

Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases[†]

JOSEPH L. HOFFMANN*

INTRODUCTION

In his brilliant 1983 article, *Deregulating Death*,¹ Robert Weisberg made the following observation about jurors in death penalty cases: "If the decision to kill is indeed fraught with personal moral intensity, arousing the sentencer's most intense fears and anxieties, then it may be a harmful illusion for the juror to believe that he or she is choiceless."² According to Weisberg, death penalty jurors resemble the subjects in the famous Milgram experiments.³ Like those subjects, the average death penalty juror is placed "in a novel and disorienting situation that pose[s] for him a distressing moral dilemma."⁴ And, as in the Milgram experiments, the juror in a death penalty case may seek "a professional, symbolic interpretation of the situation to reorient him"⁵—in short, the "mystifying language of legal formality" may lead the juror to conclude that the sentencing decision falls outside the scope of the juror's personal moral responsibility, and may thereby cause the juror's "moral sense to be distorted."⁶

At the time Weisberg wrote his article, he was forced to rely largely on analogies and philosophical reasoning to support his hypothesis that jurors are

† © Copyright 1995 by Joseph L. Hoffmann. All rights reserved.

* Professor of Law, Indiana University. I would like to thank the National Science Foundation, Law and Social Science Program, for funding the Capital Jury Project; Dean Alfred C. Aman, Jr., and my law faculty colleagues at Indiana University, for supporting my participation in the Project; and the law faculty at the University of Virginia, for making helpful comments on an earlier version of this Article.

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

2. *Id.* at 391.

3. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974); Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963); Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57 (1965).

The experiments, conducted by Stanley Milgram, involved volunteers who were asked to serve as "teachers" in a study of learning. The "teachers" were told to ask questions of a "subject," and to administer a painful electric shock to the "subject" if the "subject" gave the wrong answer. The stated purpose of the study was to see how negative reinforcement affects learning.

In reality, however, Milgram wanted to study the capability of the "teachers" to administer pain—the shocks were not real, and the "subjects" were trained actors who only pretended to suffer real pain from the shocks. Milgram found that the "teachers" showed a disturbing capability to administer various levels of pain that (in their perception) ranged from relatively mild to very severe, even potentially fatal. According to Milgram, this capability to engage in conduct that would seem sadistic and cruel under normal circumstances was triggered by an abdication of personal moral responsibility—whenever they balked, the "teachers" were told that "the experiment must go on," and that responsibility for the outcome would rest with the scientists and not the "teachers."

4. Weisberg, *supra* note 1, at 392.

5. *Id.*

6. *Id.* Weisberg also compared death penalty jurors to the anguished decision-makers described in Robert Burt's account of civil commitment and termination-of-medical-treatment cases. See ROBERT BURT, *TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS* (1979). Weisberg noted that according to Burt's account, these decision-makers "escape the dilemma when the law offers them the 'choice to be choiceless' through a mechanical formula of decision cloaked in the rhetoric of professional authority." Weisberg, *supra* note 1, at 393.

prone to abdicate their personal moral responsibility for the death sentencing decision. As he put it: "The empirical studies of jury conduct shed little light on this question whether jurors artificially distance themselves from choices by relying on legal formalities."⁷

Today, thanks to the National Science Foundation and the Capital Jury Project, more light can be shed on this empirical question. In this Article, I will provide evidence—in the form of interview responses from Indiana death penalty jurors—that directly supports Robert Weisberg's hypothesis. This evidence suggests that many death penalty jurors who are confronted with the anguishing moral dilemma of a death sentencing decision seek to avoid the perception that they bear personal moral responsibility for making that decision.

I will also discuss the possible legal implications of such evidence. Since 1985, the United States Supreme Court has adhered to the rule announced in *Caldwell v. Mississippi*.⁸ The Eighth Amendment prohibits giving death penalty jurors misleading information that serves to diminish their sense of personal moral responsibility for the death sentencing decision.⁹ The Court, however, has been reluctant to apply the *Caldwell* rule to reverse actual death sentences. Most recently, in June, 1994, the Court held that the *Caldwell* rule was not violated when the jury in an Oklahoma case was given information (which later proved to be erroneous) that the defendant was already subject to a death sentence for a prior murder.¹⁰

In this Article, I will suggest that the Court's continuing difficulty with the *Caldwell* rule can be traced to the way in which the Court originally articulated the rule. In light of the evidence supporting juror misperception of responsibility that is now emerging from the Capital Jury Project, I will propose that we consider framing the *Caldwell* rule in terms of a positive duty, not a negative prohibition. Instead of focusing on the extent to which jurors might have been *misled* by a prosecutor's argument or a judge's instructions, the rule should recognize that jurors are predisposed to use almost *any* available information to downplay their responsibility for the death sentencing decision—including information that accurately describes the sentencing process. I will therefore suggest that if society really cares about death penalty jurors' sense of personal moral responsibility,¹¹ it should give

7. Weisberg, *supra* note 1, at 391.

8. 472 U.S. 320 (1985).

9. *Id.*

10. See *Romano v. Oklahoma*, 114 S. Ct. 2004 (1994).

11. The reasons for caring about death penalty jurors' sense of responsibility are beyond the scope of this Article. The empirical evidence of juror misperception of responsibility for the death sentencing decision presented in this Article does not answer the further question of how such misperception might affect the death sentencing decision.

Others have speculated about the possible effects of such juror misperception of responsibility. See *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). But see Weisberg, *supra* note 1, at 395 ("Nor is there any empirical proof that the formal model of the penalty trial [which permits jurors to avoid responsibility] results in more executions than the less formal model,

the jurors—in every death penalty case—strong, unequivocal, affirmative instructions stating that the personal moral responsibility for the death sentencing decision rests with each and every one of them.

I. THE LEGAL BACKGROUND:
MCGAUTHA, FURMAN, AND CALDWELL

The “modern era” of American death penalty law began with the United States Supreme Court’s 1972 decision in *Furman v. Georgia*¹² which invalidated all then-existing state death penalty statutes, holding that such statutes violated the Eighth Amendment’s prohibition against “cruel and unusual punishment.”¹³ Many states quickly developed new death penalty statutes designed to satisfy the Court’s Eighth Amendment concerns, and in 1976, three of those new statutes were upheld by the Court in *Gregg v. Georgia*¹⁴ and its companion cases.¹⁵ Since 1972, about three-fourths of the states have enacted death penalty statutes based on one of the three statutes approved in *Gregg et al.*

To understand the subject of juror responsibility for death sentencing, however, it is necessary to roll the clock back to the year before *Furman* was decided. In 1971, the Court held in *McGautha v. California*¹⁶ that the Constitution does not require standards to guide a jury’s death sentencing decision. Justice Harlan, writing for the majority, put the matter this way:

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel.¹⁷

Justice Brennan, writing in dissent in *McGautha*, stated the contrary view:

But discretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds. . . . The point is that even if a State’s notion of wise capital sentencing policy is such that the policy cannot be implemented through a formula capable of mechanical

though one can identify some cases where the degree of legal formality may be the key variable in explaining a death sentence.”).

I will assume, for purposes of this Article, that there are good reasons to insist that death penalty jurors feel a sense of responsibility for the death sentencing decision.

12. 408 U.S. 238 (1972) (per curiam).

13. U.S. CONST. amend. VIII.

14. 428 U.S. 153 (1976).

