

Should Juries and the Death Penalty Mix?: A Prediction About the Supreme Court's Answer

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Although still in its infancy, the Capital Jury Project has already vastly improved our understanding of the jury sentencing process in capital cases. As the foregoing articles make clear, the overall import of this research is that jury decision-making in death penalty cases is unpredictable and perhaps even lawless. The question addressed here, through the vehicle of a mock United States Supreme Court opinion, is whether this finding has any constitutional significance.

The Court's death penalty decisions have routinely given short shrift to empirical data. One could even say that the Court considers social science research "irrelevant" to death penalty jurisprudence, at least if relevance is defined to include both of its two commonly accepted components: the materiality of a given piece of evidence, and the probative value (or strength) of the evidence.^a In its earliest death penalty decisions of the modern era, the Court's response to social science research rested upon a perceived lack of probative value. Consider, for example, the Court's mid-1970's decisions upholding the death penalty against constitutional challenges. Although conceding that studies concerning the deterrent effect of capital punishment would be useful (*i.e.*, material) in assessing its constitutionality, the Court labeled as "inconclusive" those studies which suggested that the death penalty has only a minimal deterrent impact, and thus resorted to intuition in deciding that the death penalty does deter crime.^b Similarly, in *Witherspoon v. Illinois*,^c the Court questioned the probative value of data suggesting that death-qualified juries (*i.e.*, juries from which people who will not vote for the death penalty are removed) are more prone to convict at the trial stage of a capital case. Although the Court appeared willing to consider conviction-proneness an impediment to achieving the Sixth Amendment's guarantee of jury impartiality, it concluded that the research extant at the time (a total of three studies) was "too tentative and fragmentary" to be helpful on the issue.^d

Eighteen years later, despite twelve confirmatory studies, then-Justice Rehnquist's opinion in *Lockhart v. McCree*^e continued to insist that social science had nothing worthwhile to say on the conviction-proneness issue. This time, however, the Court directed most of its attention to the materiality

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a. See generally MCCORMICK ON EVIDENCE § 185 (4th ed. 1992).

b. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 185 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

c. 391 U.S. 510 (1968).

d. *Id.* at 517. The Court continued: "In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." *Id.* at 518 (*italics in original*).

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

question. Rehnquist noted that even if the new research did prove that a death-qualified jury is more conviction-prone than a jury not so constituted, it was not pertinent to the Sixth Amendment issue: the Impartiality Clause only guarantees jurors who are willing to abide by their oath, not jurors with particular types of attitudes.^f In a similar vein, Justice Powell's decision in *McCleskey v. Kemp*^g made only a half-hearted attempt at attacking either the methodology or findings of the Baldus study,^h a mammoth undertaking which demonstrated that murderers who kill white victims are much more likely to be sentenced to death than those who kill blacks. Instead, Powell concluded that the research was immaterial because it did not show that discrimination or arbitrariness infected any particular case in which the victim was white.ⁱ

How would the current Court react to the types of data reported in the five principal papers published in this issue of the *Indiana Law Journal*? The following opinion by "Justice O'Rehnedey" reflects the prediction that a majority of the Court, most obviously including Justices Rehnquist, O'Connor, and Kennedy, would dismiss the research as both immaterial and lacking in probative value. The three dissenting Justices disagree. The first dissent, written by "Justice Marnan," adopts the abolitionist view endorsed by now-retired Justices Brennan, Blackmun, and the late Justice Marshall.^j Although perhaps unlikely to be authored by a current Justice, such an opinion is not an entirely unrealistic forecast given the strength of the Capital Jury Project's findings, the still-malleable attitudes of Justices such as Souter and Breyer,^k and the sudden shifts in attitude that death penalty cases seem to inspire.^l The

f. *Id.* at 183 ("In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints.").

g. 481 U.S. 279 (1987).

h. See DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

i. *McCleskey*, 481 U.S. at 294-95.

j. See *Callins v. Collins*, 114 S. Ct. 1127, 1138 (1994) (mem.) (Blackmun, J., dissenting), *denying cert.* to 998 F.2d 269 (5th Cir. 1993); *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (per curiam) (Brennan, J., concurring); *id.* at 358-59 (Marshall, J., concurring).

k. Justice Souter has never voiced opposition to the death penalty, but has written or joined several recent opinions finding in favor of the defendant in such cases. See, e.g., *Simmons v. Carolina*, 114 S. Ct. 2187 (1994); *Romano v. Oklahoma*, 114 S. Ct. 2004 (1994); *Graham v. Collins*, 113 S. Ct. 892 (1993); *Sochor v. Florida*, 112 S. Ct. 2114 (1992). Similarly, although Justice Breyer has stated that he has no fundamental opposition to the death penalty, some commentators suggest that he is "inclined to side with the court's liberals on the issue." Nancy E. Roman, *Breyer's Questions Suggest Tilt to the Left*, WASH. TIMES, Oct. 4, 1994, at A4. In addition, during his confirmation hearings Breyer avoided giving a direct answer to the question of whether he agreed with *McCleskey*. Bruce Fein, *Breyer After Blackmun*, WASH. TIMES, July 26, 1994, at A16.

l. Witness, for example, both Justice Blackmun's late conversion, and Justice Powell's too-late conversion (after he retired from the bench). Justice Blackmun's opinions at least implicitly supported the death penalty until 1994, when he dissented to a denial of certiorari in *Callins v. Collins* on the ground that the death penalty "as currently administered" is unconstitutional. 114 S. Ct. at 1138 (Blackmun, J., dissenting).

Justice Powell never repudiated capital punishment while on the bench, but two years after his retirement from the Court, he stated:

"It's perfectly clear that if I were in the legislature now, in view of the extended litigation and the ineffectiveness of the way the system operates, I would vote against the death penalty." . . .

"I would be inclined to vote against it in any event. We are the only Western democracy that still retains the death sentence. . . . We have a system that isn't working, and I doubt very

second and third dissents, by "Justice Stelia" and "Justice Scavens" respectively, also accept the research, but for different reasons. Justice Stelia uses it as a springboard for advocating the return of the death penalty process to its pre-1970's form, while Justice Scavens relies on it in support of his proposition that jury decision-making be eliminated in capital cases. Although these dissents are perhaps a bit fanciful, they are not entirely inconsistent with the thoughts of the Court's most iconoclastic members, Justices Stevens and Scalia.^m

KILLER v. TEXCALIDA

JUSTICE O'REHNEY delivered the opinion of the Court.

Petitioner argues that his death sentence violates the protections of the Eighth Amendment of the United States Constitution because it was arbitrarily imposed and thus constituted cruel and unusual punishment. More specifically, based on studies from the Capital Jury Project, petitioner contends that his sentence violates the prohibitions set forth in *Furman v. Georgia*, 408 U. S. 238 (1972) (per curiam), and in *Gregg v. Georgia*, 428 U. S. 153 (1976), against "sentencing procedures that create[] a substantial risk that [the punishment will] be inflicted in an arbitrary and capricious manner," *id.*, at 188 (joint opinion of Stewart, Powell, and Stevens, JJ.). Petitioner argues that jurors in death sentence proceedings (1) do not take their job seriously; (2) do not fully understand the instructions given them by the trial judge; (3) pay little or no attention to evidence presented at the sentencing phase; and (4) are generally influenced in the direction of a death sentence by these and other factors. For the reasons given below, we reject petitioner's arguments and affirm his death sentence.

much whether you could ever by law create a system that would work at the present stage of our civilization."

