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Life or Death Decisions

An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*

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The penalty phase deliberation experiences of capital jurors guided by the "special issues" sentencing instructions were investigated. These instructions ask jurors to consider three specific issues to determine whether a defendant should receive a sentence of life imprisonment or the death penalty: whether the crime was committed deliberately; whether there is a probability that the defendant would pose a continuing threat to society; and whether the conduct of the defendant was unreasonable in light of any provocation on the part of the victim. In-depth interviews with 27 jurors explored the organization of the penalty deliberation, the topics discussed, influential factors in the decision-making process, the impact of sentencing instructions, the importance of the possibility of parole, and the stress associated with capital jury service. Jurors relied heavily on sentencing instructions to guide their deliberations and to determine their responsibilities. Future dangerousness and the possibility of parole were critical considerations in deciding between life and death. Although jurors found the capital trial to be stressful, most believed that the life or death decision should be made by jurors. Findings are discussed in light of constitutional concerns about the administration of the death penalty.

For most people, capital punishment remains an abstract topic of debate. The decision as to whether capital punishment is an appropriate sanction becomes concrete and personal for only a small percentage of the American public. In most

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states, it is the people who serve as jurors in capital murder trials who actually decide if the death penalty should be imposed.

Jurors play an unusually prominent role in capital trials. In most criminal cases, jurors are asked only to decide if a defendant is guilty. The decision about the appropriate punishment, if necessary, is left to the judge. The judge has a better understanding of various sentencing options (e.g., incarceration, probation, diversion programs) as well as a sense of their availability for a given defendant (Gillers, 1980). But in a capital case, these concerns are moot. The issue of punishment revolves around whether the defendant deserves to live or die. The judge is no more qualified than the jury to make that decision and, indeed, the jury is believed to be the most appropriate decision maker in that instance. The Supreme Court has explained that "the jury . . . is a significant and reliable objective index of contemporary values" (*Gregg v. Georgia,* 1976, p. 181) and that, "a jury can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death" (*Witherspoon v. Illinois,* 1968, p. 519).

Until the early 1970s, juries were asked to make the capital sentencing decision without specific guidance from the courts. In *Furman v. Georgia* (1972), the Supreme Court was persuaded that the death penalty, as then administered, violated the Eighth Amendment's prohibition against cruel and unusual punishment. At that time, Justice Stewart concluded that the death penalty was "wantonly and freakishly imposed" (p. 310) and Justice White observed that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" (p. 313). Although the Court recognized the discrimination endemic to capital decision making, it did not prohibit the application of the death penalty *per se*. It was the current system of administering capital punishment that was prohibited.

The Justices placed the blame for the discriminatory application of the death penalty upon the "unbridled discretion" afforded the sentencer. The corrective mechanisms finally approved by the Court attempted to guide juror discretion during the sentencing process. In these "guided discretion" statutes, a system was instituted in which perpetrators of certain types of crimes (i.e., murder with special circumstances) are eligible for the death penalty. Those accused of these crimes are tried by jury in a bifurcated proceeding. Guilt is assessed in the first phase, and if the defendant is found guilty of a capital crime, sentence is determined in the second "penalty" phase. The penalty phase is a proceeding in which the jury hears testimony pertaining to the aggravating circumstances that recommend death and the mitigating circumstances that favor a life sentence. Before deliberation, the judge provides instructions about how the jury is to make the sentencing decision.

The Special Issues Sentencing Instructions

Most states that have the death penalty have modeled their statutes according to the American Law Institute's Model Penal Code (1980). This format provides jurors with a list of possible aggravating and mitigating circumstances. Jurors are

asked to consider these factors, and any other circumstances they deem relevant, in determining whether aggravating factors have been proven to be present. Upon finding the existence of an aggravating factor, they may impose the death penalty if they do not find that mitigating factors outweigh the proven aggravating factors (*California Jury Instructions* (CALJIC) 8.84.2: 1986 Revision).

Oregon and Texas are the only states with an entirely different format which stresses three "special" issues rather than the weighing of aggravating circumstances against mitigating circumstances.[1] Instead of providing the jury with factors to consider in making a holistic, unstructured sentencing choice, the special issues framework asks jurors to answer yes or no to three specific questions. The answers to these questions determine the penalty. The three questions posed to jurors are as follows:

> (1) Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that death of the deceased or another would result?
> (2) Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? Consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct, and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed; and
> (3) If raised by the evidence, was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased? (ORS 163.150, *Criminal Code of Oregon*, 1988)

If the jury unanimously finds the answers to all three questions to be yes, beyond a reasonable doubt, the death penalty will be imposed. If the answer to at least one question is no, or if the jurors cannot unanimously agree upon their answers, life imprisonment will be imposed.

In spite of the attention instruction formats have received from the judiciary, there is no empirical evidence to inform consideration of the special issues framework. As the Justices have acknowledged elsewhere, "the question . . . is not what the Supreme Court [or any other court] declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning" (*Mills v. Maryland*, 1988, p. 376, quoting *Sandstrom v. Montana*, 1979, pp. 516–517). We do not know how jurors understand and interpret the special issues instructions or how they use the framework to organize the sentencing decision.

Research on Penalty Decision Making

The nature of jury decision making in the penalty phase has received little empirical attention (see Costanzo & Costanzo, 1992, and Hans, 1988, for reviews). The few existing empirical studies of penalty decision making have examined the decisions of jurors operating under modifications of the Model Penal

[1] Virginia's death statute is a combination of the two formats (Sicola & Shreves, 1988).

