ARTICLES

THE EMOTIONAL ECONOMY OF CAPITAL SENTENCING

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What influences the emotional responses a juror has toward a capital defendant? Do a juror's emotions affect how she votes? The prevailing wisdom claims that several features of the capital-trial penalty phase create emotional distance between jurors and defendants, which in turn increases the likelihood of a death sentence. In this Article, Professor Garvey surveys the emotional economy of capital sentencing, examining these questions and scrutinizing the prevailing wisdom.

INTRODUCTION

The theory is simple. When a juror empathizes with a capital defendant, she is less likely to condemn him to death and more likely to sentence him to life imprisonment. But the capital sentencing process systematically distances jurors from defendants, making empathy difficult, if not impossible. The result is a disproportionate number of death sentences. That's the theory. It's also the prevailing wisdom, at least in academic circles.[1]

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[1] I take the following statement to be typical:

> To ensure its viability, the system of death sentencing in the United States depends on the creation of an *extraordinary* set of psychological conditions. These conditions must prevail in capital trials to facilitate or somehow "enable" the participation of ordinary people in a potentially deadly course of action. Since, under typical circumstances, a group of twelve law-abiding persons would not calmly, rationally, and seriously discuss the killing of another, or decide that the person in question should die and then take actions to bring about that death, this unique set of conditions is crucial to allow the death-sentencing process to go forward.

Craig Haney, Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death, 49 Stan. L. Rev. 1447, 1447-48 (1997). Haney goes on to "discuss[ ] the legal and psychological mechanisms that are employed in death penalty law and trial practice to bridge the gulf between deep-seated inhibitions of capital jurors

But is it true? Does empathy really mean life? And what about the darker emotions a juror may experience during the course of the penalty phase, like anger or fear? Do they mean death?

I attempt here to answer these questions. More generally, I describe and analyze what might be called the *emotional economy* of capital sentencing. Academic proposals to reform the rules that constitute and regulate capital sentencing are never-ending.[2] Indeed, some of these proposals even approach the problem as one of achieving a form of optimal emotional regulation.[3] But before we change a regulatory framework we ought to know as much as we can about the economy it regulates.

The answers I offer are based on data gathered as part of the Capital Jury Project (CJP), a nationwide effort to improve our understanding of how jurors decide capital cases.[4] In interviews lasting

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against hurting others and state-sanctioned violence of the most profound sort." Id. at 1448. I examine some but not all of the mechanisms Haney discusses.

[2] See, e.g., Phyllis L. Crocker, Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases, 66 Fordham L. Rev. 21, 84-85 (1997) (emphasizing distinction between guilt-phase concept of culpability and penalty-phase concept of deathworthiness and proposing jury instructions based upon that distinction); Stephen P. Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 Cornell L. Rev. 989, 1016-17 (1996) (arguing that capital sentencing should occur in two steps, with jury first deciding whether death is deserved and second whether to grant or withhold mercy); Joseph L. Hoffmann, Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases, 70 Ind. L.J. 1137, 1158 (1995) (arguing that "death penalty jurors should be told—in strong, unequivocal language—that . . . they simply cannot pass off the responsibility for the sentencing to anybody else"); Scott W. Howe, The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial, 146 U. Pa. L. Rev. 795, 862 (1998) (arguing that "proper domain of the Court lies in drawing categorical lines defining relatively precisely which offenders are death-eligible"); Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 414-26 (1995) (examining two approaches to constitutional regulation of capital sentencing that focus on stages of process other than jury's "moment of decision"); Jordan M. Steiker, The Limits of Legal Language: Decisionmaking in Capital Cases, 94 Mich. L. Rev. 2590, 2620-23 (1996) (proposing series of reforms designed "to ensure that states truly reserve the death penalty for a more narrowed class of offenders and that the ultimate moral decision concerning the defendant's desert is made in a separate proceeding by sentencers fully informed of the scope and significance of their decisionmaking power").

[3] See, e.g., Samuel H. Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 Cornell L. Rev. 655, 658 (1989) (arguing that "Supreme Court has made significant efforts to protect the [juror's] opportunity to empathize in its capital jurisprudence, but has failed to see the need to affirmatively encourage sentencer empathy").

[4] See Justice Research Ctr., Northeastern Univ., Juror Interview Instrument: National Study of Juror Decision Making in Capital Cases (1997) [hereinafter CJP Study] (unpublished document, on file with the *New York University Law Review*). For an overview of the Capital Jury Project (CJP), see William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 Ind. L.J. 1043 (1995).

Quantitative analyses of CJP data to date can be found in William J. Bowers et al., Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experi-

three to four hours, CJP researchers asked jurors who actually sat on capital cases a wide range of questions using a semistructured interview instrument.[5] For example, participants were asked for their thoughts and feelings about the defendant,[6] and about his victim.[7] They were asked about their deliberations,[8] and about the sentencing instructions they received.[9] All told, each interview generated over 750 variables.[10]

I focus on the CJP's South Carolina segment, which has so far yielded the most extensive set of data of all the states participating in the CJP.[11] The data set encompasses interviews with 187 jurors in

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ence, and Premature Decision Making, 83 Cornell L. Rev. 1476 (1998) (multistate data); William J. Bowers & Benjamin D. Steiner, Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing, 77 Tex. L. Rev. 605 (1999) (multistate data); Theodore Eisenberg et al., But Was He Sorry? The Role of Remorse in Capital Sentencing, 83 Cornell L. Rev. 1599 (1998) [hereinafter Eisenberg et al., Remorse] (South Carolina data); Theodore Eisenberg et al., Jury Responsibility in Capital Sentencing: An Empirical Study, 44 Buff. L. Rev. 339 (1996) [hereinafter Eisenberg et al., Jury Responsibility] (South Carolina data); Theodore Eisenberg & Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L. Rev. 1 (1993) (South Carolina data); Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538 (1998) (South Carolina data); James Luginbuhl & Julie Howe, Discretion in Capital Sentencing Instructions: Guided or Misguided?, 70 Ind. L.J. 1161 (1995) (North Carolina data); Marla Sandys, Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines, 70 Ind. L.J. 1183 (1995) (Kentucky data); Benjamin D. Steiner et al., Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness, 33 L. & Soc'y Rev. 461 (1999) (multistate data); Scott E. Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 Cornell L. Rev. 1557 (1998) [hereinafter Sundby, Capital Jury] (California data); Scott E. Sundby, The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony, 83 Va. L. Rev. 1109 (1997) (California data).

Qualitative analyses of CJP data to date can be found in Hoffmann, supra note 2, passim (Indiana data); Austin Sarat, Violence, Representation, and Responsibility in Capital Trials: The View from the Jury, 70 Ind. L.J. 1103 (1995) (Georgia data).

[5] The instrument—a fifty-plus page questionnaire—includes both open-ended questions and questions to which the jurors were asked to choose among a selection of possible responses.

[6] See CJP Study, supra note 4, at 10-13.

[7] See id. at 14-16.

[8] See id. at 21-25, 32-36.

[9] See id. at 49-51.

[10] See id. app. at 1.

[11] All data presented here are derived from the South Carolina segment of the CJP, and are on file with the *New York University Law Review*. The CJP began collecting data in 1990 with funding from the Law and Social Sciences Program of the National Science Foundation. As of 1999, the CJP nationwide had gathered data from 916 jurors sitting in 257 cases from 11 states. See Bowers & Steiner, supra note 4, at 608 n.6; Steiner et al., supra note 4, at 474. Efforts to gain access to the multistate data set were unavailing. See Letter from William J. Bowers, Principal Research Scientist, College of Criminal Justice, Northeastern University, to Stephen P. Garvey, Associate Professor of Law, Cornell University (Mar. 22, 1999) (on file with the *New York University Law Review*).

fifty-three cases tried in South Carolina between 1988 and 1997.[12] The CJP's goal was to interview four jurors from each case.[13] Of the 187 jurors whose interviews yielded the data analyzed here, 100 sat on one of the 28 cases that resulted in a death sentence, and 87 sat on one of the 25 cases that resulted in a sentence of life imprisonment.[14]

The CJP's interview methodology allows unique access to the decisionmaking of capital jurors, but with that access come unique limitations. First, the answers a juror gave may have been less than forthright. His answers may have been the ones he believed the interviewer wanted to hear, or the ones he thought were most socially acceptable, not the most honest or accurate ones.[15] Second, a juror's memory may have faded or changed between the time of the trial and the time of the interview.[16] Third, a juror may have been biased by hindsight.[17] For example, a juror may have said the defendant's crime was especially brutal because he voted to sentence the defendant to death, not because he really thought the crime was especially brutal. Fourth, the data contain no independent assessment of the relevant

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[12] Data collection began in South Carolina following the enactment of the South Carolina Omnibus Criminal Justice Improvements Act of 1986, 1986 S.C. Acts 2955 (codified in scattered sections of S.C. Code Ann. § 24 (Law. Co-op. 1976)). The 1986 Act changed the standards of parole in capital cases and provided a natural starting point for the collection of data. See id. at 2983 (changing parole eligibility for defendants convicted of capital murder with aggravating circumstance, but not sentenced to death, from ineligibility for 20 years to ineligibility for 30 years). A later amendment to the South Carolina death penalty statute provided that capital defendants not sentenced to death would be ineligible for parole for life. See Act of June 7, 1995, No. 83, 1995 S.C. Acts 545, 557.

[13] See Bowers, supra note 4, at 1081. Three to four (and in one case five) jurors were interviewed in 46 of the 53 cases. Fewer than three jurors were interviewed in each of the remaining seven cases.

[14] Accounting for missing observations, the data set included 152 white jurors (82%), 33 black jurors (18%), 86 men (46%), and 100 women (54%).

[15] See Valerie P. Hans, How Juries Decide Death: The Contributions of the Capital Jury Project, 70 Ind. L.J. 1233, 1236 (1995) (discussing limitations of CJP's interview techniques while stressing that interviews remain highly valuable). Jurors might also fail to give the best or most articulate descriptions of their own thought processes. See id. at 1235. Psychologists who study emotions often rely on independent tests—e.g., physiological changes and facial expressions—to gauge emotional responses, not self-reports. See generally Robert Plutchik, The Psychology and Biology of Emotion 107-40 (1994) (describing methods of studying emotion through analysis of facial expressions and physiological changes).

[16] See Hans, supra note 15, at 1235-36. The longest delay between trial and interview was approximately seven years; the shortest was approximately three months. Seventy-four percent of the jurors said they remembered "hearing evidence about the defendant's punishment" "very well," and 97% said they remembered it at least "fairly well." Eighty percent of the jurors said they remembered "very well" the "jury deliberations about the defendant's punishment," and 99% said they remembered the deliberations at least "fairly well."

[17] See id. at 1236.

case characteristics. The only assessments we have are the impressions of the jurors themselves.

Accordingly, the following results need to be interpreted and relied upon with appropriate care. They provide revealing insights—which at times confirm and at times challenge conventional wisdom—but they are far from the last word on the subject. On the contrary, a complete understanding of the dynamics of juror decisionmaking in capital cases will come not only from what actual jurors themselves have to say, but also from jury simulations,[18] qualitative analyses,[19] and statistical studies in which researchers, not jurors, code the salient characteristics of the case.[20] Still, a good way to discover what capital jurors themselves think is to ask them, which is precisely what the CJP does.

With these limitations in mind, here is a brief glimpse at the results.[21] The emotional responses jurors have toward capital defendants run the gamut from sympathy and pity at one extreme, to disgust, anger, and fear at the other. These responses probably depend more on each juror's individual emotional capacities and dispositions, together with the evidence she sees and hears during the trial, than on how well she understands the judge's instructions. The psychology of the juror and the facts of the case seem to matter more than the law. A juror's race, especially in combination with the defendant's race, also appears to make a difference: Black jurors tend to have more empathy for defendants than do white jurors, especially (but not only) if the defendant is black as well.

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[18] See, e.g., Jane Goodman-Delahunty et al., Construing Motive in Videotaped Killings: The Role of Jurors' Attitudes Toward the Death Penalty, 22 Law & Hum. Behav. 257, 269 (1998) (finding based on jury-simulation study that death-qualified jurors were among other things more likely "to infer . . . that the defendant would be a future threat to society"); James Luginbuhl, Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial, 16 Law & Hum. Behav. 203, 214-16 (1992) (finding based on simulation study that juror comprehension under new North Carolina instructions was better than under old ones but also that new instructions "are not perfect").

[19] See, e.g., Craig Haney et al., Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death, J. Soc. Issues, Summer 1994, at 149, 171 (finding "[s]everal major differences between the [Oregon and California] statutory frameworks" based on in-depth interviews with samples of capital jurors from each state); Sarat, supra note 4, at 1121-33 (using interviews with CJP jurors in one Georgia case to "help[ ] us to understand how and why" capital jurors "cast the weight of citizenship on the side of law's violence").

[20] Cf. David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638, 1670-71 (1998) (describing data sources from which independent culpability indices were developed for use in multiple regression analyses of capital sentencing in Philadelphia).

[21] This synopsis is developed infra Parts II-IV.

Two emotions appear to influence how a juror votes: fear and sympathy.[22] Sympathy understandably prompts some jurors to cast a vote for life. But many jurors who vote for death insist that they too feel sympathy or pity for the defendant. This insistence is puzzling, but only at first; on reflection it makes perfect sense. Some jurors sympathize with the defendant and accordingly vote for life, while others sympathize with him *because* they voted for death.

Fear of the defendant tends to work its greatest influence on the minds of undecided jurors, nudging them toward death. Jurors who at the outset of the jury's deliberations cast their first vote for death tend to be no more afraid of the defendant than are jurors who cast their first vote for life. But among jurors who are undecided at the first vote, fear appears to play a distinct role in the decision of those who cast their final ballot for death.

Part I sets the stage for the analysis that follows. It briefly describes the prevailing wisdom and the claims it makes about the emotional experience of capital jurors. Parts II to IV then proceed with the analysis of these claims.

