpaster has expressed: "At the penalty phase of a capital case, the central issue is no longer a factual inquiry into whether the defendant committed any crimes; it is the highly-charged moral and emotional issue of whether the defendant, notwithstanding his crimes, is a person who should continue to live."¹³¹

Notably, while *Lockett* affirmed the character of the sentencing decision as a profound moral judgment rather than a factfinding task, the Court also held in *Lockett* that the capital statutes of Florida, Georgia, and Texas already permitted the unlimited consideration of mitigation, either because the statutory language explicitly authorized it, or because the state appellate courts had construed the law in this manner.¹³²

128. *Lockett*, 438 U.S. at 604. Chief Justice Burger, in his plurality opinion, went on to state: Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.

Id. at 605.

129. *Id.* at 605. Burger reasoned that a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id.

130. For interpretations of the *Lockett* ruling, see Gary Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 799-802 (1983); Hans, *supra* note 117, at 149; Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317 (1981); Bruce S. Ledewitz, *The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute*, 21 DUQ. L. REV. 103, 128-36 (1982); Weisberg, *supra* note 48, at 323-28.

131. Goodpaster, *supra* note 75, at 334-35. An especially apt statement of the difference between a decision based on proof and one based on judgment is to be found in the words of Utah Supreme Court Justice Stewart:

Whether aggravating circumstances outweigh mitigating circumstances cannot be determined by the same mental processes by which direct and circumstantial evidence are evaluated for determining such questions as who entered an intersection first. The process of weighing and evaluating evidence to determine the existence of a factual proposition is a process common to the ordinary activities of life. The reference points are facts and inferences from facts; the process is one of logic and practical experience. The point of evaluating aggravating and mitigating circumstances in a capital case is not to prove a factual proposition but to determine a punishment. . . . The youth of the defendant, or the lack of prior criminal activity, cannot be "weighed" in any meaningful sense against the aggravating facts. How does one find that the "fact" that the age of the defendant, whether 18 or 30 years, does or does not preponderate against an aggravating circumstance? . . . To speak of weighing those factors against the aggravating circumstances is to employ an appealing but meaningless metaphor which in fact gives the mind no guidance in resolution of such an overwhelmingly important question.

State v. Brown, 607 P.2d 261, 275 (Utah 1980) (Stewart, J., concurring).

132. *Lockett*, 438 U.S. at 606-07. For a further discussion of the role of mitigating circumstances and the Supreme Court's ambivalence toward them, see Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

Jurors making the penalty decision must reconcile or combine the facts of the crime and perhaps other past crimes (the aggravation) with the meaning of the "life story" of the defendant (the mitigation). These are not two different versions of the same events; they are two different ways of understanding human conduct, two different causal models.¹³³ The penalty decision requires jurors "to 'equate incommensurables.'"¹³⁴ It is a decision "involving judgment rather than proof."¹³⁵ Reconciling, or choosing between, two different causal explanations is a "meta-task" far beyond the complexity of the ordinary factfinding decision. And legal scholarship suggests that juries' difficulties in handling penalty phase evidence may fall disproportionately on the side of mitigation. Factors such as sympathy and mercy may be more difficult for jurors to articulate than aggravating factors.¹³⁶

In *Zant*, the Court further liberated the sentencing decision from the algebraic imperative, and from reviewability. It affirmed the unbridled character of the sentencing decision once a single statutory aggravator had served to identify a defendant as death-eligible.¹³⁷ It gave the prosecution access to nonstatutory aggravators—unless state law provided otherwise.¹³⁸ Weisberg observed that *Zant* "essentially grant[ed] the states a *Lockett* right: the penalty trial is to be a free market in information. The Court will permit the state to introduce virtually any evidence in aggravation, without the constraint of legal categories."¹³⁹ This, of course, placed departures from

133. Sontag has employed Mark Kelman's distinction between intentional and determinist prerational assumptions to distinguish between the underlying logic of aggravation- and mitigation-based arguments and reasoning. See Sontag, *supra* note 71, at 75; see also Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981). The aggravation-based argument rests firmly on the traditional intentional model of conduct. See *id.* at 597-98. That is, it assumes that the crime was the result of the defendant's free choice. In this model, punishment depends upon the link between choice and blame; people should be punished when they choose to do evil. In the context of such a model, mitigation pertaining to aspects of the defendant's life other than the crime itself would be meaningless. With the introduction of mitigating evidence, the penalty trial "becomes the depository of all the determinist explanations of the defendant's behavior which lie outside the normal [legal] rules of insanity, diminished capacity, or provocation." Weisberg, *supra* note 48, at 324 n.80.

134. ZIMRING & HAWKINS, *supra* note 22, at 501 (quoting RUPERT CROSS & ANDREW ASHWORTH, *THE ENGLISH SENTENCING SYSTEM* 132 (1981)).

135. Ledewitz, *supra* note 130, at 155 n.268.

136. *Id.* at 152-56.

137. *Zant v. Stephens*, 462 U.S. 862, 875-78 (1982).

138. *Id.* at 878-79. The Court explained:

Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

Id. (footnote omitted). A state is, of course, free to decide as a matter of state law to limit the evidence of aggravating factors that the prosecution may offer at the sentencing hearing. A number of states do not permit the sentencer to consider aggravating circumstances other than those enumerated in the statute. See, e.g., ARK. CODE ANN. § 5-6-602(4) (Michie 1993); 42 PA. CONS. STAT. ANN. § 9711(a)(2) (1982); see also Gillers, *supra* note 23, at 101-19 (summarizing the provisions of capital punishment laws in 35 states).

139. Weisberg, *supra* note 48, at 358.

algebraic decision-making beyond constitutional scrutiny, and made it more difficult to police arbitrariness.¹⁴⁰

States with balancing statutes could continue under state law to have a sort of algebraic-like weighing process for the exercise of sentencing discretion. Aggravating considerations may be specified and limited by state law, mitigating considerations may be specified but not limited by state law, and state law may require jurors to weigh aggravating and mitigating considerations. In some states, such as North Carolina, this process is made quite concrete by providing jurors with a verdict form that lists the statutory aggravating and mitigating factors (with space for nonenumerated mitigators) that they must weigh in making their punishment decision.¹⁴¹

There is an evident tension between the language of factfinding and weighing in many state statutes, and the premium on individualized treatment—free of statutory strictures—in the Court’s “deregulating” decisions in *Lockett* and *Zant*. Indeed, the Court’s decisions have affirmatively forsaken any model or legal formulation as to how the decision should be made.¹⁴² Only a few protections are constitutionally required:

The law must somehow identify a class of death-eligible murderers smaller than the class of all murderers, must give some sentencer some discretion about choosing which of the eligibles to execute, and must grant defendants a fairly broad opportunity to make a case for mitigation. Beyond that, the

140. Sontag has observed, “[O]nce absolute discretion was re-introduced (if only by judicial construction) into the hypothetical second stage of juries’ penalty decision-making process, the content of that decision became so mysterious and unformed that most errors could be viewed as harmless by the reviewing courts.” Sontag, *supra* note 71, at 64.

The Court in *California v. Boyde* asserted that if there is ambiguity as to the correct interpretation of a penalty phase instruction, the “commonsense understanding of the instructions in the light of all that has taken place at the trial [is] likely to prevail.” 494 U.S. 370, 381 (1990). The standard for analyzing a challenged instruction on review was reduced from the *Sandstrom* question—whether a reasonable juror could have interpreted the instruction in an unconstitutional manner, *see Sandstrom v. Montana*, 442 U.S. 510, 514 (1976)—to an inquiry as to “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” *Boyde*, 494 U.S. at 380.

141. *See* N.C. GEN. STAT. § 15A-2000(b), (e), (f) (1994).

142. This point is clearest in passages where the Court contrasts the nature of the guilt and punishment decisions for purposes of denying claims that the defendant’s death sentence was imposed arbitrarily.

If one of the few theories of guilt presented to the jury in the trial judge’s instructions, or the indictment, proves invalid, there is a substantial risk that the jury may have based its verdict on an improper theory. This follows from the necessarily limited number of theories presented to the jury, and from the fact that the jury’s decisionmaking is carefully routed along paths specifically set out in the instructions. When an aggravating circumstance proves invalid, however, the effect ordinarily is only to diminish the probative value of one of literally countless factors that the jury considered. The inference that this diminution would alter the result reached by the jury is all but nonexistent.

Zant v. Stephens, 462 U.S. 862, 900-01 (1983) (Rehnquist, J., concurring).

Or, similarly:

In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar “central issue” from which the jury’s attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury’s choice between life and death must be individualized.

California v. Brown, 432 U.S. 161, 182 (1977) (Sontag, concurring).

rule may be of any kind, and the Court will not monitor its enforcement.¹⁴³

C. *The Psychological Realities of the Guilt Decision*

The legal formulation of guilt determination has always been understood as an ideal or normative description of how jurors should decide cases, not necessarily a description of what they really do.¹⁴⁴ Psychological research on how jurors actually determine a defendant's guilt has begun to map out how jurors organize and process information in reaching their decisions. This has led to the formulation and testing of an alternate guilt decision model: the "narrative" or "story" model.

The story model of juror decision-making, advanced by Bennett and Feldman¹⁴⁵ and elaborated principally by Pennington and Hastie,¹⁴⁶ argues that jurors evaluate the guilt of the accused by arranging trial evidence in a sequence of motivated events:

[P]eople transform the evidence introduced in trials into stories about the alleged criminal activities. The structural features of stories make it possible to perform various tests and comparisons that correspond to the official legal criteria for evaluating evidence (objectivity, reasonable doubt, and so on). The resulting interpretation of the action in a story can be judged according to the law that applies to the case.¹⁴⁷

The research by Pennington, Penrod, and Hastie indicates that the story is then compared to the available guilt verdict categories, with the jurors choosing the category which best fits the story. They observed that as the story of the crime develops in jurors' minds, they become increasingly resistant to evidence that would cause them to reconstruct it.¹⁴⁸

This observation implies that in a capital case, the jurors will begin the penalty phase with a story already constructed during the guilt phase of the trial. The story therefore incorporates the important elements upon which the jurors based their guilty verdict. New elements in the penalty phase would

143. Weisberg, *supra* note 48, at 358.

144. For example, difficulties with the legal assumptions regarding proof of the several elements of a crime "beyond a reasonable doubt" have been identified by Jonathan Cohen and Ronald Allen, who argue that the factfinding formula is unrealistic modeling of what jurors can be expected to do. See Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373 (1991); L. Jonathan Cohen, *The Role of Evidential Weight in Criminal Proof*, 66 B.U. L. REV. 635 (1986).

145. See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981).

146. See REID HASTIE ET AL., *INSIDE THE JURY* (1983); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) [hereinafter Pennington and Hastie, *The Story Model*]; Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986); Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 521 (1988).

147. BENNETT & FELDMAN, *supra* note 145, at 4.

148. See HASTIE ET AL., *supra* note 146, at 169 ("[O]nce jurors' constructions of the evidence, their stories of what happened, were formed and stabilized, these stories were relatively resistant to persuasive argumentation from other jurors.").

include the evidence of aggravation and mitigation that is adduced by the prosecution and the defense. Since stories—once developed—are resistant to reconstruction, jurors may thereafter be unreceptive to new penalty phase evidence intended to create a different understanding that would serve as the basis for deciding on punishment. Hence, sentencing deliberations and the ultimate sentencing decision may often be dominated by the story of the crime and the defendant that was developed during the guilt phase of the trial.