Code's format. In one of the first studies of penalty decision making, an extensive archival analysis was performed to determine what factors influenced sentencing in capital cases (*Stanford Law Review*, 1969). Researchers analyzed the details of the offense, the demographic characteristics of major trial participants, and the circumstances of the trial. They concluded that the probability of a death sentence was increased when (a) there was a rape or kidnapping in addition to murder, (b) the defendant killed at least one victim himself, (c) he was not under the influence of alcohol, and (d) he actively resisted arrest.[2] Factors in the defendant's background that correlated positively with death sentences were prior criminal history, not being a white collar worker, and poor job stability. Influential aspects of the trial that increased the probability of a death sentence were whether the defendant put forth an insanity defense, whether evidence of his prior criminal record was introduced, and whether co-defendants testified against him. Unfortunately, this study has limited generalizability to current penalty decisions because it is based on data gleaned from decisions made under pre-*Furman* statutes.

As part of their landmark study on jury decision making, Kalven and Zeisel (1966) examined judge's summaries to identify the factors that influenced the decisions made by judges and juries in capital cases. They found that the cases in which both judge and jury agreed on a death sentence were marked by "peculiar heinousness" such as gratuitous violence, multiple murder, killing of family members, defenseless victims, or sexual overtones. Where the judge and jury disagreed as to the appropriate sentence, the jury was more likely to grant mercy in cases where the defendant appeared to be mentally or emotionally unstable, whereas the judge was more merciful when the defendant acted in anger. Again it should be noted that these decisions were made before the implementation of current statutes requiring some sort of guided discretion.

In a jury simulation study, White (1987) found that death sentences were most likely when the defendant was tried by a highly competent prosecutor, believed to present a danger to society, and perceived as choosing to do what he did. Barnett's (1985) archival research on actual jury verdicts supports White's conclusion that the more certain the jurors are that the killing was intentional, the more willing they are to render a death sentence. Like other researchers, Barnett found that death sentences are strongly correlated with the heinousness of the murder.

Geimer and Amsterdam (1988) interviewed three capital jurors from five cases in which the jury agreed upon a life sentence and five cases in which the jury agreed upon a death sentence. Juries returning death sentences tended to believe that there was a presumption that they were to return a death sentence unless convinced otherwise. The most frequently cited reason for death sentences was the gruesome or cruel manner in which the murder was carried out. The factor most often cited by juries returning life sentences was lingering doubt about the defendant's guilt. Finally, a case study analysis of a California penalty phase found that jurors (Costanzo & Costanzo, 1989) emphasized the importance of reaching consensus and tended to discuss the sentencing decision in terms of the group's

[2] Throughout this article, capital defendants will be referred to as males because all of the defendants in the cases studied were male.

interpersonal dynamics. Jurors did not necessarily feel that they had chosen the most appropriate sentence, but they did feel that they had chosen the only possible sentence given the composition of their jury.

Even though these studies have used varied methods to advance our understanding of sentencing decisions in capital cases, there are two important gaps in our current state of knowledge. First, the focus has been almost exclusively on the sentencing outcome—what distinguishes cases that end in life sentences from cases that end in death sentences. Virtually nothing is known about the process through which actual jurors arrive at their final decision. Second, no study has investigated jury deliberations guided by the special issues sentencing instructions. The research reported here focuses on the process and content of penalty deliberations under the special issues framework.

The present study seeks to extend our understanding of the process of penalty decision making through an analysis of interviews conducted with capital jurors in the state of Oregon. These interviews provided an opportunity to learn more about penalty decision making in general and to address concerns unique to the special issues framework.

Extensive, focused interviews were conducted with jurors who served on capital murder trials. The interviews explored how jurors proceed and what information they consider in making their penalty decisions. The interview schedule focused on six broad topics: (1) juror perspectives on the purpose and importance of the penalty trial; (2) the organization and mechanics of the penalty deliberation; (3) how sentencing instructions shaped the penalty deliberation process; (4) how jurors viewed their responsibilities; (5) the importance of the possibility of parole and the belief that their sentence would be implemented; and (6) the stress associated with capital jury service.

METHOD

The Capital Cases

The jurors interviewed served on nine capital murder cases tried in an urban county in Oregon. All nine trials included complete guilt and penalty phases, guilt and penalty decisions were rendered by the jury, and the defendant faced charges of "aggravated murder" as defined by the Oregon state statute (ORS 163.095, *Criminal Code of Oregon,* 1988). These nine cases constituted the total number of capital murder trials in a particular county over the two-year research period. All of the defendants were male. In the nine cases, the circumstances that resulted in charges of aggravated murder were hiring someone to commit murder (1 case), murdering a potential witness in a criminal proceeding (1 case), murder in conjunction with rape (2 cases), murder during the commission of robbery (3 cases), murder in conjunction with arson (1 case), and murder while committing car theft (1 case). In all cases, there was a single victim. In five cases, death sentences were rendered and in four cases life sentences were rendered.

Subjects

Twenty-seven jurors were interviewed. The group comprised three randomly selected members from the complete list of jurors who served in each case. All jurors participated in both guilt and penalty deliberations. Of the 27 subjects, 17 were female, 10 were male; 25 were White, 1 was Black, and 1 was Polynesian. Their ages ranged from 27 to 81 years old.

All jurors had been death qualified. Death qualification is the process of questioning potential capital jurors about their attitudes toward inflicting the death penalty as punishment if the defendant is found guilty of aggravated murder. In 1985, the Supreme Court ruled that jurors whose beliefs would "substantially impair" their ability to be fair should be excused (*Wainwright v. Witt*, 1985). Potential jurors who feel they could not impose the death penalty under any circumstances are excluded from the jury pool and those who feel they could impose it under at least some circumstances are retained. Thus all jurors in this study were willing to consider imposition of the death penalty.