15. *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).

16. 402 U.S. 183 (1971).

17. *Id.* at 207-08.

application . . . there is no reason that it should not give some guidance to those called upon to render decision.¹⁸

Just one year after *McGautha*, the Court (in a five-to-four decision consisting of nine separate opinions) effectively reversed itself in the *Furman* case. Although it is impossible to tease out a single "Court position" from the nine separate *Furman* opinions, it can be said that *Furman* represented the vindication of Justice Brennan's *McGautha* view that due process requires at least some standards to guide the jury's death sentencing decision.

Indeed, the notion of "guided discretion," based on the Court's *Furman* and *Gregg* decisions, has become the hallmark of modern death penalty statutes. All of the death penalty statutes that have been upheld since *Furman* and *Gregg* contain sentencing guidance, usually expressed in the form of "aggravating" and "mitigating" circumstances that must be considered by the jury.¹⁹ At the same time, the Court has stressed that the sentencing jury must retain some discretion; mandatory death sentencing schemes have uniformly been held to violate the Eighth Amendment, even if they are limited (for example) to those defendants who commit murder while already serving a life sentence for a previous murder.²⁰

After *Furman* and *Gregg*, the Court quickly became enmeshed in the development of a new body of Eighth Amendment doctrine to regulate the administration of the death penalty in the states.²¹ The *McGautha* case—and in particular Justice Harlan's reliance on the capital sentencing jury's sense of the "truly awesome responsibility of decreeing death for a fellow human"²²—was largely forgotten.

Until 1985, that is. In *Caldwell v. Mississippi*,²³ a narrow majority of the Court voted to reverse a death sentence because the prosecutor's closing argument, which overstated the extent and scope of appellate review of the jury's sentencing decision under Mississippi law, had the effect of diminishing the jury's sense of responsibility for its decision. Justice Marshall's lead opinion,²⁴ relying in part on Justice Harlan's opinion in *McGautha*, concluded that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the

18. *Id.* at 285-86 (Brennan, J., dissenting).

19. This was the scheme used in the Georgia and Florida death penalty statutes upheld in *Gregg*, 428 U.S. at 164-66, and *Proffitt*, 428 U.S. at 247-53. The original Texas scheme, which was upheld in *Jurek*, relied instead on three specific "questions" to be answered by the sentencing jury, but the Court interpreted those three questions as authorizing the jury's consideration of the same kinds of "aggravating" and "mitigating" factors contained in the Georgia and Florida statutes. See 428 U.S. at 269-71.

20. See *Sumner v. Shuman*, 483 U.S. 66 (1987) (invalidating Nevada's mandatory death penalty statute for those who commit murder while serving a life sentence for a previous murder).

21. For a discussion of the evolution of Eighth Amendment doctrine since *Furman* and *Gregg*, see Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817 (1993).

22. *McGautha*, 402 U.S. at 208.

23. 472 U.S. 320 (1985) (plurality opinion).

24. The opinion of Justice Marshall expressed the view of a five-member majority of the Court, except for Part IV-A of the opinion, which was not joined by Justice O'Connor and hence constituted only a plurality opinion.

responsibility for determining the appropriateness of the defendant's death rests elsewhere."²⁵ According to Justice Marshall:

[T]he 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.²⁶

Justice O'Connor provided the crucial fifth vote for the outcome in *Caldwell*, and wrote a separate opinion concurring in part and concurring in the judgment.²⁷ The disagreement between Justice O'Connor and Justice Marshall—a disagreement that has taken on increasing significance in the ten years since *Caldwell*—involved the question of whether an *accurate* description of diminished sentencing responsibility would be a constitutional violation. According to Justice O'Connor, the key to *Caldwell* was the fact that the prosecutor's description of Mississippi's appellate review was mistaken: "In my view, the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility."²⁸ Justice O'Connor stressed, however, that the Eighth Amendment did *not* bar "the giving of *nonmisleading* and *accurate* information regarding the jury's role in the sentencing scheme."²⁹

Almost immediately after the *Caldwell* decision, death-row inmates began to claim that various aspects of their death sentencing hearings served to diminish the sentencing jury's sense of responsibility for the death penalty decision, thus requiring reversal of their death sentences. The Court, however, has consistently rejected the invitation to extend the *Caldwell* rule to other factual situations. For example, in *Darden v. Wainwright*,³⁰ the Court held that a prosecutor's extremely emotional closing argument which characterized the defendant as an "animal" and admonished the jury to carry out its duty to protect society from such a person, may have been inappropriate, but did not violate *Caldwell*.³¹

The most recent, and glaring, example of the Court's reluctance to apply the *Caldwell* rule occurred in June of 1994. In *Romano v. Oklahoma*,³² the jury was informed by the prosecutor during the sentencing phase of the trial that the defendant had already received a death sentence for a prior murder. The

25. *Caldwell*, 472 U.S. at 328-29.

26. *Id.* at 333.

27. *Id.* at 341 (O'Connor, J., concurring).

28. *Id.* at 342.

29. *Id.* at 341 (emphasis in original).

30. 477 U.S. 168 (1986).

31. *Id.*; see also *Sawyer v. Smith*, 497 U.S. 227 (1990) (refusing to apply *Caldwell* to invalidate a death sentence in which the prosecutor instructed the jurors that their decision would be reviewed on appeal); *Dugger v. Adams*, 489 U.S. 401 (1989) (refusing, on procedural grounds, to apply *Caldwell* to invalidate a death sentence in which the trial judge told the prospective jurors that it was the judge, not the jurors, who imposed the death penalty).

32. 114 S. Ct. 2004 (1994).

jury decided to impose another death sentence against the defendant. While the second case was pending on appeal, the first death sentence was overturned by an appellate court. The defendant argued that the jury's sense of responsibility in the second case was diminished, in violation of *Caldwell*, because the jury believed—erroneously, as it turned out—that he was already subject to a death sentence in another case. The Court, by a five-to-four margin, rejected the defendant's claim. Chief Justice Rehnquist, writing for the majority, found that the jury was not “affirmatively misled” about its role in the sentencing process; the challenged information “was neither false at the time it was admitted, nor did it even pertain to the jury's role in the sentencing process.”³³ Justice O'Connor, who joined the majority opinion but also wrote a separate concurring opinion, emphasized her view of *Caldwell*:

Petitioner's sentencing jury was told that he had been sentenced to death—and indeed he had been. Introducing that evidence is no different than providing the jury with an accurate description of a State's appellate review process. Both may (though we can never know for sure) lessen the jury's sense of responsibility, but neither is unconstitutional.³⁴

II. THE EMPIRICAL EVIDENCE: INDIANA JUROR ACCOUNTS OF RESPONSIBILITY FOR THE DEATH SENTENCING DECISION

Both Robert Weisberg (in his 1983 article) and Justice O'Connor (in her 1994 *Romano* concurrence) noted a lack of empirical evidence about how jurors perceive their responsibility for the death sentencing decision. In the pages that follow, I will try to provide at least some such evidence, in the form of excerpts from juror interviews conducted in Indiana as part of the Capital Jury Project.