In contrast to the algebraic model that draws upon legalistic assumptions about the weighing of evidence, the story model rests on psychological assumptions about the way people make sense of complex and conflicting information. As such, it provides a broader framework for understanding how and why arbitrariness may enter the sentencing decision. It presupposes psychological mechanisms such as simplification, dissonance reduction, stereotyping, and consonance amplification. The individual is presumed to approach decisions with predispositions and to evaluate evidence with selectivity.¹⁴⁹ The “story” behind a given juror’s decision is thus bound to reflect subjective predispositions and internal consistencies. Indeed, a “strain toward consistency” will tend to cause jurors to minimize the weight of conflicting evidence and to overlook facts that do not “fit” the story.¹⁵⁰ By implication, such a strain toward consistency might make a juror who has developed a relatively firm guilt-phase story of the defendant unreceptive to a defendant’s subsequent expressions of remorse or other evidence of mitigation in the penalty phase of the trial.¹⁵¹

D. The Matching Model: An Alternative View of the Sentencing Decision

The Court’s deregulation rulings and the psychological research on guilt determination suggest that the algebraic formulation may not be an appropriate or accurate representation of how most jurors make sentencing decisions. It seems especially unsuited given a shift in the decision-making agenda from factfinding to moral reasoning that is supposed to encompass both “proof” of aggravation and “judgment” about mitigation. Perhaps this kind of complex moral decision-making, in which jurors must try to make sense of a myriad of intentionalist and determinist considerations, also entails working with the elements or the logic of stories; perhaps it involves comparing and choosing among alternative stories.

149. Evidence for this view is summarized in DONALD E. VINSON, *JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY* § 4-3 (1986). See also Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 42 (Reid Hastie ed., 1993) (reviewing how jurors’ death-penalty-specific attitudes may influence their verdicts).

150. As an example, see Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1049-55 (1991) (discussing how myths and misconceptions about rape influence verdicts in rape trials).

151. Goodpaster, *supra* note 75, at 330.

Valerie Hans has argued that jurors may choose among alternative punishments by identifying or matching the crime and/or the defendant in the case before them with more or less abstract "prototypes."¹⁵² These prototypes may be categorical (e.g., types of crimes or defendants, representing perhaps an amalgamation of specific incidents or individuals), or particular (e.g., a specific crime or criminal). She explains:

To decide whether a defendant deserves to die, jurors would match the central figure in their story, the defendant, to the abstract prototype. If the defendant is quite similar to the prototype, the match is close, and the juror decides on death; if there are significant discrepancies, then the juror decides on life.¹⁵³

During jury selection, attorneys occasionally ask prospective jurors whether they have heard about a particular murder or murderer, and whether they believe that someone guilty of such a crime deserves the death penalty. The attorney may be probing for the prospective juror's internalized prototypes, or indeed seeking to "fix" such a referent in the prospective juror's mind—to plant a seed to be harvested in the punishment phase of the trial.

The matching model for punishment is similar to the story model for guilt in that jurors are presumed to structure their thinking and process information in terms of a story involving a crime or a murderer. But, instead of piecing together a "causal" story of the crime from the evidence at the guilt stage of the trial, jurors are presumed to draw upon prototypes for a "moral" story involving a crime, a defendant, and the appropriate punishment in making their decision at the sentencing phase of the trial. Hans observes:

If [attorneys'] penalty phase arguments reflect lawyers' intuitions about how jurors decide death, then attorneys appear to believe that jurors employ a category-based [matching] approach rather than a[n algebraic] weighing approach. If jurors do operate with such categories, then instructions to weigh aggravating and mitigating evidence would be at odds with their "natural" decision making strategy, and might be less successful in governing their decisional processes.¹⁵⁴

The matching model, like the story model, can be interpreted to accommodate legal requirements. Jurors' moral or punishment stories will contain elements of aggravation and mitigation consistent with life or death as punishment. Jurors who match the crime and defendant before them with one rather than another moral story may be seen as engaging in a sort of "weighing" process. But the matching model also quite readily suggests how

¹⁵² Hans, *supra* note 117, at 162. For this formulation, Hans draws upon Smith and Medin's research in cognitive psychology. EDWARD F. SMITH & DOUGLAS L. MEDIN, CATEGORIES AND CONCEPTS (1981). Unlike the story model, this categorical matching model is not the product of empirical testing, reformulation, and retesting. Rather, it remains strictly hypothetical as a representation of the sentencing process.

¹⁵³ Hans, *supra* note 117, at 162.

¹⁵⁴ *Id.* There is no guarantee, of course, that jurors will wait for the punishment phase of the trial to match the crime and/or defendant with a prototype or "moral" story that indicates the appropriate punishment. And, the earlier that jurors decide what the defendant deserves, the more likely it is that statutory sentencing standards will be discounted or ignored.

arbitrariness and bias may enter the sentencing decision. The prototypes and moral stories of crime and punishment that jurors employ can, of course, be infected with misperceptions and misrepresentations. Imbedded in them, for instance, may be distorted views of criminals, disparate feelings about crime victims, or mistaken assumptions about alternative punishments.¹⁵⁵

E. Where the Sentencing Models Leave Off

The algebraic and matching sentencing decision models are hypothetically posed, not empirically confirmed, accounts of how jurors make their sentencing decisions. Neither may reliably describe how most jurors make such decisions. Indeed, no single model, or small number of models, may adequately map how sentencing decisions are made. This section considers why jurors' decision-making might depart from these or other decision models—a reason why jurors' decision-making may be quite idiosyncratic: namely, the existential situation capital jurors face.

Capital jurors have good reason to feel uncertain and anxious about the sentencing task. Sontag has aptly catalogued the elements of ambiguity capital jurors confront:

The dislocation from the routines of everyday life, the unfamiliarity of the sentencing task, the public exposure to which it subjects the jury, the unsettling experience of learning about a frightening crime in minute and graphic detail, the impact of finding another human being guilty of such a crime, and then the necessity of switching “frames” of understanding from one phase of the trial to the other, the incommensurable nature of the two types of evidence that must be “weighed” in the penalty phase, the inherent subjectivity and moral relativity of the penalty decision, and the burden of choosing between life and death can all create ambiguity . . . [and] can leave the jury with uncertainties and anxiety about what they are supposed to do.¹⁵⁶

Such ambiguity, uncertainty, and anxiety may be an invitation to whim and arbitrariness, regardless of statutory guidelines.¹⁵⁷ Ambiguity about the evidence, the task, or the rules that apply may cause jurors to be susceptible

155. For an indication of the biasing effect of mistaken assumptions regarding the punishment for convicted first-degree murderers not sentenced to death, see Bowers, *supra* note 22, at 167-71 (drawing upon data from the CJP to show that jurors who impose the death penalty, as compared to those who do not, more often and more substantially underestimate the time that first-degree murderers who are not sentenced to death will serve in prison before being paroled or returned to society). For a legal analysis of this issue, see Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211 (1987), and William W. Hood, Note, *The Meaning of “Life” for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605 (1989). See also J. Mark Lane, “Is There Life Without Parole?”: *A Capital Defendant’s Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L. REV. 327 (1983).

156. Sontag, *supra* note 71, at 80.

157. Erving Goffman has observed that when action is required, and yet there are ambiguities regarding what primary framework of understanding to apply, “ambiguity will be translated into felt uncertainty and hesitancy.” ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 302 (1974).

to irrelevant or improper influences.¹⁵⁸ Uncertainty about how to proceed may cause jurors to "invent" their own rules or understandings about how the sentencing task should be performed.¹⁵⁹ Anxiety about the sentencing task and insecurity about their performance may cause jurors to seek consensus and approval over independence and objectivity in decision-making.¹⁶⁰

Furthermore, the discussion of decision models has been cast largely in terms of the individual juror. The convicted defendant's punishment is, of course, a collective or group decision. Any group decision may be an amalgam of individual decisions arrived at quite differently. Regardless of how the individual jurors approach the decision-making task, group processes are also apt to be involved in reaching a final consensus about the defendant's punishment. When the jurors are not of one mind at the start of sentencing deliberations, the stage is set for what might be different kinds of group processes.

Among the contrasting group decision processes documented in research on guilt deliberations are "evidence-driven" and "verdict-driven" deliberations.¹⁶¹ As these terms suggest, in evidence-driven deliberations, the premium is on reviewing the facts, interpreting the evidence, and addressing differences of opinion by reference to the evidence. In verdict-driven deliberations, the emphasis is on determining the verdict preference of most jurors early on and then converting the minority to this view with whatever arguments or influences may be effective.

158. Kalven and Zeisel concluded that ambiguous evidence opens the door to the influence of unrecognized "sentiment" in jury decisions. KALVEN & ZEISEL, *supra* note 103. Thompson, Cowan, Ellsworth, and Harrington have argued that an attitude, such as racial prejudice,

is likely to have an unrecognized influence on behavior (1) when the attitude is associated with a perspective (or set of scripts) that is applicable to the situation at hand; (2) when the situation itself is sufficiently ambiguous to leave substantial room for differences in interpretation; (3) when the behavioral alternatives are clear and the person cannot abstain from choosing among them; and (4) when the criterion for choosing is not clearly specified.

William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 111 (1984) (footnote omitted). Concerning penalty phase instructions, Hans has observed that "the admonition to disregard illegitimate factors is based on two questionable premises: that jurors know when an illegitimate factor is influencing them, and that they are able to subtract the influence of this factor in the decisional calculus." Hans, *supra* note 117, at 163. She adds that "[t]he difficulty of instructing jurors to disregard illegitimate factors is magnified in the penalty phase because the decision maker must be allowed to consider any relevant mitigating evidence of the defendant's background and character and the circumstances of the offense." *Id.* at 164 (citations omitted).

159. Sontag cites Shibutani's research on the genesis of rumor in ambiguous situations for the proposition that uncertainty "can lead penalty juries to substitute their own 'instructions,' that is, their own rules," where there are "gaps in the jury instructions." Sontag, *supra* note 71, at 81. "[P]reviously accepted norms prove inadequate or inappropriate as guides for conduct if a situation becomes problematic and some kind of emergency action is required." *Id.* (quoting TAMOTSU SHIBUTANI, *IMPROVISED NEWS: A SOCIOLOGICAL STUDY OF RUMOR* 172 (1966)).

160. Schachter has shown that anxiety and insecurity arouse affiliative needs and, more specifically, a need for social evaluation. Assuming evaluative needs and granting a situation in which evaluation is possible only through social comparison processes, it follows from the above that if discrepancies exist among group members, pressures will arise to reduce such discrepancy. STANLEY SCHACHTER, *THE PSYCHOLOGY OF AFFILIATION: EXPERIMENTAL STUDIES OF THE SOURCES OF GREGARIOUSNESS* 104 (1959).