I
THE PREVAILING WISDOM

The prevailing wisdom begins with an attractive premise: Human beings naturally empathize with one another such that doing serious harm to one another ordinarily is unthinkable.[23] This premise has two interpretations. The first treats it as a logical claim holding that people *cannot* harm those with whom they empathize. The problem here is that this interpretation risks collapsing into a non-falsifiable tautology: People who harm other people could not have empathized with them because and just because they have done them harm. Like all tautologies, this one may generate insight, but not testable hypotheses. In contrast, the second interpretation treats the premise as an empirical claim holding that people *tend not* to harm those with whom they empathize. The second interpretation—the one examined here—does generate claims we can test.

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[22] Jurors were asked if they felt sympathy *or* pity for the defendant. For convenience I often refer only to sympathy in the text. I don't mean to imply that sympathy and pity are necessarily one and the same thing. See infra note 30. On the contrary, sympathy may more accurately describe the emotion that moves jurors to vote for life, while pity may more accurately describe the emotion of jurors who vote for death. See infra Part III.A.

[23] See, e.g., Haney, supra note 1, at 1447 ("[U]nder typical circumstances, a group of twelve law-abiding persons would not calmly, rationally, and seriously discuss the killing of another . . . .").

To this first premise is added a second one whose truth is readily observed: People who sit on capital juries do in fact do harm to others. They authorize the state to extinguish the life of a fellow citizen on an appointed day and hour, and in a particularly dehumanizing way.[24]

The conclusion then follows: Capital jurors who vote for death tend not to empathize with the men whom they condemn.[25] Something must therefore be blocking or muting the empathy one human being naturally feels for another—empathy that jurors would otherwise naturally feel for defendants.[26]

Speculation abounds as to what this something is. Some observers claim that the law itself acts as an obstacle to empathy inasmuch as some "psychological barriers between [capital jurors] and the defendant that facilitate dehumanization . . . are structured into the trial process itself and derive from the formality that attaches to legal language and court proceedings."[27] Indeed, on this account we should expect capital jurors to respond to capital defendants without any sort of fellow feeling. But unless we allow jurors to impose capital sentences without the "formality that attaches to legal language and court proceedings," we really have no way to test how much, if at all, these hallmarks of legality do indeed "facilitate dehumanization." Thankfully, the CJP data do allow us to test the influence of a range of other factors alleged to obstruct empathy.

The prevailing wisdom presents three basic questions. First, what emotional responses *do* jurors have toward capital defendants? Do they really lack empathy? Second, what factors influence these responses? What factors move jurors to have one emotional response rather than another? Third, do a juror's emotional responses actually

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[24] See Robert Johnson, Death Work: A Study of the Modern Execution Process 83-118 (1990) (giving detailed description of "deathwatch" and "[a]n execution and its aftermath").

[25] Men form the overwhelming majority of death-row inmates. See Capital Punishment Project, NAACP Legal Defense & Educ. Fund, Inc., Death Row U.S.A. 1 (1999). The defendants were men in 50 of the 53 cases analyzed here.

[26] See, e.g., Haney, supra note 1, at 1486 ("[I]f the machinery of death sentencing failed to perform . . . various rituals of bad faith and ceased resorting to . . . mechanisms of moral disengagement . . . , it might well fail in the task of finding volunteers who are . . . willing to take on the job of condemning their fellow citizens to death . . . .").

[27] Id. at 1454; see also Lynne N. Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574, 1589 (1987) ("[T]he doctrinal development of the procedures for imposing the death penalty offers the opportunity to avoid empathic understanding by resorting to rules . . . ."); Robert Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305, 393 ("In the case of the death penalty, the law has sometimes offered the sentencer the illusion of a legal rule, so that no actor at any point in the penalty procedure need feel he has chosen to kill any individual.").

influence her vote? Are empathetic jurors really less likely to recommend death? Parts II to IV try to answer these questions.

II
EMOTIONAL EXPERIENCES

Our jurors were asked about a number of emotions they might have had toward the defendant, ranging from disgust to pity. Although not asked in so many words if they "empathized" with the defendant, they were asked if they "imagined being like" the defendant or being "in [the] defendant's situation,"[28] which are synonymous with at least some conceptions of empathy.[29] They were also asked if they felt sympathy or pity for the defendant.[30] Although sympathy and pity are not the same as empathy, they nonetheless occupy

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[28] CJP Study, supra note 4, at 12.

[29] See, e.g., Mark H. Davis, Empathy: A Social Psychological Approach 202-03 (1996) (suggesting that "domain of empathy" is made up of two capacities: "the ability and/or tendency to understand the thoughts and feelings of others, and our affective responsivity to the experiences of those others"); Henderson, supra note 27, at 1581 (noting that one "form of . . . empathy is imaginative experiencing of the situation of another"). A very helpful discussion of the different ways in which psychologists have conceptualized empathy and sympathy can be found in Davis, supra, at 1-12, as can a helpful summary of recent psychological research on empathy, see id. at 202-04.

[30] See CJP Study, supra note 4, at 12. For discussions of the differences between sympathy and empathy, see, e.g., Davis, supra note 29, at 5 (arguing that sympathy historically has "had a largely, though not entirely, passive flavor to it" while "empathy suggested a more *active* attempt by one individual to get 'inside' the other"); Stephen Darwall, Empathy, Sympathy, Care, 89 Phil. Stud. 261, 261 (1998) ("Empathy consists in feeling what one imagines [the other] feels, or perhaps should feel[,] . . . or in some imagined copy of these feelings . . . . Sympathy, on the other hand, is felt as from the perspective of 'one-caring.'"); Lauren Wispé, The Distinction Between Sympathy and Empathy: To Call Forth a Concept, A Word Is Needed, 50 J. Personality & Soc. Psychol. 314, 318 (1986) ("The object of empathy is to 'understand' the other person. The object of sympathy is the other person's 'well-being.'").

Nor are sympathy and pity the same thing. Pity is usually thought to carry connotations of contempt that sympathy and compassion lack. See Lawrence Blum, Compassion, in Explaining Emotions 507, 512 (Amélie Oksenberg Rorty ed., 1980) ("[P]ity (unlike compassion) involves a kind of condescension, [which is] why compassion is morally superior to pity."); Martha Nussbaum, Compassion: The Basic Social Emotion, in The Communitarian Challenge to Liberalism 27, 29 (Ellen Frankel Paul et al. eds., 1996) (noting that "from the Victorian era onward, the term [pity] has acquired nuances of condescension and superiority to the sufferer that it did not have formerly"); Eamonn Callan, The Moral Status of Pity, 18 Can. J. Phil. 1, 3 (1988) ("[C]ompassion has been associated with a recognition of human equality which is absent from pity."); see also Felicia Ackerman, Pity as a Moral Concept/The Morality of Pity, 20 Midwest Stud. Phil. 59, 60 (1995) ("Sympathy seems to be a less global attitude implying less in the way of a general judgment about someone's life as a whole [than does pity]."). But cf. Brian Carr, Pity and Compassion as Social Virtues, 74 Phil. 411, 428-29 (1999) (urging that pity is social virtue insofar as it reflects "educated tolerance" of "those we do not understand"); A.T. Nuyen, Pity, 37 S.J. Phil. 77, 84 (1999) ("[T]here are situations in which the conceptual requirements for pity are met without pity being insulting or offensive.").

the same end of the emotional register; disgust, anger, and fear occupy the opposite end.[31]

Table 1 describes how jurors responded when asked about their thoughts or feelings about the defendant.

TABLE 1
THOUGHTS AND FEELINGS ABOUT THE DEFENDANT
(Survey Question II.B.7)

Did you have any of the following thoughts or feelings about the defendant? (% responding)

	Yes	No
Felt pity or sympathy for the defendant (n=187)	50	50
Found the defendant likable as a person (n=171)	21	79
Imagined being like the defendant (n=187)	12	88
Imagined yourself in the defendant's situation (n=187)	24	76
Was disgusted or repulsed by the defendant (n=187)	35	65
Felt anger or rage toward the defendant (n=187)	30	70
Found the defendant frightening to be near (n=186)	21	79
Couldn't stand to look at the defendant (n=187)	7	93

Sympathy and pity dominate the emotional economy of capital sentencing, with half the jurors reporting feelings of sympathy or pity for the defendant. Moreover, South Carolina's standard package of capital jury instructions includes a so-called "anti-sympathy" instruction,[32] according to which jurors are cautioned *against* being "governed by sympathy, by prejudice, by passion, or by public opinion."[33] The fifty-percent figure is thus all the more striking.

Not far behind sympathy and pity were disgust and anger, with about a third of the jurors having had these thoughts and feelings. Consistent with the prevailing wisdom, empathy is noticeably less

[31] For an engaging and often amusing analysis of disgust, see William Ian Miller, The Anatomy of Disgust (1997). For an application of Miller's analysis to the criminal law, see Dan M. Kahan, The Anatomy of Disgust in Criminal Law, 96 Mich. L. Rev. 1621 (1998) (book review).

[32] See Interview with John Blume, Visiting Professor of Law, Cornell University, and Director, Cornell Death Penalty Project, in Ithaca, New York (Apr. 15, 1999) [hereinafter Blume Interview]. Professor Blume was the Executive Director of the South Carolina Death Penalty Resource Center from 1988 to 1996. He continues to litigate capital cases in South Carolina and is well acquainted with capital practice in that state.

[33] State v. Bell, 393 S.E.2d 364, 374 (S.C. 1990). Anti-sympathy instructions of this sort have withstood constitutional challenges under the Eighth Amendment. See, e.g., California v. Brown, 479 U.S. 538, 543 (1987) (concluding that "[a]n instruction prohibiting juries from basing their sentencing decisions on factors not presented at trial, and irrelevant to the issue at trial, does not violate the United States Constitution"); cf. Saffle v. Parks, 494 U.S. 484, 486 (1990) (holding that challenge to constitutionality of Oklahoma trial court's anti-sympathy instruction "is not dictated by our prior cases and, were it to be adopted, it would contravene well-considered precedents").

prominent: Only a quarter of our jurors reported that they imagined themselves being in the defendant's situation, and only a tenth reported that they imagined actually being like the defendant. One-fifth found the defendant likable as a person,[34] while another fifth found him frightening to be near. Finally, only a handful of jurors said they couldn't even bring themselves to look at the defendant.

What triggers these emotions? What factors summon a juror's disgust, arouse her anger, or elicit her sympathy? More to the point, what factors mute or engage a juror's empathy? To these questions we now turn.

III
EMOTIONAL INFLUENCES

The data enable us to explore the relationship between a juror's emotional responses and a range of other factors. Below I examine four groups of such factors: jury selection and instruction, race, victims and their families, and defendants and their crimes.

A. Jury Selection & Instruction

The prevailing wisdom commonly attributes an absence of empathy to defects or failures in the process by which capital jurors are selected and instructed. Capital jurors should be impartial and well informed about the legal rules governing the decision they are asked to make. But, the argument goes, capital jurors are in fact neither impartial nor well informed. The process by which jurors are selected and instructed too often miscarries, producing jurors who are not only unqualified or ill-prepared to serve, but who also "act with punitive decisiveness, unrestrained by compassion."[35]

The law does indeed have high expectations for capital jurors. First, a capital juror should be neither opposed to the death penalty as a matter of principle,[36] nor should she be opposed in principle to life imprisonment.[37] She must be willing to entertain either possibility.

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[34] Sixteen of the values for this variable are missing (n=171), presumably because a number of the jurors didn't quite know what to make of the question.

[35] Haney, supra note 1, at 1481; see also id. at 1482-85 (discussing how "death qualifying voir dire" and the "final judicial instructions that precede the sentencing decision" function to "mak[e] it appear that the law favors death verdicts over life imprisonment").

[36] See Wainwright v. Witt, 469 U.S. 412, 424 (1985) (holding that "proper standard for determining when a prospective juror may be excluded for cause because of his or her views [in opposition to] capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'").

[37] See Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding that "capital defendant may [under the Due Process Clause] challenge for cause any prospective juror who . . . will

Accordingly, prosecutors can remove for cause jurors who lean too far in favor of life (called "death-qualification"),[38] and defense lawyers can do the same to jurors who lean too far in favor of death (called "life-qualification").

Second, a capital juror should understand that he and he alone bears responsibility for the defendant's sentence.[39] Unless some legal error is later discovered to have tainted the sentencing process, the jurors' decision will be the final one. No one will second guess them on the merits.[40] Indeed, if the state misleads a jury's members about

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automatically vote for the death penalty . . . [and] will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do").

[38] Whatever effect, if any, "death-qualification" has on a juror's emotional response to the defendant, it influences jury decisionmaking in a variety of other ways. For one of the most recent analyses describing the effects of death-qualification, see Mike Allen et al., Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis, 22 Law & Hum. Behav. 715, 725 (1998) (analyzing 14 studies of death-qualified jurors and finding that "data support the conclusion that death-qualified *voir dire* practices produce jurors more likely to render guilty verdicts and therefore more likely to invoke the death penalty as a form of punishment").

[39] See Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985) ("[W]e conclude 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 . . . the defendant's death sentence rests elsewhere."). Subsequent cases have arguably narrowed the scope of this principle. See, e.g., Romano v. Oklahoma, 512 U.S. 1, 9 (1994) ("[W]e have since read *Caldwell* as 'relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'" (quoting Darden v. Wainwright, 477 U.S. 168, 184 n.15 (1986))).