Stuart Taylor Jr., *Justice Powell's Predicament*, LEGAL TIMES, Oct. 2, 1989, at 29 (second omission in original) (quoting former Justice Powell).

m. Most relevant in this regard is the debate between Stevens and Scalia about the merits of "guided discretion" versus "individualized punishment" in *Walton v. Arizona*. See 497 U.S. 639, 656 (1990) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 708 (Stevens, J., dissenting). Whereas Scalia opts for the former, he appears to do so primarily out of respect for precedent. See *id.* at 672-73 (Scalia, J., concurring in part and concurring in the judgment). Stevens, on the other hand, justifies his support for wide-open jury decision-making on the ground that discretion has already been limited by requiring proof of an aggravating factor. See *id.* at 715-16 (Stevens, J., dissenting). Although disagreeing on the surface, the two Justices may not be that far apart. See, in particular, the single footnote in Scalia's opinion. *Id.* at 665 n.* (Scalia, J., concurring in part and concurring in the judgment).

I

We first set out petitioner's arguments in more detail. Petitioner's initial assertion is that, as a result of a host of factors, many capital sentencing jurors misapprehend or are overly casual about the import of their decision. This attitude, petitioner contends, undermines the spirit, if not the letter, of our holding in *Caldwell v. Mississippi*, 472 U. S. 320 (1985), barring a death sentence that rests "on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.*, at 328-29. In support of this factual contention, petitioner points to a seven-state survey of persons who have served as capital sentencing jurors,¹ only one-fifth of whom believed that either the jury or they as individuals were "most responsible" for the punishment meted out to the defendant at trial. Nearly one-half of those surveyed instead felt that the defendant was most responsible for the punishment; another one-third chose the "law" as most responsible, with three out of four choosing the law as either the first or second most important factor of five (the other four being the defendant, the jury, the individual juror, and the judge).²

Another study based on interviews of capital jurors, this time focusing solely on Indiana trials, concluded that

[f]aced 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.³

Both this study and an in-depth study of one capital case in Georgia⁴ quote extensively from juror statements purporting to demonstrate how jurors minimize responsibility for their sentencing decision by pointing to the law's "requirements," the appellate process, and (at least in Indiana, which allows judicial override of jury sentences) the fact that the jury vote is only a "recommendation."⁵ Finally, the Georgia study describes the beliefs of some jurors that individuals who are sentenced to die are rarely executed, and that those who receive a life sentence are often released well before their life expires—beliefs which are also said to undermine juror concern about imposing the death penalty.⁶

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

2. *Id.* at 1094 tbl. 10.

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

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

5. Hoffmann, *supra* note 3, at 1146-52; Sarat, *supra* note 4, at 1130-31.

6. Sarat, *supra* note 4, at 1131-33; see also James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1178 tbl. 5 (1995) (noting that 74% of jurors who vote for the death penalty believe that a life sentence means the defendant will spend fewer than 20 years in prison).

Petitioner's second assertion is that capital sentencing jurors significantly misunderstand their instructions in ways that undermine what we described in *Woodson v. North Carolina*, 428 U. S. 280 (1976), as "Furman's basic requirement": that a death penalty statute replace "arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Id.*, at 303. Here, Petitioner relies on a survey of eighty-three persons who had previously served on capital juries in North Carolina, which found that a substantial percentage of those surveyed believed, contrary to North Carolina law (1) that the jury could consider any aggravating factor, including those not mentioned by the judge (48%); (2) that mitigating circumstances must be proven beyond a reasonable doubt (41%); (3) that a mitigating circumstance may be considered only if all jurors agree it exists (42%); (4) that a death sentence is required when there are stronger aggravating than mitigating circumstances (27%); and (5) that a life sentence is not required even when there are no aggravating circumstances (36%) or when mitigating circumstances are stronger than aggravating ones (34%).⁷ Additionally, the aforementioned seven-state study found that 41% of those surveyed believed that a death sentence was required if the defendant's conduct was "heinous, vile, or depraved," and that 32% believed such a sentence was required if the defendant would be dangerous in the future⁸—both beliefs are contrary to the law announced in our previous decisions. See *id.*, at 304 ("[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.") (citation omitted).

Petitioner next asserts that, even if capital sentencing jurors can be said to understand their penalty stage instructions, they do not follow them, thus again undermining our determination in *Woodson* and *Gregg* that the jury be "circumscribed by the legislative guidelines." *Gregg*, 428 U. S., at 207 (joint opinion of Stewart, Powell, and Stevens, JJ.). In support of this argument, petitioner presents evidence from the seven-state study indicating that approximately 50% of those surveyed were "absolutely convinced" or "pretty sure" of their penalty decision before the penalty stage had begun,⁹ and that almost 75% of those surveyed believed that the sentencing instructions "simply provided a framework for the decision most jurors had already made [after the guilt stage of trial]."¹⁰ Petitioner also points to a Kentucky-based survey focusing on nine jurors who claimed to have changed their minds about the appropriate penalty between the end of the guilt phase and the final

7. Luginbuhl & Howe, *supra* note 6, at 1165-66 tbl. 1, 1172 tbl. 3.

8. Bowers, *supra* note 1, at 1091 tbl. 7.

9. *Id.* at 1089-90 tbls. 5, 6.

10. *Id.* at 1093 tbl. 9.

vote on the sentence.¹¹ According to this study, the principal reason for these changes was not consideration of the evidence presented during the sentencing proceeding, but the desire to avoid a hung jury.¹² Petitioner asserts that this finding reinforces the conclusion that the information presented and the instructions given at the sentencing stage are superfluous.

Petitioner's final assertion is really a summation of the three foregoing assertions: *Furman* and its progeny were violated by his death sentence proceeding (and apparently all other death sentencing proceedings as well) because the various deficiencies described above make an improper death sentence more likely. This theme is echoed in most of the studies that have been cited. The North Carolina study, for instance, concludes 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."¹³ The author of the Georgia case study concluded in that case that the "diffusion of responsibility . . . invited a death verdict."¹⁴ And, the seven-state study emphasizes findings that suggest that capital jurors are heavily influenced by the finding of guilt at the trial stage, the perception that the prosecution outperforms the defense, and prosecution-oriented misunderstandings about their instructions.¹⁵

II

Before turning to the legal issues in the case, we are constrained to point out what we believe to be several "serious flaws" in petitioner's evidence. Cf. *Lockhart v. McCree*, 476 U. S. 162, 168 (1986). Petitioner's arguments rest entirely on several research studies, conducted under the aegis of the Capital Jury Project ("the Project"), which rely on interviews of jurors involved in the guilt and punishment phases of capital trials in fourteen states since January of 1988. Typically, four jurors from each jury were interviewed, with the interviews lasting an average of three hours each. Two problems are immediately apparent from even a cursory examination of the Project's methodology.