161. HASTIE ET AL., *supra* note 146, at 163-65 (1983).

When it comes to the sentencing decision, there might be different types of evidence-driven group decision processes—perhaps to the extent that group norms develop supporting a weighing or matching approach to the punishment decision. Thus, jurors may collectively decide to weigh elements of aggravation and mitigation in light of statutory guidelines, or to compare and contrast the case at hand with prototypes of crimes and defendants to arrive at the appropriate punishment. Alternatively, they may improvise distinctive rules and procedures that mix various aspects of weighing, matching, and moralizing. And there may be a verdict- or outcome-driven process in which jurors attempt to break the resistance of dissenters or holdouts by means not restricted to evidence-based weighing or matching procedures. For example, in outcome-driven sentencing deliberations, persuasion might entail the reduction of the complex moral decision to a single simplistic distinction or formula specially tailored to the concerns of potential holdouts.

The foregoing discussion of the ways in which capital jurors and juries may make their sentencing decisions points to the need for empirical research. This Part concludes with a review of the limited but provocative available evidence on jurors' exercise of capital sentencing discretion.

F. The Empirical Research on Capital Jurors' Sentencing Decisions

Of the countless studies of jurors and juries since Kalven and Zeisel's 1966 classic, *The American Jury*, only three quite recent efforts—one published study¹⁶² and two doctoral dissertations¹⁶³ (which were recently summarized in published form¹⁶⁴)—have attempted systematically to examine how jurors make sentencing decisions in capital cases. In each of these studies, the investigators interviewed at least three jurors each from nine or ten capital trials in a particular state.

In the first of these studies, William Geimer and Jonathan Amsterdam interviewed some 54 jurors from ten Florida trials—five in which the jury voted for death and five in which it voted for life imprisonment.¹⁶⁵ In the other two studies, Lorelei Sontag and Sally Costanzo, respectively, interviewed 30 California and 27 Oregon capital jurors. In California, Sontag interviewed jurors from one death and one life case in each of five counties

162. Geimer & Amsterdam, *supra* note 74.

163. Sally Costanzo, *Penalty Decision-Making Under the Special Issues Framework: A Social Psychological Analysis* (1990) (unpublished Ph.D. dissertation, University of California (Santa Cruz), reprinted by UMI Dissertation Services); Sontag, *supra* note 71.

164. Craig Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. SOC. ISSUES, Summer 1994, at 149.

165. Geimer & Amsterdam, *supra* note 74, at 7-10. The life cases studied by Geimer and Amsterdam were atypical in that the authors purposely chose cases in which the jury had decided on a life sentence, but the trial judge had rejected or overridden the jury's decision and imposed a death sentence (as permitted under Florida's judicial override provision). *Id.* at 8-9.

throughout the state.¹⁶⁶ In Oregon, Costanzo interviewed jurors in five death and four life cases from a single urban county responsible for the majority of Oregon's capital trials.¹⁶⁷ In all three of these studies, the questioning protocol was largely open-ended, with only a few structured questions posed to all jurors.¹⁶⁸

The Florida study examined jurors' exercise of sentencing discretion under the first balancing statute to be upheld by the Supreme Court.¹⁶⁹ In that study, Geimer and Amsterdam asked the jurors to explain the reasons for their life or death sentencing decisions and to evaluate the role or influence of Florida's statutory aggravating and mitigating considerations on their decisions. A majority of the jurors interviewed (35 of 54) said that Florida's statutory aggravating and mitigating guidelines had "little or no influence" on their sentencing decisions.¹⁷⁰

Geimer and Amsterdam's analysis of jurors' primary reasons for the punishment they imposed led the researchers to formulate what they called the "operative factors" that were most important in deciding whether or not to impose a death sentence, as opposed to the statutory factors that jurors said were of little or no importance in the sentencing decision.¹⁷¹ The most common operative aggravator (cited by 54 percent of the jurors in death-recommendation cases) was a presumption of death as the appropriate punishment as indicated by "the view that death was to be the punishment for first degree murder, or at least that death was to be presumed appropriate unless [the] defendant could persuade the jury otherwise."¹⁷² Sixty-nine percent of the jurors interviewed in the life-recommendation cases cited lingering doubt about guilt as indicated by "[t]he existence of some degree of doubt about the guilt of the accused."¹⁷³

Under California's balancing statute,¹⁷⁴ which lists "special circumstances" without specifying whether these factors are to be considered as aggravating or mitigating, and without indicating how the factors are to be

166. See Sontag, *supra* note 71, at 90. In two of the cases Sontag studied, the original trial jury had not reached a unanimous sentencing decision and the prosecution chose, as permitted under the California statute, to retry the sentencing phase with a different jury that had not been exposed to the guilt phase. *Id.* at 168.

167. Costanzo, *supra* note 163, at 44-45. In one of the death cases, two co-defendants who were tried jointly were both sentenced to death. The jurors were interviewed about both sentencing decisions. *Id.* at 45.

168. Sentencing verdicts in the California and Oregon cases were rendered between 1986 and 1989, and the interviews were conducted between 1987 and 1989—on average within 10 months or less of the trial. See Haney et al., *supra* note 164, at 155.

169. See *Proffitt v. Florida*, 428 U.S. 242 (1976); see also *supra* notes 2, 16, and accompanying text. The Florida capital statute lists both aggravating and mitigating factors and requires that jurors weigh aggravating against mitigating factors in reaching their sentencing decision. See FLA. STAT. ANN. § 921.141(2). The Florida statute also permits the trial judge to reject or override the jury's sentencing decision. *Id.* § 921.141(3).

170. Geimer & Amsterdam, *supra* note 74, at 24.

171. *Id.* at 26-28, 40-41.

172. *Id.* at 41.

173. *Id.* at 28.

174. See CAL. PENAL CODE ANN. § 190.1 (West 1988).

weighed in making the punishment decision, juries seemed quite confused about how to make the sentencing decision. Sontag found that California juries deliberated with much broader and less coherent agendas, and took approximately three times longer to reach a sentencing verdict than did the Oregon juries studied by Costanzo.¹⁷⁵

Many California jurors tended to search for a key factor that would make the decision clear-cut. They typically narrowed the decision by focusing almost exclusively on the crime and on issues which had already come up in the guilt decision-making phase of the trial. The investigators reported that "fully one-third of our sample refocused the penalty phase inquiry entirely on the nature of the crime itself, and did so in a way that amounted to a *presumption* in favor of death."¹⁷⁶ This tendency to boil the complex question of life or death down to one dispositive point is illustrated in the comments of a few jurors. For example, one death-juror recalled the nature of the penalty decision as follows: "[A]ccording to the instructions, the main thing was, was it premeditated? Did he deliberately, did he intend to kill these people? If so, then we should give him the death penalty. If not, then we should give him life without the possibility of parole."¹⁷⁷ Another juror confused the penalty decision with the legal standard of insanity: "I think the bottom line was, at the time he was committing [the crimes], did he know what he was doing? Did he know right from wrong? That's the whole thing."¹⁷⁸

Oregon's Texas-like directed statute¹⁷⁹ makes the defendant's life or death sentence turn almost exclusively upon the jurors' answer to a single question: "[w]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹⁸⁰ Oregon juries, compared to those in California, appeared more coherent in their decision-making but were much more constricted in the range of information they considered.¹⁸¹ The directed statutes used in Oregon and Texas have been charged with discouraging the presentation and consideration of mitigating evidence.¹⁸² In this connection, Costanzo reported that

175. Haney et al., *supra* note 164, at 160-62.

176. *Id.* at 162 (emphasis in original).

177. *Id.* (alteration in original) (quoting a California juror).

178. *Id.* (alteration in original) (quoting a California juror).

179. See OR. REV. STAT. § 163.150 (1993).

180. *Id.* § 163.150(1)(b)(B). The Oregon statute at the time of Costanzo's study (and as it currently exists), like the Texas statute approved in *Jurek*, also made the death sentence contingent on affirmative answers to two additional questions: "Was the killing unreasonable in response to the provocation?" and "Was it deliberate?" See *id.* § 163.150(1)(b)(A), (C). Yet, the guilt decision also requires affirmative answers to the latter two questions. Thus, in principle, the issue of future dangerousness is the only open question at the sentencing phase of the trial. As in Texas, jurors' answers have been interpreted to incorporate a consideration of mitigation, although as in Texas, the Oregon statute was revised in 1989 to make it explicit that the answer to this question should take account of mitigation. See *id.* § 163.150(1)(b)(D), (c); see also *State v. Wagner*, 786 P.2d 93 (Or. 1990).

181. Haney et al., *supra* note 164, at 160; see also Costanzo, *supra* note 163, at 102-11.

182. See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (overturning a death sentence imposed under the Texas statute). In an earlier case challenging the Texas sentencing procedure, the Supreme Court specifically acknowledged the possibility that in certain types of cases these questions might overlook

although most jurors said there was nothing more they would like to have heard about in deciding on the punishment, many of their comments underscored the narrowing effect of the directed statute on the range of issues they considered: “We just had to stick to those four [sic] basic criteria. We couldn’t deviate with this mitigating circumstance, or testimony of people that had spoken on his behalf or against him. We just had to go by those guidelines that they give you when you make that decision.”¹⁸³

Oregon jurors relied upon the sentencing instructions not only to narrow the scope of the evidence they considered but also to minimize their responsibility for the outcome of their deliberations:

“We are not sentencing him to death—we are just answering these questions. We talked about it. ‘We are just answering these questions’—to get a clear mind so as not to feel guilty that I sentenced him to die. That’s how the law has it—just answer these questions.”¹⁸⁴

Oregon jurors also generally underestimated how long convicted defendants who were not given the death penalty would spend in prison before returning to society, and fully one-half of the Oregon jurors did not believe that the death penalty would actually be carried out.¹⁸⁵

Concerning both the California and Oregon studies, the investigators observed that “there was a tendency among jurors from both samples to shift or abdicate responsibility for the ultimate decision—to ‘the law,’ to the judge, or to the legal instructions—rather than to grapple personally with the life and death consequences of the verdicts they were called upon to render.”¹⁸⁶ In addition, the researchers concluded:

Capital penalty instructions fail to acknowledge (let alone clearly frame or carefully guide) the inherently moral nature of the task that they direct jurors to undertake. They seem to imply that death sentencing involves nothing more than simple accounting, an adding up of the pluses and minuses on the balance sheet of someone’s life.¹⁸⁷

These studies raise serious questions about the operation of the guided discretion statutes in these states and point to the need for a more extensive and more rigorous study of the exercise of capital discretion. The CJP seeks to build upon this work, to develop more systematic and scientifically reliable interview data on jury sentencing decisions, to see whether and in what ways various elements of arbitrariness enter and affect these sentencing decisions, and to assess the extent to which such arbitrariness is present under the various *Gregg*-, *Proffitt*-, and *Jurek*-inspired statutory guidelines.

constitutionally required mitigation. But it concluded that a jury operating under the special issues framework “[is] likely to weigh mitigating evidence as it formulates these answers to the three questions in a manner similar to that employed by capital juries in ‘pure balancing states.’” *Franklin v. Lynaugh*, 487 U.S. 164, 182 n.12 (1988).

183. *Haney et al.*, *supra* note 164, at 165-66 (quoting an Oregon juror).

184. *Id.* at 166-67 (quoting an Oregon juror).

185. *Id.* at 170.

