

# Taking Capital Jurors Seriously

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## INTRODUCTION

I want to begin this Commentary by acknowledging my admiration for the scholars whose research is reflected in the articles appearing in this Symposium. The data now being collected by the Capital Jury Project reflect an enormous amount of very difficult work, the mastery of many complicated methodological problems, and a subtle and sophisticated grasp of the numerous, thorny legal issues that surround capital litigation. It can be said, without a hint of exaggeration, that what Kalven and Zeisel did for the American jury in their classic study,<sup>1</sup> William Bowers and his colleagues are doing for the American capital jury, only better—better because they are concentrating on the words of actual jurors, sampling more systematically and from a broader frame, and posing highly focused, detailed, and legally sophisticated questions to all of their respondents. We will all be learning from their data for years to come.

Two overarching issues—one primarily legal and one primarily psychological or social-scientific in nature—subsume the many important topics illuminated by these early publications of the Capital Jury Project. The legal or constitutional issue concerns whether and in what ways the various *Furman*<sup>2</sup>-inspired and *Gregg*<sup>3</sup>-approved capital sentencing reforms operate to guide the discretion of the juries that the Supreme Court has authorized to make life-and-death decisions in courtrooms across the country. Statistical analyses of actual capital verdict patterns have for some time suggested that the Court's leap of faith in *Gregg* and its companion cases<sup>4</sup> (to the effect that the capital jury's "unbridled discretion" could be fairly and meaningfully regularized and controlled in ways that would eliminate arbitrary and discriminatory decision-making)<sup>5</sup> was unjustified.<sup>6</sup> But this new generation of studies gets beneath these statistical patterns to look at what actually goes on during the capital decision-making process. What is emerging from this and other research is not, in constitutional and other terms, a pretty picture.

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1. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

2. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

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

4. *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).

5. See *Gregg*, 428 U.S. at 206-07 (joint opinion of Stewart, Powell and Stevens, JJ.).

6. E.g., DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990); SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989); William Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 *CRIME & DELINQ.* 563 (1980); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 *HARV. L. REV.* 456 (1981).

And, as increasingly larger and more detailed parts of the picture are revealed—with data like those collected by the Capital Jury Project—it dashes any hope the Court might have had, as one commentator put it, to “mask the administration of the death penalty in individually isolated, inscrutable jury deliberations.”<sup>7</sup>

The increasing scrutability of the capital jury focuses attention on the second overarching issue, one that has remained only implicit in most studies of capital punishment but which now is coming more clearly to the forefront of research into the death sentencing process: How does our legal system overcome jurors' deep-seated psychological prohibitions against violence, enabling twelve average, law-abiding citizens to calmly and rationally contemplate taking the life of another and engage in actions designed to bring about that death? To be sure, the process of facilitating legal violence begins long before jurors enter the courtroom. Elsewhere I have written about the media stereotypes that systematically misinform the public about the causes of violent crimes and the characteristics of the persons who commit them—misinformation that facilitates the death sentencing process.<sup>8</sup> We also know that, despite (or perhaps because of) the political prominence of the topic, the public continues to be systematically misinformed about the utility of the death penalty in achieving important societal goals such as public safety. In California, for example, my colleagues and I found that a majority of citizens believed that the existence of capital punishment should be justified primarily by the broader social purposes it serves (*i.e.*, not just retribution), but were badly misinformed about how well or poorly it functions in this regard.<sup>9</sup> But, as the research of the Capital Jury Project now is helping to make clear, our system of capital punishment also depends upon the implementation of various legal procedures *inside* the courtroom that distance lay decision-makers from the practical realities and emotional complexities of their decisions, thereby increasing the likelihood that defendants will be sentenced to death.

## I. BRINGING ORDER TO CHAOS, AND VICE VERSA

One of the most disturbing findings to emerge from this and other research on the internal workings of the capital jury is the extent to which this decision-making process is still governed by confusion, misunderstanding, and even chaos. Jurors decide life-and-death questions laboring under numerous

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7. Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1779 (1987).

8. See Craig Haney, *The Social Context of Capital Murder: Social Histories and Mitigation*, 32 SANTA CLARA L. REV. (forthcoming 1995).