Procedure

Complete juror lists were provided by the county's jury coordinator after permission to interview jurors was obtained from the judge in every case. If a juror was unable or unwilling to be interviewed, another juror was randomly selected from the same jury list to fill the space. Five of the jurors initially contacted declined to be interviewed. Of those who declined, two indicated that they did not want to "deal with it again," one cited "personal reasons," one said that she traveled extensively and did not have time, and one did not provide any reason.

Each juror was initially contacted by mail. The letter introduced the investigator and explained the project, the interview format, and the content areas to be discussed. It advised the juror that the investigator would contact him or her by phone to request an interview. Approximately three days after receiving the letter, the juror was contacted by phone. The investigator reviewed the contents of the letter, asked if the juror had any questions, and scheduled a personal interview. The time and place of the interview were selected to be at the convenience of the juror.

All interviews were conducted by the same investigator. The interviews took place in restaurants, community centers, or jurors' homes. They lasted between 1 and 5 hours with the mean interview lasting just over 2 hours. The average length of time between rendering of the sentence and the interviews was 31.37 weeks (SD = 21.53). The interview guide was designed to provide a rich data set concerning penalty decision making.[3] Before beginning the interview, the investigator explained the content areas to be addressed, so as to provide the juror with infor-

[3] A copy of the full interview schedule can be obtained by writing the authors. The variation in interview length was a natural consequence of individual differences between jurors. Some jurors were articulate, focused, and succinct, whereas other jurors were inarticulate, meandering, and verbose.

mation regarding what to expect as well as to organize the interview better.[4] It was also explained that all responses were anonymous so neither the case nor the juror would be referred to by name. The interviewer reviewed a Human Subjects Consent form and informed the juror that he or she was free to decline to answer any question. All jurors signed the consent form and gave their permission to be tape recorded.

A focused interview format was used (Merton, Fiske, & Kendall, 1956) with an interview guide of open-ended questions. Great care was taken to avoid leading or biased questions. A funnel interview structure (Judd, Smith, & Kidder, 1991) was used so that broad open-ended inquiries (e.g., "Tell me about the penalty deliberation" and "What issues were discussed?") were always asked before more pointed questions. At the conclusion of the interview, the juror was given a formal opportunity to ask questions and make comments. Several days after the interview, jurors received postcards thanking them for their time and participation.

The data coding form provided 66 categories for possible responses to the questions and ample room for additional information and direct quotes. Coding of the interview tapes was performed after all interviews had been completed. Jurors' responses were coded directly from the interview tapes onto the code sheet. Each tape was listened to twice, stopping the tape whenever necessary to record responses on the coding sheets. As a reliability check, 15 of the 27 interviews were independently coded by a second rater. The interrater agreement rate was 94.14%.

Content analyses of jurors' responses sometimes treated the jury as a unit (for topics such as the organization of the deliberation and group dynamics), but usually treated the jurors' personal thoughts or experience individually. When coding responses on issues pertaining to a jury as a whole, all three jurors from that jury served as the unit of analysis. When referring to a jury as a whole, the decision rule for a given item was that there had to be agreement among at least two of the three jurors. The use of three members of each jury enabled us to obtain multiple descriptions of each deliberation process and served to reduce possible biases due to incomplete or distorted recall of individual jurors. For a detailed discussion of the strengths and weaknesses of juror interviews as compared to experimental simulations, see Costanzo and Costanzo (1992).

RESULTS AND DISCUSSION

This section describes several aspects of the penalty deliberations. Throughout this section, quotes extracted from 62 hours of audiotaped interviews will be used to illustrate the feelings and observations of jurors. When the responses of

[4] Obviously, experimenter blindness is not possible in a study of this kind. Even if the interviewer began the interview blind, this blindness would be destroyed early in the interview. Every juror discussed the nature of the crime, the evidence presented, the dynamics of the jury, the deliberation process, and the sentence. In addition, the interviewer had to be aware of the nature of the case in order to ask informed questions and to probe the knowledge of the juror.

jurors are quoted in the text, the first number after the quote refers to the number of the jury, and the number after the hyphen identifies the individual juror (e.g., 1-1, 7-3). Four of the juries (1–4) rendered sentences of life imprisonment and five of the juries (5–9) rendered sentences of death.

Jurors' Perspectives on the Penalty Phase

Legal scholars and practicing attorneys understand the important ways in which the penalty phase differs from the guilt phase. Although the distinctions between the two phases of the capital trial are obviously important in a legal sense, we do not understand what distinctions are salient for jurors. Jurors were asked to comment on the ways in which the guilt phase deliberation differed from the penalty phase. They were also asked if they believed that a separate phase was necessary to make the sentencing decision.

Twenty-five of the 27 jurors responded that they perceived a difference between the guilt and penalty decisions. The two jurors who did not perceive any difference sat on the same life jury (3). The most common way of categorizing the guilt phase decision was that it was a decision based on facts or evidence. In contrast, the penalty decision was characterized as more difficult and emotional.