186. *Id.* at 160.

187. *Id.* at 172.

III. THE CAPITAL JURY PROJECT

A. General Objectives

The common effort of the CJP research team and the independent work of the respective investigators is guided by the following three general objectives:

1. To examine and systematically describe jurors' exercise of capital sentencing discretion;
2. To identify the sources and assess the extent of arbitrariness in jurors' exercise of capital discretion; and
3. To assess the efficacy of the principal forms of capital statutes in controlling arbitrariness in capital sentencing.

B. Project Design and Organization

The Capital Jury Project is organized as a consortium of university-based investigators specializing in the analysis of data collected in their respective states and collaborating to address the objectives of the Project. For comparison across states, the research is based on a common core of data collected from the participating states. State-specific data are used to address particular issues of interest in the respective states.

Lengthy, in-person interviews with capital jurors are the chief source of data for this research. The investigators cooperatively developed a core juror interview instrument. They enhanced the use of this instrument in their respective states by adding to the information gathered in the core interviews, conducting additional interviews in selected cases of special interest, and incorporating additional case-specific data from other sources.

Advanced law and/or social science students working under the supervision of the various faculty investigators carried out much of the interviewing and other data collection in the respective states. All jurors selected for interviews are guaranteed confidentiality and offered twenty dollars as an incentive for their participation. The preparation of the interview data for state-level and project-wide analyses is being carried out at Northeastern University.

1. Sampling Plan

The study incorporates a three-stage sampling design. First, states representing the principal variations in guided discretion capital statutes were chosen. Then, within each state, full capital trials since 1988 with both guilt and sentencing phases were selected in equal numbers to provide balanced coverage of cases that resulted in life and death sentences. Finally, a minimum of four randomly selected jurors from each case are being interviewed.

a. State Sample

The participating states were selected in order to represent the principal types of, and distinctions among, guided discretion capital statutes.¹⁸⁸ Priority has been given to states with a sufficient volume of capital trials to meet case sampling quotas¹⁸⁹ and to states that would enhance the regional diversification of the sample. University-based law and social science faculty members with research interests in this area were identified and recruited to serve as the chief investigators for the participating states.

The first eight participating states¹⁹⁰ were selected to provide coverage of threshold, balancing, and directed statutes, and to include statutes with narrow, as well as traditional, definitions of capital murder.¹⁹¹ Four additional states¹⁹² were selected one year later to enhance statutory coverage and representativeness.¹⁹³ Two additional states¹⁹⁴ subsequently joined the project with independent funding to cover the costs of data collection. As indicated in Table 1 below, the fourteen states currently participating in the CJP include states with threshold, balancing, and directed statutes; advisory and binding sentencing variations of the balancing model; and narrow as well as traditional statutory definitions of capital murder.¹⁹⁵

188. See *supra* notes 23-29 and accompanying text.

189. See *infra* part III.B.1.b.

190. The initial eight states that were the focus of the CJP were: California, Florida, Indiana, Kentucky, New Jersey, South Carolina, Texas, and Virginia. Pennsylvania was substituted for New Jersey in the original eight-state sample shortly after the sampling began. In New Jersey, the investigator for that state discovered that there had been only five death cases during the sample period—one-third of the trial sample quota for such cases. See *infra* part III.B.1.b. New Jersey was reinstated in the CJP in 1994 with independent support and a revised case sampling plan.

191. Compare GA. CODE ANN. § 17-10-30 (employing a "traditional" definition of capital murder as requiring a finding of at least one of several enumerated aggravating factors during the sentencing phase) with TEX. PENAL CODE ANN. § 12.31 (defining capital murder "narrowly" by requiring the jury at the guilt phase of the trial to find that the killing took place under at least one of eight aggravating circumstances).

192. The next four states added to the CJP were Georgia, Louisiana, North Carolina, and Tennessee. Prospective investigators in these states were initially contacted shortly after the CJP began as a hedge against the possible loss of states in the original sample, and to enhance the coverage of balancing statutes. These states were subsequently added to the CJP with supplemental funding from the National Science Foundation.

193. More specifically, adding Louisiana, North Carolina, and Tennessee enhanced the CJP's coverage of the most common forms of guided discretion statutes (*i.e.*, balancing statutes under which the jury's sentence is binding on the trial judge), and improved the regional representativeness of these balancing statutes in the CJP.

194. Alabama and New Jersey were the last two states added to the CJP. When New Jersey rejoined the CJP, the sample time frame and the initial case quota were set aside. Both of these states began with twenty-trial and eighty-juror target samples.

195. See *supra* part I.A. See generally sources cited *supra* note 23.

TABLE 1¹⁹⁶

DEFINITION OF CAPITAL HOMICIDE	FORMS OF GUIDED DISCRETION			
	THRESHOLD	BALANCING WITH SENTENCING		DIRECTED
		ADVISORY	BINDING	
NARROW	VA	AL**	CA, LA*	TX
TRADITIONAL	GA* KY, SC	FL, IN	NC*, NJ** PA, TN*	

In terms of geographical representation, there are Western, Southwestern, Midwestern, Mid-Atlantic, Border, and a spread of Southern states included in the sample. Sampling a relatively large number of states enhances both the geographical diversity and statutory variation in the data which, in turn, provides greater flexibility in exploring other statutory and procedural differences among states (for example, differences in the statutory and non-statutory aggravators that jurors may, must, or must not consider; differences in the instructions or procedures jurors are asked to follow in deciding on the sentence). Having a large sample of states also makes the findings less sensitive to idiosyncratic state-specific influences.¹⁹⁷

b. Trial Samples

In each state, a sample of full capital murder trials that went through both the guilt and punishment phases is drawn from all such trials conducted in that state since January, 1988.¹⁹⁸ For the original eight states, the target sample is thirty trials—fifteen in which the jury voted for the death penalty,

196. The four states denoted by an asterisk (*) were added in the second year of the CJP. The two states denoted by two asterisks (**) were added in the third and fourth years of the CJP.

197. A further advantage of having a relatively large number of participating states is the flexibility it provides in adjusting to the possible failure to complete the data collection, or any other unforeseen obstacles to the research in a given state. Thus, for example, interviews not completed in one state could be proportionally reallocated to other states to preserve statutory and/or geographical representation.

198. At the time of sample selection in a few states, there had not been the requisite number of full capital trials since January, 1988, in which life or death jury verdicts had been handed down. In these instances, a few cases tried prior to the beginning of the sampling period were included in the samples. For example, there were fewer than 15 death cases in Kentucky and fewer than 15 life cases in Virginia at the time the case samples were drawn for these states. Thus, the current Kentucky sample includes two pre-1988 trials, one of which occurred in 1986 and the other in 1987. See Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1189 (1995). In Virginia, recent cases are being added to the sample in order to meet the quota of 15 life cases. In both Kentucky and Virginia, consideration was given to oversampling jurors from the underrepresented trials in order to reach the overall quota of juror interviews. See *supra* part III.B.1.c.

and fifteen in which it did not.¹⁹⁹ For the remaining six states, the target sample is twenty trials—ten with death and ten with life imprisonment verdicts. In selecting trials for the sample, investigators have generally favored more recent cases on the assumption that the more recent the experience, the more detailed and reliable will be the jurors' recall. Investigators have occasionally departed from this general rule, however, to enhance the diversity of the sample,²⁰⁰ the independence among case characteristics,²⁰¹ or the comparability of the life and death subsamples.²⁰² In a few instances, investigators have randomly sampled the full inventory of capital trials, or the life and the death cases separately, since 1988.²⁰³

The sample of recent capital trials is drawn from all capital murder trials occurring within a state, except in California, Florida, and Texas. In these three states, which are characterized by long distances within state boundaries and a large volume of capital trials, the sampling of capital trials was restricted to a specific area within the state. In California, the cases come from the middle one-third of the state bounded roughly by San Francisco, Sacramento, and Fresno. In Florida, the cases come from the northern and central portion of the state—the area north of Tampa including the Panhandle. The Texas sample comes from the south-central quadrant—which includes Austin, Houston, San Antonio, and rural counties within this area. The data collection has been limited to these areas within the states in order to conserve the time and expense of data collection. The number of cases within these areas is sufficient for sampling purposes.²⁰⁴

199. In Florida and Indiana, where judges have the final sentencing authority and occasionally override the jury's sentencing verdict, trials were sampled to achieve a balance between life and death jury verdicts, rather than judge-imposed life or death sentences, since the focus of the CJP is on the decision-making of jurors rather than judges.

200. For example, if most capital trials in a given state take place in urban settings, those in rural locations might be oversampled (with the likely effect that earlier cases are included) to facilitate the analysis of differences in the decision-making of jurors in both rural and urban settings. Alternatively, if such cases are less common in some regionally or culturally distinct areas of a state, trials from these areas might be oversampled (again with the likely effect of including earlier cases) to provide sufficient representation for analysis. For an example of such sampling, see Sandys, *supra* note 198, at 1189.

201. As an example, if most capital trials for felony-type murders are held in urban settings, the sample of capital trials might overrepresent felony-type murder cases occurring in rural areas to increase opportunities for comparing jurors from cases different in one respect (rural/urban setting), but alike in another (felony-type murder). This would facilitate an examination of whether the thinking of jurors about this particular type of crime is different in the two settings.

202. For example, this might entail selecting capital trials so as to match the distributions of life and death subsamples in terms of several characteristics, such as region within the state, urban versus rural setting, and type of offense (e.g., killings that were, and were not, committed in the course of another felony). Alternatively, it might involve selecting life and death cases in "like pairs" where each pair of cases is matched insofar as possible in respects other than sentencing outcome. This strategy of matching pairs of life and death cases on independent variables would improve the chances of detecting factors that influence the sentencing decision in otherwise quite similar cases. The "like-pairs" strategy was employed in the sampling of cases in North Carolina. See Luginbuhl & Howe, *supra* note 72.

203. For instance, random sampling within categories of city size was used to obtain the Florida sample of capital trials. See Julie Goetz, *The Decision Making of Capital Jurors in Florida: The Role of Extra Legal Factors 91-92* (1995) (unpublished Ph.D. dissertation, Florida State University (Tallahassee)) (copy on file with author).

204. The representativeness of all sampled cases, and of the life and death subsamples, can be assessed with information from an inventory of all capital trials held in the state (or in the target areas within California, Florida, and Texas) since 1988. Such an inventory was prepared for sampling

c. Juror Samples

CJP investigators attempt to interview four randomly selected jurors from each trial. Thus, in states where the target sample is thirty trials, a total of 120 juror interviews are conducted, while eighty interviews are conducted in those states with a twenty-trial sample. Investigators have conducted additional interviews (above the four-per-case minimum) in trials of special interest, particularly where the initial interviews left some questions unanswered or raised further questions. Strict procedures are followed to ensure randomness in the selection of jurors and to minimize selection bias in replacing jurors who cannot be located or who do not agree to be interviewed.²⁰⁵ As noted above, jurors are assured that their responses will be kept strictly confidential, and are provided with a twenty-dollar payment for their participation.