These excerpts all involve, in one way or another, the theme of personal moral responsibility for the death sentencing decision. The excerpts represent typical juror responses; unless specifically noted otherwise, all of the quoted jurors express sentiments that were also stated, albeit in different words, by other jurors. I have edited the responses only to remove wholly extraneous material and/or preserve the anonymity of jurors and parties.³⁵

At the outset, the most common thread found in the juror interviews conducted thus far in Indiana is that virtually all of the jurors discussed how difficult it was, initially, to accept responsibility for the defendant's fate:

The jurors overall did not want to be responsible for making the decision of the death penalty. I do not feel qualified to make this decision. I am not a legal expert. We had no chance to question either side. I did not feel we were a part of it. It is one-sided. We were not allowed to question back. [F1]

33. *Id.* at 2010.

34. *Id.* at 2013 (O'Connor, J., concurring).

35. The “M” and “F” in brackets after each excerpt identify the quoted jurors as male or female. The numbers were assigned sequentially, solely to identify the different jurors quoted in this Article. The “*****” symbol signifies a transition between two different jurors' quotes.

I do not think the jurors had any specific arguments, I just think they had a problem with being responsible for giving that verdict. We went down each aggravating and mitigating circumstances and we came up with more aggravating factors than mitigating factors. [M1]

I remember going into that phase of the trial, praying an awful lot, that, uh, for guidance, and tell me what to do, because, uh, I remember not feelin' sure if I could do it. I mean, I remember the jury selection. They asked my opinions on the death penalty, and I said, "Well, y'know, if you'd asked me that any other time, I would have told you how adamantly and strongly I believe in it, but I mean, sittin' across the room from, y'know, lookin' somebody straight in the face, knowin' that, y'know, it was gonna be my decision, uh, it's not quite so easy." [laughs] Uh, and I'd, I'd remember, bein' afraid that, uh, that if I felt that that was the right thing, y'know, going into the hearing, y'know the second part of it, uh, if I felt that was the right thing, could I do that? [F2]

Indeed, in a majority of Indiana cases, the jurors said that their sentencing deliberations began not with a discussion of the case before them, but with a more general conversation about whether it was appropriate for the jury even to perform the death sentencing function:

Q: How did the jury get started? What topics did it discuss? In what order? What were the major disagreements? How were they resolved?

A: Okay, well first of all, like I said, I think we just, we just talked about the death penalty in general, and that we all knew that that was a big responsibility. And we got to talking about each other's emotions, so we all felt comfortable with just dealing with the situation. I think we all more or less were allowing ourselves the right to make that decision, and that each of us had that right, you know, and that responsibility.

I think we just went back there, the first thing we did was everybody just collapsed literally in each others' arms and cried, knowing that we had to do that. And what we just said was, somebody just said, "What right do we have to decide if somebody should live or die?" And then we had a large discussion about that, about whether we as people had that right. [F3]

Of course, not all of the jurors approached their task with the same initial sense of responsibility. When asked what she remembered most vividly about her experience as a juror, one woman answered:

How casual and how light some people treated what they were doing. This is the hardest thing I've ever done in my life, bar none, and I've done some ha-a-a-ard things. I've had extremely ill children. . . . I don't come from the Waltons, so, you know, things weren't wonderful. . . . Nothing came close to this, the feeling of the responsibility that you have, and it bothered me that people were so casual with that kind of responsibility. [F2]

Indeed, the Indiana juror interviews indicate that, in most cases, a clear majority of the jurors rather quickly and easily agreed on a sentencing decision. But most juries also appeared to include between one and perhaps three or four members who felt relatively more troubled than the other jurors about the sentencing decision that they were being asked to make. I have chosen to call these jurors "responsibility holdouts." They were not always

holding out for a life sentence, and indeed they did not always initially vote for life. Rather, these “responsibility holdouts” tended simply to want more time than the other jurors to think about their sentencing decision. These jurors quickly became the focus of attention—occasionally even hostility—from other jurors who wanted to get on with the sentencing process:

I think that they didn’t understand at the time and . . . I don’t have any desire to have a reunion or anything but . . . I really don’t think it was that I didn’t think [the death penalty] was appropriate, but I just had to be very sure that I had looked at all the things I needed to look at, rather than just saying, “Oh, yeah.” . . . I had to know, for me to go on, that I had given him every benefit of the doubt, that I had looked at everything . . . before I could agree that that was what the law mandated. So it wasn’t really that, you know, I was sitting there going, “No, I don’t think,” because I never did once say that. . . . But I wasn’t ready to just jump in, get it over with, and go home.

Q: Do you recall any of the personal attacks? What did they say?

A: “Spineless,” “gutless,” “unable to make up my own mind.” “What do I need?” “How much more do I need it spelled out?” Oh yeah, we’re, we’re talking vicious.

Q: Anybody in particular?

A: This big guy was a lot of it, and there were a lot of weak women who just would, kind of, sit there pat . . . you know, the kind that you picture decorating Christmas cards or something, just real passive, mindless kind of women who are probably married to very strong men, and are easily led and whatever hubby says is just fine with them. [F4]

I needed more time. . . . I needed to think about it overnight because it was something I could not come to that quick of a decision with. . . . I had to be able to live with myself . . . and to be quite frank, I had to pray. . . . I had to just be alone with my thoughts. [F5]

We walked in. We came in. We were all pretty tired, and um, we sat around the big table and we, we started a breakdown of what, we started to hear different arguments. Some people were like, let’s just, this one guy, this really big guy, you’ll probably have to meet with him, um, he was like, “Oh, I think he’s guilty, let’s just get this over with.” I’m like, “Well, yeah, I pretty much agree, you know. Let’s just get out of here, you know, and pass this down as fast as we can.”

There were some people that were totally against it. They were like, “No, I don’t think he should get the death penalty at all.” And we were, we were like, “We’re going to be here for the next, you know, year.” And we could have, just eating three meals a day and whatever we want. The food was great. And, and we, we started convincing people, and then the more evidence you heard, or the more arguments you heard from, from either side, I mean I even started thinking, a little bit into it, the thought crossed my mind, “Well, should we give him the death penalty?” Is it, you know, let’s just, let’s just not, and let’s just let it stand as it is now, and, and uh

. . . .

I finally fell back in line a little bit later, and we argued with it for a long, we argued with it till like ten o’clock, from, for like five hours that night and uh, and we sent, we actually sent a message to the judge, after

about five hours, no after about four hours, that we were deadlocked and we said, "We're not, we're not coming up with anything," you know.

Q: What did he say?

A: He said, "Keep trying. You've got to come up with something." He sent a message back that said that, and then we debated a little bit more. Then we all decided that we were hungry and we went to a restaurant and ate. . . . But that took a lot of the pressure off of it. A lot of people didn't want to go out to eat. They just wanted to go back to their hotel room and uh, and think about it.

There was one black lady that was a holdout, she, she came in and was like, "Okay, that's fine, let's give it to him." And so we all went into the courtroom, and we were all pretty nervous, you know, after something like that and mentally exhausted. [M2]

At least one of the "responsibility holdouts"—who was the last juror in his case to come around and join the other jurors—was holding out for a death, and not a life, sentence:

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

A: Well, do you want my honest opinion? I thought that we should have given him the death sentence. That was just me, and, I think, two other people in the beginning, and then after so many votes finally it just got down to where we all agreed, more or less. I don't know if you wanted my answer now or later.

Q: Do you feel that would have been the right result, to have him receive the death penalty?

A: I thought it would have, in my own mind, and a lot of people that I've talked to since then. See, they don't understand that you as one person cannot make that choice. You have eleven other people to . . . I think I'm getting ahead of when you want me to tell you this.