> We knew he was guilty, that was obvious. But deciding whether or not he was guilty to an extent where he's not redeemable . . . is more difficult and more emotional. (6-1)

> Did he do the crime is much different than trying to figure out why he did it, will he do it again, what kind of person is he. Those questions are much more difficult. We relied more on gut feelings. (5-1)

> It was a decision based upon predictions rather than facts. (2-1)

Jurors were asked if they felt that they could have made the penalty decision without hearing the testimony presented in the penalty trial. Eighteen jurors (9 life and 9 death) felt that they needed the penalty phase testimony to make their decision, 7 felt they did not need this information, and 2 were uncertain whether they needed the information or not. The 18 jurors who felt they needed to hear the penalty testimony believed that useful information about the defendant's background was presented. Ten of these 18 felt that the testimony was particularly relevant to the issue of future danger. Seven jurors said that the penalty testimony was unnecessary because they had decided on a sentence before the penalty trial even began. Specifically, these 7 jurors stated that the crime was so heinous that the defendant deserved to die.

Organization and Mechanics of the Deliberations

In all nine deliberations, regardless of outcome, the focus was on the three questions set out in the special issues instructions. There were two basic forms of discussion: a free form discussion in which all three issues were discussed interchangeably and a more methodical discussion in which each question was addressed one-by-one. Three juries (1, 4, and 7) had free form discussions, whereas six juries (2, 3, 5, 6, 8, and 9) used the question-by-question approach.

Other facets of the voting procedures varied across juries. Five juries (2, 3, 5, 6, and 9) took "straw votes" before the actual vote to see where people stood on the issue at hand, whereas four juries did not (1, 4, 7, and 8). The five juries that cast straw votes voted more than once only on the second issue of whether the defendant would continue to pose a threat to society (estimates of the number of votes taken on this issue ranged from two to six). The first and third issues regarding whether the criminal act was deliberate and whether the victim provoked the attack were not controversial and therefore did not require repeated voting. This finding will be discussed in detail later.

As required by the special issues instructions, the final votes on all juries rendering death sentences were unanimously yes to all three questions, and the final votes on all juries rendering life sentences were not unanimous. Though all four life juries unanimously concluded that the defendant's act was unreasonable in response to the victim's actions, these juries could not agree on answers to the issue of the defendant's future dangerousness. Two juries (3 and 4) could not agree on the issue of whether the crime was committed deliberately. In all four life juries, a majority felt that the answer should be yes to all three questions, but even though a majority of the jurors believed that the defendant should receive a death sentence, the will of the minority prevailed. Consequently, many of the jurors interviewed from the juries rendering life sentences actually felt that the sentence should have been death. These "death jurors" who sat on life juries expressed dissatisfaction with the deliberation process and perceived prolonged discussion as pointless:

> It was frustrating because even though the majority wanted the death penalty on the issue of future danger, the minority was able to prevent that from happening. (2-3)

> Some jurors said right from the start that they would not vote for the death penalty. There was no way the person [sic] was going to change their mind so why hassle it? (3-3)

Those jurors who were in the minority position in terms of their opinion but in the powerful position in terms of having their verdict prevail recognized their advantage:

> We weren't going to convince them that you know, they should come our way . . . So they're not the ones that need convincing, we were the ones that needed convincing . . . Once the lines were drawn basically, then that basically stopped it. And the foreman said, "Well, we can't sit here and dicker all day. If you're not going to change your minds, then there's no reason for us to spend the rest of the day in here . . . but . . . if our minds are made up, let's just vote and tell the judge and that'll be it." And that's what happened. (4-1)

Jurors in the four life cases said that their jury decided to end its deliberation when it became clear that no one was going to change his or her mind and/or the pattern of votes kept "coming out the same way."

How the Sentencing Instructions Shaped the Deliberation Process

All nine juries focused almost exclusively on the three questions set before them in the judge's instructions. However, the three questions were treated dif-

ferently in terms of importance, time allotted for consideration, and amount of controversy generated. There was little disagreement and, therefore, relatively little discussion on the questions concerning deliberateness and provocation. In fact, no jury, regardless of sentencing decision, encountered disagreement among its members on the issue of whether the victim provoked the attack. Only two life juries (3 and 4) encountered disagreement and, therefore, significant discussion on the issue of deliberateness. No jury rendering a death sentence encountered disagreement on the issue of whether the crime was deliberate. Fourteen jurors representing all nine juries commented without prompting that questions one and three (whether the crime was deliberate and whether the defendant had been reasonably provoked) had been asked and answered during the guilt phase deliberation:

> They were kind of the same questions as in the guilty phase. . . . we couldn't disagree with those two basically because that would say we didn't rightly convict him. (1-3)

> To twelve people . . . off the street, to use the word "willful" vs. "deliberate" vs. "intentional"—all that becomes very foggy and grey and just sort of burns off in the sun . . . Did he do it? Yeah. Did he mean it? Yeah. That's what people on the jury broke it down to, so basically that first question is already answered in the guilt phase anyway . . . Nobody had any doubts in their mind [sic] if that was an issue. (4-1)

> It was pretty obvious that it was a deliberate crime and that it was unprovoked. You couldn't find him guilty of the first phase without essentially finding that those two facts were evident. In that sense, it didn't make a lot of sense—the sentencing phase. (8-2)

Given such comments, it is not surprising that nearly all jurors also offered the observation that the penalty decision hinged on the issue of whether the defendant would pose a continuing threat to society. Twenty-two jurors representing eight juries made this observation. It is worth noting that the one jury (3) whose members did not make this observation decided the fate of a defendant who beat another man to death in a drunken rage. The discussion in that deliberation focused on the issue of whether the defendant was too intoxicated to know what he was doing and therefore could not have committed the crime deliberately.