The four randomly selected jurors per trial are not, of course, a sufficient sample for generalizing about the experiences of all twelve jurors in a given case. These four jurors can, however, be relied upon for "contextual" data, especially on matters of fact (for example, the sequence of witnesses, or the first ballot vote for and against a death sentence) where agreement can be the gauge of reliability. Thus, while the chief focus is on the decision-making behavior of the individual juror as the unit of analysis, the individual level analysis can be enhanced with contextual information gained by aggregating or "triangulating" the data from all four jurors in a case.

2. Data Collection

As previously noted, a common core of data from the participating states is being collected in order to make comparisons across states, and state-specific data is being gathered to address issues of particular interest within states. While juror interviews are the principal source of data for our analyses, trial transcripts and interviews with judges, prosecutors, and defense attorneys are also being used by investigators for research purposes.

purposes by the investigator in each state. For each capital trial, the inventory included the sentencing verdict, regional location, rural versus urban setting within the state, felony killings versus non-felony-type killings, and race of the defendant and victim(s), insofar as such information could be obtained.

205. To obtain a representative sample of four jurors, the investigators adopted the following systematic procedure for picking the initial four jurors and replacing any juror who could not be reached or who refused to participate: (1) jurors were numbered from 1 to 12 corresponding to the order in which they appeared on the jury list; (2) a starting point was picked at random, to obviate any bias that might be associated with the method by which the jurors were listed (*e.g.*, the foreperson was always listed first or last); (3) from the starting point on the list, successive jurors (where #1 follows #12 in the sequence) were assigned the following sample status designations: A1 (starting point), B1 (next juror), C1 (next), A2 (next), B2, C2, A3-C3, A4-C4 (last juror in the sequence); (4) Panel A jurors (designated A1 through A4) were the initial four-juror sample contacted for interviews. Up to five attempts were made at different times of the day over a three-day period to contact a given juror in order to arrange an interview; (5) any Panel A juror who did not participate was replaced with the corresponding Panel B juror (if that failed after five attempts, the Panel A juror was replaced with the corresponding Panel C juror). If both replacement efforts failed, the investigator continued by moving to the next Panel B juror in the sequence, the corresponding Panel C juror, the next Panel B juror, and so on.

a. Juror Interviews

The interviews with the sample jurors are designed to chronicle the jurors' experiences and thinking over the course of the trial, to identify the points at which various influences (including aspects of arbitrariness) may come into play, and to reveal the ways in which jurors reach their sentencing decisions. The interviews are conducted using a fifty-page instrument²⁰⁶ that was the product of six revisions, two pretests, and two meetings of the participating investigators.²⁰⁷ Some twenty project memoranda were also circulated on matters such as instrument development, pretesting procedures, interviewing techniques, feedback on interviewing performance, and related matters.

Once the jurors in the sample have been identified by name and address, the investigator sends them a letter describing the research, promising confidentiality, offering the twenty-dollar payment, and asking for their participation, if randomly chosen as one of the four jurors to be interviewed. An interviewer follows up these letters with phone calls to schedule interviews with the four randomly selected jurors, to arrange replacements for any of these four who do not participate, and to inform the others that they were not chosen to be interviewed. The interviews typically last at least three hours²⁰⁸ and are

206. The interview instrument is a mixture of both structured questions with designated response options and open-ended questions that occasionally invite lengthy narrative descriptions of issues such as the crime and the jury's sentencing deliberations. It contains many explicit interviewing instructions. All questions and response options were read verbatim by the interviewer, and open-ended questions were typically accompanied by instructions about areas or issues to be probed. To convey both the general orientation of these interviews and to identify the types of problems and difficulties that some interviewers have experienced, a 15-page *Interviewers' Guide* was prepared that emphasizes the importance of encouraging respondents to take as much time as they need to relate everything they regard as relevant. The investigators in the various states conducted training sessions for interviewers that included a detailed review of the interview instrument and its embedded instructions, a thorough discussion of the *Interviewers' Guide*, one or more mock interviews with role playing, and the use of the tape recordings of completed interviews to illustrate both effective and ineffective interviewing techniques.

207. Project meetings devoted primarily to instrument development were held July 14-15, 1990, at the Washington and Lee University School of Law, and November 11, 1991, at the Institute of Criminology and Criminal Justice, University of Maryland.

208. The original plans called for a two-hour juror interview, with one hour devoted to a common core of questions to be used in all states. The other hour was available for questions of particular interest to each investigator in his or her own state. Our instrument development efforts, involving meetings, pretests, and numerous contacts by phone and e-mail, made the various investigators aware that many of their own particular interests were shared by the others and led to a consensus that all would benefit by expanding the common core of questions to cover more of these shared interests. Our two pretests further indicated that jurors were willing—indeed eager—to give us very lengthy interviews on what many described in terms such as “the most important experience of my life.” We were extremely gratified at the readiness of respondents to provide us with detailed accounts of their experiences.

These factors led us to extend the time originally planned for the interview by roughly one hour. Moreover, the jurors' lengthy accounts of their experiences and their thinking about it, as revealed in the pretests, quickly persuaded us of the need to tape record the interviews, absent objections from the respondents. See *infra* note 210. While most juror interviews have taken about three hours, a few have lasted more than seven hours. In Kentucky, for example, the first 30 interviews averaged three hours and forty minutes; when the six longest interviews were excluded, the interviews averaged over three hours. See Sandys, *supra* note 198, at 1190.

usually conducted in the home of the respondent.²⁰⁹ With the juror's permission, the interview is tape recorded.²¹⁰ The jurors have generally been quite forthcoming and candid in their responses; most have readily understood the questions and have been responsive to probes for further details of their thinking and behavior.

b. Additional Data Sources

In some states, investigators are also working with two additional sources of data: the trial transcripts of their sample trials, and data from interviews with judges, prosecutors, and defense attorneys in these cases. The trial transcripts provide a verbatim record of attorneys' motions and arguments, judges' rulings, witness' testimony, and exhibits. They also indicate how the judge instructed the jury to make its sentencing decision and whether the jury asked the judge for further instruction during sentencing deliberation. Where jurors claim that the evidence was especially persuasive or confusing, the transcripts may be used to understand what produced these reactions. Thus, the trial transcripts are particularly useful in ascertaining the nature and strength of the evidence presented at both the guilt and sentencing phases of the trial, in evaluating jurors' recall and/or understanding of the evidence, arguments, and jury instructions, and in resolving disagreements in the accounts jurors give regarding what actually transpired during the trial.

Interviews with judges, prosecutors, and defense attorneys have typically addressed the trial strategies of the prosecution and defense, the nature and strength of the evidence, and their impressions of the jury and its verdict. These interviews are conducted to help understand how prosecutors and defense attorneys attempt to influence the thinking of jurors. Specifically, interviewers seek to learn how consciously and prominently prosecutors and defense attorneys advance certain themes in the organization and presentation of evidence and in the formulation of opening and closing arguments.

209. The length of the interviews and the premium on avoiding interruptions has sometimes led to scheduling them at places other than the respondent's home, such as the workplace, restaurants, or libraries. The interviews are typically completed in a single visit, although a few have required a second sitting or a follow-up phone call.

210. Our pretests revealed that many jurors wished to explain or elaborate on their answers to specific questions and to "unburden" themselves with extended accounts of matters they felt were important for understanding their thinking or actions at various points in the trial. Their descriptions in these interviews of the events and dynamics of the trial and their detailed accounts of their experiences and reactions as jurors are remarkable and invaluable for purposes of qualitative analysis. This persuaded us that tape recording the juror interviews (with their permission) was essential in order to capture the full richness and detail of their open-ended responses. These tapes have also proved extremely valuable in our data preparation activities, especially for purposes of checking the accuracy and completeness of the interviewers' written entries on the instrument and for providing us with feedback on the performance of individual interviewers. We have found that roughly four out of every five jurors are willing to have their interview tape recorded.

c. Current Status of the Data Collection

The CJP data collection is ongoing. Expanding the sample from eight to fourteen states, lengthening the juror interviews from two to three hours, and transcribing of tape recorded interviews have generally added to the time needed for the collection and preparation of the data. The target number of juror interviews has been completed (or nearly so) in seven states—one-half of those presently participating in the Project; the number of interviews that have already been conducted in two of these states well exceeds the target sample. The interviews from these seven states have been coded and computerized for analysis, and the analysis-ready data have been returned to the respective investigators. Progress has been slower for various reasons in the other states,²¹¹ but it is anticipated that the original interviewing targets will be met in most of them. The acquisition of trial transcripts and interviews with judges and attorneys has yet to be completed in most states.

C. Dissemination of Findings

The CJP investigators began working with the qualitative interview data from specific trials—the open-ended portions of the juror interviews that provide extensive narrative accounts of jurors' experiences and decision-making—soon after the interviews for some of the cases were completed.²¹² The statistical analyses of the quantitative data—the many structured questions about jurors' thinking and reactions to the trial experience—must necessarily await the accumulation of sufficient numbers of interviews to permit statistically reliable inferences from the data. As such, statistical analyses have appeared only for the first several states where the target number of juror interviews have been completed.²¹³ The interest of scholars and the legal community in the CJP is evident in the attention this research has

211. Some investigators have been delayed by difficulties in tracking down the full inventory of capital trials since 1988 and obtaining juror lists for sampling purposes. In addition, the investigators themselves have varied in the time they could commit to the project. The summer months have proven to be the best time for organized interviewing efforts, especially for the investigators who are law faculty members or who employ law students as interviewers.

212. Some early qualitative results were reported in Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 IND. L.J. 1333 (1993).

213. The structured interview data from California, Florida, and South Carolina—the first three states to complete the target sample of juror interviews—have received the most statistical attention. Limited statistical analyses have been performed with the data from all three states. See Bowers, *supra* note 22, at 162-71. More detailed analyses have been conducted with the data from South Carolina and Florida. See Eisenberg & Wells, *supra* note 72 (discussing the South Carolina study); Goetz, *supra* note 203 (discussing the study of Florida jurors).

attracted at professional meetings,²¹⁴ and in citations to the first published research articles from the project in a recent Supreme Court decision.²¹⁵

The articles that follow are an extension of these developments. They represent research in progress. These articles are based on results obtained or updated just as the data collection in the state was completed, or as sampling targets were in sight. In all instances, the articles represent extensions and refinements of analyses presented at earlier professional meetings.²¹⁶ Three of these papers draw heavily on the rich narrative reports and responses of jurors to describe their thinking about the crimes for which they must punish,²¹⁷ to identify the influences that make them change their minds (or at least their votes), about what the punishment should be,²¹⁸ and to assess their readiness to shoulder the responsibility for their life or death decisions;²¹⁹ one paper relies foremost on jurors' responses to the structured questions to learn how well jurors understand the instructions for deciding what punishment should be imposed.²²⁰

The final Part of this Article will also extend the existing research by previewing some highlights from the responses of jurors to the structured interview questions in the seven states where the target number of juror interviews has now been, or is about to be, completed. It examines questions that bear on the issues raised in the papers that follow and illustrates the potential interplay between the qualitative and quantitative data. Its purpose is partially to set the stage for the analyses that follow, partially to illustrate how the quantitative and qualitative data can complement one another, and partially to demonstrate the promise of more refined statistical analyses that will follow.