Q: And what would you say caused you to change your mind?

A: I think it was just more or less to get it over with. I mean, I think we were all tired, tired of having been there. . . . No chance of getting the others to change their mind. . . . I felt that maybe they knew more than I did about it. How can everyone else be wrong?

Q: When you think back about serving as a juror on the defendant's case, is there anything you wish you had said or done differently?

A: I think I wish I would have hung the jury. . . . It's not really on my conscience. . . . I don't think we made the wrong decision, but I don't think we made the totally right decision. I think it was kind of a cop out, the decision. Nobody had to have it on their conscience. . . . That's why I thought it should really be up to the judge, because they see and hear this all the time. . . . I mean, that's why they're called the judge. [M3]

One juror, who served as the foreperson on her jury, made a concerted effort to relieve the pressure on a holdout, even if only temporarily:

There was a lot of that twelve angry juror thing. You know, "What are you, nuts? Are you kidding me?" type stuff. Then I'd have to hold them off a little bit. And at one point, I changed my vote just to take the pressure off her. Maybe I shouldn't have done that. But I wanted people to rethink. I really did not change my vote in my own mind, but I did it because I felt like we couldn't

Then when we counted the votes I said, "Now there is someone else in this group who isn't sure so let's go over this again." There was a point where one of the girls, I can't remember which one, said, "Let's go around

the jury room and give their one main reason why they feel death is warranted." The guy who was the holdout was the last one to speak, by the time it got around to her—it was a woman—there had really been some impassioned reasons given and she said, "Yeah, you've convinced me." Then we just did an "all in favor say 'aye'" thing, and we did and it was over with. [F6]

The holdouts responded in different ways to the pressure of other jurors to agree on a sentencing decision. One holdout juror was so convinced that a life sentence was appropriate that he was able to sway the other jurors by a combination of persuasion and sheer persistence:

Some wanted to kill him and some didn't want to kill him. Some wanted an eye for an eye or whatever their motives were. Some wanted, my personal self, after thirteen days of testimony and witnesses for both sides, I just, in my right mind, couldn't kill him. 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. Before you do this, make sure that you can sleep tonight or next week or the rest of your life with what you've done. And later on not think that kid did not have a chance and what I done." That was my presentation to them. I don't know about other people. I just know personally. [M4]

Other holdouts, however, ended up changing their votes simply to avoid deadlocking the jury:

Q: You changed?
 A: Uh-huh.
 Q: What caused you to change?
 A: We just quit. It was either that or we deadlocked.
 Q: And you didn't want to be deadlocked.
 A: That's something else that bothered me. Somebody made a comment, I thought of it later. "Well after all this time and money, how could we vote and have a hung jury?" And that bothered me because I thought when you are voting on somebody's life, you have to be able to live with the decision—what makes the difference. [F7]

In Indiana, as in several other death penalty states (e.g., Florida and Alabama), the trial judge has the power to override a jury's capital sentencing verdict and impose a different sentence.³⁶ In fact, the law in Indiana provides that the jury's verdict is only a "recommendation"; the judge need not defer to the jury's opinion, but is free to agree or disagree with the jury on any ground that is authorized as a sentencing factor under the state's death penalty statute.³⁷

36. IND. CODE § 35-50-2-9 (1993); see also ALA. CODE § 13A-5-47 (1994); FLA. STAT. ANN. § 921.141(3) (West 1985 & Supp. 1995).

37. See *Roark v. State*, 644 N.E.2d 565 (Ind. 1994). In *Roark*, the Indiana Supreme Court adopted an unprecedented and bizarre allocation of capital sentencing responsibility. While upholding the right of the trial judge to reject the jury's recommendation for any legitimate reason, the court simultaneously held that, on appeal, it would uphold a trial judge's override of a life recommendation when "all the facts . . . point so clearly to the imposition of the death penalty that the jury's recommendation is unreasonable." *Id.* at 572; see also *Martinez Chavez v. State*, 534 N.E.2d 731 (Ind. 1989). Of course, a sentencing jury is very unlikely to realize that a life recommendation may only be a "recommendation" to the trial judge, but would be virtually binding on appeal to the Indiana Supreme Court.

Indiana capital jurors are generally instructed that their verdict is only a "recommendation" which the judge is free to accept or reject. Given the extreme discomfort that most jurors expressed over their role in capital sentencing, most jurors tended to remember vividly the portion of the judge's instructions that indicated the jury's decision was only a "recommendation":

Q: What do you remember about the judge's instructions to the jury in deciding what the punishment should be?

A: He was very careful in telling us that whatever we decided it would be a recommendation and that if we decided for the death penalty that, you know, that the final decision would rest with him, so not to, um, you know, to look at it as an individual case, and not, if he then goes ahead and decides for the death penalty, not to let it weigh on our consciences too much, because what we did was only offer a recommendation. . . . In other words, he was trying to make us feel more comfortable with whatever we did. [F8]

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

A: He stressed a lot that it was just a recommendation. He said, "All you're going to do," he said, "if you say 'yes, he should get the death penalty,' that's not actually, you know, it doesn't mean we're actually going to give him the death penalty. It's just, your recommending to the judge," and they, that was, all this recommendation stuff was, was all we ever heard, that's all we ever heard, was, "You're just recommending." They wanted to make sure we didn't think we were actually killing him. [M2]

We knew that even if the jury decided for the death penalty, the judge would not necessarily follow. The judge could impose a prison term. The jury thought of it more as a recommendation than a decision. [M5]

One juror took the "recommendation" idea so much to heart that, in her answers to a series of interview questions, she flatly denied having played any role in the defendant's sentencing. (The case file revealed that the juror actually recommended a death sentence in the case, and that the defendant actually received a death sentence from the trial judge.) The interviewer tried his best to deal with this unexpectedly complete memory lapse:

Q: After hearing all the evidence (this may not apply . . .) and the judge's instructions to the jury in deciding the punishment, and before you began deliberating (which you say you really never did . . .), at that point did you think he should be given the death penalty?

A: No.

Q: At any point?

A: No.

Q: You didn't think he should be given a death sentence?

A: I really had no thought about it because it wasn't my choice to make, it's not my, you know, it's a judgment call, it's for [the judge] to decide, it's not my call.

Q: But the jury itself?

A: The jury itself has said, "Guilty," and we recommended the death penalty. . . . I'm not against the death penalty, nor am I against giving [the defendant] the death penalty, it just really doesn't mean a whole lot what I say because it's ultimately up to the judge. . . . That would be my

recommendation, it may not be his . . . but like I said, I think it's all up to the judge, not me. [F1]

At least some jurors did not agree with the idea of dividing sentencing responsibility between the jury and the judge:

Q: Did you know you would decide what the punishment would be?

A: We were not really deciding, but were making a recommendation. Whatever we decided, that didn't mean the judge had to go with that recommendation.

Q: Did that have any effect?

A: No, not really. I understood that a recommendation weighed heavily. I feel like that if you are going to do that, I think the jury should make the ultimate decision [rather] than the judge.

Q: Why is that?