The jurors who perceived that the issue of future danger was the crucial question for their jury made comments such as the following:

> The thing that determined whether he would get the death penalty was whether you felt that he was going to be a threat to society. (1-1)

> That was the main one. Would he be able to be rehabilitated and come out and be able to be integrated into society again without being a danger to the community? (2-2)

The defendant's prior criminal activity, past violent acts, and the present crime were important factors to all of the jurors. In discussing future dangerousness, jurors tended to rely upon the defendant's prior criminal history:

> To be perfectly honest, this is where it became important in the sentencing phase—where his prior convictions, prior acts, prior crimes, reputation in the community, and all that sort of stuff became very important. (4-1)

Six juries specifically tried to assess whether there was a reason to believe the defendant would be less violent in the future or that he would be able to be rehabilitated (3, 4, 5, 6, 7, 9).

> Everybody can change. Well, that's true. But what are the odds? He's 30 years old. His crimes have gotten progressively worse over the years . . . these [crimes] are the ones we know about . . . I don't think they had more than a small percentage [of the crimes he did]. (5-2)

> A lot of people took it as a moral and religious issue. . . . God can change people and this stuff. And my answer to that was that "yes, but we're not here to play God. But the State has asked us to come to a conclusion on this one specific incident and do we honestly believe that he'll stop all his activities at this point?" (6-2)

In determining whether the defendant could change, 14 jurors considered the fact that the defendant displayed no remorse for his crime. Indeed, one juror mentioned that he perceived the defendant as smiling with pleasure as he relived the memory of a prior crime that one of his victims recounted on the witness stand.

Two of the life juries encountered significant disagreement on whether the murder was deliberate. This culminated in split votes. One jury (3) disagreed over whether the defendant had acted in a deliberate manner because he may have been too intoxicated to realize what he was doing. The other jury (4) disagreed over whether the defendant had been coerced into committing the murder by his co-defendant. No jury encountered any real disagreement over whether the victim provoked the fatal attack. Most jurors had sentiments similar to those expressed in the following quote:

> The third one—provoking the attack—we answered that one real fast—obviously, this poor woman didn't—no way. . . . There was just no doubt. The heinousness of the crime was so great that there was no way . . . the physical abuse, the beating, the killing, of course not, no one invites that. (4-1)

During the penalty trials, all of the jurors heard testimony intended to show that the defendant did not deserve the death penalty. Friends and family described his character. Employees and teachers described his work and educational background. Psychologists and doctors offered opinions about his health and ability to respond to treatment.

Twenty-five jurors said that there was nothing else that they would have liked to consider in their determinations. Indeed, for many jurors, penalty phase testimony was not directly relevant to their decision.

> There was nothing that could give him sympathy in this case because the crime itself was so awful. (8-1)

> I thought it [the penalty trial] was kind of silly, to be perfectly honest . . . A rotten childhood was not the question that we had to answer. (7-2)

> Character witnesses didn't really seem relevant to the issue, which was, "was he a threat?" Everything went back to what he had done and I think everyone had their mind made up before the penalty phase started. (1-1)

Perceived Responsibility

The comments of jurors made it clear that many were able to discount their own sense of responsibility for the sentence. Fifteen jurors from five juries (1, 3, 5, 6, and 9) stressed that they were not imposing the sentence, whereas 12 jurors from the other four juries (2, 4, 7, 8) perceived themselves as responsible for imposing the sentence. Within every jury, there was consensus about whether or not its members were ultimately responsible for imposing sentence. Jurors who did not perceive themselves as the final judges of the defendant's fate expressed this opinion in various ways:

> We are not sentencing him to death—we are just answering these questions. We talked about it. We are just answering these questions—to get a clear mind so as not to feel guilty that I sentenced him to die. That's how the law has it—just answer these questions. (1-3)

> You have to answer those three questions in three separate places with no thought to what you're going to get here—the result. You deal with three separate questions in three separate compartments and that's how you do it . . . You divorce that part . . . You go at that the same way Scarlett O'Hara did a different thing—"I won't think about that now—I'll think about it later." (3-3)

> The questions that you're answering are so firm, that if you're truthful in your answers, the decision is made without your making it practically. . . . (6-2)

> I think having those questions sort of takes that burden off of you . . . sort of we weren't saying he'll get the death—we were just answering the questions. It was more comforting to focus on the questions. (5-3)

Jurors who did feel that the responsibility for the defendant's fate was in their hands made the following kinds of comments:

> I just felt a lot of pressure and I went home crying one night. I guess it's because you had somebody's life in your hands—it's a very big decision. (4-2)

> I am one of the many who has the opportunity to say no and stop it [the execution] and I didn't. I said yes and it goes on. (8-2)

> Even though you do agree with the death penalty . . . it's a major decision and you don't want to make a mistake. It's probably one of the most important decisions you'll ever make and you want to do the right thing. (8-3)

From these comments, it is clear that the issue of felt responsibility for the final sentence was important to jurors, regardless of where they believed the responsibility to lie. Because the Supreme Court reviewed this issue as it pertains to jurors' knowledge of the appeals process, it is worth noting that 5 jurors from four juries (2, 4, 5, and 6) mentioned that their juries were aware that their sentencing decision would be reviewed by appellate courts.

The Importance of the Possibility of Parole

For the jurors interviewed here, the alternative to the death penalty was a sentence of life with the possibility of parole after a minimum of 20 to 30 years. Seven of the juries (1, 2, 3, 5, 6, 8, and 9) were aware that a life sentence would include the possibility of parole. Members of one jury (4) were not informed about

the terms of a life sentence and members of another jury (7) did not agree upon what they knew at that time.

