

Fall 1995

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Recommended Citation

Sherman, Steven J. (1995) "The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law," *Indiana Law Journal*: Vol. 70 : Iss. 4 , Article 9.

Available at: <http://www.repository.law.indiana.edu/ilj/vol70/iss4/9>

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The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law

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As an experimental social psychologist, my discussion will address how psychology research and theory can help us focus on, understand, and perhaps offer suggestions and solutions for the issues and concerns about capital jury decision-making that the Capital Jury Project ("CJP") has raised. Psychology can play a role in two different ways. First, the law itself, in terms of legal doctrine and practice, and the specific instructions to jurors in capital cases, makes certain assumptions about how people think, act, make decisions, and make judgments. Research and theory in several areas of psychology can help assess the extent to which these assumptions are correct. Second, the CJP has identified several specific problems concerning the way in which jurors in capital trials think and act. These problems involve an inability to understand instructions (especially at the sentencing phase),¹ a less than perfect recall of the instructions and procedures,² and certain biases both in thinking at the individual level and in making decisions at the group level.³ Psychological research is especially attuned to identifying these types of misunderstandings, memory failures, and biases in judgment. More importantly, this research may suggest ways to mitigate or eliminate these problems. Thus, there are many aspects of the capital trial process to which the field of psychology could speak. This discussion, however, will focus on only one of these issues—responsibility in capital sentencing hearings.

I. RESPONSIBILITY

After considering the foregoing articles concerning the CJP, it is clear that a key factor in life versus death decisions in capital cases is the degree of responsibility taken by the various participants. Although the responsibility assumed by the judge, the lawyers, and the defendant clearly plays a role, it is the degree of personal responsibility assumed by the jurors that is most central to sentencing decisions.

Two major assumptions regarding responsibility—that perceived responsibility affects decision-making, and that the greater the perceived responsibility, the less likely a juror will choose death—will serve as the basis for this discussion. Psychology theory and research clearly supports the validity of both of these assumptions.

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1. See Joseph L. Hoffmann, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1151-52 (1995); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1165-75 (1995).

2. See Luginbuhl & Howe, *supra* note 1, at 1169.

3. See *id.* at 1171.

*A. Responsibility Is an Important Mediator
of Juror Capital Decisions*

Much work in social psychology indicates that the decisions of people who feel personally responsible for an outcome differ from those decisions where the individual assumes no such responsibility. This is particularly true when the decision involves the welfare of another person. Studies of bystander intervention, involving victims of crime,⁴ accidents, or other situations of need, show that feelings of responsibility are a key component of the degree of help offered by an observer.⁵ Assuming personal responsibility for the outcome of decisions also leads decision-makers to take more time in rendering judgments, and to avoid the biases involved in making quick judgments.⁶ When decision-makers feel less responsible, they generally employ less complex judgment strategies and may use simple heuristic principles of judgment.⁷

Thus, the degree of personal responsibility significantly affects the decision-making process and can therefore affect the outcome of a decision, particularly when the decision involves consequences to the welfare of another person or group of persons. Given that a life or death decision during the sentencing phase of a capital trial is as important a consequence to another person as there can be, it follows that the degree of responsibility experienced by a juror would impact on capital decisions.

*B. The Less the Jurors' Perceived Personal Responsibility,
the More Likely Is a Death Decision*

The literature cited above indicates that perceived responsibility affects decision-making. A second assumption is that this effect moves predominantly in one direction when it comes to capital decisions—namely, the greater the feeling of responsibility, the less likely it becomes that a juror will choose a death decision. Findings in the psychology literature indicate that diminished responsibility generally leads to a greater willingness to expose oneself to negative consequences.⁸ These results can be interpreted in the following way: In order to experience a troubled cognitive state (such as cognitive dissonance), two conditions are necessary—a feeling of personal responsibility for a decision, and the occurrence of aversive consequences resulting from the

4. See, e.g., Leonard Bickman, *Bystander Intervention in a Crime: The Effect of a Mass Media Campaign*, J. APPLIED SOC. PSYCHOL., July-Sept. 1975, at 296 (1975); David R. Shaffer et al., *Intervention in the Library: The Effect of Increased Responsibility on Bystanders' Willingness to Prevent a Theft*, 5 J. APPLIED SOC. PSYCHOL. 303 (1975).