9. We found that about three-fourths of a representative sample of adult Californians believed that the death penalty deterred murder, about two-thirds believed that even defendants sentenced to life without parole managed to get out of prison, one-half believed that the death penalty was not administered in a racially biased manner, and more than two times as many believed that the death penalty was less costly than life in prison than believed the opposite. See Craig Haney et al., “*Modern*” *Death Qualification: New Data on Its Biasing Effects*, 18 LAW & HUM. BEHAV. 619, 626, 629 (1994).

misconceptions about the utility and operation of capital punishment—sometimes unclear about the fundamental import of certain kinds of evidence (including something as basic as whether the evidence is aggravating or mitigating), almost always confused over the meaning of the all-important capital instructions, in some instances wrong about the decision rules by which they are to reach a sentencing verdict, and unclear about (or highly skeptical of) the ultimate consequences of the very alternatives between which they must choose. I have interviewed many capital jurors myself, and have studied the interview transcripts compiled in conjunction with our comparative study of capital jurors in Oregon and California.<sup>10</sup> Now, I have had the opportunity to read through excerpts of a number of the transcripts prepared by the researchers of the Capital Jury Project and—all of my social scientist instincts to find order in masses of data to the contrary—the thought continues to gnaw at me that we are glimpsing at the ultimately chaotic and disorderly record of what happens when average citizens, in groups of twelve, are asked to do the impossible and inhuman—to fairly decide whether another human being deserves to die.

But the thought also continues to gnaw at me that—despite what has been said and written in judicial circles about the importance of bringing order to this muddled area of law—many of the procedures that govern jury decision-making are *designed* to sow the seeds of chaos and confusion, and ensure that juror decision-making is based on partial truths rather than on a more complete knowledge and understanding of the issues. That is, I wonder whether the legal system insists upon telling capital jurors only part of the story of how the death penalty really operates because to do otherwise would place its implementation in grave jeopardy. For example, we know that capital jurors come to the courtroom misinformed about the deterrent effect of the death penalty and its comparatively expensive and racially inequitable administration. Yet, the law systematically prevents jurors from receiving any education whatsoever about these issues during the course of the capital trial. We also know that capital jurors are uncertain about something so fundamental as whether, legally, life means life and death means death. Yet, the legal system appears content with this lack of clarity, systematically refusing to educate jurors in a realistic and evenhanded way about this topic.

The mistakes and misunderstandings are not randomly distributed. Indeed, it is the asymmetry to the ignorance that we tolerate in capital trials that raises concerns about underlying motivation. For example, Professor Sarat emphasizes the tremendous effort that goes into “the graphic presentation of the murder, as well as the actions which led to death and its consequences” in the typical capital case, where the prosecution spares no expense “bring[ing] to life the violence outside law.”<sup>11</sup> Sarat perceptively contrasts

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

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

this effort to the law's refusal to provide jurors with any information whatsoever about the legal violence they are being asked to authorize. Thus, capital jurors are brought face-to-face with the violence of the crime—as perhaps they should be—while they are systematically prohibited from even the faintest contemplation of the violence of the execution.<sup>12</sup> How else may one account for this, except as a way to facilitate legal violence at the expense of honesty in the capital decision-making process?

The biases that are built into these procedures most often lead mistaken and perplexed jurors to impose death—not life—sentences. Thus, jurors who are misled by the capital instructions into believing that the judicial formulas dictate a certain outcome in their deliberations usually have the outcome of death in mind. Moreover, confusion over the instructions and over the nature of the “promises” made during the death qualification process, as Professor Hoffmann argues, can operate in tandem to provide pro-death jurors with a powerful advantage over their pro-life counterparts in the deliberation process.<sup>13</sup> Similarly, in light of the numerous errors Professor James Luginbuhl and Julie Howe document, the authors are surely correct in concluding that “[t]he effect of the jurors’ poor understanding of the law is to reduce the likelihood that capital defendants will benefit from the safeguards against arbitrariness built into the North Carolina law.”<sup>14</sup> Of course, capital jurors themselves are desperately seeking order and certainty—a framework by which they can understand what they are being asked to do. In part because to confront the potential irrationality of a process that has such profound consequences—consequences unlike any other legal process in which laypersons participate—would be too painful and raise too many questions about the nature of our system of capital justice than most of them could bear, many jurors are highly motivated to impose whatever outcome they believe has been dictated to them, whether or not they are accurate in these beliefs.<sup>15</sup>

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12. Indeed, as this and other research shows, the execution remains not only hidden but, in the minds of many of the jurors, is unlikely ever to occur. See *infra* notes 43-45 and accompanying text.