Jurors were asked if they believed that their sentence would be carried out by the criminal justice system. Sixteen jurors (6 life and 10 death) did *not* believe that their sentence would be carried out. Members of life juries believed that the defendant would be released early and members of death juries believed that the execution would not occur. Only 7 jurors (5 life and 2 death) believed that the sentence rendered by their jury would be carried out. Four (1 life and 3 death) jurors were not sure if their sentences would be implemented. Jurors made the following comments concerning this issue:

> Most of the people that voted for the death sentence said, "Who are you kidding . . . Why don't you just vote for the death sentence? We know he's not going to get it. When was the last time we killed anybody? We can sit here and vote for the death sentence—it doesn't mean that we're going to kill him." (4-1)

> I was convinced of it and I still am . . . he's going to get out if you give him life imprisonment—he's going to get out. We all knew that. We talked about that . . . It's that simple. . . . The only way I can guarantee that [he will stay in prison] is to vote the death penalty. (8-2)

Twenty-three jurors (11 life and 12 death) felt that the possibility of parole was an important factor when considering the defendant's sentence. Indeed, Jury 1 rendered a sentence of life in the belief that the defendant would be too old to be a danger when released and Jury 8 rendered a death sentence because they believed their defendant would still be young enough to be a danger to society when released. All jurors who responded that the possibility of parole was an important consideration would have preferred having the option of a life sentence without parole. Only three jurors, all from life juries, preferred having a life sentence with parole. These jurors all believed that even the worst criminals deserve another chance.

Those jurors (9 life and 13 death) who stated a preference for a sentence of life without parole (LWOP) offered several reasons. The most common reason cited was that LWOP would offer a good compromise between those who believed that the defendant should not be executed and those who believed that he was dangerous and should never be released back into society. Eight jurors (3 life and 5 death) expressed these sentiments. Four death jurors indicated that they or others on their jury would have preferred LWOP because they would have been able to achieve their goal of protecting society without bearing responsibility for the defendant's death.

Many jurors stated that they or their jury would have been more comfortable with LWOP because a life sentence should mean that the defendant would stay in prison all his life and the costly and unpredictable process of appeals could be avoided.

> I think we would have found for life without parole . . . because he'd be in prison the rest of his life—he wouldn't be a threat to society . . . but our question, the way we had to answer it, was if he got life imprisonment and got out in 10 years or 15 years for good behavior and goes out and does it again, how could we live with that? (6-1)

> Life imprisonment doesn't mean life imprisonment. That was a very definite factor in deciding for the death penalty. (7-1)

Although most jurors would have preferred to consider the option of life without the possibility of parole and many indicated that they might have voted for it, most jurors did not feel that the death penalty is rendered unnecessary if life without parole were an option. Twenty-one (10 life and 11 death) jurors believed that it is important for society to have the death penalty, regardless of whether life without parole was an option. Only one juror (life) believed that there was no need to execute people because life without parole was sufficient. The most common reason given for the opinion that the death penalty is necessary was that some people's crimes are so horrible that they deserve to die (10 life and 7 death jurors). Other opinions were based on the beliefs that the death penalty is a deterrent (3 death jurors), LWOP is too expensive (3 death jurors), and the death penalty protects the prison staff and other inmates (1 death juror).

It is not surprising that the jurors in this study believed that the death penalty is necessary for society. All were death-qualified and thus had publicly committed themselves to the belief that capital punishment is appropriate in at least some circumstances. Also, because the life sentences came from juries unable to reach unanimity, most jurors interviewed believed that the defendant in their case deserved the death penalty, regardless of the final sentence.

The fact that the life sentence option included the possibility of the defendant's eventual release was an important consideration for jurors.[5] The option of LWOP would have allowed them to punish the defendant and protect society, and would relieve jurors from the burden of having to impose a death sentence. Clearly, some voted for the death penalty even though they felt that the lesser sentence of LWOP would have been more appropriate. They found themselves confronted with two inappropriate choices and felt compelled to honor their duty to protect society. This sense of duty was probably enhanced by the second question regarding the defendant's future dangerousness. The interviews suggest that, if given the opportunity, more jurors would choose sentences of LWOP, and therefore fewer defendants would be sentenced to die. Alternatively, capital jurors could be given three sentencing choices—life with the possibility of parole, LWOP, or death.

Other research suggests that the availability of parole makes a crucial difference to many people. National polls (Gallup, 1986) indicate that significantly fewer people (55% instead of 70%) favor capital punishment when LWOP is given as an option. Surveys also indicate that a majority of Americans favor LWOP in combination with a restitution program over the death penalty (Bowers, 1993; Paternoster, 1991).

The Stress of Capital Jury Service

To better understand the emotional and physical toll of capital jury service, jurors were asked about symptoms of stress. Twenty-two (9 life and 13 death) said

[5] After these interviews were conducted, Oregon adopted LWOP as the alternative to the death penalty in capital cases.

that they endured some sort of stress. Five (3 life and 2 death) did not find the experience to be stressful.

Most of the jurors who felt stress noticed at least some physical symptoms (8 life and 7 death jurors). The most common complaint was an inability to sleep well (5 life and 3 death jurors). Complaints also included fatigue (3 life jurors), irritability (2 life), preoccupation or "paranoia" with the trial (4 life and 2 death jurors), headaches (2 life jurors), stomachaches (1 life and 2 death), backaches (1 life), and pathologically clenched teeth (1 life).[6] One life juror reported that she gained 50 pounds as a result of the trauma she experienced as a capital juror. Another life juror said that the trial aggravated his alcoholism (he began to drink again after a hiatus) and forced him to re-enter therapy.