A: Well, then what's the purpose of having it? Do you understand what I'm saying? If a judge is making the decision, then what was the purpose of it? Maybe to give him some feeling. . . . It's almost like the electoral college, you vote for this but it doesn't really count. That type thing. [M6]

We just kind of had a discussion about the mitigating circumstances. . . . That was the main topic involved in whether he would get the death sentence or not. . . . If we all felt that the mitigating circumstances were greater than—I don't remember what the other circumstances were called—if they overrode like the actual crimes or something It was kind of confusing, I guess I'm kind of stupid. . . . To be honest, I didn't really understand why it was up to the jury to decide on the death penalty. I felt that well, not really, that we did our job and we found him guilty. I thought it should have been up to the judge to sentence, but apparently that must not be the case anymore. [M3]

In one case, all of the jurors felt that the defendant should receive a life sentence. But the jurors could not agree on whether any of the alleged aggravating circumstances had been proven. In order to avoid a hung jury, which might have allowed the judge more room to impose a death sentence, the jury "compromised" on the existence of the aggravating factors:

We started with, um, the first, uh, aggravating factor—is that what they call it? And that was that he intentionally killed [victim one] and, out of our eleven hours of deliberation, that probably took ten and a half of 'em. [laughs] Actually, after I don't know, maybe a couple hours of debating and discussing on his intent, someone had suggested that perhaps the people who were saying, "No, he did not intend," or had no intent, y'know, or did not intentionally kill him, were voting that way because they were concerned that the rest of us were going to want to give him the death penalty. So we decided that we would just take a quick vote to see where we stood on the death penalty itself. And no one wanted to impose the death penalty.

Q: Oh. So you argued for ten hours?

A: We never even discussed—I mean, it wasn't even discussed. We just took a vote and found that none of us wanted to give him the death penalty.

. . . .

Q: How did it all get resolved? I mean, did you feel like some people just kinda gave in on their argument, or did they really get persuaded, or . . . ?

A: I think one of the first ones to be persuaded, said, uh, "Y'know, I, I guess I just don't want to believe that someone could do something like that, but . . ." That was why she was saying "no," because she just couldn't believe that somebody would do something like that. And she said, "But I know, I know that they do," so she changed her vote.

We finally decided that the last two people who were arguing that he didn't intentionally murder [victim one] were not going to change their mind, and we decided that, if we were a hung jury, and could not, if we couldn't come to agreement on those aggravating factors, then we couldn't make any recommendation. And if we didn't make a recommendation, there was always the chance that the judge would send him to the electric chair. So if we could come to some sort of compromise on these aggravating factors, then we could make a recommendation. And the judge, most likely, was not going to overrule it, so we compromised, and unanimously agreed that he had intentionally killed [victim one] and unanimously agreed that he had, that it had not been proven, that he had killed, intentionally killed, the other one. [F2]

In another remarkable case, the "recommendation" instruction allowed the jury to reach a bizarre "compromise" verdict during the guilt-innocence phase of the trial:

Well, I don't know if I should get into this, but there was . . . we deliberated for quite a while . . . and when we took our first vote, um, there was only three of us that said "guilty." The rest did not, and part of the problem was that two of the women, particularly, did not listen to the instructions. Uh, the only thing that turned the whole thing around was we sat there and kept reading the instructions, which [inaudible] about, without sentiment or . . . something . . . something and using your own reason and, you know, you had to sift through the testimony and decide which was true and which wasn't.

And the instructions were really quite clear but very hard to put into use, and particularly the sentiment one, and then the last holdout did not seem to understand that. She kept saying she did not want to be responsible for putting somebody to death. And that's why we had to keep going back over it and back over it.

And actually that's why . . . the only reason that we didn't recommend the death penalty was this one woman. She would have never gone for the guilty verdict if she'd thought she would be involved in recommending the death penalty. I think just about everybody else on the jury would have gone for the death penalty.

Q: Why . . . so the jury didn't want to come out hung for this reason? They wanted to, they wanted to, they'd rather go 12-0 for life than go 11-1 and a hung . . . ?

A: Right. I think most people felt so strongly about the fact that he did do it, and the one woman that was the holdout was . . . Well, for instance, when we first walked in to start deliberations, she said, "I'm not going to say he's guilty, and that's it," and she sat there and read a book.

Q: Wow.

A: Yeah, so that was very frustrating to everybody else. And second of all, she, you know, we kept talking to her and—so, all right, during jury selection, we know they asked you if you could be fair and impartial

during this, and even if it meant the death sentence, and she said, "I told them I would try, and that's all I said."

So it took the reading of the instructions over and over and finally she said, uh, "I, all right, I admit it. I'm wrong." And he said, "No. We don't want you to do it just to end this." And she said, "No. I, according to the instructions, I honestly feel that he did it, but I won't participate in the, uh, being responsible for sentencing, sentencing him to death." So that was the reason for the, not recommending the death penalty.

Q: So why—I think I know why, you understand—but why do you like it that, in the end, you had the judge? Because you, the judge then gave the death penalty?

A: Right.

Q: Is that why you liked it?

A: Right. Right.

Q: Do you think, did you, did she, did you all know that at the time, that you knew that even though you were going to come out 12-0 for life, did you have a feeling, or sense, that this was okay because the judge was going to give the death penalty anyway or . . . ?

A: I think . . .

Q: . . . was that not really there?

A: I think we all strongly hoped he would. Um, I had a feeling, although it's, it's not very usual, that he would, because I felt the evidence was, was strong. [M7]

The fact that the jury's sentencing verdict was only a "recommendation" often became the most important single tool used by other jurors in an effort to get the holdout jurors to make a decision. The "recommendation" argument was highly effective:

A: There was one holdout. She just had a thing about the death sentence. It wasn't this thing in particular. Just the death sentence.

Q: She soon came around?

A: I think partly because the judge could overturn anything we said. It was just a recommendation, not a "we're going to do it tomorrow" thing. It seemed to clear her conscience. [M8]

There were two who were not sure if the death penalty fit the crime. I think one of the things that helped us the most is I said, "Just because we have a death penalty verdict does not mean he will be killed. The judge has to either accept our recommendation or not. The judge will pass sentence on [the defendant] regardless what we come back with," and we were informed this judge was inclined to go in the past with the recommendation of the jury, and that probably complicated things more. [F9]

By the time it came to a vote most of us had, had decided for the death penalty, except for one woman . . . She was an older woman, she was just really uncomfortable with the idea of killing, you know, giving an order to kill someone else, no matter, and I don't blame her. We talked to her after the vote was down—it could have remained anonymous—but she spoke up and said, "I'm the one who voted against," and we talked to her and we did as the judge did, we reminded her that what did, what we were going to do was only give a recommendation, that didn't mean that that was going to be what actually happened to him.

Then we discussed some more about his likelihood for reform, the things that he had done, and just went on basically discussing the same things we had been discussing and she calmed down, and we did the vote again, and at that time, I think it was just two votes, at that time we all agreed, and we just all kind of sat there for a minute, and a couple of people were kind of crying. [F10]

In at least one instance, the "recommendation" argument led a holdout to vote for death, even though she was aware that Indiana judges generally do not override a death penalty recommendation in favor of a life sentence:

I along with three or four others decided we could not make up our minds right away, that we had to have another day . . . and that made some of the jurors very angry. That was fine, because I was going to take another day. There was a lot of heated debate, a lot of strong emotions about the death penalty, about our responsibility. It was a recommendation, that was one of the other things too, that we were recommending, and that helped alleviate and relieve some of my guilt. . . . Even though I know that most judges take the jury's recommendations, the fact it was a recommendation was different than you were actually imposing the sentence, the judge does that. [F11]

In addition to the "recommendation" instruction, which seemed to make an impression on all of the jurors, many jurors had mixed reactions to the rest of the sentencing instructions they received. Some jurors felt that the instructions were totally unhelpful:

The instructions were confusing. Specifically it was written in legal terminology. Very wordy. He gave us a forty-page booklet. He read a great deal to us, and it took two hours, but it was confusing and not written where a lay person could understand it. We laughed, like what did you get out of this? Very little help to us. We were not allowed to ask questions. We were given the evidence and then we were told when you have verdict you ring a bell and that is it.