5. See Shaffer et al., *supra* note 4.

6. See Philip E. Tetlock & Jae I. Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. PERS. & SOC. PSYCHOL. 700 (1987).

7. See *id.*

8. See, e.g., Clifford Mynatt & Steven J. Sherman, *Responsibility Attribution in Groups and Individuals: A Direct Test of the Diffusion of Responsibility Hypothesis*, 32 J. PERS. & SOC. PSYCHOL. 1111 (1975).

decision.⁹ Therefore, if negative consequences are seen as likely to follow from one's decision, one will reduce cognitive conflict by avoiding or denying responsibility for the outcome. If personal responsibility is clear, one will avoid cognitive conflict by making choices that are unlikely to result in negative consequences. If perceived personal responsibility is low, one should be more willing to make decisions that could result in negative outcomes.

From the comments of the jurors in the CJP, it seems clear that the negative decision that weighs most heavily on jurors' minds is the taking of the defendant's life.¹⁰ It is therefore reasonable to assume that any factor that increases the responsibility felt by a juror will decrease the likelihood of that juror making the choice that would potentially have the most negative consequences—the death penalty.

It should be noted that avoiding responsibility for a negative occurrence is not a universal finding in the psychology literature. Sometimes individuals are willing to take more than their fair share of responsibility for negative outcomes,¹¹ even when these outcomes involve crimes committed against the self, such as rape.¹² Nevertheless, understanding the role of responsibility in juror decision-making is essential to identifying potential problems and biases in the judgments that are made during the sentencing phase of capital trials.

II. SOURCES FOR RESPONSIBILITY ATTRIBUTION

Given that the degree of personal responsibility felt by jurors is an important factor in the sentencing phase in capital trials, it is important to consider the various sources of responsibility that are available to the juror. Aside from the self, the juror has six other major sources upon which to place responsibility for the sentencing decision. These have all been discussed to some extent in the preceding articles,¹³ but it will nevertheless be helpful to formally identify and consider these six sources in order to understand the level of responsibility experienced by a juror.

9. Joel Cooper & Russell H. Fazio, *A New Look at Dissonance Theory*, 17 *ADVANCES EXP. SOC. PSYCHOL.* 229, 241-43 (1984).

10. See Hoffmann, *supra* note 1, at 1155-56 ("Almost all of the jurors mentioned how they initially felt uncomfortable, sometimes even overwhelmed, by the role that they were being asked to play during the sentencing portion of the capital trial."); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 *IND. L.J.* 1183, 1208 (1995) ("I didn't want to give [the defendant] the death sentence . . . [T]he average person is not used to that [decision], and, the average person has a fight within themselves to find out what their views are.") (quoting an unidentified Kentucky juror).

11. Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, 37 *J. PERS. & SOC. PSYCHOL.* 322, 334-35 (1979).

12. Ronnie Janoff-Bulman, *Characterological Versus Behavioral Self-Blame: Inquiries into Depression and Rape*, 37 *J. PERS. & SOC. PSYCHOL.* 1798, 1806 (1979).

13. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 *IND. L.J.* 1043, 1094-97 (1995) (providing statistical information on the sources of responsibility and discussing how capital jurors apportion responsibility for their decisions between the law, the judge, the appeals process, the jury, and themselves); see also Hoffmann, *supra* note 1, at 1146-50 (discussing how Indiana capital jurors relied on the law and the judge's sentencing instructions to alleviate their sense of responsibility for their sentencing decision).