Jurors also reported having nightmares about the case (3 life and 3 death jurors). One man on a life jury reported that a woman on his jury dreamt that the victim was calling out to her for help. Two men had frustration dreams in which they were forced to watch the crime occur but were unable to stop it. Three life jurors reported crying about the case. Of course, reports of stress-induced problems must be interpreted cautiously. Problems such as a substantial weight gain and a relapse into alcoholism probably have far more complicated roots than the stress associated with capital jury service.

Perceptions of responsibility for the sentence did not seem to affect feelings of stress—the number of jurors reporting feelings of stress was not different for those who saw themselves as merely answering questions rather than deciding sentence. Jurors made the following comments regarding the stress experienced during their jury service:

> You had to argue to make the decision . . . continual arguing . . . tempers flared . . . You could see that over the days, it was taking its toll. (2-1)

> I don't think anyone would vote for the death penalty if they had to do it . . . you have to judge this person . . . you have to say this guy has to die. (6-3)

> It's very stressful because you're talking about someone's life and/or future . . . What made it more difficult was that you couldn't discuss it with your husband or any friends. You just had to do a lot of thinking and analyzing and figuring out what would be best for society and the defendant. (2-2)

Although jurors found the experience to be stressful, it was difficult for them to suggest ways to minimize the stress. Seventeen (9 life and 8 death jurors) said that the experience could not be less stressful. Those who had ideas suggested the following: fewer delays (1 life and 1 death juror), greater monetary compensation (1 life), a more comfortable jury room (1 death), do not poll jurors (4 death), and provide posttrial counseling for those who want it (3 life). Only two jurors did not think it was important to reduce the stress experienced by jurors:

> Why would you want to minimize stress? I think stress is very important. If you don't feel it, you may as well let a computer make the decision for you. (8-2)

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[6] Some jurors reported more than one symptom of stress.

Lastly, in spite of the stress experienced, 22 jurors (11 life and 11 death) believed that the stress was not so severe that jurors should be excused from the task of deliberating on the penalty. Four death jurors were ambivalent, and the remaining life juror felt that it was unfair of judges to "dump the most difficult sentencing decision into the laps of jurors" (2-1). The Supreme Court has acknowledged that the capital juror's role is very difficult:

> A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. (*Caldwell v. Mississippi*, 1985, p. 333)

Making this "very difficult and uncomfortable choice" takes its toll on jurors. Kaplan's (1985) research indicated that 4 out of 16 capital jurors and alternate jurors interviewed appeared to suffer from post-traumatic stress disorder, and most of the others exhibited at least some symptoms of that syndrome. Anecdotal accounts ("Death penalty cases," 1985; Leeson, 1987) as well as previous studies (Costanzo & Costanzo, 1989) indicate that capital jury service is extremely stressful.

These findings suggest that although the stress of capital jury duty is not usually debilitating, it is a factor that should be considered in our attempts to better understand penalty phase decision making. The emotions associated with stress undoubtedly impinge on the penalty decision process. In addition, it could be argued that the stress of penalty decision making may be an important factor for judges to consider in certain circumstances. One such instance might be when a judge considers whether to admonish a hung jury to continue its penalty deliberation. The stress associated with continuing a deadlocked deliberation over a highly charged emotional issue may be a factor worthy of the judge's consideration. Finally, as suggested by jurors, the courts could make trained psychotherapists available to capital jurors for a brief period after the sentence has been rendered.

Legal Implications

The process of penalty decision making is poorly understood and has received little empirical attention. Even less is known about those penalty decisions guided by the special issues (SI) framework. Accordingly, this research has been exploratory and the findings should be regarded as preliminary. Although the SI instructions are only used in the states of Oregon and Texas, the experiences of these jurors raise a variety of important legal and psychological issues.

Guiding Discretion While Preserving Responsibility and Fairness

From the perspective of the legal system, the findings reported here could be viewed as comforting. All jurors made a serious and sincere effort to evaluate the evidence and render a fair sentence. Although jurors interpreted the sentencing instructions somewhat differently, every juror used the instructions to structure

the decision task. As intended, the discretion of jurors was strongly constrained and the process and content of deliberation was powerfully shaped by the SI instructions. The three questions influenced the topics discussed, the factors considered relevant or irrelevant, and the jurors' sense of responsibility.

From another perspective, the findings reported here are disturbing. It is clear to jurors that they are expected to provide answers to the three questions. It is not clear whether they are merely providing answers to the questions or if they are actually deciding upon the appropriate penalty. This distinction is an important one because the Supreme Court has determined 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 responsibility for determining the appropriateness of the defendant's death rests elsewhere. (*Caldwell v. Mississippi,* 1985, pp. 328–329)

Jurors using the SI framework appear to be violating the spirit of *Caldwell v. Mississippi* because, in focusing on the specific issues before them, they may lose sight of the larger issue of whether the death penalty is appropriate. If they lose sight of this overarching issue, the meaning of their responses to the three questions may be obscured. Consequently, they may not feel the appropriate sense of responsibility for their decision. As Justice Linde pointed out in his dissent in *State v. Wagner* (1990), "a statute limiting the jury to specified findings of fact might seem to forbid arguments drawing attention to the life-or-death consequences of those findings" (p. 103). If such arguments are lacking, jurors are not providing "a reasoned *moral* response to the defendant's background, character, and crime" (Justice O'Connor's concurrence in *California v. Brown,* 1987, p. 545).