In South Carolina, the trial judge must impose whatever sentence the jury recommends. See Eisenberg et al., Jury Responsibility, supra note 4, at 351 & n.52. See generally James R. Acker & Charles S. Lanier, Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes, 31 Crim. L. Bull. 19, 20-27 (1995) (describing various state practices regarding judicial authority to accept or reject jury's sentencing recommendation). In states where the trial judge can impose death despite a jury recommendation of life, or life despite a jury recommendation of death, a juror may feel less responsible for the sentence she votes to impose because in fact she doesn't have the last word. See Bowers, supra note 4, at 1095 n.233 (noting 7.9-percentage point difference between jurors in override states and jurors in non-override states who allocated primary responsibility for defendant's sentence to trial judge). These so-called "override" statutes have so far withstood constitutional scrutiny. See, e.g., Harris v. Alabama, 513 U.S. 504, 505, 515 (1995) (refusing to hold "Alabama's capital sentencing statute [to be] unconstitutional because it does not specify the weight the judge must give to the jury's [sentencing] recommendation").

[40] The only chance that a jury's judgment on the merits will be second-guessed arises from the possibility of executive clemency. But executive clemency is nowadays very rare. See, e.g., Hugo Adam Bedau, The Decline of Executive Clemency in Capital Cases, 18 N.Y.U. Rev. L. & Soc. Change 255, 263 tbl.1 (1990-91) (documenting general decline in number of death-sentence commutations nationwide between 1960 and 1988); Michael L. Radelet & Barbara A. Zsembik, Executive Clemency in Post-*Furman* Capital Cases, 27 U. Rich. L. Rev. 289, 297 tbl.1 (1993) (documenting number of death-sentence commutations nationwide between 1973 and 1992).

the nature of their responsibility, and if the jury then imposes a death sentence, that sentence is constitutionally invalid, and the defendant must be resentenced.[41] In short, a reliable sentence requires a jury that appreciates its "truly awesome responsibility"[42] for the defendant's fate.

Third, a capital juror should understand the legal rules governing mitigation. A juror should, at a minimum, understand that she is never *required* to impose a death sentence. Long-standing constitutional doctrine outlaws so-called mandatory capital sentences.[43] Moreover, a juror is free to take account of *any* factor the defendant proffers as a basis for a sentence less than death, not just those factors specifically itemized in the state's capital sentencing statute.[44] A juror is also free to take a mitigating factor into account even though he does not believe the defendant has proven its existence beyond a reasonable doubt.[45] So too is a juror free to take a mitigating

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No South Carolina death-row inmate has received executive clemency in the post-*Furman* era. See Blume Interview, supra note 32. Nonetheless, 51% of our jurors believed that "very few [murderers sentenced to death in South Carolina] will ever be executed," and only 6% believed "nearly all of them will eventually be executed." The rest distributed themselves fairly evenly among the remaining responses, which ranged from "most will be executed," to "about half will be executed," to "less than half will be executed." See CJP Study, supra note 4, at 39; cf. Eisenberg et al., Jury Responsibility, supra note 4, at 362 tbl.4 (presenting similar results in earlier study of South Carolina CJP jurors).

41 See *Caldwell*, 472 U.S. at 341 (vacating death sentence).

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

43 See Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (concluding that "death sentences imposed upon the petitioners under North Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments"). But cf. Boyde v. California, 494 U.S. 370, 376-77 (1990) (upholding California sentencing scheme which mandated death if aggravating circumstances outweighed mitigating circumstances); Blystone v. Pennsylvania, 494 U.S. 299, 302-03 (1990) (upholding similar Pennsylvania instruction).

44 See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (concluding that "Eighth and Fourteenth Amendments require that the sentencer... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); see also Louis D. Bilionis, Moral Appropriateness, Capital Punishment, and the *Lockett* Doctrine, 82 J. Crim. L. & Criminology 283, 300-13 (1991) (detailing contours of so-called *Lockett* doctrine).

45 A state can require a capital defendant to prove the existence of a statutory mitigating factor by a preponderance of the evidence. See Walton v. Arizona, 497 U.S. 639, 650 (1990) ("[A] defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."); see also Delo v. Lashley, 507 U.S. 272, 277 (1993) (per curiam) ("Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support them."). But no state requires a defendant to prove the existence of a statutory mitigating circumstance by anything more than preponderant evidence. Cf. James R. Acker & Charles S. Lanier, In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws, 30 Crim. L. Bull. 299, 341-42 (1994) (noting that only five states explicitly require defendant to prove statutory mitigating circumstances by prepon-

factor into account even if every other juror thinks it should be ignored.[46]

Fourth, a capital juror should reach a sentencing verdict only after having made an "individualized assessment of the appropriateness of the death penalty."[47] She should not simply tally up the number of statutory aggravating and mitigating circumstances and then do the math. A juror's verdict is supposed to reflect a "reasoned moral response"[48] to the defendant and the defendant's crime, not an exercise in amoral arithmetic.

That's what the law expects. In reality, our jurors often disappointed the law's expectations. For example, while no capital juror should think that the death penalty is the *only* appropriate punishment for convicted murderers, some of our jurors did.[49] Similarly, no capital juror should believe that anyone but she alone is responsible for the defendant's sentence. Some of our jurors nonetheless believed they shared that responsibility with trial or appeals court judges.[50]

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derant evidence and that most states are silent about allocation of burden of persuasion). South Carolina allows the jury to consider any mitigating factor "supported by the evidence," S.C. Code Ann. § 16-3-20(C) (Law. Co-op. Supp. 1998), but jurors are not instructed on any specific burden of proof. See Blume Interview, supra note 32.

46 See Mills v. Maryland, 486 U.S. 367, 384 (1988) (vacating lower court judgment sustaining death sentence where "there [was] a substantial probability that reasonable jurors . . . well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance"); see also McKoy v. North Carolina, 494 U.S. 433, 435 (1990) ("North Carolina's unanimity requirement violates the Constitution by preventing the sentencer from considering all mitigating evidence.").

47 Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

48 Id. (emphasis omitted) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

49 Jurors were asked: "For convicted murderers, do you now feel that the death penalty is . . . ." Responses were coded (1) "an unacceptable punishment"; (2) "the least appropriate of several punishments"; (3) "just one of several appropriate punishments"; (4) "the most appropriate of several punishments"; and (5) "the only acceptable punishment." CJP Study, supra note 4, at 61. Any juror who believed that the death penalty was the "only acceptable" punishment for convicted murderers should not have been permitted to serve. It should be noted, however, that those jurors who gave this response may have felt differently prior to the trial. For the percentage of jurors giving each response, see infra app. tbl.14.

50 Jurors were asked: "When you were considering the punishment, did you think that whether [the defendant] lived or died was . . . ." Responses were coded (1) "strictly the jury's responsibility and no one else's"; (2) "mostly the jury's responsibility, but the judge or appeals courts take over responsibility whenever they overrule or change the jury's decision"; (3) "partly the jury's responsibility and partly the responsibility of the judge and appeals courts who review the jury's sentence in all cases"; and (4) "mostly the responsibility of the judge and appeals courts; we make the first decision but they make the final decision." CJP Study, supra note 4, at 40. The correct response is (1). For the percentage of jurors responding to each statement, see infra app. tbl.15; see also Bowers, supra note 4, at 1096 (presenting comparable results emerging from nationwide CJP data). For a more

Nor did many of our jurors fully understand mitigation. Some erroneously believed that the death penalty was sometimes mandatory,[51] or that a mitigating factor only counted if it was included in the state's death penalty statute,[52] or only if the defendant proved its existence beyond a reasonable doubt,[53] or only if all the jurors agreed it existed.[54] Finally, a few of our jurors may in fact have behaved like amoral calculators.[55] But South Carolina jurors are not atypical. Capital jurors in other CJP states exhibit many, if not all, of the same failings.[56]

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complete discussion of jury responsibility in capital sentencing, see Eisenberg et al., Jury Responsibility, supra note 4, passim.

[51] Jurors were asked: "After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that . . . [(a) the defendant's] conduct [was] heinous, vile, or depraved[, or (b) the defendant] would be dangerous in the future[?]" CJP Study, supra note 4, at 31. "No" responses were coded (1); "yes" responses were coded (2). The correct response is (1). For the percentage of jurors giving each response, see infra app. tbl.16.

[52] Jurors were asked: "Among the factors in favor of a life or lesser sentence, could the jury consider . . . ." Responses were coded (1) "any mitigating factor that made the crime not as bad"; (2) "don't know"; and (3) "only a specific list of mitigating factors mentioned by the judge." CJP Study, supra note 4, at 50. The correct response is (1). For the percentage of jurors giving each response, see infra app. tbl.17.

[53] Jurors were asked: "For a factor in favor of life or lesser sentence to be considered, did it have to be . . . ." Responses were coded (1) "proved only to a juror's personal satisfaction"; (2) "don't know"; (3) "proved beyond a preponderance of the evidence"; and (4) "proved beyond a reasonable doubt." CJP Study, supra note 4, at 50. In South Carolina, the correct response is (1). See supra note 45. For the percentage of jurors giving each response, see infra app. tbl.17.

[54] Jurors were asked: "For a factor in favor of life or lesser sentence to be considered . . . ." Responses were coded (1) "jurors did not have to agree unanimously on that factor"; (2) "don't know"; and (3) "all jurors have to agree on that factor." CJP Study, supra note 4, at 50. The correct response is (1). For the percentage of jurors giving each response, see infra app. tbl.17.

[55] Jurors were asked to rank on a scale of (1) to (4), with (1) indicating "most important" and (4) indicating "least important," each of four different ways in which "jurors make such hard decisions," one of which included "adding up the factors for and against a death sentence and weighing one side against the other." CJP Study, supra note 4, at 45. Responses were recoded (1) "least important" and (4) "most important," with responses of (2) and (3) representing the intermediate positions. For the percentage of jurors giving each response, see infra app. tbl.18.

A word of caution is in order. A juror who described her decisionmaking process as involving "adding up the factors for and against a death sentence and weighing one side against the other" is not necessarily acting like an amoral calculator. Indeed, assuming that the weighing of one side against the other involves some qualitative assessment, jurors who describe themselves as deciding in this fashion are arguably behaving as the law expects them to behave. See Eisenberg et al., Jury Responsibility, supra note 4, at 366-67.

[56] See Bowers, supra note 4, at 1091 & tbl.7:

> Contrary to the laws of their states, four out of ten capital jurors [from several states] believed that they were required to impose the death penalty if they found that the crime was heinous, vile, or depraved, and three out of ten thought that the death penalty was required if they found that the defendant would be dangerous in the future.

Thus the process by which capital jurors are selected and instructed does indeed miscarry, as the prevailing wisdom maintains. But what about the next step in the argument? Do any of these miscarriages actually influence the thoughts and feelings capital jurors have toward the defendants they sentence?

In order to examine this question, each of the variables reflecting the jurors' thoughts and feelings about the defendant (listed in Table 1) was entered as the dependent variable—i.e., the variable to be explained—in a survey logistic regression model in which one of a number of other variables served as the independent variable—i.e., the variable doing the explaining.[57] Each model produced a number (among others) known as a *t*-statistic. If the value of *t* is greater than 1.96 or less than -1.96, then the relationship between the two variables is statistically significant at or below the 0.05 level ($p \# 0.05$).[58] In plain English, if the *t*-statistic is greater than 1.96 or less than -1.96, we can be pretty confident that the relationship between the two variables is not the result of chance. For example, if the *t*-statistic in a model using sympathy as the dependent variable and the defendant's abuse as a child as the independent variable produces a *t*-statistic of

See also id. at 1096-97 & 1096 tbl.11 ("Only one in four jurors (27.2%) believe that the jury alone is strictly responsible for the punishment."); Luginbuhl & Howe, supra note 4, at 1165 tbl.1 (reporting confusion among North Carolina CJP jurors regarding scope of permissible mitigating evidence, burden of proof applicable to mitigating circumstances, and need for juror unanimity with respect to mitigating circumstances); Ellen Blau & Marla Sandys, The Decision Maker: What Moves Jurors? 24 (Mar. 24, 1998) (unpublished manuscript, on file with the *New York University Law Review*) (reporting similar confusion among capital jurors using sample of over 920 CJP jurors from 13 states); cf. Bowers et al., supra note 4, at 1505 tbl.6 (reporting percentage of jurors from multistate CJP data who said that death penalty was "only acceptable" punishment for various specified crimes).

57 For an early and straightforward explanation of "[h]ow [m]ultiple [r]egression [w]orks," see Franklin M. Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 705-16 (1980). In Fisher's terms, my goal here is to test whether one variable has any effect on another variable (known as "hypothesis testing"), not to estimate how much of an effect a change in one variable has on another assuming such an effect exists (known as "parameter estimation"). See id. at 704.

Each regression model also included as an independent variable the sentence the defendant received. The defendant's sentence was included in an effort to control for the influence of hindsight. Because each juror was interviewed *after* he had voted, the thoughts and feelings he reported having had about the defendant at the time of the interview may well have been influenced by the vote he ended up actually casting. A juror might, for example, have reported having thought the defendant was disgusting *because* he voted to impose death, and not the other way around. Controlling for the outcome helps reduce the risk of hindsight bias, but no statistical technique can eliminate it completely.

58 If *t* is greater than 1.96 or less than -1.96, which amounts to the same thing as $p \# 0.05$, we can confidently reject the so-called "null" hypothesis—i.e., the hypothesis that the independent variable and the dependent variable bear no relationship to one another. I only report associations that are significant at or near the 0.05 level. Complete results of the analysis are on file with the author.

3.211,[59] we can be confident—controlling for the sentence the jury finally imposed although not controlling for other variables—that a juror who believed the defendant had been a victim of child abuse was more likely to look upon the defendant with sympathy than was a juror who did not.[60]

Table 2 shows the results of this analysis for several independent variables related to the process by which capital jurors are selected and instructed.

Surprisingly, the results suggest that the emotional responses of a juror who doesn't fully understand her role or the court's instructions differ little from those of a juror who does. For example, a juror who recognized her responsibility for the defendant's sentence had much the same thoughts and feelings about the defendant as did a juror who didn't. Nor do any differences emerge between a juror for whom "ranking and adding up" mitigating factors was comparatively more "important in his punishment decision" and a juror for whom it was comparatively less important.