A. The Law

Guided discretion requires that standards and guidelines of judgment be spelled out to jurors so that arbitrary and capricious decisions, as identified in *Furman v. Georgia*,¹⁴ can be eliminated. Although the setting of rules and guidelines may make decisions less arbitrary, it may have an additional (and perhaps unintended) effect on the degree of responsibility experienced by the jurors, and thus on the likelihood of a life versus death decision. The clearer the guided discretion, the more likely it is that jurors can place responsibility for their sentencing decision on the law and its requirements. Where guidelines are clear, jurors will perceive less freedom for their sentencing decisions, and perceived freedom enters into one's feelings of cognitive conflict about any potential negative outcomes of a decision. Thus, the diminished sense of responsibility stemming from a lack of perceived freedom in the context of guided discretion might very well increase the likelihood of a death decision, while at the same time it reduces the likelihood of an arbitrary or capricious death decision.

B. The Judge

Perceiving the judge as a major locus of responsibility for the sentencing decision is more likely to occur in some states than in others. In states such as Indiana, where jurors are told that their sentencing decisions are only recommendations to the judge (who is not bound by these recommendations),¹⁵ jurors are likely to attribute a substantial amount of responsibility to the judge, thereby diminishing their own sense of responsibility. Accordingly, one would predict that (all other things being equal), death decisions should be more likely in states where jurors' sentencing decisions are not binding, but are only recommendations to judges.

C. The Defendant

The defendant is an especially attractive source for responsibility attribution. Given the previous guilt decision for murder, it is easy for jurors to see the defendant as responsible for any consequences that might then occur. To the extent that the prosecution can point to the evilness of the defendant, jurors can diminish their own sense of responsibility, and blame the murderer for his own execution.

14. 408 U.S. 238 (1972) (per curiam).

15. See IND. CODE § 35-50-2-9(e) (1993); see also Hoffmann, *supra* note 1, at 1146-48.

D. The Appeal Process

From the point of view of a juror in a capital case, it is a virtual certainty that a jury verdict for the death penalty will be appealed. Thus, another judge, another court, or the state's governor will have the decision-making power to overturn the jury's decision. This knowledge should clearly reduce the jurors' perceived responsibility, because the final accountability is not theirs. Interestingly, states such as Indiana are now calling for a far more restricted appeal process for death decisions.¹⁶ Opponents of the death penalty want very much to keep the appeal process as open as possible in order to protect the rights (and perhaps the life) of the defendant. Ironically, the greater the number of appeal possibilities, the weaker will be the jurors' feelings of responsibility during the sentencing process. The present analysis suggests that this will lead to greater numbers of death decisions that will then need to be appealed. Accordingly, with a no-appeal process, death decisions might be minimized (although such a process has many legal and ethical reasons for questioning it).

E. The Community

Jurors are informed that they have been chosen as representatives of the community, and that they must represent the moral values of that community. In a capital case, there is often outrage and anger in the community-at-large about the murder. Cries for retribution and a death sentence are common. Believing that they are simply conduits for the expression of community values can greatly diminish the jurors' personal sense of responsibility. To the extent that this occurs, more death sentences are likely.

F. Other Jurors

In his review of the comments of CJP participants, Professor Hoffmann points out that jurors often share the responsibility of the decision with other jurors.¹⁷ This is a very important observation, and it relates directly to the social psychology literature concerning group versus individual decision-making. When decisions are made in a group setting (as in a jury, and especially when the decision rule is unanimous) rather than by individuals, feelings of responsibility are consistently diminished. This diffusion of responsibility to other group members is one of the predominant explanations for why groups make riskier and more polarized decisions than do individuals.

In addition to feelings of diminished responsibility in a group setting, individuals in certain kinds of groups often feel anonymous, and experience what social psychologists refer to as "deindividuation." These feelings of

16. See 1994 Ind. Acts 158, § 7 (to be codified at IND. CODE § 35-50-2-9(h)) (effective July 1, 1995) (mandating that executions be carried out within one year plus one day of conviction).