The first problem is the effect of memory decay. The Project, which began collecting data no earlier than 1990 in some of the target states (and as late as 1992 in others), asked jurors a series of detailed questions about complicated legal events occurring several months to several years in the past (indeed, the Kentucky study included jurors who had served on trials in 1985 and 1986).¹⁶ Under such circumstances, the jurors' recall of their knowledge

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

12. *Id.* at 1198-1200, 1203-06, 1207.

13. Luginbuhl & Howe, *supra* note 6, at 1181.

14. Sarat, *supra* note 4, at 1135.

15. Bowers, *supra* note 1, at 1091-1101.

16. Sandys, *supra* note 11, at 1189. Professor Bowers estimates that the average delay between the trial and the interview has been over one year. William Bowers, Statement during National Conference on Juries and the Death Penalty, Indiana University School of Law-Bloomington (Feb. 24, 1995).

or actions at the time of the sentencing proceeding, much less the knowledge and actions of others on the jury at that time, is highly suspect. For example, expecting individuals with no legal training to remember several months or even years later the evidentiary effect of aggravating and mitigating circumstances and the standards of proof associated with each, as required by the North Carolina study, is naïve. As the authors of that study themselves noted, jurors are best at understanding concepts with which they are familiar.¹⁷ Thus, for instance, the fact that many jurors believed, at the time of the survey, that the jury must unanimously find that mitigating circumstances are proven beyond a reasonable doubt may merely reflect the substitution of well-known legal principles (*i.e.*, unanimity, and proof beyond a reasonable doubt) for actual memory. Similarly, a belief that a finding of aggravating circumstances mandates the death penalty or that non-statutory aggravating circumstances may be considered by the jury could well be a present-day commonsense conclusion masquerading as a memory of judicial instructions delivered years earlier.¹⁸ Jurors' memories about certain other factors, such as what they felt at the end of the guilt stage or how they reacted to evidence at sentencing, could also be distorted by hindsight bias resulting from knowledge of the eventual outcome of a case.¹⁹

Further evidence that memory loss affects the Project's findings can be derived from the fact that the participating jurors did not act in a vacuum. It is difficult to believe, for instance, that jurors who thought that mitigating circumstances had to be unanimously perceived, or that any statutory aggravating factor required the death penalty, would not be disabused of these notions by more knowledgeable fellow jurors during the deliberation and voting processes. The mere fact that a large percentage of the jurors themselves believe they remember their deliberations "very well" or "fairly well" (a finding of the seven-state study)²⁰ does not contravene these observations.²¹ Indeed, some of the studies candidly recognize that jurors misremembered or disagreed about what happened during sentencing deliberations.²²

The second obvious problem with the Capital Jury Project research is that fewer than one-half the people on any given jury were interviewed. As one of the researchers admits, "[t]he four randomly selected jurors per trial are not, of course, a sufficient sample for generalizing about the experiences of

17. See Luginbuhl & Howe, *supra* note 6, at 1169-70.

18. The same can be said for the types of questions reported in the seven-state survey. See Bowers, *supra* note 1, at 1086-1101.

19. For an account of the insidious impact of hindsight on memory, see S.A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 197 PSYCHOL. BULL. 311 (1990).

20. Bowers, *supra* note 1, at 1086 tbl. 2.

21. Perhaps also of relevance here is research in the eyewitness area which indicates that one's degree of confidence in one's memory is unrelated to (or perhaps even inversely related to) the accuracy of one's memory. For a summary of the research, see Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 985 (1977).

22. Hoffmann, *supra* note 3, at 1146-47; Sandys, *supra* note 11, at 1203-06.

all twelve jurors in a given case.”²³ In other words, even assuming that one or two of the four jurors interviewed misunderstood a particular instruction at the time of deliberation and persisted in that misapprehension despite input from other jurors, this discovery tells us nothing of what the other, non-surveyed jurors in that case may have understood about the instruction.

Finally, the way in which the jurors were queried may also have reduced the value of some of their responses. Particularly troubling, given petitioner’s heavy reliance on the answer to it, is the question asking jurors which person or entity they think is “most responsible” for the defendant’s punishment.²⁴ The words “most responsible” are subject to multiple interpretations and are ultimately insolubly ambiguous. Certainly a juror could believe that the defendant is the primary cause of his punishment, or that the law provides the main vehicle for his sentence, while at the same time maintaining the belief (considered important in *Caldwell*) that the “ultimate determination of death” will rest with the jury. 472 U. S., at 333. Particularly puzzling is petitioner’s allegation that jurors who say the “law” is most responsible for the punishment meted out in a capital sentencing proceeding are improperly minimizing their role.²⁵ The entire import of our decisions since *Woodson* and *Gregg* has been to impose the constraints of law on the jury decision-making process. That jurors recognize these constraints, one would think, is cause for optimism, not pessimism, about the death penalty process.

III

Even if we accept the Project’s research on its face, we are not convinced that it provides substantial support for petitioner’s four arguments. Beginning with the assertion that capital sentencing jurors do not take their responsibility seriously, we note that the survey results seem to be contradictory to a significant degree. Despite findings that neither the jury nor individual jurors are generally considered “most responsible” for the punishment imposed, the research is replete with accounts of jurors who felt burdened by the decision they had to make. The seven-state study states, for instance, that “it was common for the jurors to comment that serving as a capital juror was a ‘truly memorable experience,’ something they ‘would never forget,’ because, as some added, ‘it was the most important thing I’ve ever done.’”²⁶ The Indiana and Kentucky studies also contain reports of jurors who talked of “‘the feeling of the responsibility that you have,’”²⁷ how “scary” it would be “‘if we can all twelve mutually agree and we’re still wrong,’”²⁸ how “‘it was just so hard to say that, for me to think that I should be in a position to say whether

23. Bowers, *supra* note 1, at 1081.

24. *See id.* at 1094 tbl. 10.

25. *Cf. id.* at 1095-96; Hoffmann, *supra* note 3, at 1157-58.