Likewise, a juror who is confused about the scope of mitigation and the burden of proof needed to establish a mitigating factor responds much like a juror who is not confused. A juror who understood that mitigating factors could include anything that "made the crime not as bad" responded much the same as did a juror who mistakenly thought she could consider "only a specific list of mitigating factors mentioned by the judge." So too a juror who understood that mitigating factors need be "proved only to a juror's personal satisfaction" responded much the same as did a juror who mistakenly believed mitigators must be proved beyond a reasonable doubt. In sum, a juror who measured up to the law's expectations had much the same thoughts and feelings about the defendant as did a juror who didn't—with three notable exceptions.

First, a juror who mistakenly thought that a mitigating factor could not be taken into account unless his fellow jurors all agreed on its existence was less likely to have imagined being in the defendant's situation than was a juror who understood unanimity was not required. Indeed, the strength of this association tended to increase in more complex multiple regression models.[61] A juror who sought una-

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[59] See tbl.7 infra Part III.D.1.

[60] Where this simple model suggests a relationship between the independent variable and the dependent variable, I sometimes explore the relationship in more detail using multiple regression models.

[61] The models included variables controlling for the perceived viciousness or depravity of the crime, the perceived dangerousness of the defendant, the perceived remorse of the defendant, the juror's belief in the appropriateness of the death penalty for convicted mur-

TABLE 2
JURY SELECTION & INSTRUCTION—
CORRELATION WITH THOUGHTS AND FEELINGS
ABOUT THE DEFENDANT

The more a juror . . .	The more the juror was . . .
Felt the death penalty was an appropriate punishment for convicted murderers	More likely to have felt anger or rage toward the defendant (t=1.866) Less likely to have felt sympathy or pity for the defendant (t=–2.043)
Thought that whether the defendant lived or died was the responsibility of the trial judge and appeals court judges	No statistically significant correlations
Thought the law required him to impose a death sentence if the evidence proved the defendant's conduct heinous, vile or depraved	More likely to have found the defendant likable as a person (t=2.415)
Thought the law required him to impose a death sentence if the evidence proved that the defendant would be dangerous in the future	More likely to have found the defendant likable as a person (t=1.919)
Thought the jury could only consider the specific mitigating factors mentioned by the judge	No statistically significant correlations
Thought that mitigating factors had to be proven beyond a reasonable doubt	No statistically significant correlations
Thought that jurors had to agree unanimously on a mitigating factor in order for it to be considered	Less likely to have imagined being in the defendant's situation (t=–1.875)
Ranked the process of adding up the factors for and against a death sentence and weighing one side against the other as important in his punishment decision	No statistically significant correlations

Note: Each of the variables in Table 1 representing a juror's thoughts and feelings about the defendant served as the dependent variable in a survey logistic regression model using the outcome of the sentencing proceeding on which a juror sat and the variables listed in the left-hand column as the independent variables. Observations ranged from 165 to 187.

nimity may have lacked the sense of independence needed to prompt him to look at the situation from all angles, including the defendant's, before reaching a decision. Conversely, a juror who realized she could take no comfort in unanimity—and who may therefore have been more apt to see the decision as hers alone—may have acquired an added incentive to explore the case from all points of view.

derers, and the race of the juror, defendant, and victim. These models, as well as each of the other models to which I refer, are on file with the author.

Second, a juror who thought the law required him to impose a death sentence if the evidence proved that the defendant's conduct was "heinous, vile, or depraved," or if the evidence proved the defendant "would be dangerous in the future," was actually *more* likely to have found the defendant likable as a person. Why would that be?

The answer appears to depend on race. Black jurors were more likely than white jurors to have believed the law required them to impose a death sentence when the crime was heinous or the defendant was dangerous. But black jurors were also more likely to find the defendant likable as a person.[62] Consequently, the correlation between thinking the law required a death sentence and thinking the defendant was likable as a person disappeared in models that controlled for a juror's race. Thus the likelihood that a juror would find the defendant likable as a person probably had more to do with the juror's race than with any confusion about the law.

Third, the more a juror thought the most appropriate or the only acceptable punishment for a convicted murderer was death, the quicker she was to become angry at the defendant. Likewise, the more a juror thought death was the right punishment, the less inclined she was to feel sympathy or pity for the defendant. Thus the more a juror tended to believe that anyone convicted of capital murder should be sentenced to death, the angrier and less sympathetic she was likely to be.[63]

The foregoing analysis compares the emotional responses of jurors who receive and understand constitutionally adequate instructions with the responses of those who receive such instructions but don't understand them, finding little difference between the two groups. But I should emphasize what it does not do. It does *not* examine the effect of constitutionally *inadequate* instructions on a juror's emotional responses.[64] Nor does it examine the effect of an instruction that openly charges jurors to try to empathize with the defendant.[65] Nor does it examine the effect of instructional

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[62] See infra note 74 and accompanying text.

[63] This result may be partly a function of race insofar as death-qualified black jurors were marginally less likely to think the death penalty was an appropriate punishment than were death-qualified white jurors.

[64] Cf. Penry v. Lynaugh, 492 U.S. 302, 328 (1989) ("[I]n the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of [petitioner's] mental retardation and abused background . . . we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' . . . .").

[65] Cf. Haney, supra note 1, at 1457 ("[A] judge's capital-sentencing instructions *should* clearly frame the broadened scope of the penalty phase inquiry so that capital jurors understand that the defendant's entire life lies at the heart of their sentencing decision." (emphasis added)); Pillsbury, supra note 3, at 658, 703-04 (proposing jury instructions designed to "affirmatively encourage sentencer empathy").

misunderstanding on a juror's sentencing verdict.[66] Examining those relationships would require additional analysis.

B. Race

Race influences who does and doesn't get sentenced to death. South Carolina is no exception.[67] Prosecutors tend consciously or unconsciously to ask for death, and jurors tend consciously or unconsciously to impose it, when the defendant is black, and even more so when the victim is white.[68] Prosecutors and jurors tend to place a premium on the value of white lives and a discount on the value of black ones.[69]

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[66] Some evidence does in fact exist to suggest that misunderstanding correlates with death verdicts. See, e.g., Shari Seidman Diamond & Judith N. Levi, Improving Decisions on Death by Revising and Testing Jury Instructions, 79 Judicature 224, 231 (1996) (finding based on study of 170 jury-eligible citizens that jurors who received revised instructions "were less likely to lean toward the death penalty than jurors who received the pattern instructions (51 percent versus 66 percent)"); Richard L. Wiener et al., Comprehensibility of Approved Jury Instructions in Capital Murder Cases, 80 J. Applied Psychol. 455, 463 (1995) (concluding based on mock jury study of 173 jury- and death-eligible Missouri residents that "participants who were less confused about the jury instructions (i.e., those who scored higher on the comprehension survey) were least likely to impose the death penalty on the defendant").

[67] See Raymond Paternoster & Ann Marie Kazyaka, The Administration of the Death Penalty in South Carolina: Experiences over the First Few Years, 39 S.C. L. Rev. 245, 278-79, 405 (1988) (concluding based on well-controlled analysis of 302 death-eligible felony murders—which constituted 97% of all death-eligible murders in South Carolina between 1977 and 1981—that "South Carolina prosecutors operated with a race-specific definition of homicide severity and were more tolerant of black-victim than white-victim killings"); see also Raymond Paternoster, Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina, 74 J. Crim. L. & Criminology 754, 764, 784 (1983) (concluding based on analysis of 321 capital murders in South Carolina between 1977 and 1981 that "the prosecutor's decision to seek the death penalty is significantly related to the race of the victim").

[68] Or, more precisely: Different empirical studies using different statistical techniques and data sets have found different forms of discrimination (race of victim, race of defendant, or both) attributable to different decisionmakers (prosecutors, jurors, or both). For the most comprehensive review to date of the influence of race on capital sentencing, see Baldus et al., supra note 20, at 1660-61 & app. B; see also U.S. Gen. Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 6 (1990) ("[T]he synthesis [of 20 studies] supports a strong race of victim influence. The race of offender influence is not as clear cut and varies across a number of dimensions.").

[69] See Randall Kennedy, *McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court, 101 Harv. L. Rev. 1388, 1441 (1988) (suggesting that "underlying problem" revealed by Baldus study is that "in Georgia's marketplace of emotion the lives of blacks simply count for less than the lives of whites" (emphasis omitted)); see also Douglas O. Linder, Juror Empathy and Race, 63 Tenn. L. Rev. 887, 909 (1996) ("The ability of white jurors to empathize more easily with white victims than black victims contributes to race-of-victim disparities, and is not an expression of racial hostility so much as it is an emotional fact of interracial relations.").

Does race also influence a juror's thoughts and feelings about the defendant, or at least the thoughts and feelings she said she had? Is empathy "racially selective"?[70]

Table 3 examines this question.[71] The first three panels examine the race of the juror, analyzed separately and in combination with the race of the defendant. The last two panels examine the race of the defendant and the race of victim, each analyzed separately.[72]

Race *does* matter. The defendant's race alone made no difference to a juror's reported thoughts and feelings. Nor did the victim's race.[73] But a juror's *own* race did. Three race-based associations emerged.

First, white jurors were more likely than black jurors to have felt anger toward the defendant. Second, white jurors were less likely than black jurors to have imagined being in the defendant's situation. Third, white jurors were less likely than black jurors to have found the defendant likable as a person.

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[70] Kennedy, supra note 69, at 1420.

[71] I also examined the relationships between a juror's gender and his or her emotional responses to the defendant. I found no statistically significant associations. Cf. Davis, supra note 29, at 58 (reviewing psychological literature and concluding that widespread impression that "females are more empathetic . . . depends on the particular definition of empathy which is employed and the specific measures which are used"). But cf. Eisenberg et al., Remorse, supra note 4, at 1623 (finding based on prior study of South Carolina CJP jurors that "[c]ompared to white males and black females, white females were the least likely to think the defendant was remorseful").

[72] To obtain the results in Table 3, white jurors, defendants, and victims were coded (0). Black jurors, defendants, and victims were coded (1). Dummy variables were created to test the joint influence of juror and defendant race.

Accounting for missing observations, the number of jurors within each of the various racial combinations is as follows:

	White Jurors		Black Jurors	
Victim Race	Defendant Race			
	White	Black	White	Black
White	90	47	15	14
Black	0	12	0	4

Notice that in none of the cases within the data set is the white defendant-black victim combination represented. Statistical analyses conducted by my colleague Theodore Eisenberg in connection with litigation in South Carolina suggest that the rate at which South Carolina solicitors seek death in black-victim cases is substantially lower than the rate at which they seek death in white-victim cases. See John H. Blume et al., Post-*McCleskey* Racial Discrimination Claims in Capital Cases, 83 Cornell L. Rev. 1771, 1782, 1790, 1794 n.116 (1998) (collecting evidence of race-based "death-seeking" decisionmaking on part of solicitors in several South Carolina counties).

[73] The *p*-value for the relationship between victim race and juror sympathy or pity was 0.129, with jurors expressing less sympathy for the defendant when the victim was white. I also examined the relationship between juror thoughts and feelings about the defendant and the black defendant-white victim combination. No statistically significant associations emerged.

TABLE 3
JUROR, DEFENDANT, AND VICTIM RACE—
CORRELATION WITH THOUGHTS AND FEELINGS
ABOUT THE DEFENDANT

If the juror was . . .	The more the juror was . . .
White	More likely to have felt anger or rage toward the defendant (t=2.007) Less likely to have found the defendant likable as a person (t=–4.110) Less likely to have imagined being in the defendant's situation (t=–2.528)
Black	More likely to have found the defendant likable as a person (t=4.110) More likely to have imagined being in the defendant's situation (t=2.528) Less likely to have felt anger or rage toward the defendant (t=–2.007)
If the juror was white and . . .	**The more the juror was . . .**
The defendant was black	Less likely to find the defendant likable as a person (t=–1.923) Less likely to have imagined being in the defendant's situation (t=–1.982)
The defendant was white	Less likely to find the defendant likable as a person (t=–2.558)
If the juror was black and . . .	**The more the juror was . . .**
The defendant was white	More likely to have found the defendant likable as a person (t=3.120)
The defendant was black	More likely to have found the defendant likable as a person (t=2.482); to have imagined being like the defendant (t=2.067); to have imagined being in the defendant's situation (t=2.473)
If the defendant was . . .	**The more the juror was . . .**
White	No statistically significant correlations
Black	No statistically significant correlations
If the victim was . . .	**The more the juror was . . .**
White	No statistically significant correlations
Black	No statistically significant correlations

Note: Each of the variables in Table 1 representing a juror's thoughts and feelings about the defendant served as the dependent variable in a survey logistic regression model using the outcome of the sentencing proceeding on which a juror sat and the variables listed in the left-hand column as the independent variables. Observations ranged from 169 to 187.