13. Joseph L. Hoffmann, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1157-58 (1995).

14. James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1181 (1995).

15. By this, I also mean to suggest that however chaotic the retrospective interview accounts make this process appear, they likely underestimate the magnitude of the problem. Moreover, this observation raises a question about whether, as researchers, we may inadvertently suggest to jurors templates onto which they profoundly need to grasp in ways that may distort the accuracy of their self reports. The members of the Capital Jury Project appear to have successfully avoided this problem, and their work provides powerful, troubling documentation of the confusion that reigns during the capital decision-making process. But future researchers must guard against the possibility that we will bring more rationality to this phenomenon than it in fact has, smoothing out the jagged edges of the process and eventually making it *look* orderly (and more constitutionally palatable). This is the nature of social science—to map our theories onto initially confusing arrays of data and thereby render them interpretable and patterned. I cannot think of an area of social science about which researchers have eventually concluded that *no* pattern actually exists, and this one is not likely to be an exception.

## II. THE ELUSIVENESS OF MITIGATION

In light of the prosecution's effective emphasis on the instrumentalities of violence that Sarat identified in the guilt phase of the typical capital trial, it is perhaps not surprising that, at the conclusion of this phase of the trial and before any penalty phase testimony had been presented, Professor Sandys found that twice as many capital jurors believed the defendant should be sentenced to death as believed that a life sentence was the appropriate verdict.<sup>16</sup> At this point in the typical capital trial, of course, little or nothing is known about the defendant other than his responsibility for the graphically depicted crime that the jury has decided he committed.<sup>17</sup> Yet, there is fairly clear constitutional caselaw indicating that the crime alone should not be the exclusive basis upon which the jurors' life-and-death decision is to be made.<sup>18</sup> Sandys' data certainly underscore the significant role that penalty-phase mitigation must play if this mandate is to be abided. In theory, at least, capital litigators know that "the absence of mitigating evidence is tantamount to automatic imposition of the death penalty. Consequently, those involved in death penalty litigation agree that the presentation of mitigation in the penalty phase is of overwhelming importance."<sup>19</sup>

Yet, researchers are now beginning to learn that even in cases where mitigation is presented—by no means necessarily the normative capital case<sup>20</sup>—there is no reason to believe that jurors will understand its mitigating significance or know how it is to be properly used in reaching a fair and just verdict. Some of this derives from the fact that we seem to have become a society that has, at this time in our history, a very difficult time conceptualizing and legitimizing compassion, mercy, charity, and understanding—all concepts that are intertwined with mitigation but which now have become terribly hard for our citizens to define, harder to assert, and virtually impossible to connect to something resembling a principled point of view.<sup>21</sup> But much of it also involves the sentencing procedures at work in capital

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16. Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1192 (1995).

17. Because the overwhelming majority of capital defendants are male, I have used the generic masculine pronoun to refer to them throughout this Commentary.

18. *E.g.*, *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Bell v. Ohio*, 438 U.S. 637 (1978); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

19. Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 102 (1987).

20. *E.g.*, Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849 (1992); William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 28 N.Y.U. REV. L. & SOC. CHANGE 273 (1990-1991); Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 803-10 (1986).

21. *Cf.* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (arguing that the law resists a widespread understanding of empathic knowledge despite its great explanatory power in legal contexts).

penalty trials and the failure of the capital sentencing instructions to correct this collective blindness.