IV. A PRELIMINARY LOOK AT THE QUANTITATIVE DATA

Now that CJP investigators have largely met the target number of juror interviews in seven states, we are in a position to take an early look at the responses of a sizable sample of jurors to the structured interview questions. I have chosen results that contain some surprises and raise questions that will be the focus of more detailed upcoming analyses of these data. This early look at jurors' responses to a few selected questions will be limited to simple

214. Panel sessions devoted to CJP have been held at the annual meetings of the Law and Society Association and the American Society of Criminology since 1991. At these sessions, CJP investigators have reviewed and discussed project design issues, presented early findings, and prepared some working papers for circulation.

215. Two published reports of findings from these data were cited by the Supreme Court in *Simmons v. South Carolina*, 114 S. Ct. 2187, 2193 (1994) (citing Eisenberg & Wells, *supra* note 72); *id.* at 2197 n.9 (citing Bowers, *supra* note 22).

216. References to these presentations appear in the first footnote of each paper.

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

218. See Sandys, *supra* note 198.

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

220. See Luginbuhl & Howe, *supra* note 72.

frequency distributions and confined to jurors from the seven states where the target number of juror interviews has been, or soon will be, met.²²¹

A. Recall

During the interviews, it was common for the jurors to comment that serving as a capital juror was a "truly memorable experience," something they "would never forget," because, as some added, "it was the most important thing I've ever done." We can evaluate how well jurors actually remember various aspects of this experience in sophisticated ways with information from trial transcripts and other case records, through the responses of the other jurors from the same trial, and by the internal consistency of a juror's responses throughout the interview. A useful starting point, however, is to ask the jurors directly how well they remember the successive stages of the experience, as we did in the following question:

How well do you remember each of the following stages of the trial?

TABLE 2

	Very Well	Fairly Well	Not Well	Not at All	(N) of Cases
The Selection of the Jury	67.6%	29.1%	3.0%	0.3%	(667)
Hearing Evidence About [the Defendant's] Guilt	59.0%	38.2%	2.6%	0.2%	(659)
Jury Deliberations About [the Defendant's] Guilt	67.7%	30.8%	1.4%	0.2%	(647)
Hearing Evidence About [the Defendant's] Punishment	55.0%	37.5%	6.8%	0.8%	(662)
Jury Deliberations About Defendant's Punishment	70.3%	27.2%	2.1%	0.3%	(661)

221. The tabulations that follow are based on a total of 684 interviews conducted with capital jurors in Alabama, California, Florida, Georgia, Kentucky, North Carolina, and South Carolina. The percentages shown in the tables are based on all valid responses to the respective questions, excluding "no answers," "don't know," or missing responses. The number of valid responses to each question is shown in parentheses under the heading "(N) of Cases."

Most jurors say that they remember each stage of the trial "very well"; virtually all of the remaining jurors say that they remember each stage "fairly well." At both the guilt and punishment phases of the trial, jurors appear to remember jury deliberations somewhat better than they do the presentation of evidence; they remember punishment deliberations best and evidence about punishment least. Yet, none of these variations are departures of more than ten percentage points from a relatively consistent 60% who claimed that they remember each stage "very well" and another 35% who say that they remember it at least "fairly well." In more refined analyses, we can, of course, concentrate on the responses of those whose recall is superior, as indicated by these self reports or by more sophisticated objective indications. For now, we examine the responses of all jurors from these seven states.

B. The Guilt Phase

Jurors' responses to questions about the guilt phase of the trial suggest that many of them began considering aggravation and punishment while they were still deciding on the defendant's guilt, and indeed, that many began to take a stand on what the defendant's punishment should be well before being exposed to the statutory guidelines for this decision. We see these indications in their responses to questions about topics they discussed during the jury's guilt deliberations and in their answers to a question about what they thought the punishment should be prior to the punishment phase of the trial.

1. Considerations of Aggravation and Punishment

When the questioning turned to the jury's deliberations at the guilt phase of the trial, we asked jurors about a number of specific topics they might have discussed, including some that are legally irrelevant or impermissible in determining guilt, such as the defendant's likely future dangerousness²²² and jurors' feelings about the appropriate punishment—considerations explicitly reserved for the later punishment phase of the trial. Specifically, we asked:

222. Some aggravating factors are relevant to guilt deliberations in states with "narrowing statutes" where defendants must be convicted of aggravated murder to be eligible for the death penalty. See Table I, *supra* p. 1079. The defendant's future dangerousness, however, is not an element of aggravated murder and, hence, is not a relevant aggravating consideration at the guilt stage of the trial under any current death penalty statute.

How much did the discussion [about the defendant's guilt] among the jurors focus on the following topics?

TABLE 3

	Great Deal	Fair Amount	Not Much	Not at all	(N) of Cases
Defendant's Dangerousness if Ever Back in Society	35.7%	26.4%	19.0%	18.9%	(641)
Juror's Feelings About the Right Punishment	49.7%	15.2%	11.0%	24.1%	(630)

Jurors were evidently concerned with the defendant's future dangerousness and the punishment to be imposed during their deliberation on the defendant's guilt. More than six out of ten said the jury's guilt deliberations focused on each of these topics a "great deal" or a "fair amount." One-half of the jurors said that there was a great deal of discussion about the "right punishment."

Conscious that jurors might not clearly distinguish between the guilt and punishment deliberations in response to this question,²²³ and that some topics discussed during guilt deliberations might not have actually figured in the decision-making about guilt, we asked a further question explicitly worded to focus the juror's attention exclusively on the defendant's punishment as a relevant consideration in the jury's decision about the defendant's guilt:

In deciding guilt, did jurors talk about whether or not the defendant would, or should, get the death penalty?

TABLE 4

Yes	No	(N) of Cases
37.2%	62.8%	(624)

Here, too, a sizable number of jurors recall that in deciding guilt, there was explicit discussion of what the defendant's punishment would or should be. Obviously, some of those who said punishment was discussed a great deal

223. In subsequent analyses, we will be able to use the responses of all four jurors from a trial for a more reliable indication of the jury's behavior. Their agreement will be a more reliable indication of the objective reality than the report of any one juror, and such agreement can be further weighted by the reliability of the individual juror's responses as noted *supra* at Part IV.A.

during guilt deliberations (in response to the question analyzed in Table 3) were unwilling to say that it actually figured in the decision-making about guilt (in response to the more focused question analyzed in Table 4). But the fact that nearly four out of ten claimed that jurors talked about what the punishment would or should be in deciding guilt indicates that the improper consideration of punishment played a role in many of these capital trials.²²⁴

2. Timing of the Punishment Decision

In addition to these questions about what the jury did as a group, CJP investigators also asked the individual jurors about their own personal thinking and decision-making with respect to the defendant's punishment prior to the sentencing phase of the trial. In particular, we asked whether they had come to a decision on punishment, what they thought the punishment should be, and how convinced they were of their decision. The first question and their responses were as follows:

After the jury found [defendant's name] guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think the defendant should be given . . .

TABLE 5

Death Sentence?	Life Sentence?	Undecided	(N) of Cases
29.5%	20.7%	49.8%	(634)

One-half of the jurors were undecided, but the other one-half said that they had chosen (more or less firmly) between a life or death sentence at this stage of the trial. A second follow-up question, addressed only to those who, at this stage, thought that the defendant should be given a life or death sentence, asked:

224. Whether the chief role of such punishment discussions was to enlist support for a capital murder conviction by underscoring the abhorrence of the crime and the determination to see the defendant subjected to the ultimate punishment the law can impose, to confirm a bargain for a life sentence in exchange for a capital murder conviction, or for some other reason, must await a detailed analysis of the narrative comments and clarification which jurors offered in connection with their answers to this structured question.

How strongly did you think so?

TABLE 6

Absolutely Convinced	Pretty Sure	Not Too Sure	(N) of Cases
64.6%	30.5%	4.8%	(311)

Thus, most of the jurors who had decided what the punishment should be before the sentencing phase of the trial were "absolutely convinced" of their punishment decision, and nearly all the rest were at least "pretty sure." In effect, it appears that three out of ten jurors had essentially made up their minds, and another two in ten were leaning one way or the other, before hearing from the judge about the standards that should guide their sentencing decisions.²²⁵

C. The Punishment Phase

The interviews, both the structured questions and the open-ended probes, focused primarily on the sentencing phase of the trial. We designed our questions to reveal how individual jurors and the jury as a group reached their sentencing decisions. The following is a review of jurors' responses to a few of the structured questions that deal with sentencing guidelines, jury instructions, and responsibility for the punishment imposed.

1. Guidelines and Instructions

If statutory standards are to guide the exercise of sentencing discretion, they must, of course, be understood and applied in the course of actually making the sentencing decision. Among the various questions we asked to tap jurors' understanding of sentencing guidelines, the responses to the question regarding the substance of the statutory standards were notably unsettling. Beforehand, let me say that none of the seven states for which juror responses are tabulated has guidelines that "require" the death penalty to be imposed upon a finding of aggravation.²²⁶ This question about jurors' understanding of statutory guidelines asked:

225. See KALVEN & ZEISEL, *supra* note 103, at 486 (finding that many jurors make up their minds about the defendant's guilt before the jury begins its guilt deliberations). Kalven and Zeisel draw this inference from the power of the first jury vote to predict the final verdict to convict or acquit. The first jury vote during guilt deliberations comes, of course, after hearing the guilt evidence and the judge's instructions to the jury for deciding guilt. *Id.* Here, however, the evidence pertains to the punishment decision before punishment deliberations, before the judge's sentencing instructions, and before the presentation of evidence about what the punishment should be.

226. Although "directed" statutes, see *supra* notes 28-29 and accompanying text, might be interpreted to require the death penalty once jurors make certain findings of fact, none of the seven states examined here employ such statutes.

After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that the

...

TABLE 7

	Yes	No	Undecided	(N) of Cases
Defendant's Conduct Was Heinous, Vile, or Depraved	40.9%	57.7%	1.4%	(655)
Defendant Would Be Dangerous in the Future	31.9%	66.6%	1.5%	(652)

Contrary to the laws of their states, four out of ten capital jurors believed that they were required to impose the death penalty if they found that the crime was heinous, vile, or depraved, and three out of ten thought that the death penalty was required if they found that the defendant would be dangerous in the future. This misunderstanding of statutory standards obviously biases the sentencing decision in favor of death to the extent that jurors do, in fact, find that the evidence proves that the crime was heinous, vile, or depraved, or that the defendant would be dangerous. The jurors' answers to a further question are relevant here:

After hearing all of the evidence [at the punishment phase of the trial], did you believe it proved that the . . .