26. Bowers, *supra* note 1, at 1086 (quoting an unidentified juror).

27. Hoffmann, *supra* note 3, at 1143.

28. *Id.* at 1152 (quoting an unidentified Indiana Juror).

somebody should live or die,"²⁹ having nightmares, loss of appetite, crying (both during and after the proceeding was over),³⁰ and the "overwhelming responsibility" of sentencing a man to death.³¹ Admittedly, the author of the Indiana study concluded that from eight to eleven members of each jury were relatively casual about their responsibility, but this conclusion appears to be based primarily on the perception that most jurors "rather quickly and easily agreed on a sentencing decision" rather than on admissions from these jurors themselves that they did not carefully consider their position.³²

We also have difficulty agreeing with petitioner that the research concerning juror knowledge of instructions shows sufficient misunderstanding of the law to warrant his conclusion that jury decision-making is arbitrary. Again setting aside concerns about validity, the North Carolina study—which is most directly on point—still indicates that of the sixteen questions asked about instructions, eleven were answered correctly by a large majority of those who felt able to answer.³³ With two of the remaining five questions, correct answers outnumbered incorrect answers by a smaller margin. Only three questions, one of which queried jurors about whether they could consider non-statutory aggravating factors and two of which inquired into the combination of mitigating and aggravating circumstances that requires a life sentence, produced more incorrect answers than correct ones. In each of the latter three cases, the percentage answering incorrectly fell under 50% (albeit barely).³⁴ *In toto*, we hardly think that this showing demonstrates lawless decision-making. Furthermore, we reiterate that whatever the understanding of the instructions by individual jurors, decision-making in capital sentencing proceedings is a group process that is very likely to ameliorate ignorance of the law. Cf. *Ballew v. Georgia*, 435 U. S. 223 (1978) (holding that a jury of six or more is required to promote group deliberation and accurate decision-making).

Petitioner's third contention, that many jurors pay no attention to the evidence at sentencing, is also not adequately supported by the research. First, even assuming that they are not infected by hindsight bias, the results from Kentucky and the seven-state survey showing that many jurors had made their

29. *Id.* at 1153 (quoting an unidentified Indiana Juror).

30. *Id.* at 1155.

31. Sandys, *supra* note 11, at 1216 (quoting an unidentified Kentucky Juror).

32. See Hoffmann, *supra* note 3, at 1143.

33. See Luginbuhl & Howe, *supra* note 6, at 1165-66 tbl. 1, 1172 tbl. 3. The same was true of the two questions about instructions reported in the seven-state study. See Bowers, *supra* note 1, at 1091 tbl. 7 (reporting that jurors who stated that the heinousness of the crime required the death penalty comprised only 40.9% of the sample, compared to 57.7% who did not; jurors who stated that dangerousness required the death penalty comprised only 31.9% of the sample, compared to 66.6% who did not).

34. See Luginbuhl & Howe, *supra* note 6, at 1165 tbl. 1 (reporting that 48% of jurors believed that "[a]mong [the] factors in favor of a death sentence," the jury could consider "any aggravating factor that made the crime worse"); *id.* at 1172 tbl. 3 (reporting that 48% of jurors erroneously believed that they were free to choose among a life or death sentence when they found "one or more factors opposing a death sentence and none favoring it," and that 48% of jurors erroneously believed that they were free to choose the sentence if they found "stronger factors opposing than favoring a death sentence").

decisions about the penalty after the guilt adjudication stage are potentially misleading to the extent they suggest that jurors did not consider all of the evidence relevant to capital punishment. The aggravating and mitigating evidence presented at the sentencing proceeding often merely reaffirms what was presented at trial. Indeed, in many cases, this evidence revolves almost entirely around the circumstances of the offense and the defendant's mental state at the time it was committed,³⁵ which is precisely the focus of many capital trials.³⁶

Second, as with petitioner's first contention regarding jury casualness, much of the research is contradictory. While the data from Kentucky and the seven-state survey were gleaned from single answers to abstract questions, the Indiana research, which provides fuller accounts of how jurors actually behaved, describes juries which "'went down each aggravating and mitigating circumstances [sic],'"³⁷ "'had a discussion about the mitigating circumstances [T]he main topic involved . . . whether he would get the death sentence or not,'"³⁸ "'started with um, the first, uh, aggravating factor—is that what they call it?,'"³⁹ and "'specifically weighed the aggravating and mitigating factors.'"⁴⁰ It is also noteworthy that a sizeable number of those jurors who stated that they were "absolutely convinced" or "pretty sure" about their verdicts after the guilt adjudication phase nonetheless changed their minds during the sentencing phase.⁴¹

Given our dismissal of petitioner's first three contentions, his fourth argument—that juror nonchalance, ignorance, and close-mindedness all work to increase the likelihood of an improper death sentence—fails as well. We cannot resist noting, however, that even if we accept the dim view of capital sentencing juries that petitioner promotes, his fourth assertion rings hollow on its own terms. First, contrary to what petitioner would have us believe, the evidence from the Capital Jury Project suggests that the three supposed

35. Of the eight mitigating circumstances listed in the widely adopted Model Penal Code death penalty statute, only two (no prior history and youth) do not relate to circumstances at the time of the offense. Typical mitigating circumstances include domination by another at the time of the offense, extreme emotional disturbance at the time of the offense, and impaired capacity for appreciation and control at the time of the offense. MODEL PENAL CODE § 210.6(4) (1980). Of the eight aggravating circumstances listed by the Code, only two (defendant under sentence, and previous conviction of a violent felony) do not involve circumstances about the offense. Typical aggravators include the vileness of the crime, the commission of other offenses during the murder, and the murder of more than one person at the time of the offense. *Id.* § 210.6(3).

36. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 331, 332 (1983) ("Were defendant simply to admit guilt and go straight to the penalty phase trial, the prosecution at that time would undoubtedly present much of what it otherwise would have presented during the guilt phase. . . . [M]uch of the defense evidence which would be presented at the guilt phase, such as evidence of diminished capacity or insanity, also may be presented at the penalty phase in mitigation.")

37. Hoffmann, *supra* note 3, at 1143 (quoting an unidentified Indiana juror).

38. *Id.* at 1148 (quoting an unidentified Indiana juror).

39. *Id.* (quoting an unidentified Indiana juror).

40. *Id.* at 1151 (quoting an unidentified Indiana juror).

41. See Sandys, *supra* note 11, at 1194 tbl. 3 (reporting that 13 of 43 jurors who stated that they had initially favored a particular verdict after the penalty phase ultimately changed their votes by the end of the sentencing deliberations).

deficiencies in the jury decision-making process identified above can, and often do, redound to defendants' benefit.⁴² More importantly, if petitioner's view were correct, we would expect to see a significant number of death sentences being handed down by juries. Yet, sources other than the Capital Jury Project indicate that most capital juries opt against the death penalty. Indeed, some estimate the jury death sentence rate to be below 25%, depending upon the jurisdiction, while most would not put it far above 50% regardless of the jurisdiction.⁴³ Whatever the correct percentage, capital sentencing juries do not seem to be "uncommonly willing to condemn a man to die," *Witherspoon v. Illinois*, 391 U. S. 510, 521 (1968), despite what petitioner would have us believe.

IV

Most important to our decision today, however, is that we do not believe petitioner has made out a constitutional claim even if the empirical evidence demonstrates what he claims. From this perspective, we again briefly canvass petitioner's four contentions.