In more complex multiple regression models, the first two of these associations disappeared; the third survived. A black juror continued to be more likely to have found the defendant likable as a person no matter what the race of the victim or the defendant, no matter how vicious she thought the crime was, no matter if she thought the

evidence proved the defendant would be dangerous in the future, no matter how sorry she thought the defendant was or wasn't, and no matter what punishment she thought was appropriate for convicted murderers. Black jurors thus appeared more willing than white jurors to keep the sin separate from the sinner.[74]

Another pattern emerges when the juror's race and the defendant's race are analyzed in combination. Compared to white jurors, black jurors continued—as before—to be more likely to find defendants likable as people, white and black defendants alike. But when the defendant was black, black jurors were also more likely than white jurors to have imagined being in the defendant's situation and even to have imagined actually being like the defendant.[75]

C. *Victims and Their Families*

Capital jurors usually learn about the victim's life and the effect of the victim's death on his family through so-called "victim impact

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74 This conclusion is consistent with anecdotal evidence, see, e.g., Sheri Lynn Johnson, Respectability, Race Neutrality, and Truth, 107 Yale L.J. 2619, 2634 (1998) (reviewing Randall Kennedy, Race, Crime, and the Law (1997)) ("In my personal experience, black Christian churches have been much better than their white counterparts at 'Hate the sin, love the sinner.'"), as well as with emerging survey research, see, e.g., Chester L. Britt, Race, Religion, and Support for the Death Penalty: A Research Note, 15 Just. Q. 175, 189 (1998) (speculating that differences in support for death penalty between black and white Protestant fundamentalists appearing in General Social Survey data may among other things be due to "effects of alternative theological emphases (e.g., hope, forgiveness, 'second chances') in fundamentalist churches"); Robert L. Young, Religious Orientation, Race and Support for the Death Penalty, 31 J. Sci. Study Religion 76, 85 (1992) (noting in connection with analysis of 1988 General Social Survey data that "black Americans . . . tend[ ] to make situational rather than personal attributions, and to [be] . . . relative[ly] skeptic[al] . . . [of] the American criminal justice system"). See generally Marian J. Borg, Vicarious Homicide Victimization and Support for Capital Punishment: A Test of Black's Theory of Law, 36 Criminology 537, 562-63 (1998) (suggesting based on analysis of 1988 General Social Survey data that "blacks are perhaps more likely than whites to separate the moral dimensions of individual responsibility and atonement from the secular dimensions of public punishment"); Harold G. Grasmick et al., Religion, Punitive Justice, and Support for the Death Penalty, 10 Just. Q. 289, 309 (1993) (finding based on 1991 random sample survey of 395 residents of Oklahoma City that—although noting small number of nonwhites in sample—"nonwhite evangelical/fundamentalist Protestants were less supportive of the death penalty . . . than [were] their white counterparts"); Brandon K. Applegate et al., Forgiveness and Fundamentalism: Reconsidering the Relationship Between Correctional Attitudes and Religion 24-25 (July 1999) (unpublished manuscript, on file with the *New York University Law Review*) (finding based on survey of 559 Ohio respondents that "compassionate as well as fundamentalist religious orientations clearly affect correctional attitudes" and that "[t]hose respondents who were more forgiving were more supportive of offender treatment and were less punitive").

75 See supra notes 28-29 and accompanying text for a discussion of these responses as indicia of juror empathy.

statements" (VIS).[76] It wasn't always so. In 1987, the Supreme Court decided *Booth v. Maryland*,[77] holding that victim impact evidence had nothing to do with a capital defendant's culpability and thus had no business being introduced into a capital trial.[78] Four years later the Court decided *Payne v. Tennessee*,[79] changing its mind and holding that a state could fairly conclude that a capital defendant's culpability *does* depend on the details of the victim's life and the impact of her death on the members of her family.[80] As a result, VIS are now routinely introduced in penalty-phase proceedings in most death penalty states,[81] including South Carolina.[82]

The CJP asked jurors a number of questions about the victim and the victim's family. Unfortunately, limitations on the data make it difficult to analyze what effect, if any, *Payne* has had on capital sentencing in South Carolina. First, the original CJP survey instrument was developed before the Court's decision in *Payne* and accordingly did not inquire explicitly about victim impact evidence. Second, South Carolina law and practice governing victim impact evidence was shifting and unsettled for much of the period during which the cases included in the data set were tried. Thus we can't be sure how many of the jurors who sat on cases tried before *Payne* were actually exposed

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[76] The term "victim impact statement" (VIS) typically refers to (1) evidence about the victim and the victim's life; (2) evidence about the impact of the victim's death on the victim's family; or (3) testimony from the victim's family members offering their own characterizations and opinions about the crime, the defendant, and the appropriate sentence. See Wayne A. Logan, Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials, 41 Ariz. L. Rev. 143, 157-69 (1999) (distinguishing between "characteristics," "impact," and "opinion" forms of victim-related evidence).

[77] 482 U.S. 496 (1987).

[78] See id. at 504. *Booth*'s holding was broadened two years later in South Carolina v. Gathers, 490 U.S. 805 (1989), to cover VIS introduced through prosecutorial argument. See id. at 811 ("While in this case it was the prosecutor rather than the victim's survivors who characterized the victim's personal qualities, the [prosecutor's] statement is indistinguishable in any relevant way from that in *Booth*.").

[79] 501 U.S. 808 (1991).

[80] See id. at 825 ("We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."). The *Payne* Court sanctioned the introduction of characteristics and impact evidence—the first two types of VIS—but reserved judgment on opinion evidence, the third type. See id. at 830 n.2; id. at 835 n.1 (Souter, J., concurring). A recent survey has found that appellate courts now regularly "condone" opinion evidence that consists of victim "characterizations and opinions about the crime and the defendant" and usually treat "witnesses' opinions as to the appropriate sentence that should be imposed" as harmless error. See Logan, supra note 76, at 166-67.

[81] See id. at 150 ("Today, at least thirty-two of the thirty-eight death penalty states, as well as the federal government, permit victim impact evidence in capital trials, on the basis of either judicial or legislative authority.").

[82] See Blume Interview, supra note 32.

to victim impact evidence, or to precisely what kind of victim impact evidence they may have been exposed.[83] Third, it would naturally take some time before South Carolina prosecutors adjusted their trial tactics to take advantage of *Payne* and begin to introduce VIS. Thus, we can't even be sure how many of the jurors who sat on post-*Payne* cases were actually exposed to victim impact evidence. The following analysis therefore makes no effort to isolate the behavior of jurors who served on cases in which victim impact evidence was introduced.[84]

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[83] South Carolina solicitors rarely made aggressive use of VIS in the years following reintroduction of the death penalty in South Carolina, see Blume Interview, supra note 32; consequently, South Carolina law governing the admissibility of VIS remained untested. *Booth* banned the use of VIS in June 1987, but at least some South Carolina solicitors read *Booth* narrowly, introducing VIS not through victim statements, as in *Booth*, but through closing arguments. The Supreme Court disapproved of this practice in *Gathers*, decided in June 1989. *Payne* was decided in June 1991 and was adopted as a matter of South Carolina law in October 1991. See State v. Johnson, 410 S.E.2d 547, 555 (S.C. 1991) (holding solicitor's reference to the victim's family in closing argument to be "relevant to the jury's decision and proper"); see also Lucas v. Evatt, 416 S.E.2d 646, 647 (S.C. 1992) ("In *State v. Johnson*, . . . we adopted as state law the *Payne* decision." (citation omitted)). Assuming South Carolina solicitors and courts scrupulously honored *Booth* and *Gathers* after *Gathers* was decided in June 1989, VIS were clearly prohibited in South Carolina only during the two year interval between *Gathers* and *Payne*. The cases included in the data analyzed here were (with one exception) tried between 1986 and 1997. Some of our pre-*Payne* jurors may therefore have been exposed to VIS evidence.

[84] Very little empirical analysis has yet been conducted on the actual effects of VIS on jury decisionmaking in capital cases. One of the few that has been conducted using jury simulation concluded:

> When jurors heard VIE [victim impact evidence] about highly respectable (as opposed to less respectable) victims, they rated those victims as more likable, decent, and valuable; felt more compassion for the victims' family; believed that the emotional impact of the murders on survivors was greater; . . . rated the crime as more serious[;] . . . [and] tended to discount the defendant's assertions that his difficult upbringing was a mitigating factor in this crime. . . .
>
> We found no effect of victim respectability on ratings of the defendant's likableness, dangerousness, or chances of rehabilitation, in large part because of ceiling (dangerousness) and floor (likableness and rehabilitation) effects. . . .
>
> . . . Neither [did we find] any indication of the complementary effect: that information contained in VIE influences the weight that jurors attach to aggravating circumstances.

Edith Greene et al., Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?, 28 J. Applied Soc. Psychol. 145, 154 (1998); see also Edith Greene, The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments, 5 Psychol., Crime & L. 331, 345 (1999) (concluding that "jurors may be influenced in different ways by different types of victim impact evidence and that victims portrayed in a VIS as assets to their families and their communities may be perceived differently than victims portrayed in less glowing terms").

In neither study did the author(s) analyze the influence, if any, of VIS on the defendant's sentence. See Greene et al., supra, at 155; Greene, supra, at 345. But see James Luginbuhl & Michael Burkhead, Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death, 20 Am. J. Crim. Just. 1, 13 (1995) (concluding in simulation study that

Nonetheless, we can still ask how a juror's beliefs about the victim, or her thoughts and feelings about the victim's family—however she came to hold those beliefs, thoughts, or feelings—influenced her thoughts and feelings about the defendant. What we cannot readily ask is how victim impact evidence may have influenced a juror's thoughts about the victim or the victim's family in the first place, or how those VIS-inspired thoughts may in turn have influenced the juror's emotional response to the defendant.

1. Beliefs About the Victim

Table 4 explores the relationship between a juror's beliefs about the victim and her thoughts and feelings about the defendant.[85]

Most of the beliefs a juror had about the victim bore no relationship to the thoughts and feelings she had about the defendant[86]—with two exceptions, each involving fear. A juror was more likely to have found the defendant frightening to be near if the victim was from a poor or deprived background, i.e., if the victim was of low status. Conversely, she was less likely to have found the defendant frightening if she thought the victim was an admired or respected member of the community, i.e., if the victim was of high status.

But why would jurors be *less* afraid of the defendant when they thought the victim was an admired or respected member of the community? Shouldn't just the opposite be true? Shouldn't jurors more closely identify with high-status victims than they do low-status ones? Shouldn't that identification lead in turn to greater fear of defendants who kill high-status victims? Indeed, prior research using well-con-

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"victim impact evidence fostered votes for death [but] only in those neutral to, or supportive of the death penalty").

[85] Jurors were asked: "In your mind, how well do the following words describe [the victim]?" Responses were coded (1) "very well"; (2) "fairly well"; (3) "not well"; and (4) "not at all." CJP Study, supra note 4, at 14. For the percentage of jurors responding "fairly well" or "very well" and the percentage responding "not at all" or "not well" to each description, see infra app. tbl.19.

In addition to the variables shown in Table 4, jurors were asked if the victim was "innocent or helpless," was "raised in a warm[,] loving home," or was "someone who loved his/her own family." CJP Study, supra note 4, at 14. Table 4 omits these variables because almost all jurors believed the victim fit each of these descriptions. Jurors were also asked if the victim was "a 'loner' without many friends" or "had an unstable or disturbed personality." Id. Again, Table 4 omits these variables because almost no jurors believed the victim fit either of these descriptions.

[86] The CJP also asked jurors whether the "defendant(s) and victim(s) [were] related in any of the following ways . . . ." CJP Study, supra note 4, at 8. Responses included: spouse or ex-spouse, family relations, neighbors, friends, acquaintances, strangers, lovers, coworkers, employer/employee, and tenant/landlord. A juror's beliefs about how the defendant and the victim were related appeared to have little bearing on his thoughts and feelings about the defendant.

TABLE 4
BELIEFS ABOUT THE VICTIM—
CORRELATION WITH THOUGHTS AND FEELINGS
ABOUT THE DEFENDANT

The more a juror believed the victim . . .	The more the juror was . . .
Was an admired or respected member of the community	Less likely to have found the defendant frightening to have been near (t=-2.168)
Had a wonderful future ahead	No statistically significant correlations
Was from a poor or deprived background	More likely to have found the defendant frightening to have been near (t=1.883)
Had a problem with drugs or alcohol	No statistically significant correlations
Was too careless or reckless	No statistically significant correlations

Note: Each of the variables listed in Table 1 representing a juror's thoughts and feelings about the defendant served as the dependent variable in a survey logistic regression model using the outcome of the sentencing proceeding on which a juror sat and the variables listed in the left-hand column as the independent variables. Observations ranged from 165 to 172.

trolled multiple regression analysis has found that "low victim [socio-economic] status has the substantial and statistically significant effect of reducing a defendant's likelihood of receiving a death sentence."[87]

One hypothesis would go like this: High-status victims are more likely to be killed by high-status defendants. Moreover, high-status defendants are generally less likely to appear frightening to jurors than are low-status defendants. Ironically, jurors will therefore be less likely to be afraid of defendants who kill high-status victims than they will be of defendants who kill low-status victims, not because they identify less with high-status victims and more with low-status ones, but rather because defendants who kill high-status victims will appear less frightening. The associations between victim status and juror fear do in fact tend to lose significance in models that control for the extent to which a juror thought the defendant was "dangerous to other people."[88]

[87] Baldus et al., supra note 20, at 1715; see also Garvey, supra note 4, at 1557, app. at 1570 tbl.7 (finding based on earlier analysis of South Carolina CJP data that "when jurors believed the victim was in fact a 'respected member of the community,' the percentage of jurors who treated that fact as aggravating jumped from 1.7% to 20.1%").

[88] The t-statistic on the association between victim high status and juror fear in this model becomes -1.658; that on the association between victim low status and juror fear becomes 1.507.

2. *Thoughts and Feelings About the Victim*

In addition to their beliefs about the victim, the jurors were also asked about their thoughts and feelings toward the victim, including the extent to which they empathized with the victim. All else being equal, one would expect a juror to empathize much more with the victim than with the defendant.[89] Moreover, one might reasonably hypothesize that a juror's empathy for the victim would "interfere[ ] with—and indeed [perhaps] completely block—the jury's ability to empathize with the defendant or comprehend his humanity."[90] Table 5 explores this hypothesis.[91]

The results conform to the received wisdom, but they also confound it. The conforming part is no surprise: A juror who imagined being in the victim's situation—who perhaps imagined himself as the victim of the defendant's violence—was disposed to respond to the defendant with anger and disgust. That amounts to no more than the natural reaction of any victim, or of anyone who imagined himself in the victim's situation.

But here's the confounding part: Why would a juror who imagined being in the *victim's* situation, or who imagined the victim as a member of her own family, also have imagined being in the *defendant's* situation? Why would a juror who imagined the victim as a friend have actually imagined being like the defendant? And why would a juror who admired or respected the victim also have found the defendant likable as a person?