TABLE 8

	Yes	No	Undecided	(N) of Cases
Defendant's Conduct Was Heinous, Vile, or Depraved	79.8%	15.6%	4.6%	(674)
Defendant Would Be Dangerous in the Future	75.6%	18.0%	6.4%	(672)

Three out of four participating jurors said that the evidence proved that the crime was heinous, vile, or depraved, and that the defendant would be

dangerous in the future.²²⁷ In combination with the percentages of those who believed that the death penalty was required if these factors were proved, it appears that between 21% and 33% of the jurors mistakenly believed that the state's proof of heinousness required them to vote for the death penalty. In addition, between 8% and 24% of jurors wrongly believed that evidence of the defendant's dangerousness required them to vote in favor of death.²²⁸

This death-biased misunderstanding of sentencing guidelines at the punishment phase of the trial is not necessarily independent of premature decision-making about punishment at the guilt phase; indeed, the two may go hand in hand. Note that believing the death penalty is required when aggravation is proven has the effect of discounting or dismissing mitigation—the fundamentally new concern or agentic shift of the punishment phase of the trial. An early punishment decision based largely on evidence of aggravation developed at the guilt phase of the trial is, thus, insulated from later evidence and arguments for a life sentence. For jurors who became absolutely convinced or even pretty sure of what the punishment should be before the sentencing phase of the trial, this misunderstanding serves to preserve their premature punishment decisions.

The preceding evidence that many jurors discussed aggravating factors such as dangerousness, and indeed talked about what the punishment should be during guilt deliberations, and that a good many were “absolutely convinced” of what the punishment should be before the punishment phase of the trial, suggests that the statutory guidelines as conveyed in the judge's sentencing instructions may be more of a foil than a guide for the punishment decision. One question CJP researchers asked bears specifically on this issue:

227. There is some evidence that these two factors serve as “catch-all” aggravators that may be used when others do not apply; in particular, the use of the “heinous, vile, atrocious, etc.” aggravator has been found to vary considerably apart from the aggravation of the crime. Bowers & Pierce, *supra* note 79, at 580 n.34; see also BLACK, *supra* note 68, at 29; Dix, *supra* note 68; Rosen, *supra* note 68.

The Court has been of two minds about the so-called “catch-all” aggravators. In *Jurek v. Texas*, it held that Texas' future dangerousness question was broad enough to incorporate considerations of both aggravation and mitigation and thus preserve the constitutionality of a Texas statute that did not otherwise explicitly provide for considerations of mitigation. 428 U.S. 262 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). In *Godfrey v. Georgia*, on the other hand, the Court faulted the application of Georgia's wanton, vile, or heinous aggravator as too vague, thus permitting possibly arbitrary or prejudicial considerations under Georgia's statute, which explicitly calls for the consideration of mitigation without enumerating any such factors. 446 U.S. 420 (1980) (plurality opinion).

228. The minimum estimates are calculated according to the following formula: [% of jurors saying “death required” - (100% - % of jurors saying “evidence proved”)]. The formula for the maximum estimates is as follows: [% of jurors saying “death required” X % of jurors saying “evidence proved”].

Would you say the judge's sentencing instructions to the jury [simply provided a framework for the decision most jurors had already made]?

TABLE 9

Yes	No	(N) of Cases
74.1%	25.9%	(634)

Here, the timing is unambiguous. The perception of at least three out of four jurors is that the judge's instructions to the jury simply provided a framework for a decision already made by most jurors. This suggests that their misunderstanding of what the law requires may be the result of selective perceptions, perhaps tailored to fit the decisions they had already made.

2. Responsibility for the Punishment

One criticism of guided discretion capital statutes is that they tend to allay jurors' sense of responsibility for their life or death sentencing decisions by appearing to provide them with an authoritative formula that yields the "correct" or "required" punishment.²²⁹ We have seen above that a good many jurors have the mistaken impression that the law requires a particular punishment when certain kinds of aggravation are proven. Weisberg has argued that statutory guidelines serve less, if at all, to guide the exercise of sentencing discretion than to diminish jurors' sense of responsibility for the awful punishment they may impose²³⁰—perhaps by displacing it. That is, the punishment appears to be a result of the defendant's crime or what the law

229. This challenge is perhaps best articulated by Robert Weisberg, who argues that the penalty phase juror, deciding whether or not to sentence the defendant to death, is in a position similar to that of the subjects in Stanley Milgram's classic program of research on obedience to authority in which subjects were instructed by an authority figure to inflict "painful" punishment on a "learner" in an adjacent room. Weisberg, *supra* note 48, at 305. Milgram found that his subjects were willing to increase the pain-inducing electric shocks despite the ersatz sounds of their victims suffering, because they attributed responsibility for the pain they were apparently inflicting to the experimenter who devised the research, and not to themselves—they saw themselves as merely the agents of the experimenter who were not responsible for the punishing pain they imposed. Milgram's interpretation of his findings was that, in response to instructions from an authority figure, a moral state is induced which he called an "agentic shift," a state of mind in which a man feels responsible to the authority directing him but feels no responsibility for the content of the actions that the authority prescribes. Morality does not disappear, but acquires a radically different focus. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 132-34 (1974).

230. *See* Weisberg, *supra* note 48, at 343 ("In the very special situation of the criminal courtroom and the death penalty trial, it seems fairly plausible that a lay jury exposed to the mystifying language of legal formality may indeed allow its moral sense to be distorted."). In this view, a jury naturally holds values against taking life, or harming another, just as Milgram's subjects did. But these values can be subordinated by features of the situation in which an authority figure is perceived as giving orders. Weisberg postulates that the modern penalty jury is given instructions which provide no real guidance, but have the appearance of legal rules. These pseudo-instructions dilute the jury's sense of responsibility, rather than guiding discretion. *Id.*

prescribes rather than the decision-making of the juror himself.²³¹ To see where capital jurors located responsibility for punishment, we asked them to:

Rank the following from "most" through "least" responsible for [the defendant's] punishment. [Give 1 for "most" through 5 for "least" responsible.]

TABLE 10²³²

	Most <-----> Least					(N=)
	1	2	3	4	5	
Defendant - Because of his conduct determined punishment	46.1%	10.7%	6.4%	7.6%	29.1%	(605)
Law - states what punishment applies	34.4%	39.2%	7.8%	11.2%	7.4%	(605)
Jury - votes for sentence	8.8%	23.3%	38.8%	25.5%	3.6%	(605)
Individual Juror - since jury's decision depends upon the vote of each juror	6.4%	13.7%	26.8%	29.4%	23.6%	(605)
Judge - who imposes the sentence	4.5%	12.9%	20.2%	26.1%	36.4%	(605)

Unmistakably, jurors placed responsibility for the defendant's punishment elsewhere. Eight out of ten jurors feel that the defendant or the law is the most responsible for the defendant's punishment. More jurors believe that the greatest responsibility lies with the defendant than with the law. The idea that the defendant's punishment is his own responsibility may be especially attractive because it blames the culprit for what the jury must do. Note,

231. While it is true that the sane defendant is deemed responsible for his crime and that his/her action would not be a crime except for the criminal code that forbids it, the question of responsibility for the defendant's punishment is a different matter. The criminal sanction is society's response to a particular defendant's crime defined as such by the criminal law; responsibility for it rests squarely on the shoulders of those chosen, authorized, and obligated by society to decide what the punishment should be. Where statutes mandate or require a particular punishment upon conviction, the law might be deemed responsible for the defendant's punishment, although even in this situation, jurors as agents of the law may exercise responsibility in the form of "jury nullification." Robin West has argued that "the defendant should be constitutionally entitled" to "morally responsible decision making" on the part of jurors. Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 87 (1989).

232. The percentages reflected in Table 10 are based only on the responses of the 605 jurors who completed all five parts of the question by correctly assigning ranks to each of the five options, so that the ranks sum to 15.

however, that between one-fourth and one-third of the jurors appear to distinguish between blaming the defendant for his crime and for his punishment; thus, 29.1% of the jurors believed that the defendant is the least responsible of the five named agents for his punishment.

By contrast, only a tiny minority (6.4%) believed that the individual juror was most responsible for the punishment. Only a few more (8.8%) believed that the jury as a body was most responsible. Altogether, only three in twenty (15.2%) believe that the jurors, as a group or individually, were the agents most responsible for the defendant's punishment. The jury ranked third, the individual juror fourth, and the judge fifth in responsibility for the punishment,²³³ as indicated both by the percentage of jurors responding "most responsible" and by the modal rankings of the five alternatives.

The responsibility felt by jurors when making the punishment decision has been a concern for the Supreme Court and is addressed in two of the articles that follow.²³⁴ In *Caldwell v. Mississippi*,²³⁵ the Court stated that a belief

233. Among the seven states the CJP is studying, Alabama and Florida permit the judge to override the jury's sentencing decision. See *supra* notes 44-47 and accompanying text. In these two "judge override" states, as compared to the five "jury binding" states, one might expect even fewer jurors to see themselves as responsible for the defendant's punishment and, correspondingly, more jurors to view the judge as the responsible agent. Juror responses, tabulated separately below for the "judge override" and "jury binding" states, show that this is indeed the case.

PERCENT SAYING THAT A GIVEN AGENT WAS MOST RESPONSIBLE FOR
DEFENDANT'S PUNISHMENT: "JUDGE OVERRIDE" VS. "JURY BINDING" STATES

	Judge Override	Jury Binding
Defendant	42.6%	47.3%
Law	36.8%	33.6%
Jury	7.1%	9.3%
Individual Juror	3.2%	7.6%
Judge	10.3%	2.4%
(N) of Cases	(155)	(450)

In the "judge override" states, the judge ranks third, ahead of the jury and the individual juror as the most responsible agent for the defendant's punishment. Indeed, just as many jurors saw the judge as the one most responsible for the defendant's punishment (10.3%) as saw either the jury as a group (7.1%) or the individual juror (3.2%) combined. And just as virtually no jurors saw themselves as most responsible in the "judge override" states (3.2%), so too, virtually none saw the judge as most responsible in the "jury binding" states (2.4%).

Aside from the difference in the rankings of the judge relative to the two categories of jurors, however, juror assignment of responsibility is remarkably similar in the "judge override" and "jury binding" states. The defendant and the law rank first and second in responsibility—with four out of five jurors viewing either one or the other as most responsible for the defendant's punishment in both types of states.

234. See Hoffmann, *supra* note 219; Sarat, *supra* note 217.

235. 472 U.S. 320 (1985).

among jurors that the responsibility for the ultimate determination of death rests with others presents an "intolerable danger."²³⁶ The Court reasoned:

A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.²³⁷

One question we asked about jurors' responsibility for the defendant's punishment focused quite specifically on the issue raised in *Caldwell*; namely, the extent to which jurors might attribute responsibility for the punishment to judges who subsequently review their decision. Specifically, the question asked:

When you were considering the punishment, did you think that whether the defendant lived or died was . . .

TABLE 11

Strictly the jury's responsibility and no one else's.	27.2%
Mostly the jury's responsibility, but the judge or appeals courts take over responsibility whenever they overrule or change the jury's decision.	29.9%
Partly the jury's responsibility and partly the responsibility of the judge and appeals courts who review the jury's sentence in all cases.	24.3%
Mostly the responsibility of the judge and appeals courts; we make the first decision but they make the final decision.	18.6%
(N) of Cases	(655)

When they are making the punishment decision, most jurors think of themselves as sharing responsibility for their decision with the trial or appellate court judges. Only one in four jurors (27.2%) believe that the jury

236. *Id.* at 333.