We were supposed to weigh the aggravating and mitigating factors within that booklet and that is specifically what we did. Also it was reiterated by prosecution and defense. We specifically weighed the aggravating and mitigating factors. No one was really prepared to make such a decision.

An analogy, like taking you [the interviewer], and you play Doctor today, we will give you instructions on how to amputate a limb. If we take it off, no chance of infection and the patient will live, but if you do not take it off, the patient might regain use of that arm, we do not want you to amputate it prematurely and now you make the decision. We will give you the help of other people, but you cannot ask questions, they will just tell you what they think you should do.

They tried to prepare us, but were we prepared? No, I do not feel like we were. We understood what we were doing but the way we were supposed to come up with that verdict using these specific instructions were confusing, the manner in which those forty pages were written. It was very little use to us. The aggravating and mitigating factors were verbally presented, I read it to the jurors. It was not clear at all. When the bailiff brought all the evidence in, we all looked at each other and said, "Now what do we do?" [F12]

Yeah it was, it was very frustrating, because, they just kept tellin', y'know the bailiff, just kept sayin', "Read the instructions." And here are twelve people who really don't, y'know, and it's kind of left up to us to interpret them, and come to an agreement on that interpretation, and that's really scary, because you think, "Well what if we're wrong?", y'know, "what if we can all twelve mutually agree and we're still wrong?"

I don't remember consciously thinking, uh, I mean I remember being afraid that we're misinterpreting, like who are we to interpret these instructions? I don't think I was aware of a conscious fear of not applying the law correctly. I think I was more aware of just doing the right—what I thought, in my heart, was the right thing to do. [F3]

Significantly, some jurors mistakenly believed that the judge's sentencing instructions were intended to define a legally "correct" capital sentencing outcome. These jurors tended to see the sentencing decision as analogous to the guilt-innocence determination. They interpreted the judge's instructions as eliminating most of their own personal moral responsibility for choosing life or death for the defendant:

I think it more or less was a procedure. I had a feeling he was giving us a procedure and we needed to go through these certain steps. And then if all the pieces fit, then you have a responsibility to come back with a death sentence. That was the way I felt. [M9]

Unless we found him insane, temporarily insane, not responsible for his actions, we would have to find him guilty of a capital crime and recommend the death penalty. [M10]

In certain circumstances, unless mitigating circumstances, society demands execution as a penalty.

We were all very concerned jurors and scratching hard to make sure that any decision would be the right decision because it was a death penalty. We searched everything we could think of individually and together. But at the end we all decided on the death penalty.

We had to, and it was our duty to consider what society said should be done. If you could find no reason to believe otherwise you should go with it. [F13]

There was something in the instructions, or something, that . . . I would like to think I would have voted for life . . . unless this was a predetermined death penalty case . . . felony-murder . . . I mean, I don't ever remember that as being a viable alternative . . . but maybe it was, and maybe the defense lawyer didn't plead that . . . I don't remember, maybe the instructions said, "Did the defense attorney make a good case for that?" and I would have to have honestly answered "no." [F14]

As with the "recommendation" instruction discussed earlier, jurors were often able to make effective use of the rest of the jury instructions and/or statements made by a holdout juror during jury selection to persuade the holdout to join the majority. In at least some cases, holdouts were reassured that "the law" dictated the capital sentencing outcome:

Some jurors felt that we should not kill [the defendant]. This juror said she cannot give this decision for the death penalty. I then said that we were asked if we could do this at jury selection, and I asked her what she said when the judge asked you if you could come down on the death penalty. The juror told me that she told the judge during jury selection she could come down with the death penalty. I then said, "Are you feeling you cannot come down with the death penalty now even though during jury selection you said you could if the crime fits the punishment?"

This is when we had a dispute. I told these jurors, "You cannot change your mind now if the crime fits the punishment." Two jurors did this and that aggravated me, because it was as though they did not take their statements at jury selection seriously. It is a different case if the punishment does not fit the crime, then you can opt against the death penalty. [F15]

We kept going back to the instructions. Um, there would be discussion and it would get quite heated at times and one gal, in particular, had a nice, quiet, soothing voice and she would just stop everybody at that point in time and read the instructions again. And I, that's what turned most of them around, following the instructions. [M11]

Q: Was your final vote the same as your first vote?

A: No.

Q: What caused you to change your mind?

A: The rest of the jurors, we talked about it, made me realize that . . .

Q: What kind of things did they say that helped you to come to that decision and agree with . . . ?

A: For me, it was just so hard to say that, for me to think that I should be in a position to say whether somebody should live or die. Probably what they told me was, through all the evidence and trial and everything it was obvious, it shouldn't be that difficult to make that decision. [F16]

And the one person, with religious convictions, stood up and said she doesn't believe in death and so forth and so on. I asked her, "Do you think he ought to be back out in society?" And I asked her another question. I said, "What if it was your granddaughter that was in this, that it happened to?" And she said, "If there was no other alternative, he ought to die." [M12]

If the instructions did not directly lead the jury to believe that they were simply making a legally "correct" capital sentencing decision, the instructions at least ruled out certain kinds of considerations (such as sympathy or purely emotional responses) that might otherwise have resulted in more lengthy jury deliberations:

Q: Would you say the judge's sentencing instructions to the jury guided the decision-making process? At sentencing?

A: Yes and no, I mean because what he told us, because again that was when we sort of, didn't let our emotions into it. We tried to go by what the law said, you know, the understanding and what it was. [M13]

Several jurors resorted to other interesting strategies that went far beyond looking for legally "correct" answers in the eyes of the judge, or in the language of the jury instructions:

It was a lot of fun, well going out to dinner, dinner was fun, dinner was enjoyable 'cause you could get up and act like queers, you know, and get on the elevator, turn it off, and what made it so was that we had some good sheriffs. They made it enjoyable.

Q: Did they allow you to drink?

A: Oh yeah, we could drink. We could do, but everywhere you went you had to have a sheriff with you. [M14]

Uh, I don't know if, I don't suppose it's particularly significant, but um, it might be. [laughs] There were, uh, during the course of the whole trial, there were three occasions that the jury, as a group, prayed together. And um, it, it surprised me, there were a lot of people who were, who were very active in their church, and a couple of the ladies had people from their church who would come to the trial, just as a show of support to them. Uh, but it surprised me when, the first time that we, as a, as a, jury, prayed together, uh, the fore, forewoman, uh, asked if anybody would mind if we did, and I had sort of expected, not that anybody would mind, but I, I was surprised that, that all fifteen, with the alternates, all fifteen of us said, "Yes, let's do." I would just have assumed that somebody would say, "Well, I don't care." But all fifteen of us felt the need to do that. And it seemed like we, at the uh, before our deliberation of the guilt phase, and then before our deliberation of the penalty phase, and then after the penalty phase deliberating, yeah, before each of the deliberations, and then, prayed for [the defendant] after our deliberation of the penalty.