The sentencing instructions given capital jurors should, if nothing else, clearly articulate and underscore the importance of broadening the focus of the penalty-phase inquiry and extending the jurors' moral assessment to issues beyond the guilt-phase crime itself. Indeed, this is the very purpose of the separate penalty trial. Unfortunately, some of the research we have been conducting in California on the comprehension of capital instructions suggests that the instructions *contribute* to the jurors' narrow crime-focus by failing to clarify *what else* (e.g., the background and character of the defendant) the jurors should take into account.<sup>22</sup> Indeed, the instructions appear to assist or encourage the jurors to ignore the defendant's personhood. Thus, the opportunity to put the defendant's life in context, to give it substance, texture, history, a set of connections to other lives, is withheld until the final stage of the trial—when it may be too late—and then capped off with instructions that encourage jurors to ignore it. The poor timing of the defense case in mitigation and the crime-focus of the penalty instructions may help to explain why, as Professor Bowers reports,<sup>23</sup> the penalty trial (*i.e.*, "evidence about the defendant's punishment") was the *least* well-remembered stage of the entire process for capital jurors,<sup>24</sup> and that one-half of the jurors had actually made up their minds (were "absolutely convinced" or "pretty sure") about the appropriate penalty once they had convicted the defendant at the guilt phase.<sup>25</sup> It is also not surprising, in this context, that forty percent of the capital jurors believed the heinousness of the crime *compelled* a sentence of death.<sup>26</sup>

Similarly, Luginbuhl and Howe have documented the way in which capital penalty instructions in North Carolina say one thing but—because of the manner in which they are written and ultimately so poorly understood by capital jurors—accomplish another.<sup>27</sup> The problems are serious overall—Luginbuhl and Howe found that less than fifty percent of the jurors they interviewed could answer correctly more than one-half of the questions they were asked about the operation of the sentencing statute—but they also are asymmetrical in effect. Indeed, the lack of comprehension pushes the

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22. See Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411, 430 (1994). Specifically, our research found:

The seemingly inexorable (and perhaps unintended) narrowing of relevant considerations to the circumstances of the crime and little else likely stems from the relative ease with which legislative judgments and jury decision making can be precisely focused on crime characteristics, as compared to the more difficult, elusive, and ultimately discretionary inquiry into the moral nature and essential worth of the person whose life stands in the balance.

*Id.*

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

24. *Id.* at 1087 tbl. 2.

25. *Id.* at 1090 tbl. 6.

26. *Id.* at 1091 tbl. 7.

27. See Luginbuhl & Howe, *supra* note 14, at 1174-77.

jurors—who believe they are “just following orders” that are contained in the judicial instructions they have been given—toward death and away from life verdicts. Thus, close to one-half or more of the capital jurors interviewed in North Carolina mistakenly believed that the judicial instructions had authorized them to rely on any aggravating circumstance, whether or not it was enumerated in the statute, but to rely upon a mitigating circumstance *only* when there was unanimous agreement that it had been proven beyond a reasonable doubt.<sup>28</sup>

Just as Luginbuhl and Howe did in North Carolina, my colleagues and I found in California that many key provisions of the capital sentencing instruction were very poorly understood, but that “comprehension appears to be worse when mitigating factors are considered.”<sup>29</sup> Like Luginbuhl and Howe, Mona Lynch and I concluded that the instruction failed to explain novel and unfamiliar concepts, likely forcing jurors “to fall back on their own prior knowledge.”<sup>30</sup> Yet, in part because few people have any preexisting framework for understanding and applying the concept of mitigation, it is more likely to be discounted or ignored in the jury’s decision-making process. For example, after having heard the California instruction read to them three times, less than one-half of our subjects could provide even a partially correct definition for the term “mitigation,” almost one-third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in ten was still so mystified by the concept that he or she was unable to venture a guess about its meaning.<sup>31</sup> In North Carolina, the death-tilting effect of that state’s instruction was underscored in the answers to another set of questions that Luginbuhl and Howe posed: “[R]oughly one-fourth of the jurors felt that death was mandatory when it was not and approximately one-half of the jurors failed to appreciate those situations which mandated life.”<sup>32</sup>

In addition, our research in California reveals that not only do laypersons have less “commonsense” understanding of the term “mitigation” than any other key term in the instruction, but that defense attorneys also have a difficult time conceptualizing and focusing clearly on it in their penalty-phase arguments, or describing it meaningfully to capital juries in ways the jurors can connect to specific evidence that has been presented.<sup>33</sup> This problem is exacerbated by the fact that judges refuse to give any case-specific meaning to the definition of mitigation that would add concreteness to what then remains a hopelessly abstract concept. Not surprisingly, many capital jurors are unable to hold on to mitigation in deliberation. Because it is so elusive,

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28. *Id.* at 1167.