Petitioner first argues that the failure of a significant number of capital sentencing jurors to take their job seriously fundamentally undermines the integrity of their verdict. While we did decide, in *Caldwell*, that a prosecutor's exaggerated allusion to the nullifying power of appellate courts "presents an intolerable danger that the jury will in fact choose to minimize the importance of its role," 472 U. S., at 333, that decision was predicated upon intentional misconduct by the state. Even if we were to reverse our decision in *Romano v. Oklahoma*, ___ U. S. ___; 114 S. Ct. 2004 (1994), and extend *Caldwell* to accurate statements about factors which tend to depreciate the jury's role (such as appellate review, judicial override, and the probability of execution), state action would still be a predicate for a constitutional violation. The possibility that capital jurors, on their own initiative, with no prodding by the prosecutor or judge, might choose to take a relatively casual attitude toward their decision is not a constitutionally cognizable cause of action, absent proof that they completely failed to consider the evidence or in some other way totally abdicated the responsibilities delineated in their oaths. Petitioner has failed to make such a showing in his case, and we doubt whether any other individual sentenced to death would be able to do so. We also decline

42. See Hoffmann, *supra* note 3, at 1144, 1147, 1149; Sandys, *supra* note 11, at 1203-04. But see Luginbuhl & Howe, *supra* note 6, at 1176 tbl. 4 (stating that various juror misunderstandings will actually increase the potential for a death sentence).

43. See DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 233 (1990) (finding that, in ten states, the death sentence rate varied between 25% (in Delaware) to 74% (in Florida)—the latter a state where judicial override of the jury's recommendation of life accounts for roughly 25% of the death sentences; only one other state, Mississippi, returned over 50% death sentences). Other estimates of the percentage of capital offenders sentenced to death put the figure at less than 25%. See Kenneth C. Haas & James A. Inciardi, *Lingering Doubts About a Popular Punishment*, in CHALLENGING CAPITAL PUNISHMENT 11-28 (Kenneth C. Haas & James A. Inciardi eds., 1988).

petitioner's invitation to require judges to instruct the jury that they are the principal arbiters of the defendant's fate, since nothing petitioner has presented convinces us that the typical juror believes otherwise.

Petitioner's argument that juror misunderstanding of instructions violates the Eighth Amendment also falls short. In *Gregg*, we made it clear that to reach a valid death sentence, a capital jury "must find and identify at least one statutory aggravating factor." 428 U. S., at 206 (joint opinion of Stewart, Powell, and Stevens, JJ.); see also *Zant v. Stephens*, 462 U. S. 862, 877 (1983). *Gregg* also requires that the jury be allowed to focus on the "particularized nature of the crime and the particularized characteristics of the individual defendant," 428 U. S., at 206 (joint opinion of Stewart, Powell, and Stevens, JJ.), a theme we reiterated in *Lockett v. Ohio*, which held that mitigating evidence relating to these issues could not be precluded. 438 U. S. 586 (1978). If, however, the jury verdict is based on at least one statutory aggravating factor and on a particularized assessment of the crime and the defendant, then, whatever may be the case under state law, it passes constitutional muster. None of the North Carolina findings concerning juror comprehension of instructions even remotely suggests that capital jurors misapplied these minimum constitutional requirements. A substantial majority of jurors understood that they could consider any mitigating factors.⁴⁴ And by far the majority of those surveyed knew that aggravating factors had to be proven beyond a reasonable doubt to the satisfaction of all the jurors.⁴⁵ Even if, as the research purports to show, a significant number of jurors incorrectly believe that a death sentence may be imposed when *any* such aggravating factor is found to exist,⁴⁶ or when none at all is present,⁴⁷ the trial court implementing our admonition that juries identify the aggravating circumstance(s) upon which they rely would discover and reject any death sentence predicated on these assumptions, thus avoiding a violation of *Gregg*. Cf. *Zant*, 462 U. S., at 890-91.

For the reasons given above, we could not countenance a verdict pronounced by a jury that did not consider particularized evidence about the offense and the defendant. But even if we accept petitioner's third claim that many jurors have settled on their penalty verdict prior to the sentencing hearing, we are left unconvinced that these jurors give no weight to evidence and instructions during the sentencing hearing. At most, petitioner's evidence shows that they are predisposed to vote a particular way after the guilt phase, not that they shut their minds to subsequent events.

44. See Luginbuhl & Howe, *supra* note 6, at 1166 tbl. 1 (reporting that 59% of the survey participants understood that the jury should consider "any mitigating factor that made the crime not as bad").

45. *Id.* at 1165 tbl. 1 (reporting that 68% of the jurors surveyed knew that aggravating circumstances must be proven beyond a reasonable doubt).

46. *Id.* tbl. 1 (reporting that 48% of jurors believed that the jury could consider "any aggravating factor that made the crime worse").

47. *Id.* at 1172 tbl. 3 (noting that 36% of the jurors interviewed believed that the death penalty could not be imposed when the jury found "one or more factors opposing a death sentence and none favoring it").

Finally, even if we accept petitioner's contention that the foregoing tendencies tilt the sentencing process in the direction of death, we cannot say that this fact would prove a constitutional defect. As we stated in *Lockett*, there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." 438 U. S., at 605 (opinion of Burger, C.J.). And, as we stated in *McCleskey v. Kemp*, 481 U. S. 279 (1987), statistics of the type presented by petitioner "at most may show only a likelihood that a particular factor entered into some decisions," *id.*, at 308, not that his own sentence was defective. Finally, as this Court stated in *McCleskey*, the kind of empirical evidence petitioner offers here is "best presented to the legislative bodies."

It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."

Id., at 319 (citations omitted).

Accordingly, we deny relief to petitioner.

It is so ordered.

JUSTICE MARNAN, dissenting.

This Court has once again blinked at reality. Confronted by yet another impressive body of research proving the arbitrariness of the death penalty process, the Court has again denied that the problems painstakingly described therein exist. Cf. *McCleskey v. Kemp*, 481 U. S. 279 (1987); *Lockhart v. McCree*, 476 U. S. 162 (1986). Apparently, the Court's trust in the jury is so blind and its fear of "legislating" so great that no amount of evidence establishing the deficiencies of the former or the need for the latter will spur it into action. I reiterate my belief that the death penalty is unconstitutional. This belief is substantially bolstered by the findings of the Capital Jury Project, which show that we have failed in our two-decade-long effort to impose some rationality on the death penalty process. While the inevitable foibles of jury decision-making can perhaps be endured when the stakes are less significant, a sentence of death imposed by people who readily believe that they are mere cogs in the death-sentencing machine, who have great difficulty in understanding the task at hand, and who are prone to form premature judgments, cannot be countenanced. I dissent.

I

The majority's attempt to discount the Project's research is disingenuous, if not dishonest. In *Lockhart v. McCree*, this Court decried studies relying on mock jurors and laboratory settings, asking instead for data derived from "actual jurors sworn under oath to apply the law to the facts of an actual case

involving the fate of an actual capital defendant." 476 U. S. 162, 171 (1986). Yet, when presented with precisely such data, the Court shies away from them as well. Until we allow observation of the deliberation process and intense questioning of jurors both during and immediately after its completion, we will never obtain a complete picture of jury decision-making in capital cases. In the meantime, we must make do with what we have, and the Capital Jury Project has offered us the next best alternative.