We were led in prayer by the forewoman. And then, I believe everyone, I don't think anyone was Jewish, or, non-Christian denomination. Uh, I, I'm sure that the majority, if not all of us, prayed all week long, y'know, on our, y'know by ourselves, for guidance. But as a group we were led in prayer by our forewoman.

I believe that I, as well as the other jurors, were guided, that God guided us to the decision that we made. [F2]

Q: Were you nervous about your selection as a juror?

A: Enough to seek the guidance of a priest. He said the Lord will steer you in the right path, and that one who commits crimes against his fellow man should be served justly. I told the priest that I will be required to make a decision on a man's life, and the priest said, "You will arrive at the right decision with the help of the Lord." I was surprised he did not say turn the other cheek, but he never said an eye for an eye either. He was a liberal type. This counseling helped me make a decision. [M15]

And, after the trials were concluded, many jurors continued to experience what might be described as "post-trauma" effects:

I do not think about it now. At the time it was emotionally disturbing. The intensity of the thing for a week. They ushered us out real quick. We went to a church activity right afterwards and everyone was talking about light ordinary things. I needed to get away from it. It took me a couple of days to get closure. Dave, a fellow juror now a neighbor. That night we went out and we saw Dave and we introduced our spouses, and we talked

about it and finally found closure. It was like taking a child to an emergency room and afterwards it just hits you. [F17]

I had nightmares for several months. Shootings, killings, threat of harm. Dreamed I was shot. Meeting victims. Loss of appetite, and loss of a couple of pounds. It was upsetting. Lost respect for the legal system. [F12]

By eleven o'clock in the morning, or twelve, I guess it was about twelve, we gave the [death-penalty recommendation,] the courtroom was cleared, and then we went back into the deliberation room and the judge came back. He wanted to talk to us. Okay, we can't just leave. And by this time there was a mass of reporters waiting for us and the judge came back in there with the defense attorney and with the prosecution. And, uh, the judge was telling us, they said, "Well, okay, do you have any questions?" and you know everybody was like, "YOU, Mr. Defense Attorney, what's your job? Why do you get paid if you're not going to do your job?" And he's like, "Well, I'll tell you, I'll let the judge explain that to you."

And the judge then told us that [the defendant] had served already fifteen years and right now was serving a hundred-year sentence, um, I guess he'd be out in five years, however the system goes. A hundred-year sentence on a different murder down the street. . . . The same guy had tried to do something like two weeks after that first murder that he was serving the sentence for, and they had a guy testify in the guilt phase, that yes, this is the guy that tried to do the same thing to us. That was another important factor of his guilt. And we were like, "What is this guy doing?" you know.

He, the guy that testified, like ran in and stopped him and pushed him out of the house and, and [the defendant] took off, off running.

Q: And he said this during the case?

A: Yeah, that was another, another bit of evidence, pieces of this keep coming back. The same woman that, that was crying when she said, "Yes, okay, let's give him the [death penalty]," said "Aahh." She started crying more, more, and more. She said, you know, "If we would have known this, if you, if we would have known this before, this whole thing would have been so easy." And the judge said, "That's why we don't tell you. We want to make it difficult. We want to make it fair for him." If you just assume that he's guilty, just simply because he'd done it, a crime in the past. They wanted to make it fair and we all understood. We were, the majority of us, all of us basically, were extremely relieved after the judge had told us that he was already serving. It was like, all of this guilt that we might have been feeling was gone.

Q: So you're glad obviously that he called you in there?

A: Yeah, and he wanted to explain, all the guilt that we were feeling was gone, and we left there with a clear conscience, knowing that we'd done the right thing. [M2]

III. THE LEGAL IMPLICATIONS—CALDWELL AS A POSITIVE DUTY

Having allowed the jurors to speak for themselves in the preceding Part, I will now summarize my impressions of their responses. Almost all of the jurors mentioned how they initially felt uncomfortable, sometimes even

overwhelmed, by the role that they were being asked to play during the sentencing portion of the capital trial. And, after the trial was over, many jurors suffered lingering traumatic effects from their experience. In between, however, most of the jurors in the Indiana cases were able to overcome their initial discomfort and quickly agree on a sentencing decision. On each jury, only a few of the jurors—from one to four—were “responsibility holdouts” who wanted to take more time to think about the sentencing decision.

During the jury deliberations, most jurors found ways to overcome, or avoid confronting, their sense of personal moral responsibility for the defendant’s fate. Some turned to God, others to the bottle, and still others somehow misinterpreted the trial judge’s instructions as saying that “the law” dictated a particular outcome. Given the peculiarities of Indiana death sentencing law, many jurors were able to hide behind the fact that they were only being asked to make a “recommendation” to the trial judge. This was a highly effective way to avoid the sense of personal moral responsibility—even for jurors who were aware that the trial judge would probably follow the jury’s “recommendation.”

In most of the cases, the few “responsibility holdouts” on the jury quickly became the focus of attention, as the rest of the jurors attempted to break down their resistance and achieve a unanimous sentencing decision. The three most effective techniques for persuasion consisted of: (1) pointing out to the “responsibility holdout” that the sentencing decision was only a “recommendation” to the judge; (2) arguing that the judge’s instructions and “the law” dictated a particular outcome; and (3) reminding the “responsibility holdout” that, during jury selection, he or she had expressed a capacity to vote for the death penalty.³⁸ The first two techniques clearly seek to produce a diminished sense of personal moral responsibility in the holdout juror. The third technique is a form of “estoppel” argument that also seeks to deny, at least at the time of the sentencing hearing, the holdout juror’s continuing responsibility for the sentencing decision.

If these impressions are correct, then they have significant implications for death penalty law, and especially for the *Caldwell* rule. Both *Caldwell*, and Justice Harlan’s opinion in *McGautha* (on which *Caldwell* was partially based), rely on a crucial, unproven assumption—namely, that jurors who serve in death penalty cases and are thus “confronted with the truly awesome responsibility of decreeing death for a fellow human,”³⁹ will tend to make their sentencing decisions with due regard for that “truly awesome responsibility.” In *McGautha*, Justice Harlan counted on that heightened sense of responsibility to provide a necessary substitute, in the death penalty context, for the more customary due process requirement of rules and standards to guide the decision-maker. In *Caldwell*, Justice Marshall—and even more so

38. To put it a little differently, because the holdout indicated support for the death penalty during jury selection, the holdout no longer has the right—or the responsibility—to make a sentencing decision based on lingering feelings of opposition to the death penalty.

39. *McGautha v. California*, 402 U.S. 183, 208 (1971).

Justice O'Connor—assumed that jurors would inevitably feel that sense of responsibility, so long as no one affirmatively misled the jurors about their role in the sentencing process.

What the Capital Jury Project confirms, however, is this: Faced with the choice of recommending either a life sentence (which might greatly disappoint, and possibly endanger the juror's entire community) or a death sentence (which will, at least in theory, lead to the killing of another human being), many death penalty jurors seek, and manage to find, ways to deny their personal moral responsibility for the sentencing decision.⁴⁰ By the time that they cast their final votes for life or death, many death penalty jurors—with or without being “affirmatively misled” about their role—are able to find ways to avoid confronting the “truly awesome responsibility” that Justice Harlan described in *McGautha*.