The puzzle may well have a simple solution. We might think of empathy as a scarce resource, of which we only have so much to give. On this account, the more empathy a juror extends to the victim the less he has left to extend to the defendant. But empathy is perhaps more a capacity or quality of character than it is a limited resource. Consequently, it makes perfectly good sense to discover that a juror who imagined being in the victim's situation, or who imagined the victim as a friend, would also tend to imagine being in the defendant's

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89 Cf. Susan Bandes, Empathy, Narrative, and Victim Impact Statements, 63 U. Chi. L. Rev. 361, 400 (1996) ("The feeling of identification with the victim of a crime often comes naturally.").

90 Id. at 402.

91 Jurors were asked: "Did you have any of the following thoughts or feelings about [the victim] . . . ?" CJP Study, supra note 4, at 14. "No" responses were coded (0); "yes" responses were coded (1). For the percentage of jurors giving each response, see infra app. tbl.20.

In addition to the responses shown in Table 5, jurors were also asked if they "felt grief or pity for" or "were disgusted or repulsed by" the victim. CJP Study, supra note 4, at 14. Table 5 omits both of these variables because almost all jurors felt grief or pity for the victim, and almost none felt disgusted or repulsed.

TABLE 5
THOUGHTS AND FEELINGS ABOUT THE VICTIM—
CORRELATION WITH THOUGHTS AND FEELINGS
ABOUT THE DEFENDANT

If a juror . . .	The more the juror was . . .
Admired or respected the victim	More likely to have found the defendant likable as a person (t=2.104)
Imagined being in the victim's situation	More likely to have felt anger or rage toward the defendant (t=2.375); to have been disgusted or repulsed by the defendant (t=2.176); to have imagined being in the defendant's situation (t=2.793)
Imagined himself as a friend of the victim	More likely to have imagined being the defendant (t=1.956); to have imagined being in the defendant's situation (t=2.807)
Imagined the victim as a member of her own family	More likely to have imagined being in the defendant's situation (t=2.538)
Wished the victim had been more careful	No statistically significant correlations

Note: Each of the variables in Table 1 representing a juror's thoughts and feelings about the defendant served as the dependent variable in a survey logistic regression model using the outcome of the sentencing proceeding on which a juror sat and the variables listed in the left-hand column as the independent variables. Observations ranged from 159 to 187.

situation, or even being like the defendant himself. Some jurors are just naturally empathetic.

3. *Thoughts and Feelings About the Victim's Family*

Much the same pattern emerged when jurors were asked not for their thoughts and feelings about the victim, but about the victim's family.[92] Table 6 explores the relationship between a juror's thoughts and feelings about the victim's family and her thoughts and feelings about the defendant.[93]

[92] Jurors were asked: "Did any of [the victim's] family members come to the trial?" CJP Study, supra note 4, at 15. Over 86% of the jurors responded that they were "sure" the victim's family members did attend the trial.

[93] Jurors were asked: "Whether or not they came to trial, did you have any of the following thoughts or feelings about [the victim's] family?" Id. "No" responses were coded (0); "yes" responses were coded (1). For the percentage of jurors giving each response, see infra app. tbl.21.

In addition to the responses shown in Table 6, jurors were also asked if they "felt [the victim's family's] grief and sense of loss" and if they "felt [the victim's family was] partly to blame for what happened." CJP Study, supra note 4, at 15. Table 6 omits these variables because almost all jurors felt the victim's family's grief, and almost none felt the victim's family was to blame for what happened.

TABLE 6
THOUGHTS AND FEELINGS ABOUT THE VICTIM'S FAMILY—CORRELATION WITH THOUGHTS AND FEELINGS ABOUT THE DEFENDANT

If a juror . . .	The more the juror was . . .
Imagined himself in the situation of the victim's family	More likely to have imagined being in the defendant's situation (t=2.529)
Felt distraught or remote from the victim's family	No statistically significant correlations
Thought the victim's family seemed very different from his own family	No statistically significant correlations
Wished he knew the victim's family personally	More likely to have felt anger or rage toward the defendant (t=1.801); to have found the defendant frightening to be near (t=1.818); to have felt disgusted or repulsed by the defendant (t=2.225)
Imagined himself as a member of the victim's family	More likely to have imagined being in the defendant's situation (t=3.309)

Note: Each of the variables in Table 1 representing a juror's thoughts and feelings about the defendant served as the dependent variable in a survey logistic regression model using the outcome of the sentencing proceeding on which a juror sat and the variables listed in the left-hand column as the independent variables. Observations ranged from 168 to 185.

The pattern is familiar. Identification with the victim's family leads predictably to reactive emotions. A juror who wished she knew the victim's family responded to the defendant as the victim's family members might themselves have responded, with anger, fear, and disgust. But again, identification is not a zero-sum game. A juror who imagined being in the situation of the victim's family, or being a member of the victim's family, was likely to have imagined being in the defendant's situation as well.

D. Defendants and Their Crimes

The first line of capital defense, according to the prevailing wisdom, is to humanize the defendant, to tell the story of his life.[94] The

[94] See Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 335 (1983) (noting that one "element of the mitigating case . . . [is] to show that the defendant's capital crimes are humanly understandable in light of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is"); Jeffrey J. Pokorak, Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases, 30 St. Mary's L.J. 421, 433 (1999) ("In fact, one can say that a defense counsel's only defense against a prosecution's presentation of a horrific crime is to humanize the defendant." (emphasis omitted)); Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 U. Ill. L. Rev. 323, 361 ("In every case, the capital defendant's

aim is not to *excuse* the defendant's crime, but rather to *explain* it.[95] The idea is to help jurors understand the crime, on the theory that understanding will lead them to a life sentence. Of course, this strategy can only work if a defendant's lawyer follows it, and by all accounts, many don't.[96] But assuming the defendant's story is told, and assuming jurors believe the story, does it make any difference to the thoughts and feelings they have about the defendant?

1. *Mitigating Defendant Characteristics*

Table 7 explores this question. It examines the relationship between a number of beliefs a juror might have had about the defendant—all of which might plausibly be understood as mitigating—and the juror's thoughts and feelings about the defendant.[97]

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attorney should seek to 'humanize' the defendant."); see also William S. Geimer, Law and Reality in the Capital Penalty Trial, 18 N.Y.U. Rev. L. & Soc. Change 273, 286 (1990-91) ("I believe [that 'empathy' evidence] is the most important category [of defense penalty trial evidence, in part] . . . because the key to winning a life verdict is establishing a 'no fault' or 'shared fault' impairment that is traced directly and understandably to the crime.").

[95] See Craig Haney, The Social Context of Capital Murder: Social Histories and the Logic of Mitigation, 35 Santa Clara L. Rev. 547, 560-61 (1995):

> Social histories, in this context, . . . are not excuses, they are explanations. . . . [T]he goal is to place the defendant's life in a larger social context and, in the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically-important events has been shaped and influenced by them.

[96] See, e.g., Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, 1841-66 (1994) (describing "[p]ervasive [i]nadequacy of [c]ounsel for the [p]oor and the [r]easons for [i]t"); Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 Buff. L. Rev. 329, 459 (1995) (documenting "deplorable underfunding of capital defense services"); cf. Louis D. Bilionis & Richard A. Rosen, Lawyers, Arbitrariness, and the Eighth Amendment, 75 Tex. L. Rev. 1301, 1312 (1997) (arguing that "[a]ny jurisdiction that opts for capital punishment bears a constitutional obligation to provide a system that minimizes the arbitrariness attributable to inefficacies and disparities in the quality of capital defense lawyering"). For a helpful state-by-state overview of indigent defense systems in the United States, see generally Robert L. Spangenberg & Marea L. Beeman, Indigent Defense Systems in the United States, 58 Law & Contemp. Probs. 31 (1995).

[97] Jurors were asked whether various words or phrases accurately described the defendant. Responses were coded (1) "very well"; (2) "fairly well"; (3) "not well"; and (4) "not at all." CJP Study, supra note 4, at 10. For the percentage of jurors responding "not at all" or "not well" and the percentage responding "fairly well" or "very well" to each word or phrase, see infra app. tbl.22.

TABLE 7

MITIGATING DEFENDANT CHARACTERISTICS—CORRELATION WITH THOUGHTS AND FEELINGS ABOUT THE DEFENDANT

The more a juror believed the defendant . . .	The more the juror was . . .
Was from a poor or deprived background	No statistically significant correlations
Was raised in a warm and loving home	More likely to have found the defendant likable as a person (t=2.464) Less likely to have felt sympathy or pity for the defendant (t=–2.375)
Was severely abused as a child	More likely to have felt sympathy or pity for the defendant (t=3.211)
Had gotten a raw deal in life	More likely to have felt sympathy or pity for the defendant (t=3.900)
Was mentally defective or retarded	More likely to have felt sympathy or pity for the defendant (t=2.156)
Was emotionally unstable or disturbed	More likely to have felt sympathy or pity for the defendant (t=1.930); to have imagined being the defendant (t=2.211); to have been disgusted or repulsed by the defendant (t=2.380)
Was a loner without many friends	More likely to have felt sympathy or pity for the defendant (t=3.629)
Was sorry for what he did	More likely to have felt sympathy or pity for the defendant (t=2.343); to have found the defendant likable as a person (t=3.228); to have imagined being like the defendant (t=3.118); to have imagined being in the defendant's situation (t=2.526) Less likely to have found the defendant frightening to have been near (t=–2.089); to have been disgusted or repulsed by the defendant (t=–2.530)
Was a good person who got off on the wrong foot	More likely to have felt sympathy or pity for the defendant (t=2.204); to have found the defendant likable as a person (t=4.450) Less likely to have felt anger or rage toward the defendant (t=–2.206); to have felt disgusted or repulsed by the defendant (t=–3.362)
Was someone who loved his family	More likely to have found the defendant likable as a person (t=3.487) Less likely to have felt disgusted or repulsed by the defendant (t=–1.964)

The more a juror believed the defendant . . .	The more the juror was . . .
Was a drug addict	More likely to have imagined being in the defendant's situation (t=1.903)
Was an occasional drug abuser	No statistically significant correlations
Was an alcoholic	More likely to have felt sympathy or pity for the defendant (t=2.279)
Was an occasional alcohol abuser	No statistically significant correlations
Went crazy when he committed the crime	No statistically significant correlations

Note: Each of the variables in Table 1 representing a juror's thoughts and feelings about the defendant served as the dependent variable in a survey logistic regression model using the outcome of the sentencing proceeding on which a juror sat and the variable listed in the left-hand column as the independent variables. Observations ranged from 157 to 187.

Telling a defendant's story does indeed appear to have its intended emotional effect. Jurors displayed little emotional resonance to the fact that the defendant was from a poor or deprived background,[98] but other features of the defendant's life resonated loud and clear. If a juror believed that the defendant experienced the torment of abuse as a child,[99] labored under the burden of a mental defect or mental retardation,[100] was emotionally disturbed, battled with alcoholism (but not drug addiction), was a loner in the world, or had generally gotten a raw deal in life, the usual response was sympathy or pity.

But not always. The exception relates to a defendant's emotional instability or disturbance. If a juror believed the defendant was emotionally unstable or disturbed, he responded with sympathy, just as expected. Yet he also responded with disgust. Emotionally disturbed

98 Cf. Garvey, supra note 4, at 1559 tbl.4, 1565 (finding that when South Carolina CJP jurors were asked directly whether "background of extreme poverty" would make them more or less likely to vote for death, only 15% said that it would make them less likely).

99 Empirical research has shown that many capital defendants were abused as children. See Phyllis L. Crocker, Childhood Abuse and Adult Murder: Implications for the Death Penalty, 77 N.C. L. Rev. 1143, 1167 (1999) (citing sources and noting that "[i]n addition to cases that show histories of abuse and its consequences, research on death row inmates documents similar patterns of pervasive childhood abuse").

100 Cf. Dorothy Otnow Lewis et al., Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States, 143 Am. J. Psychiatry 838, 841-42 (1986) ("If our 15 subjects are representative . . . and, because of the criteria for their selection, we believe that they are, then we must conclude that many condemned individuals in this country probably suffer a multiplicity of hitherto unrecognized psychiatric and neurological disorders that are relevant to considerations of mitigation."); Ronald J. Tabak & J. Mark Lane, The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty, 23 Loy. L.A. L. Rev. 59, 94 & n.260 (1989) (citing unpublished study by Georgia Clearinghouse on Prisons and Jails entitled Mental Retardation and America's Death Row for proposition that "more than twelve percent of the inmates currently on death row have been diagnosed as either retarded or of borderline intelligence").

defendants can thus leave a juror feeling sympathetic and disgusted all at once.[101] Which response dominates—sympathy or disgust—may depend at least partly on how a juror reacts to the defendant's crime itself. An especially heinous or depraved crime may tend to crowd out any sympathy or pity a juror might otherwise feel toward an emotionally unstable defendant, whereas a comparatively less heinous or depraved crime may allow sympathy to gain the upper hand.[102]

Most of the circumstances that elicited sympathy or pity continued to do so in more complex multiple regression models. For example, when the defendant had been severely abused as a child, was mentally defective or retarded, or was emotionally disturbed, a juror continued to sympathize with him when the analysis held a number of other factors constant. More specifically, the association between each of these circumstances and a juror's sympathy or pity remained significant or near-significant no matter how vicious or depraved the defendant's crime, no matter if the juror thought the defendant was dangerous, no matter what the race of the defendant or the juror, no matter how strongly the juror thought the appropriate punishment for convicted murderers was death, and no matter what sentence the jury finally imposed.