The majority's concern that memory lapses taint the data is not insubstantial, but neither is it fatal. As the supervisor of the Project states, "We can evaluate how well jurors actually remember various aspects of this experience in sophisticated ways with information from trial transcripts and other case records, through the responses of the other jurors from the same trial, and by the internal consistency of a juror's responses throughout the interview."⁴⁸ Although trial transcripts are still in the process of being reviewed by Project staff, presumably the latter two steps have already been taken with respect to the results upon which petitioner relies, and thus deficiencies due to memory loss have been largely controlled for. The fact that only four jurors from each jury were interviewed is a reasonable compromise as well. The richly textured accounts of each deliberation process elicited from these four-person samples can be cross-checked against one another and provide the best approximation of that process short of contemporary observation.⁴⁹ And, although it is always possible to nitpick about the phrasing of questions, as the majority does here, the fact that the answers to these questions are consistent across jurisdictions with differing laws, demographics, and mores suggests that the answers are worthy of attention.

The picture that this methodologically sound research paints of the death penalty process is nothing short of devastating. The Project has found that substantially large percentages of those surveyed (ranging from 30% to 80%) hold the law or the defendant, rather than themselves, accountable for the penalty decision; misunderstand crucial aspects of their instructions, including those having to do with constitutional requirements announced by this Court; and rely on the guilt rather than the penalty phase to obtain most of the evidence employed in making their sentencing decision.⁵⁰ The majority attempts to downplay these results by suggesting that *most* jurors understand the process, or that fewer than half do not, and by rejecting the obvious implications of juror statements about their decision-making process. The bottom line, however, is that any given group of twelve jurors will be riddled with individuals who, to use the majority's language, are either casual, ignorant, or close-minded, *ante*, at 1258, or a combination thereof.

While some misimpressions or improper tendencies could perhaps be corrected by other jurors, the Court grossly overstates this possibility. To take

48. Bowers, *supra* note 1, at 1086.

49. It should also be noted that the three other studies relying on interviews with capital jurors produced similar results. See *id.* at 1073-76 (discussing three previously conducted studies of capital jurors in Oregon and California).

50. See *id.* at 1093-98; Luginbuhl & Howe, *supra* note 6.

the most obvious examples, consider a juror's erroneous beliefs that (1) a life sentence is not required even if mitigating circumstances are stronger than aggravating circumstances; (2) aggravating circumstances other than those enumerated by statute may be considered in arriving at a punishment; and (3) finding certain aggravating circumstances mandates the imposition of the death penalty. Because jurors need not disclose to one another the precise basis for their decision, none of these beliefs will necessarily ever be challenged in the course of normal jury deliberations. Furthermore, the research from Indiana and Kentucky makes clear that the few "responsibility holdouts" who exist on a given jury are unsuccessful at instilling in others a greater respect for the process.⁵¹

II

Given these empirical facts, the conclusion is inevitable that jury decision-making in capital cases is highly arbitrary and therefore unconstitutional. Furthermore, the deficiencies briefly described above cannot be corrected by clearer, or more forceful, instructions from the trial judge. With respect to redressing juror nonchalance toward the sentencing decision, it has been suggested that the judge specifically instruct against such a mindset,⁵² and inform the jury of the likely details of an execution as well.⁵³ Contrary to the majority's conclusion, the failure to give an instruction reminding the jury of its "truly awesome responsibility" in death penalty cases, *McGautha v. California*, 402 U. S. 183, 208 (1971), is sufficient state action for me. Nonetheless, giving such an instruction is not likely to overcome jurors' apparently overwhelming penchant, demonstrated by the jurors surveyed by the Project, for minimizing their burden by reference to appellate review, judicial override, the low probability of execution, the high probability of early release, the "law," or some other mechanism. Similarly, apprising jurors of the literal violence associated with an execution is not likely to inculcate any further sense of responsibility, if only because most jurors, including presumably many of those surveyed by the Project, have already been exposed to such accounts through the media.

In the same vein, while simplifying instructions about the relationship between aggravating and mitigating circumstances may alleviate some misunderstanding, experience with such exercises in other legal contexts indicates that they do not have the kind of substantial impact I believe is required by the consequences of confusion in a death penalty case.⁵⁴

51. See Hoffmann, *supra* note 3, at 1143-46 (describing how jurors attempted to break down the holdout jurors' resistance and achieve a unanimous sentencing decision); Sandys, *supra* note 11, at 1203-07 (noting that, in one particular case, three jurors changed their votes from death to life solely because they wanted to avoid the possibility of a hung jury).

52. Hoffmann, *supra* note 3, at 1157-59.

53. Sarat, *supra* note 4, at 1124-25, 1134.

54. See Laurence J. Severance et al., *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 213 (1984) (showing that redrafted instructions concerning intent, reasonable doubt, and prior convictions reduced the error rate in juror comprehension by only 9% when compared to no instructions, and by only 4% as compared to pattern instructions).

Furthermore, it is difficult to believe that obfuscating legal language by itself could lead some 40% of capital-sentencing jurors to accept the clearly erroneous premise that the death penalty is *required* if the crime is heinous and vile, and another 32% of jurors to believe the fallacy, equally obvious from any minimally adequate instructions, that the death penalty must be imposed if the defendant is dangerous.⁵⁵ These statistics would seem to be explicable only by the fact that today's public, from which capital sentencing juries are drawn, has been whipped into an anti-criminal frenzy by the media and politicians to the point where the "particularized" consideration of mitigating factors required by *Gregg* and *Woodson* is seen as a waste of time regardless of the admonitions from the judge.

A final concern is raised by the above-cited statistic that many of those surveyed believe that a death sentence is required for dangerous defendants. This belief is wrong not only because we have held that proof of an aggravating circumstance does not bar a life sentence, but also because in many of the states from which the jurors were drawn the defendant's dangerousness is not a permissible aggravator.⁵⁶ Yet, as other data from the Project attest, dangerousness is clearly a *paramount* concern of most capital sentencing jurors regardless of their jurisdiction's law on the matter.⁵⁷ Even in those states where the defendant's future dangerousness is a legitimate factor to consider, its insidious effect is exacerbated by the possibility that jurors will construe supposedly mitigating circumstances, particularly those having to do with the defendant's mental disabilities, as suggestive of potential dangerousness as well.⁵⁸ Unless and until the states provide that life-without-parole is the only alternative to a death sentence and inform jurors of that fact, cf. *Simmons v. South Carolina*, ___ U. S. ___; 114 S. Ct. 2187 (1994), jurors are likely to use the death penalty primarily as an incapacitative device,⁵⁹ concomitantly undermining instructions about authorized aggravation and the balancing effect of mitigation.