One important possible legal implication of this finding is that the *Caldwell* rule should be revisited, and perhaps reinvigorated, as a major component of Eighth Amendment jurisprudence. If many death penalty jurors actively seek and find ways to deny their personal moral responsibility for the sentencing decision, even without the “help” of inaccurate or misleading information from the prosecutor or judge, then the *Caldwell* rule—if it is to reflect the true spirit of Justice Harlan's *McGautha* opinion—must do much more than merely prohibit such inaccurate or misleading information. Rather, the *Caldwell* rule should be premised upon the psychologically defensible, and now empirically supported, assumption that death penalty jurors will take advantage of any available opportunity to *mislead themselves* about the extent of their responsibility for the sentencing decision.

Unfortunately, neither the Capital Jury Project nor any other presently available empirical research can tell us the best way to ensure that jurors feel appropriately responsible for their sentencing decision.⁴¹ For now, we must speculate that the more clearly we tell jurors about their responsibility, the more they will feel responsible. If this is so, then perhaps the *Caldwell* rule should be restated to impose upon the trial judge a *positive duty* to try to impress upon death penalty jurors the responsibility they bear for the

40. This is, of course, not surprising. In his article, *Violence and the Word*, the late Robert Cover discussed how even experienced judges in capital cases must struggle to overcome the natural human reluctance to “do violence” to another human being. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). It should be expected that jurors, who are not similarly experienced, will feel even more uncomfortable (and will even more desperately seek to find a way to cope with their feelings) when they are asked to decide whether a particular defendant lives or dies.

As another observer has written:

In novel and disorienting situations [such as death penalty trials and the Milgram experiments], individuals usually respond to internal conflict by adjusting their beliefs so that they perceive themselves as not fully responsible for their actions. In a sense, individuals shift responsibility for their actions “upward” to the perceived legitimate authority.

Charles Collier, Note, *The Improper Use of Presumptions in Recent Criminal Law Adjudication*, 38 STAN. L. REV. 423, 454 (1986).

41. The Court has never even attempted to define exactly how much of a sense of responsibility is required of a death penalty juror. See Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 87 (1990).

sentencing decision. In short, death penalty jurors should be told—in strong, unequivocal language—that their role is *supposed* to be a very difficult one, and that they simply cannot pass off the responsibility for the sentencing decision to anybody else.⁴²

Although I do not have a suggestion for specific language to satisfy the proposed affirmative *Caldwell* duty, it may be helpful to recall the language of the jury instructions that were actually given in the *McGautha* case. The trial judge in *McGautha* instructed the jury:

“[I]n this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling.

“The defendants in this case have been found guilty of the offense of murder in the first degree, and it is now your duty to determine which of the penalties provided by law should be imposed on each defendant for that offense. Now, in arriving at this determination you should consider all of the evidence received here in court presented by the People and defendants throughout the trial before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant’s background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand.

“ . . . Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion. That verdict must express the individual opinion of each juror.

“Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed.”⁴³

42. Ironically, strengthening the *Caldwell* rule from a mere negative prohibition to an affirmative duty might have the effect of reducing, rather than increasing, litigation over the *Caldwell* issue. If strong, unequivocal instructions about sentencing responsibility were given to the jury in every death penalty case, then some *Caldwell* claims would likely be swiftly dismissed by the appellate and habeas courts on the ground that the jury instructions would surely overcome the negative effects produced by any such errors or transgressions.

43. *McGautha*, 402 U.S. at 189-90 (alterations in original) (quoting the trial judge). After beginning to deliberate, the jury in *McGautha* sent a message to the trial judge asking whether a life sentence meant life without the possibility of parole. The trial judge replied by giving the jury a brief description of the California parole system, and then stated:

“So that you will have no misunderstandings relating to a sentence of life imprisonment, you have been informed as to the general scheme of our parole system. You are now instructed, however, that the matter of parole is not to be considered by you in determining the punishment for either defendant, and you may not speculate as to if, or when, parole would or would not be granted. It is not your function to decide now whether these men will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether these men shall suffer the death penalty or whether they shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment is the proper sentence, you must assume that those officials charged with the operation of our parole system will

Whatever one may think about the debate between Justice Harlan and Justice Brennan in *McGautha*, or about the wisdom of the death penalty itself, it should be apparent that the instruction given in *McGautha*—on the specific issue of sentencing responsibility—was more carefully crafted to produce the desired sense of responsibility than the legalistic “guided discretion” instructions that are given to jurors in death penalty cases today.

The problem, of course, is that despite its force, the language of the *McGautha* instruction cannot be used today without substantial modification. Some of what the trial judge told the jury in *McGautha* no longer represents an accurate statement of the law of the death penalty. Today, under prevailing Eighth Amendment doctrine, the jury cannot be given the kind of unfettered discretion that was present in *McGautha*.⁴⁴

This suggests another possible implication of the evidence from the Capital Jury Project—perhaps the Supreme Court’s adoption of the Eighth Amendment “guided discretion” model itself should be reconsidered. The tension here is both clear and unavoidable: Is it possible to give a “little” guidance to a death penalty jury, without the jurors mistakenly concluding that they are getting a “lot” of guidance, and thus avoiding their personal moral responsibility for the sentencing decision?⁴⁵

Maybe Justice Harlan was right all along in *McGautha*. Perhaps the best we can do in the death penalty area is to turn this intensely moral decision over to twelve good people and let them sweat blood over it.⁴⁶ Perhaps our attempts to create “rationality” from within, by drafting lists of “aggravators” and “mitigators,” merely permit the jury to conclude that there is a legally “correct” answer to the sentencing question.⁴⁷ And by doing so, perhaps we enable a majority of jurors to coerce the few “responsibility holdouts” on their jury into giving in and going along with the majority.

These issues, though ultimately the most important ones for the future of the death penalty in America, are beyond the scope of this Article. Nor can the Capital Jury Project provide answers to such questions; like the death

perform their duty in a correct and responsible manner, and that they will not parole a defendant unless he can be safely released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Adult Authority will properly carry out its responsibilities.”

Id. at 190 n.4 (quoting the trial judge in *McGautha*).

44. See *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding a death penalty statute that replaced unfettered discretion with guided discretion); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (striking down then-existing discretionary death penalty statutes because they produced arbitrary, capricious, and often discriminatory results).

45. Some would argue that this tension, or a variant of it, is a reason to abolish the death penalty altogether. See *Callins v. Collins*, 114 S. Ct. 1127, 1133 (1994) (mem.) (Blackmun, J., dissenting) (discussing the tension between the need for consistency in the application of the death penalty and a respect for the uniqueness of the individual and the circumstances of the particular offense), *denying cert.* to 998 F.2d 269 (5th Cir. 1993).

46. See *McGautha*, 402 U.S. at 207-08; see also Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047 (1991) (arguing for a return to pre-*Furman*, *McGautha*-like discretionary decision-making by juries in death penalty cases, constrained by a judicial determination of the legal requirements for death sentences).

47. See Weisberg, *supra* note 1, at 391-95.

sentencing decision itself, the questions are moral, rather than scientific or empirical, in nature. In the meantime, while we continue to debate the morality of the death penalty, we can at least attempt to learn from the words and experiences of those jurors who have, if only briefly, felt the responsibility of deciding whether a defendant should live or die.