Lastly, beliefs that might explain the origins of a defendant's character—like child abuse—more often than not tended to summon a single emotional response: sympathy or pity. In contrast, beliefs that portrayed the defendant as a basically good person gone astray, or as a responsible agent now remorseful for his offense, tended to summon responses across a broader range. For example, if a juror believed the defendant was sorry for what he'd done, she tended not only to pity him but also to find him likable as a person. She also tended to find herself imagining what it would be like to have been in the defendant's situation and even what it would have been like to be the defendant himself. Moreover, a juror was apt to respond to the

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101 Cf. Michael L. Perlin, The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence, 8 Notre Dame J.L. Ethics & Pub. Pol'y 239, 241-42 (1994) ("A review of case law, controlled behavioral research and 'real life' research . . . tends to reveal [among other things] . . . that jurors . . . see [mental disability evidence] as a mitigating factor only in a handful of circumscribed situations (most of which are far removed from the typical scenario in a death penalty case) . . . .").

102 In multiple regression models that controlled for the viciousness or depravity of the crime, the relationship between a juror's belief that the defendant was mentally retarded or defective and his sympathy or pity for the defendant increased in significance (vicious t=2.334; depraved t=2.545). The same was true of the association between a juror's belief that the defendant was emotionally unstable or disturbed and his sympathy or pity for the defendant (vicious t=2.038; depraved t=2.410). On the other hand, the association between a juror's belief that the defendant was emotionally unstable or disturbed and his disgust toward the defendant weakened, though only slightly (vicious t=2.311; depraved t=1.906).

remorseful defendant not only with good will, but also without fear or disgust, both of which tended to recede in the face of the defendant's remorse.[103]

All in all, telling the defendant's story does in fact appear to elicit the kinds of emotional responses one might reasonably expect. But every story has two sides. If capital defense lawyers try to put their clients in one light, prosecutors try to put them in a very different one. In the typical prosecution story the defendant's crime warrants death and only death; the defendant alone bears full responsibility for his crime; and nothing short of death can guarantee that he won't kill again.[104]

2. *Aggravating Defendant Characteristics*

Table 8 examines the relationship between a number of beliefs a juror might have had about the defendant—all of which might plausibly be understood as aggravating—and the juror's thoughts and feelings about him.[105]

Like the defense story, the prosecution story appeared to hit its intended emotional target. If a prosecutor could manage to persuade a juror that the defendant was dangerous or had a history of crime and violence, he was also likely to tap into the juror's fear and anger, thus making it difficult for the juror to form any imaginative connection with the defendant. Likewise, if the prosecutor could persuade the juror that the defendant was little more than a vicious animal who couldn't tell right from wrong, or who lacked basic human instincts,

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[103] For a more extended analysis of the important role remorse plays in capital sentencing, see Eisenberg et al., Remorse, supra note 4, at 1637 (confirming "widespread conviction that remorse makes a difference to the sentence a defendant receives—provided jurors do not think the crime is too vicious"); see also Sundby, Capital Jury, supra note 4, at 1596 (concluding based on analysis of California CJP jurors that "[t]he more evidence that the jury can find indicating the defendant's acceptance of responsibility for the killing, the more likely the jury will return a life sentence").

[104] One analysis of the arguments prosecutors and defense lawyers made in 20 California capital trials summarized the typical prosecutorial story:

> For the prosecutor, both plot and character are simple. All that is important to know about the character of the defendant is revealed in his brutal crimes. The defendant is an evil, remorseless monster, motivated by little more than greed and sadism. His crimes are the product of a series of free choices rather than external forces beyond his control.

Mark Costanzo & Julie Peterson, Attorney Persuasion in the Capital Penalty Phase: A Content Analysis of Closing Arguments, J. Soc. Issues, Summer 1994, at 125, 143.

[105] Jurors were asked whether various descriptions accurately described the defendant. Responses were coded (1) "very well"; (2) "fairly well"; (3) "not well"; and (4) "not at all." CJP Study, supra note 4, at 10. For the percentage of jurors responding "not at all" or "not well" and the percentage responding "fairly well" or "very well" to each description, see infra app. tbl.22.

TABLE 8
AGGRAVATING DEFENDANT CHARACTERISTICS—
CORRELATION WITH THOUGHTS AND FEELINGS
ABOUT THE DEFENDANT

The more a juror believed the defendant . . .	The more the juror was . . .
Was dangerous to other people	More likely to have found the defendant frightening to have been near (t=3.514); to have felt anger or rage toward the defendant (t=2.296) Less likely to have imagined being the defendant (t=–1.964); to have imagined being in the defendant's situation (t=–2.474)
Had a history of violence and crime	More likely to have found the defendant frightening to have been around (t=2.247); to have felt anger or rage toward the defendant (t=2.702) Less likely to have found the defendant likable as a person (t=–1.973)
Was vicious like a mad animal	More likely to have found the defendant frightening to have been near (t=4.153); to have felt anger or rage toward the defendant (t=2.480); to have been disgusted or repulsed by the defendant (t=3.808) Less likely to have imagined being the defendant (t=–1.800)
Didn't know right from wrong	More likely to have been disgusted or repulsed by the defendant (t=2.411)
Didn't know his place in society	No statistically significant correlations
Lacked basic human instincts	More likely to have been disgusted or repulsed by the defendant (t=2.065)

Note: Each of the variables in Table 1 representing a juror's thoughts and feelings about the defendant served as the dependent variable in a survey logistic regression model using the outcome of the sentencing proceeding on which a juror sat and the variables listed in the left-hand column as the independent variables. Observations ranged from 164 to 187.

the juror was likely not only to be afraid and angry, but disgusted and repulsed as well.

3. *Crime Characteristics*

A capital defense lawyer's first line of defense during the penalty phase is to try to *explain* the defendant's crime.[106] The prosecution's

[106] See supra notes 94-96 and accompanying text.

first line of attack is to *emphasize* it.[107] Table 9 examines this strategy, analyzing the relationship between a juror's reaction to the killing and her thoughts and feelings about the defendant.[108]

A juror's thoughts and feelings about the defendant's crime appear to follow a subtle but sensible logic. The defendant's crime itself—no matter how bloody or gory—tended to evoke no special thoughts or feelings about the defendant. But when the crime reflected the moral character of the defendant—vicious, depraved, repulsive, the work of a madman—anger, fear, and disgust were the standard reactions. Disgust was also the typical response when the defendant treated his victim with distinctive cruelty or disrespect, causing suffering before death or mutilation afterward. When the killing was especially cold-blooded, anger, fear, and disgust turned into disbelief, leaving jurors unable to imagine what it must have been like to be in the defendant's situation.

IV
EMOTIONAL EFFECTS

Capital jurors experience an assortment of thoughts and feelings about the defendant during the course of the trial. Disgust, anger, and fear figure in that assortment, but so too do sympathy, pity, and imaginative identification. The prevailing wisdom predicts that these emotions are not idle: They influence how a juror votes. True?

Each of our jurors reported how he or she voted, both at the start of the jury's deliberations (first vote) and at their close (final vote). Table 10 shows how each of the thoughts or feelings about which the jurors were asked correlated with their first vote.[109]

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[107] See Costanzo & Peterson, supra note 104, at 143 ("According to prosecutors, the decision is simple and straightforward—the brutality of the crime, the requirements of the law, and the suffering of the victims all cry out for a sentence of death."); Eisenberg & Wells, supra note 4, app. at 17 (reporting based on analysis of South Carolina CJP data that "prosecutor's evidence and argument at the punishment stage" tend to emphasize "[that t]he death penalty is what defendant deserved"; "[t]he character and motives of defendant"; "[t]he brutal or savage character of this crime"; and "[t]he pain and suffering of the victim(s)").

[108] Jurors were asked: "In your mind, how well do the following words describe the killing?" CJP Study, supra note 4, at 6. Responses were coded (1) "very well"; (2) "fairly well"; (3) "not so well"; and (4) "not at all." For the percentage of jurors responding "not at all" or "not well" and the percentage responding "fairly well" or "very well" to each word, see infra app. tbl.23.

In addition to the words shown in Table 9, jurors were also asked if the crime was "senseless." Table 9 omits this variable because it displayed the least variation across the full range of possible responses.

[109] Jurors were asked: "When the first jury vote was taken on the punishment to be imposed, did you vote for a . . . ." CJP Study, supra note 4, at 41. Responses were coded (0) "death sentence"; (1) "undecided"; and (2) "life (or alternative) sentence."

TABLE 9
CRIME CHARACTERISTICS—
CORRELATION WITH THOUGHTS AND FEELINGS
ABOUT THE DEFENDANT

The more a juror believed . . .	The more the juror was . . .
The killing was bloody	No statistically significant correlations
The killing was gory	No statistically significant correlations
The killing was depraved	More likely to have found the defendant frightening to be near (t=1.989); to have felt anger or rage toward the defendant (t=2.359); to have been disgusted or repulsed by the defendant (t=2.560)
The killing was repulsive	More likely to have felt anger or rage toward the defendant (t=2.850)
The killing was the work of a mad man	More likely to have found the defendant frightening to be near (t=2.944); to have been disgusted or repulsed by the defendant (t=2.356)
The killing was vicious	More likely to have been disgusted or repulsed by the defendant (t=2.013)
The killing made him sick to think about it	More likely to have found the defendant frightening to be near (t=2.076); to have been disgusted or repulsed by the defendant (t=2.168)
The killing was cold-blooded	Less likely to have imagined being in the defendant's situation (t=–2.530)
The killing was calculated	No statistically significant correlations
The victim was made to suffer before death	More likely to have been disgusted or repulsed by the defendant (t=1.881)
The victim's body was maimed or mangled after death	More likely to have been disgusted or repulsed by the defendant (t=1.946)

Note: Each of the variables in Table 1 representing a juror's thoughts and feelings about the defendant served as the dependent variable in a survey logistic regression model using the outcome of the sentencing proceeding on which a juror sat and the variables listed in the left-hand column as the independent variables. Observations ranged from 182 to 186.

Judging from these correlations alone, some emotions do appear to influence a juror's first vote. The more a juror reported having felt sympathy or pity for the defendant, having found the defendant likable as a person, or having imagined being in the defendant's situation, the more likely she was to cast her first vote for a sentence of life imprisonment. Conversely, the more a juror reported having felt anger or rage toward the defendant, the more likely her first vote would be in favor of death.

TABLE 10
THOUGHTS AND FEELINGS ABOUT THE DEFENDANT—
CORRELATIONS WITH FIRST VOTE ON SENTENCE

The more a juror . . .	The more likely the juror's first vote was for . . .
Felt pity or sympathy for the defendant	Life (t=3.247)
Found the defendant likable as a person	Life (t=4.219)
Imagined being like the defendant	No statistically significant correlation
Imagined being in the defendant's situation	Life (t=2.160)
Was disgusted or repulsed by the defendant	No statistically significant correlation
Felt anger or rage toward the defendant	Death (t=–2.152)
Found the defendant frightening to be near	No statistically significant correlation
Couldn't stand to look at the defendant	No statistically significant correlation

Note: The first vote on the defendant's sentence served as the dependent variable in a survey ordered logistic regression model using the emotional response listed in the left-hand column as the independent variable. Observations ranged from 169 to 185.

But these correlations may be too simple. In multiple regression models that control for a juror's assessment of the viciousness or depravity of the defendant's crime, his future dangerousness, and his remorsefulness, together with the race of the defendant, the victim, and the juror,[110] each of these correlations tended to fade, with one quite robust exception: sympathy or pity.[111] A sympathetic juror was more

110 Prior research suggests that each of these six variables plays a prominent role in determining the outcome of a capital sentencing proceeding. See Baldus et al., supra note 20, at 1713-14 (emphasizing important role played by race of defendant and race of victim in analysis of capital sentencing in Philadelphia); Garvey, supra note 4, at 1555 tbl.2, 1559 tbl.4 (presenting findings based on CJP data from South Carolina that brutality of crime, defendant's future dangerousness, and defendant's absence of remorse are among factors jurors consider most aggravating).

The race of the juror is included on the grounds that, as Professor Baldus says, the "conventional wisdom is that white jurors are less likely to sympathize with black defendants or to identify with black victims." Baldus et al., supra note 20, at 1724. However, he goes on to say, "Convincing evidence also suggests that many participants in the system, both black and nonblack, consider young black males more deserving of severe punishment because they are violence prone, morally inferior, and a threat to the community." Id. at 1724-25.

111 The relationship between a juror's first vote and his thought that the defendant was likable as a person continued to be near-significant in multiple regression models that controlled for the perceived viciousness of the crime, future dangerousness of the defendant, the defendant's remorse, and the race of the defendant and the juror (t=1.945). The rela-

likely to cast her first vote for life, whatever she thought about the viciousness or depravity of the defendant's crime, his future dangerousness, or his remorsefulness, and whatever the juror's race, or the race of the defendant or victim.

However, when the final vote was cast the power of sympathy or pity to elicit a life sentence also faded into statistical insignificance. No correlation existed between a juror's sympathy or pity for the defendant and his final vote.

In fact, only two emotional responses correlated at significant or near-significant levels with a juror's final vote.[112] First, a juror who found the defendant likable as a person was less likely to vote for death than was a juror who didn't (t=–2.194). But this correlation is fragile. Controlling for the variables mentioned just above for the first vote—i.e., the viciousness or depravity of the defendant's crime, his future dangerousness, and his remorsefulness, along with the three racial variables—caused this correlation likewise to fade into insignificance.

Second, a juror was more likely to cast his final vote for death if he was afraid of the defendant (t=1.795).[113] This modest correlation is nonetheless startling inasmuch as *no* correlation appeared between a juror's fear of the defendant and his first vote. Fear thus forms the mirror image of sympathy: Sympathy correlates with a juror's first vote, but not her final one, while fear correlates with a juror's final vote, but not her first one. So what happens between the first vote and the final one?

A. Sympathy or Pity

Take sympathy or pity first. Table 11 shows the mean responses of six groups of jurors (not including any of the totals cells) to the question: Did you feel "pity or sympathy for [the defendant?]"[114] The six groups consist of jurors who: (1) voted first for life and stuck with it; (2) voted first for life and then switched to death; (3) were undecided at first and then voted for life; (4) were undecided at first

tionship lost significance when the perceived depravity of the crime was substituted for the perceived viciousness of the crime (t=1.650). What accounts for the difference between viciousness and depravity is unclear.