In short, the death penalty cannot be administered in a fair way. Our belief, stated in *Gregg*, that "legislative guidelines" will prevent juries from "wantonly and freakishly impos[ing] the death sentence," 428 U. S., at 207

55. Bowers, *supra* note 1, at 1091 tbl. 7.

56. We upheld the constitutionality of dangerousness as an aggravating factor in *Jurek v. Texas*, 428 U. S. 262 (1976), but only six states (Idaho, Oklahoma, Oregon, Texas, Virginia, and Washington) list future dangerousness as a factor in their death penalty statutes. Although after *Zant v. Stephens*, 462 U. S. 862 (1983), the jury may constitutionally consider non-listed aggravating factors as well, several states, including Florida, New Jersey, North Carolina, and Pennsylvania (all states involved in the Capital Jury Project), limit jury deliberation to listed aggravating factors, and do not include dangerousness on that list.

57. See Sarat, *supra* note 4, at 1131-33; see also Hoffmann, *supra* note 3, at 1153; Luginbuhl & Howe, *supra* note 6, at 1178-79 tbls. 5, 6; Sandys, *supra* note 11, at 1199-1200, 1216-17.

58. Compare *Miller v. State*, 373 So. 2d 882 (Fla. 1979), in which the trial judge considered the defendant's "dangerous mental illness" as an aggravating factor. While the Florida Supreme Court reversed the death sentence on this ground, discovery of such improper analysis on the part of a jury will be much more difficult.

59. Cf. James A. Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y. REV. L. & SOC. CHANGE 499, 514-15 (1990-1991) (reporting on studies showing that support for the death penalty drops significantly if incapacitation of the offender is assured).

(joint opinion of Stewart, Powell, and Stevens, JJ.), has been exposed as naïve and ill-considered. Regardless of our efforts, the infirmities in capital punishment discerned in the *Furman* opinions will remain. For this reason, the death penalty is unconstitutional.

JUSTICE STELIA, dissenting.

Like Justice Marnan, I believe petitioner's claim is sound for the reasons so ably outlined in Part I of the Court's opinion, and so inadequately debunked in Parts II, III, and IV. In all other respects, however, I disagree with my fellow dissenters as much as I disagree with the majority. The research conducted by the Capital Jury Project, while a stunning indictment of the death penalty process, does not support abolition of capital punishment; rather, it provides a basis for its significant reform. Specifically, for the three reasons recounted below, I believe that we should return to the pre-*Furman* scheme allowing jurors to exercise their "unfettered discretion," albeit with a few modifications that empirical research and our own experience suggest are necessary.⁶⁰

I

I start with the premise that there is no point in having a jury involved in the sentencing process if it does not take its task seriously. Unfortunately, as the research from the Capital Jury Project makes clear, our efforts at "super due process" have had a paradoxical effect in this regard: the more procedure imposed on the process, the less responsible jurors feel.⁶¹ This phenomenon is suggested by the Project's findings that most jurors are quite willing to hand over their decision-making authority to someone or something else, and that something else is most often the "law." It is affirmed by the dialogic evidence produced by the Project's prolonged interviews. As one researcher from the Project concluded from his in-depth analysis of a case in Georgia, "the law, with its elaborate structure of rules, reviews, and appeals in capital cases, diffuses responsibility for the violence which jurors are asked to authorize. The greater the protections provided for defendants in capital cases, the greater this diffusion of responsibility will typically be."⁶² Another researcher, basing his conclusions on interview data from a sampling of Indiana jurors, makes the point rhetorically: "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?"⁶³

60. For a similar but not identical point of view, see Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047 (1991).

61. This possibility was first recognized by Robert Weisberg in *Deregulating Death*, 1983 SUP. CT. REV. 305, 388-95.

62. Sarat, *supra* note 4, at 1135 (footnote omitted).

63. Hoffmann, *supra* note 3, at 1159.

In view of this empirical evidence, the final part of the jury instruction which this Court upheld in *McGautha v. California*, 402 U. S. 183 (1971), but which has since been rendered unconstitutional by our subsequent decisions, makes eminent sense:

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.

Id., at 190. Hand in hand with this type of instruction, which emphasizes both the discretion and the importance of the jury, any provisions for judicial override should be repealed, and the jury should be instructed that appellate review is reserved for finding errors of law and does not correct errors of fact. Only by removing excuses to shirk their duty can the “truly awesome responsibility” of imposing a death sentence properly be brought home to members of a capital sentencing jury.

II

A second reason for dispensing with the trappings of specified aggravating and mitigating circumstances, the associated standards and burdens of proof, and the rules for balancing these factors, is that jurors do not pay any meaningful attention to them. In reading the Capital Jury Project’s verbatim accounts of interviews with capital jurors, one cannot escape the impression that the instructions are virtually irrelevant to the decision-making process—that what jurors are struggling over is not whether aggravating and mitigating circumstances were proven with the requisite degree of certainty, but something more indefinite and yet more central. As one jury foreperson stated:

“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.”⁶⁴

Listen also to the words of one juror (who eventually voted for a death sentence) attempting to explain the nature of the decision-making process:

“Well again, I guess what is legal is not always ethical and moral. It should be, and I think it usually is, but it is *not* always. Again, we’re dealing with a play of personal convictions, and emotions, and all that. Yes, you want to see the law obeyed, ah, but you’re not trying to be vengeful for instance. And if you feel the law is not correct, of course, there’s just an interplay of feelings, and emotions, and instructions that come into play in this. Maybe not with every juror, but there was with me. And, I understood that we were to follow the law and not judge whether

64. Hoffmann, *supra* note 3, at 1152 (quoting an unidentified Indiana juror).

we felt the law was correct or not. But, yet, at the same time, perhaps you can't always do that. I don't know."⁶⁵

These representative excerpts indicate that, at the same time jurors erroneously attribute ultimate responsibility for their decision to the "law," they also treat their instructions as superfluous in deciding what the law requires them to do.

From this observation one could draw the conclusion that Justice Marnan does—that juries act irrationally. Or one could make the more generous inference that their thinking is merely different than what the law would prefer. Cognitive psychologists have identified at least two different, but arguably equally valid, models of reaching a decision in a legal case. The typical capital sentencing statute endorses what has been called the "algebraic model" of decision-making, under which only the facts produced at the capital proceeding are considered and each fact is labeled either aggravating or mitigating, analyzed in terms of whether it is proven with sufficient certainty, and weighed against one another.⁶⁶ A second model, which some researchers claim more accurately represents jury decision-making,⁶⁷ is labeled the "story model." Under this model, "[m]eaning is assigned to trial evidence through the incorporation of that evidence into one or more plausible accounts or stories describing 'what happened' during events testified to at the trial."⁶⁸ In addition to the evidence adduced at trial, "inadmissible" information, including general knowledge about human behavior and about events similar to those at issue at trial, comes into play. Consciously or unconsciously, this information helps flesh out "why certain actions were carried out, what emotional reaction a person had to a certain event, and so forth," thereby filling in the evidentiary gaps left by witnesses who "are typically not allowed to speculate on necessary connecting events" and who "testify to different pieces of the chain of events, usually not in temporal or causal order."⁶⁹

Put simply, the story model posits that jurors do not employ an element-by-element, "lawyer-like" template in assessing evidence, but instead simply look for the most plausible, coherent, and internally consistent account of what happened and why. As one commentator has stated, this empirical work, contrary to Justice Marnan's supposition, "largely confirms the obvious proposition that otherwise rational people do not become irrational by being placed on juries."⁷⁰ At the same time, this work suggests that the "algebraic model" implemented by current capital sentencing statutes is useless to the typical juror.