The SI instructions are not clear about what the jury is being asked to decide—the answers to the questions without consideration as to the appropriate sentence or the answers to the questions as a way of guiding discretion toward the most appropriate sentence. Most juries (7 of 9) voted on whether the answers to the questions should be yes or no, and only two juries voted on whether the defendant should live or die. The confusion felt by jurors needs to be recognized and remedied by the courts. Fifteen of the jurors interviewed, representing more than half of the cases, did not perceive themselves as ultimately responsible for sentencing. Many jurors distanced themselves from their sentencing choice by attending only to the three questions before them. The issue of responsibility must be clarified to ensure that decisions rendered by SI juries conform to constitutional standards.

The interviews highlight what might be termed the SI "illusion of fairness." On its face, the SI framework appears very fair to the defendant. After all, to receive a death sentence, a defendant must receive 36 "yes" votes (yes answers by 12 jurors to all three questions). It only takes one "no" vote to revert his sentence to life imprisonment. However, in practice, it seems to be fairly easy to get 36 "yes" votes. Half of the jurors interviewed commented that the first and third questions had already been asked and answered affirmatively during the guilt phase deliberation. Thus, many defendants began the penalty deliberation with 24

"yes" votes. In all the juries included in this study, regardless of final outcome, there were a greater number of jurors who voted "yes" on the issue of future danger than who voted "no". Thus, all defendants, even those who received life sentences, came very close to receiving 36 "yes" votes. The data presented here suggest that when SI juries walk into the penalty deliberation, they may have prejudged the defendant on questions one and three. This prejudgment is not due to jury misconduct but emerges from an accurate understanding of the statute.

Future Dangerousness

These interviews clearly indicate that in the SI framework, the issue of future dangerousness plays a prominent, if not central, role. Virtually all disagreements and prolonged discussions concerned only the second question of future dangerousness. Jurors clearly perceived the penalty decision as hinging on this issue. More than half commented that the other two questions had been asked and answered during the guilt phase deliberation. In addition, in all but one jury, this issue was the only one in which the defendant's mitigating circumstances were considered. From a constitutional perspective, this fact alone places the second question in the central role.

The centrality of the issue of future danger is troubling. As the data of Marquart, Ekland-Olson, and Sorensen (1989) suggest, jurors tend to err in the direction of false positives when making this determination. Comments from jurors suggest that the future dangerousness question leads jurors to focus on prior criminal acts rather than on any mitigating circumstances surrounding these acts. This focus is not surprising since the question asks jurors to determine if there is a probability that the defendant will commit such acts again, rather than asking them to consider why he might have committed criminal acts. As Oregon Supreme Court Justice Linde has pointed out, "personal mitigating conditions of the kind contemplated by the Supreme Court would not make the convicted person less of a future threat; they might just as likely make him more dangerous" (dissent in *State v. Wagner,* 1990, p. 104).

Full Consideration of Mitigating Circumstances

The SI instructions mention mitigating circumstances only in reference to the second question of future dangerousness. Although the court has interpreted the statute as permitting the consideration of mitigation when determining the answers to questions one and three (*State v. Wagner,* 1988), most jurors did not consider mitigation in response to these questions. And they seemed unaware that they could or should do so. Most jurors considered these questions to have been decided in the guilt deliberation, before they had heard any of the mitigating evidence presented during the penalty phase. The data presented here indicate that consideration of mitigation is open to considerable interpretation under the SI framework. Some jurors said that they tried to consider only mitigation that was directly relevant to the questions, some said that they felt that all mitigation was relevant, and some said that they felt that the mitigating circumstances presented were not at all relevant to the life or death decision.

Defendants sentenced under the SI format may be deprived of full consideration of relevant mitigation. Consequently, they may be receiving sentences that have not been determined in a constitutionally appropriate manner. The Supreme Court has repeatedly stressed that less than thorough consideration of relevant mitigation is unconstitutional (e.g., *Lockett v. Ohio,* 1978; *Eddings v. Oklahoma,* 1982; *Hitchcock v. Dugger,* 1987; *Penry v. Lynaugh,* 1990). Indeed, the Court viewed the constitutionality of the SI framework as resting upon whether the questions allow the jury to consider all relevant mitigating factors. As the Justices explained, "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed" (*Jurek v. Texas,* 1976, p. 271).[7]

CONCLUSION

The three-question format attempts to guide juror discretion by transforming an essentially moral and value-laden judgment into a factual judgment. It is not clear that such a transformation is appropriate or desirable.[8] In another context, the Federal Appeals Court ruled that asking the jury to answer a special interrogatory, consisting of specific questions about the case, is unconstitutional:

> "the jury, as the conscience of the community, must be permitted to look at more than logic," that is, it can apply principles of fairness or morality that are beyond the law. (*U.S. v. Spock,* 1969, p. 177)

The *Spock* case concerns the right to free speech. It would seem that the right to a fair penalty trial should receive the same consideration. Just as the special interrogatory improperly constrained jurors in the *Spock* case, the SI format may improperly constrain capital jurors.

The interviews reported here provide a glimpse into an unexplored area of psychology and law. This study indicates that jurors do not share the Court's understanding of key features of the special issues framework. These features are vital to constitutional administration of the death penalty. Clearly, the special issues sentencing instructions are not disregarded when jurors enter the deliberation room. They continue to exert a powerful influence on the life or death decision.

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[7] In recent decisions (*Penry v. Lynaugh,* 1990; *State v. Wagner,* 1990), the courts have acknowledged that, at least under certain circumstances, the SI framework does not allow jurors to consider all relevant mitigating circumstances.

[8] Kaplan (1987) argues that decisions requiring moral judgment tend to be decided on the basis of normative influence (norms, values, group expectations). In contrast, factual judgments tend to be decided on the basis of informational influence (evidence and facts). The SI instructions can be construed as a less than successful attempt to transform a value-based decision into an evidence-based decision.

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