29. *Id.* at 1167; *see also id.* at 1169-70 (“Jurors fared the worst . . . in applying these same concepts to mitigating factors . . .”); *see also* Haney & Lynch, *supra* note 22, at 423-24.

30. Luginbuhl & Howe, *supra* note, 14, at 1169; *see also* Haney & Lynch, *supra* note 22, at 427-28.

31. Haney & Lynch, *supra* note 22, at 420-21.

32. Luginbuhl & Howe, *supra* note 14, at 1173.

33. Craig Haney & Mona Lynch, *Debating Life and Death: Revised Instructions and Closing Arguments in Capital Trials in California* (1995) (unpublished manuscript, on file with author).

it slips away in the face of more vivid and tangible arguments about aggravation.<sup>34</sup> For example, Lorelei Sontag and I found that death juries talked as much about mitigation as life juries, but that they converted it into aggravation or transformed it in ways that robbed it of its life-giving effect.<sup>35</sup> Thus, the problem is not just that the concept of mitigation is poorly expressed in the boilerplate penalty instructions themselves, but also that courts do little or nothing proactive to ensure that mitigation—all that stands between the defendant and the gallows in the typical capital trial—is meaningfully presented and granted its appropriate significance by jurors.<sup>36</sup>

### III. EMOTIONAL AND MORAL DISTANCING

Using the Milgram obedience studies<sup>37</sup> as a point of departure, Robert Weisberg's classic article on capital jury decision-making posed an important empirical question—"whether jurors artificially distance themselves from choices by relying on legal formalities."<sup>38</sup> At the time of his writing, Weisberg was correct to observe that social scientists had little direct data with which to shed light on the question. Our comparative study of California and Oregon capital jurors was intended in part to address this and related questions, and the Capital Jury Project has examined these issues more elaborately and comprehensively than did our research. Data from all of these studies seem to confirm Weisberg's suspicion. Among the various researchers who have come to similar conclusions, Professor Hoffmann's analysis of his interviews with Indiana capital jurors<sup>39</sup> speaks directly to the emotional and moral distancing that occurs in the capital decision-making process. His interviews uncovered not only "juror misperception of responsibility for the death sentencing decision,"<sup>40</sup> but also widespread difficulty in accepting

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34. Professor Sarat reports that at least some of his jurors fell prey to a common turn of logic that is suggested by many prosecutors in their penalty arguments but which, if accepted, effectively eliminates *any* factor or circumstance from being given mitigating effect. A juror told Sarat that the defendant in his jury's trial "was under the influence of alcohol and drugs . . . . But so what? I mean a lot of people get drunk, but they don't take guns and go shoot up the Jiffy Store. . . . He shot someone because he wanted money. Like lots of people want money but they don't kill other people to get it." Sarat, *supra* note 11, at 1128 (quoting an unidentified juror). Realize that this common and seemingly plausible way of thinking about mitigation redefines it in a way that neutralizes any such evidence that might be presented (since there is no influence, experience, or circumstance that all people respond to in the same way, and certainly not in a murderous way). Surely "mitigation" was not intended to be equated with an absolute compulsion or invariant response, but many jurors end capital penalty trials never having been disabused of this misconception.

35. See Haney et al., *supra* note 10, at 167-68; Lorelei Sontag, *Deciding Death: A Legal and Empirical Analysis of Penalty Phase Jury Instructions and Capital Decision-Making* 156-61 (1990) (unpublished Ph.D. dissertation, University of California (Santa Cruz), reprinted by UMI Dissertation Services).

36. Cf. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989) (arguing that the proper emotional dynamic of capital punishment requires courts to actively emphasize jurors' obligations of empathy in judging defendants).

37. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974).

38. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 391.