65. Sandys, *supra* note 11, at 1215 (quoting an unidentified Kentucky juror).

66. See generally Valerie P. Hans, *Death by Jury*, in CHALLENGING CAPITAL PUNISHMENT, *supra* note 43, at 149, 161-63 (describing the "algebraic," "story," and "matching" models of jury decision-making).

67. See, e.g., Nancy Pennington & Reid Hastie, *Evidence Evaluation In Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242, 242-43 (1986).

68. *Id.* at 243.

69. *Id.* at 254.

70. Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 629 n.75 (1994).

III

A final reason for preferring unfettered jury discretion to our present approach is that fettering discretion, a task first undertaken in *Furman* and continued in *Gregg*, undermines what I consider to be the more important endeavor of “particularizing” the sentencing decision, an approach first explicitly required in *Lockett*. Other Justices have recognized the tension between trying to limit the scope of the jury’s inquiry at the same time the jury is allowed to consider any evidence the defense presents. See, e.g., *Walton v. Arizona*, 497 U. S. 656, 667 (1990) (Scalia, J., concurring in part and concurring in the judgment) (stating that the *Lockett* rule is “an outright negation of the principle of guided discretion that brought us down the path of regulating capital sentencing procedure in the first place”); *Lockett v. Ohio*, 438 U. S. 628, 631 (1978) (Rehnquist, J., concurring in part and dissenting in part) (noting that allowing consideration of all mitigating factors “will not guide sentencing discretion but will totally unleash it”). But these Justices have appeared ambivalent about whether resolving this tension requires moving further in the direction of “guided discretion” or back toward greater individualization of punishment. See *id.* To me, the latter approach makes more sense, because sentencing, in contrast to guilt adjudication, is an inherently broad-ranging inquiry. As we said in *Williams v. New York*, “The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and particular habits of a particular offender.” 337 U. S. 241, 243 (1948). This sentiment is not outdated, but reflects the idea that discretion in sentencing is crucial to achieving just results.

Even if I were prone to favor guided discretion in theory, however, I could not support it in practice, because as the Capital Jury Project’s results make clear, it is an unworkable approach. First, as noted above, instructions do very little to structure juror decision-making. Furthermore, regardless of what the court tells the jury, statutorily “improper” considerations, such as the defendant’s dangerousness, can have dispositive impact on the jury’s decision, while other factors, such as evidence properly admitted at sentencing, may not be considered at all by those jurors who have made up their minds by the end of the adjudicative phase.⁷¹ Rather than fighting these inevitable tendencies through instructions that cut against the natural story-building schema of the jurors and distract them from trying to fit the punishment to the crime and the criminal, the better approach is to impress upon jurors the significance of their task and let them consider any information they deem important.

IV

For those concerned that adopting these steps will open the door to an arbitrary proliferation of death sentences of the type condemned in *Furman*,

71. See generally Bowers, *supra* note 1, at 1089-91.

several observations are in order. Most importantly, whereas at the time *Furman* was decided many states authorized capital punishment for a wide array of crimes, including forcible rape, armed robbery, kidnapping, and first-degree murder,⁷² we have since limited its application to the latter category of offense, see *Coker v. Georgia*, 433 U. S. 584 (1977), thereby permitting jury imposition of the death penalty only in those cases where it is most likely to be deserved, if not presumptively so. Indeed, I would go so far as to say that a sentence of death imposed on a convicted first-degree murderer is never disproportionate to guilt. The fear that juries will accordingly sentence to death every defendant convicted of this crime is unfounded, however. Particularly noteworthy in this regard is that the one survey of verdicts in first-degree murder cases produced before the current plethora of due process "protections" found a death sentence rate of 20%, well below the rate in most jurisdictions today.⁷³

Some may still object that the approach advocated here is too likely to lead to "arbitrary" decisions in the sense that these decisions will be disparate, *i.e.*, inconsistent with one another. Given the literally hundreds of variables that can affect a capital sentencing decision, it is not clear that this argument has much force. But the concern which underlies it should to a large extent be allayed by the fact that, since *Furman*, we have required appellate review of death verdicts within each state, *Gregg v. Georgia*, 428 U. S. 153, 195 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), a requirement which I would continue.

Finally, while its discretion should generally be uncabined, the jury should not be left completely to its own devices. In contrast to the typical pre-*Furman* practice, I would require the judge not only to admonish the jury that it may not consider factors which have no bearing on whether the defendant deserves death, but also require specific illustrations of such factors. For instance, as one commentator has noted, "if the sentencer decides not to impose [or to impose] the death penalty because of the race of the victim, the defendant's societal status, a flip of the coin, or whether the sky is blue, then *Furman* undeniably is violated."⁷⁴ A trial judge could profitably use these examples in a limiting instruction to the jury.

Petitioner's empirically based claims cast grave doubt on the integrity of the jury's decision in his case. But if he were to be resentenced for murder by a jury that is made fully aware of its responsibilities and given unfettered discretion to consider any factors that rationally relate to whether he deserves capital punishment, a verdict for death should be upheld.

72. WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 33 (1984) (reporting on the number of states which, in 1967, authorized the death penalty for, *inter alia*, homicide other than murder (20), kidnapping (34), treason (21), rape (19), carnal knowledge (15), and robbery (10)).

73. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 434-49 (1966). Compare this statistic to those cited in the majority's footnote 43, *supra*.

74. Scott Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1178 (1991).

JUSTICE SCAVENS, dissenting.

We have held that a capital defendant is not entitled to a jury verdict at the sentencing phase of the trial. *Walton v. Arizona*, 947 U. S. 639 (1990). I believe that we should now hold that a capital defendant is *never* entitled to such a verdict. I am not sure whether I agree with Justice Marnan that capital sentencing juries are irrational, or with Justice Stelia that their mode of analysis is simply antithetical to the legal constructs we have imposed on the sentencing process. I am convinced, however, that juries cannot satisfactorily implement the decisional framework established in *Gregg* and *Woodson* and fine-tuned in our later decisions. At the same time, I believe that, *if* implemented properly, this framework can avoid the arbitrariness which we identified in *Furman*. The intersection of these two lines of thought leads to the conclusion that judges, and only judges, should make the sentencing decision in capital cases.

I realize that this reasoning could call into question our entire jury system. It may be, however, that the ultimate nature of the death penalty places heavier burdens on lay decision-makers than do other legal contexts, thus exacerbating any improper tendency that the jury may have to disregard the law. In any event, here as elsewhere, drawing the line between death penalty cases and other criminal cases is not constitutionally unsound. As summarized in *California v. Ramos*, 463 U. S. 992 (1983), our position has consistently been "that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *Id.*, at 998-99 (footnote omitted).