237. *Id.* (citations omitted).

alone is strictly responsible for the punishment. The remaining three-fourths saw themselves as sharing responsibility with the judicial authorities, because their decision may be overturned, because it will be reviewed, or because it is only the first step in a process that will determine the defendant's punishment.²³⁸

Evidently, jurors see others as responsible for the defendant's punishment—primarily the defendant who has committed the capital offense and the law that authorizes the death penalty for such crimes—more so than judicial authorities or jurors themselves. When jurors are asked to allocate responsibility more narrowly between themselves and judicial authorities who handle the case, most jurors see responsibility as shared with trial and appellate judges; only one in four capital jurors (27.2%) said the defendant's punishment was "strictly the jury's responsibility" and fewer did so in death than in life cases. There is obviously a serious question under these guided discretion capital statutes about who is taking responsibility for whether the defendant will live or die.

Consistent with Weisberg's argument that statutory guidelines serve foremost to replace jurors' sense of responsibility with the authority of law²³⁹—the law more consistently than the defendant outranks the jury or the individual juror in responsibility for the defendant's punishment. Three-fourths of jurors rank the law as either first or second in responsibility. This preeminence of the law, over the juror or the jury, is an apparent testimony

238. The Court's observation in the above quoted passage from *Caldwell* that some jurors may be induced to vote for death by the argument that their decision will be reviewed by judicial authorities implies that full acceptance of responsibility for the defendant's punishment may be even less among jurors in death than in life cases. Jurors' responses in Table 11, above, when tabulated separately for life and death cases, are, in fact, consistent with the Court's supposition.

PERCENTAGE INDICATING THE RESPONSIBILITY THEY FELT WHEN
DECIDING PUNISHMENT—BY THE SENTENCE IMPOSED BY THE JURY

	Death Cases	Life Cases
Strictly jury responsible	23.6%	31.2%
Jury unless overruled	32.4%	26.8%
Jury with reviewing judge	26.4%	22.1%
Jury first, judges final	17.6%	19.9%
(N) of Cases	(330)	(317)

Only two of ten jurors in death cases, as compared to three of ten jurors in life cases, see themselves as fully responsible for the defendant's punishment. While accepting strict responsibility is the most common response of life case jurors, two other responses are more common among the jurors in death cases—the feeling that they share responsibility with judges who will review and who may overturn their decisions—precisely the danger the Court declared intolerable in *Caldwell*. Note that the 7.6% difference in affirming strict jury responsibility between life and death cases represents a 32.2% greater affirmation of jury responsibility among the life than among the death jurors (because the overall percentage of jurors who accept such responsibility is relatively small).

239. Weisberg, *supra* note 48, at 343.

to the desire of jurors to defer to the law or to see themselves as simply "following the law," whether or not they understand its requirements or directives. Though jurors may misunderstand statutory guidelines, they still seek the cover of law for the awful responsibility of their life or death decision.

D. Adversarial Balance

In *Payne v. Tennessee*,²⁴⁰ the Court reversed its earlier holdings that victim-impact evidence and arguments were impermissible at the sentencing hearings of capital trials.²⁴¹ Chief Justice Rehnquist reasoned that evidence of the impact of the crime on the victim's survivors and the broader community should be allowed in order to offset the advantages that otherwise favor the defendant at the sentencing stage of a capital trial.²⁴² One set of questions we asked regarding the adversarial balance between the prosecution and defense suggests that the prosecution suffers no disadvantages—at least in jurors' eyes. To the contrary, jurors' responses present a picture of stark pro-prosecution one-sidedness. We asked:

240. 501 U.S. 808 (1991).

241. See *South Carolina v. Gathers*, 490 U.S. 805 (1989), *overruled by Payne*, 501 U.S. 808; *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled by Payne*, 501 U.S. 808.

242. *Payne*, 501 U.S. at 824-25.

In your judgment, by how much did the prosecution or the defense have the advantage in these respects? [G = "Great Advantage," M = "Moderate Advantage," S = "Slight Advantage"]

TABLE 12*

	Prosecution			N P e a r t h y e r	Defense			(N) of Cases
	G	M	S		G	M	S	
Did better job of communicating with jury	30.9	22.7	8.7	31.4	1.2	3.3	1.8	(669)
Prepared case better for trial	38.7	16.6	6.9	31.3	1.8	2.7	1.9	(667)
Possessed more money & resources	19.6	14.3	6.2	53.2	2.2	2.7	1.8	(601)
Stronger commitment to winning case	28.3	15.3	7.4	40.2	3.3	3.5	2.0	(660)
Fought harder at guilt phase of trial	36.8	17.4	7.4	26.3	4.1	5.3	2.9	(666)
Fought harder at punishment phase of trial	24.8	13.2	6.2	24.8	13.2	12.4	5.3	(660)

* With the exception of the figures contained in column 9 ((N) of Cases), all figures represent the percentage of capital jurors who responded in a particular manner.

The imbalance is obvious. Over one-half of the jurors (62.2%) believed that the prosecution had the advantage in preparing the case for trial, in communicating with the jury (62.3%), in commitment to winning the case (51.0%), and in fighting at the guilt phase of the trial (61.6%). Moreover, most jurors who gave the advantage to the prosecution, said that the prosecution's advantage was "great" rather than "moderate" or "slight." Fewer said that the prosecution had the advantage in terms of money and resources, with most jurors saying that neither side had the advantage (53.2%).²⁴³ One out of ten jurors, or fewer, said the defense had the advantage in any of these respects.

The only area in which more than one in ten jurors believe that the defense had the advantage—and in which they are not outnumbered at least five to one by those who give the advantage to the prosecution—is in fighting hard at the punishment stage of the trial. Three of ten jurors (30.9%) give the sentencing phase advantage to the defense, close to (but still below) the four in ten (44.2%) who gave this advantage to the prosecution. Whether the stark adversarial imbalance in all other respects casts the defense attorney's readiness to fight at the punishment phase of the trial more as an act of desperation than as a justifiable bid for a punishment other than death in jurors' minds is an open question.

The magnitude of this imbalance between the capital trial adversaries in the minds of jurors is remarkable. Some of the disparity could be due to ineffectiveness of defense counsel,²⁴⁴ as reflected in the relatively objective areas of preparing cases for trial and communicating with the jury. In addition, some of the difference could be attributable to the "prosecution proneness" associated with "death qualification" in jury selection,²⁴⁵ as reflected in the more subjective judgments of commitment and motivation. Yet, the magnitude and one-sidedness of these disparities in the perceived motivation and performance of the two parties suggest something more.

Perhaps jurors' opinions and perceptions of the attorneys tended to crystallize early in these trials—perhaps by the time the prosecution had convinced them to hand down a capital murder conviction. Jurors' impressions of who had the advantage may thus be heavily influenced by the guilt trial experience where the prosecution surely had the upper hand. Thus, in addition to the ineffectiveness of defense counsel and the proneness to favor the

243. The "no answers" were roughly three times greater on this particular measure than in any of the other areas of adversarial advantage, perhaps because jurors felt that assessing the availability of resources was more a matter of guesswork on their part. Jurors' tendency to say that neither side had the advantage on this particular index, and to see the advantage as less extreme among those who did give the advantage to the prosecution, could also be the reflection of a culturally inspired egalitarian presumption of a level playing field in the allocation of resources between the parties to a fair trial.

244. There is a growing body of documentation and systematic evidence of ineffectiveness of counsel for the defense. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); see also Susan J. Craighead, *Towards Atticus Finch, Assessing and Improving the Quality of Capital Trial Lawyers: Alabama, the Eleventh Circuit, and a Proposal for a New Approach to Appellate Review* (1993) (unpublished manuscript, on file with author).

245. See *Lockhart v. McCree*, 476 U.S. 162, 167-73 (1986) (discussing the literature on death qualification).

prosecution, the guilt trial experience in the bifurcated trial where the same jurors decide both guilt and punishment may close some jurors' minds to the messenger and, by association, to the message of mitigation that comes later—much as a vigorous guilt defense tends to close off remorse as a subsequent defense mitigation strategy.²⁴⁶ Whatever its causes, however, the implication of this perceived adversarial imbalance is that advocacy on behalf of a punishment less than death is in the hands of someone most jurors have come to regard as inferior or second rate, at least by these indicators of performance and motivation.

CONCLUSION

The early indications in our research—published here and elsewhere²⁴⁷—begin to sketch out a picture of the exercise of capital sentencing discretion that differs from that found in current Supreme Court precedent. These are only the first steps on the path to a comprehensive and detailed understanding of how capital jurors actually make their life or death decision. Yet, the emerging picture is noteworthy for the questions it raises concerning the Supreme Court's presumptions about the exercise of capital sentencing discretion.

The preliminary findings presented above are consistent with an other-directed, outcome-driven decision process in which, for many jurors, the critical choice of punishment appears to be formed, and even finalized, relatively early in the process—well before the presumed guidance of sentencing evidence, arguments, and instructions. Accordingly, most jurors see sentencing instructions more as a framework for a decision already made than as guidance for a decision yet to be made. They transfer responsibility for the punishment decision to the law or even to the defendant, presumably because of their own personal uneasiness about taking responsibility for whether someone lives or dies.

The articles that follow also present a picture of the capital-sentencing decision at this still-early stage of our research that is more consistent with the outcome-driven decision model than with any of the other models in the literature discussed above. Sarat's depiction of Georgia jurors' anger and fear about the crime and criminal suggests that the punishment is strongly vindictive and vengeful—less a function of the defendant's blameworthiness than of his inscrutability.²⁴⁸ Sandys' evidence that many Kentucky jurors are absolutely convinced of what the punishment should be before the sentencing hearing, instructions, or deliberations suggests that sentencing guidelines can play only a minor role—perhaps more as justification for a decision already made than as a guide in making such a decision.²⁴⁹ Luginbuhl and Howe's

246. Goodpaster, *supra* note 75, at 334-35.

247. See Bowers, *supra* note 22; Eisenberg & Wells, *supra* note 72.

248. See Sarat, *supra* note 217.

249. See Sandys, *supra* note 198.

showing that the misunderstandings of sentencing instructions by North Carolina jurors' tends to support a death sentence in large part by minimizing the weight of mitigating considerations.²⁵⁰ Finally, Hoffmann's evidence that jurors are extremely uneasy about taking responsibility for the life or death punishment decision suggests that the sentencing guidelines are more a welcome rationalization for an already decided punishment than a genuine rationale that determines what the punishment should be.²⁵¹

In sum, at this early stage in our research, we find that many jurors appear to make their decisions apart from, and indeed prior to, sentencing instructions on the bases of their unguided feelings or reactions to the crime. The findings also show that sentencing guidelines provide "legal cover" to many who have already made up their minds, and "legal leverage" for persuading the undecided. In either case, the guidelines appear to lessen the sense of responsibility for imposing an awful punishment. Yet, these are still early soundings of what the jurors have to tell us about how they think about the crimes, the defendants, the victims, and how they decide what the defendant's punishment should be. The yet unanswered critical questions, of course, are how standardless is this decision-making process; how widespread is such standardless decision-making; and—for the Court to answer—does it represent a constitutionally unacceptable level or risk of arbitrariness? We agree with then-Justice Rehnquist in *Lockhart* that the critical answers lie in what actual jurors who have served in real capital trials,²⁵² such as these, have to tell us as we dig deeper into the data.

250. See Luginbuhl & Howe, *supra* note 72.

251. See Hoffmann, *supra* note 219.

252. See *supra* note 111 and accompanying text.