39. Hoffmann, *supra* note 13.

40. *Id.* at 1138 n.11.

responsibility for the defendant's fate,<sup>41</sup> and even questions about the propriety of jurors performing the capital sentencing task in the first place.<sup>42</sup> Perhaps not surprisingly, despite fairly consistent national data about capital jurors' inability to accurately comprehend and recall sentencing instructions, Hoffmann found that most Indiana jurors "remember vividly the portion of the judge's instructions that indicated the jury's decision was only 'a recommendation.'"<sup>43</sup>

Many of the previously discussed misconceptions and misunderstandings—as well as the law's systematic refusal to educate capital jurors about certain core realities that attach to the administration of the death penalty—enhance the moral and emotional distancing that facilitates death verdicts. One of the most basic misconceptions that separates capital jurors from the consequences of their decision is the belief that the sentencing alternatives with which they are presented will never have their stated consequences. Widespread cynicism about the legal system allows many capital jurors to argue that death penalty decision-making is not "really" about life and death, but rather about safeguarding society against the future dangerousness of a defendant who is likely to be released some day. Virtually all of the social science researchers who have interviewed capital jurors have been struck with their tendency to recast their sentencing decision in this way. From the Capital Jury Project, Luginbuhl and Howe's data address the issue perhaps most systematically. They found that three-fourths of those jurors who sentenced a defendant to death believed that the defendant would spend less than twenty years in prison if not condemned to die. An equally high percentage of death sentencing jurors were concerned about the possibility that "the defendant might return to society" if they were to let him live.<sup>44</sup> But jurors voice these concerns even in states where capital sentencing statutes give them the sentencing option of life without the possibility of parole in lieu of the death penalty.<sup>45</sup> Of course, it is difficult to imagine a more effective way to distance jurors from the profound moral and emotional implications of their sentencing verdicts than to allow them to operate under the misconception that the life-and-death decisions they seem to confront really are not.<sup>46</sup>

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41. See *id.* at 1142-43.

42. See *id.* at 1143. Indeed, the issue of responsibility loomed so large for one jury that a lone holdout was able to sway the others by bringing them face-to-face with the consequences of their decision: "I told them, 'Put the kid in the chair. Now would you go up there [and] throw the switch yourself?' They said, 'Well that's not my job.' I said, 'You are doing your job now. If you say go ahead, that's the same as [if] you are doing it.'" *Id.* at 1146 (quoting an unidentified Indiana juror).

43. *Id.* at 1147.

44. These data are presented and discussed in Luginbuhl & Howe, *supra* note 14, at 1178-79.

45. In California, for example, we found that members of the public in general did not believe that life without parole meant the defendant would never be released from prison, and that death-qualified respondents were more likely to hold this mistaken belief. See Haney et al., *supra* note 9, at 628-29 tbl. 3. And this widespread misconception—because it typically goes uncorrected in capital trials and is nowhere addressed in the capital instruction—gave rise to concerns voiced by actual capital jurors in California. Haney et al., *supra* note 10, at 170-71.

46. It is probably worth reflecting on the parallels to our own connections with this morally complex and emotionally difficult subject—that is, to what extent do our roles as social scientists and lawyers who merely study the death sentencing process in some ways similarly depend upon the

## CONCLUSION

As I read through the insightful research of the Capital Jury Project that is published in this Symposium, I renewed my respect for the plight of capital jurors. They are for the most part highly dedicated, well-meaning people who work extremely hard at an impossible task, forced to do the moral dirtywork of a system that is not even honest enough with them to insist that they have the full story about the purposes, ambiguities, complexities, and consequences of the actions the state invites (indeed, urges and implores) them to take. In Professor Hoffmann's compelling look at the effect of Indiana's judge-override provision on that state's capital jurors, he suggests that they "*mislead themselves*"<sup>47</sup> about the extent of their responsibility for the sentencing decision and concludes: "During the jury deliberations, most jurors found ways to overcome, or avoid confronting, their sense of personal moral responsibility for the defendant's fate."<sup>48</sup> Without substantially disagreeing, I would suggest instead that capital jurors do no more than respond to the numerous mystifying paradigms, procedures, and verbal formulations with which the law—indeed, our entire society—surrounds them long before they finally hear the judge's confusing instructions. Furthermore, if the legal machinery of death failed to perform these many rituals of bad faith, it would have a difficult time indeed finding normal, healthy volunteers for the task of condemning their fellow citizens to die.

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distance we can create from core realities of the death penalty, and what implications might flow from that?

47. Hoffmann, *supra* note 13, at 1157 (italics in original).

48. *Id.* at 1156.