112 See infra app. tbl.13.

113 The relationship between a juror's fear of the defendant and her final vote loses significance in models that control for the defendant's future dangerousness. But this loss of significance is exactly what one would expect insofar as a juror's fear of the defendant and his estimation of the defendant's future dangerousness are themselves closely correlated.

114 CJP Study, supra note 4, at 12. Jurors could answer the question "yes" or "no." A "yes" response received a score of (1), while a "no" response received a score of (0).

and then voted for death; (5) voted first for death and stuck with it; and (6) voted first for death and then switched to life. The figure in each of the table's cells reflects the mean score of all jurors included in the cell. In effect, each figure gives the measure of how much sympathy or pity the jurors in each group felt for the defendant on average, with "1" representing great sympathy and "0" representing no sympathy.

TABLE 11
SYMPATHY OR PITY—
MEANS BY FIRST VOTE AND FINAL VOTE

First Vote	Final Vote		
	Life	Death	Total
Life	0.62 (n=45)	0.63 (n=11)	0.63 (n=56)
Undecided	0.57 (n=7)	0.80 (n=15)	0.73 (n=22)
Death	0.29 (n=34)	0.42 (n=73)	0.38 (n=107)
Total	0.49 (n=86)	0.51 (n=99)	0.50 (n=185)

Note: χ^2=16.467, p=0.006

Jurors who voted first for life, or who were undecided on the first vote, were generally a good deal more sympathetic than were jurors whose first vote was for death (0.63 for life first-voters and 0.73 for the undecided, compared to 0.38 for death first-voters), which reflects the correlation between sympathy or pity and a juror's first vote. But the sympathy differential between life final-voters and death final-voters was negligible (0.49 for life final-voters compared to 0.51 for death final-voters), which is why no correlation exists between sympathy or pity and a juror's final vote. What happens to sympathy between the first vote and the final one?

What happens is probably the death verdict itself. Jurors who were undecided at first but who eventually voted for death were on average more sympathetic than undecided jurors who finally voted for life. The same is true of jurors who voted first for death and stuck with that verdict, compared to those who voted first for death and then switched to life. Jurors who were initially undecided but who finally voted for death, or who voted first for death and stayed with that verdict, were thus noticeably more sympathetic than their counterparts who voted in the end for life. Why? *Because* they voted for death. What response to the condemned could be more natural than pity?

All told, this analysis supports two conclusions. First, sympathy or pity does appear to move some jurors to cast their first vote for life, and most jurors stick with that vote. Second, jurors who ultimately vote for death actually report being *more* sympathetic toward the defendant than do their counterparts who end up voting for life. Sympathy thus stands at both ends of the jury's deliberations, motivating votes for life and accompanying votes for death.

B. Fear

Now consider fear. Table 12 is much the same as Table 11, only it substitutes fear for sympathy. The figures in each cell now represent a measure of how much each group of jurors feared the defendant, instead of how much they sympathized with him.[115]

TABLE 12
FEAR—
MEANS BY FIRST VOTE AND FINAL VOTE

First Vote	Final Vote		
	Life	Death	Total
Life	0.18 (n=45)	0.27 (n=11)	0.20 (n=56)
Undecided	0.14 (n=7)	0.40 (n=15)	0.32 (n=22)
Death	0.12 (n=33)	0.23 (n=73)	0.20 (n=106)
Total	0.15 (n=85)	0.26 (n=99)	0.21 (n=184)

Note: χ^2=5.75, p=0.331

Jurors who voted in the end to sentence the defendant to death were generally more afraid of the defendant than were jurors who voted for life (0.15 for life-voters compared to 0.26 for death-voters), which reflects the modest correlation between a juror's fear and his final vote. In contrast, jurors who cast their first vote for life were on average just as afraid of the defendant as were jurors who cast their first vote for death (0.20 for both life-voters and death-voters), which is why no correlation exists between a juror's fear and his first vote. Once again, what happens between the first vote and the final one?

The answer appears to lie largely in the behavior of undecided voters. Although jurors who voted in the end for death were, on the whole, more afraid of the defendant than were jurors who voted in the end for life, the fear differential was most pronounced among unde-

115 See id. (asking whether juror found defendant "frightening to be near").

cided jurors. Undecided jurors who ultimately voted for life were on average much less afraid of the defendant than were undecided jurors who ultimately voted for death (0.14 for life final-voters compared with 0.40 for death final-voters). Indeed, undecided jurors who finally voted for death were substantially more afraid of the defendant than *any* other group. Thus when undecided jurors hold the balance, the defendant's fate might well depend on the undecided juror's fear.[116]

CONCLUSION

Capital sentencing forms a complex emotional economy. Jurors respond to the defendant with a wide range of emotions, but the dominant response is pity or sympathy, no matter what sentence the jury finally imposes. The prevailing academic wisdom is thus mistaken inasmuch as it depicts capital jurors as devoid of *any* fellow-feeling toward the defendant.

Nonetheless, the prevailing wisdom does have more than a grain of truth to it. For example, only a quarter of our capital jurors actually imagined being in the situation of the defendant: Empathy is indeed a comparatively scarce commodity in the emotional economy of capital sentencing. Moreover, consistent with the prevailing wisdom, jurors who sympathize with the defendant do in fact appear less apt to vote for death than do jurors who don't.

But sympathy is not the only emotion circulating in the commerce of capital sentencing. Capital jurors also experience less generous emotions, not least of which are anger, disgust, and fear. In fact, perhaps the greatest challenge to empathy comes not from any defect in the existing structure of capital sentencing—although many such defects exist—but from these darker emotions, which arise largely in reaction to the defendant's crime and the defendant himself.

116 Cf. Bowers & Steiner, supra note 4, at 660 ("[M]istaken estimates of early release [of defendants] appear to be decisive in the decisionmaking of jurors who have not made up their minds before deliberations begin or by the time of the jury's first vote on punishment.").

APPENDIX

TABLE 13
JUROR THOUGHTS AND FEELINGS ABOUT THE DEFENDANT
(Survey Question II.B.7)

Did you have any of the following thoughts or feelings about the defendant? (% responding)

	Life Juries		Death Juries		
	Yes	No	Yes	No	*p*-value
Felt pity or sympathy for the defendant (*l*=87; *d*=100)	49	51	51	49	0.831
Found the defendant likable as a person (*l*=81; *d*=90)	28	72	14	86	0.030
Imagined being like the defendant (*l*=87; *d*=100)	13	87	11	89	0.729
Imagined yourself in the defendant's situation (*l*=87; *d*=100)	28	72	21	79	0.297
Was disgusted or repulsed by the defendant (*l*=87; *d*=100)	33	67	37	63	0.602
Felt anger or rage toward the defendant (*l*=87; *d*=100)	30	70	31	69	0.869
Found the defendant frightening to be near (*l*=86; *d*=100)	15	85	26	74	0.074
Couldn't stand to look at the defendant (*l*=87; *d*=100)	9	91	6	94	0.413

Note: *l*=number of respondents sitting on life juries; *d*=number of respondents sitting on death juries. Survey logistic regression was used to calculate *p*-values. Each variable in the left-hand column served as the dependent variable in a survey logistic regression model using sentencing outcome as the dependent variable. The *p*-values test the statistical significance of the differences in responses between jurors who sat on cases in which the jury imposed a sentence of life imprisonment and jurors who sat on cases in which the jury imposed a death sentence.

TABLE 14
APPROPRIATENESS OF THE DEATH PENALTY FOR CONVICTED MURDERERS
(Survey Question VIII.3)

For convicted murderers, do you now feel that the death penalty is . . . ?
(% responding)

An unacceptable punishment	2
The least acceptable punishment	2
Just one of several appropriate punishments	51
The most appropriate of several punishments	31
The only acceptable punishment	14
	n=185

TABLE 15
JUROR BELIEFS ABOUT RESPONSIBILITY
(Survey Question IV.12)

When you were considering the punishment, did you think that whether the defendant lived or died was . . . ?
(% responding)

Strictly the jury's responsibility	29
Mostly the jury's responsibility	31
Partly the jury's responsibility and partly the responsibility of the judge and appeals courts	23
Mostly the responsibility of the judge and appeals courts	17
	n=182

TABLE 16
JUROR UNDERSTANDING OF MITIGATION—MANDATORY SENTENCING
(Survey Question III.C.17)

After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that . . . ?
(% responding)

	No	Yes
The defendant's conduct was heinous, vile, or depraved (n=180)	63	37
The defendant would be dangerous in the future (n=181)	69	31

TABLE 17
JUROR UNDERSTANDING OF MITIGATION— SCOPE OF MITIGATING EVIDENCE, BURDEN OF PROOF, AND JURY UNANIMITY
(Survey Questions V.6, V.7, V.8)

Among the factors in favor of a life or lesser sentence, could the jury consider . . . ? (% responding)	
Any mitigating factor that made the crime not as bad	49
Don't know	35
Only a specific list of mitigating factors mentioned by the judge	16
	n=187
For a factor in favor of life or a lesser sentence to be considered, did it have to be . . . ?	
Proved only to a juror's personal satisfaction	26
Don't know	15
Proved by a preponderance of the evidence	7
Proved beyond a reasonable doubt	51
	n=187
For a factor in favor of a life or lesser sentence to be considered . . .	
Jurors did not have to agree unanimously on that factor	21
Don't know	13
All jurors had to agree on that factor	66
	n=187

TABLE 18
IMPORTANCE TO PUNISHMENT DECISION— ADDING UP AND WEIGHING FACTORS FOR AND AGAINST A DEATH SENTENCE
(Survey Question IV.A.6)

How important for your punishment decision on a scale of 1 to 4 was "adding up the factors for and against a death sentence and weighing one side against the other?" (% responding)	
1=least important	3
2	22
3	43
4=most important	32
	n=176

TABLE 19
VICTIM CHARACTERISTICS
(Survey Question II.C.1)

In your mind, how well do the following words describe the victim?
(% responding)

	Very well or fairly well	Not well or not at all
Was an innocent or helpless victim (n=186)	94	6
Was an admired or respected member of the community (n=173)	84	16
Was raised in a warm and loving home (n=142)	91	9
Was someone who loved his family (n=170)	97	3
Had a wonderful future ahead (n=175)	78	22
Was from a poor or deprived background (n=166)	22	78
Was a loner without many friends (n=168)	8	92
Had an unstable or disturbed personality (n=168)	7	93
Had a problem with drugs or alcohol (n=165)	11	89
Was too careless or reckless (n=171)	20	80

TABLE 20
JUROR THOUGHTS AND FEELINGS ABOUT THE VICTIM
(Survey Question II.C.3)

Did you have any of the following thoughts or feelings about the victim?
(% responding)

	Yes	No
Admired or respected the victim (n=171)	56	44
Imagined yourself in the victim's situation (n=185)	59	41
Imagined yourself as a friend of the victim (n=186)	48	52
Imagined the victim as a member of your own family (n=187)	59	41
Felt grief or pity for the victim (n=187)	99	1
Were disgusted or repulsed by the victim (n=187)	3	97
Wished the victim had been more careful (n=183)	78	22

TABLE 21
JUROR THOUGHTS AND FEELINGS ABOUT THE VICTIM'S FAMILY
(Survey Question III.C.5)

Did you have any of the following thoughts or feelings about the victim's family?
(% responding)

	Yes	No
Imagined yourself in their situation (n=185)	81	19
Felt their grief and sense of loss (n=184)	94	6
Felt distraught or remote from them (n=167)	17	83
Felt they were partly to blame for what happened (n=179)	3	97
They seemed very different from your own family (n=167)	20	80
Wished you knew the victim's family personally (n=168)	19	81
Imagined yourself as a member of the victim's family (n=181)	44	56

TABLE 22
DEFENDANT CHARACTERISTICS
(Survey Question II.B.1)

In your mind, how well do the following words describe the defendant?
(% responding)

Mitigating Characteristics

	Very well or fairly well	Not well or not at all
Was from a poor or deprived background (n=184)	67	33
Was raised in a warm and loving home (n=174)	37	63
Was severely abused as a child (n=168)	31	69
Had gotten a raw deal in life (n=184)	24	76
Was mentally defective or retarded (n=187)	19	81
Was emotionally unstable or disturbed (n=186)	50	50
Was a loner without many friends (n=182)	51	49
Didn't know his place in society (n=179)	60	40
Was sorry for what he did (n=184)	29	71
Was a good person who got off on the wrong foot (n=174)	38	62
Was someone who loved his family (n=170)	52	48
Was a drug addict (n=166)	49	51
Was an occasional drug abuser (n=167)	54	46
Was an alcoholic (n=164)	43	57
Was an occasional alcohol abuser (n=172)	68	32
Went crazy when he committed the crime (n=185)	45	55

Aggravating Circumstances

	Very well or fairly well	Not well or not at all
Was dangerous to other people (n=186)	79	21
Had a history of violence and crime (n=180)	55	45
Was vicious like a mad animal (n=187)	44	56
Didn't know right from wrong (n=186)	29	71
Lacked basic human instincts (n=183)	42	58

TABLE 23
CRIME CHARACTERISTICS
(Survey Question II.A.2)

In your mind, how well do the following words describe the killing?
(% responding)

	Very well or fairly well	Not so well or not at all
Bloody (n=184)	84	16
Gory (n=185)	74	26
Depraved (n=185)	82	18
Repulsive (n=185)	94	6
The work of a mad man (n=185)	53	47
Vicious (n=186)	94	6
It made you feel sick to think about it (n=186)	83	17
Cold-blooded (n=186)	94	6
The victim was made to suffer before death (n=185)	72	28
The bodies were maimed or mangled after death (n=182)	29	71
Senseless (n=187)	99	1
Calculated (n=186)	72	28