17. Hoffmann, *supra* note 1, at 1149-50.

deindividuation have been used to explain why groups (to a greater degree than individuals) engage in antisocial acts such as rioting or looting.¹⁸ In a deindividuated state, people will often engage in more behaviors that are likely to bring about aversive consequences. At the least, deindividuated behavior in groups is more likely to be guided by social norms than is individual behavior.¹⁹

Professor Hoffmann's observations suggest that members of a jury may experience a diminished sense of responsibility and feel deindividuated during the jury decision-making process. Feelings of deindividuation might be especially likely in a jury, where the members are referred to by juror number rather than by name. To the extent that diminished responsibility and feelings of deindividuation lead to greater exposure to the possibility of aversive consequences, jurors may make more death decisions than would individuals or individuated members of a group.

On the other hand, there is one aspect of jury decision-making that can lead to feelings of greater responsibility. Jurors can, in some cases, choose to disregard or nullify the judge's instructions.²⁰ This possibility, which is more likely to occur in some states than in others, would require a thoughtful group decision by the jury members and would no doubt lead to feelings of heightened responsibility by jurors.

Related to the findings that group members generally feel less responsible for their decisions than do individuals, and that these feelings can lead to more decisions where the possibility of negative outcomes is higher, is the finding that group decisions are generally more extreme than are individual decisions.²¹ Whatever the majority of individual members may have felt prior to group deliberations, these feelings will be exacerbated during the group decision-making process. This generally leads to groups making more polarized and more extreme decisions than individuals. There are many reasons for this occurrence, one of which is the fact that different individuals may have different reasons for their individual decisions. When each person is then exposed to other supporting arguments by the other group members who share their decision outcome, they become even more polarized. Research clearly demonstrates that jury deliberations produce this polarization effect.²²

Group polarization effects can explain why juries almost always make decisions that are in line with the initial majority. Kalven and Zeisel found that "the jury in roughly nine out of ten cases decides in the direction of the initial majority."²³ Thus, if individual jurors have (contrary to instructions)

18. See Robert D. Johnson & Leslie L. Downing, *Deindividuation and Valence of Cues: Effects on Prosocial and Antisocial Behavior*, 37 J. PERS. & SOC. PSYCHOL. 1532, 1537 (1979).

19. ELIOT R. SMITH & DIANE M. MACKIE, *SOCIAL PSYCHOLOGY* 408-09 (1955).

20. See Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).

21. David G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 PSYCHOL. BULL. 602, 609-11 (1976).

22. See Martin F. Kaplan & Charles E. Miller, *Group Decision Making and Normative Versus Information Influence: Effects of Type of Issue and Assigned Decision Rule*, 53 J. PERS. & SOC. PSYCHOL. 306 (1987).

23. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 488 (1966).

pre-decided the punishment before any group discussion, whatever majority opinion is present at that time will very likely prevail. Interestingly, when there is no clear majority initially, group decisions are far more likely to favor the defendant, a phenomenon that MacCoun and Kerr refer to as the "leniency bias."²⁴

III. WHAT CONSTITUTES GOOD DECISION-MAKING BY THE JURY?

According to the present analysis, the stronger the personal responsibility experienced by jurors, the less likely is a death penalty decision. The weaker the personal responsibility experienced by jurors, the more likely is a death penalty decision. Some of the factors and issues that lead jurors to feel differing degrees of personal responsibility have been discussed. Nevertheless, one final point about the relation between jurors' experienced personal responsibility and the sentencing decisions at capital trials should be noted. Under the present judicial system, the correct attribution of responsibility for the jury's decision is simply not clear. How much responsibility should go to the judge or to the law or to the community-at-large? How much responsibility should fall on the mind or heart of a juror? One can speak of the factors that increase or decrease the levels of responsibility attributed to any source, but there is no way to judge the accuracy of these levels.

Similarly, the "correct" number or proportion of death penalty decisions is not easily established. Stated another way, although increased responsibility may lead jurors to make fewer death decisions, and decreased responsibility may lead them to make more death decisions, it is not at all clear whether increased or decreased responsibility leads to *better* decision-making. In order to judge the correctness or propriety of jury sentencing decisions in capital crimes, one would need some objective normative standard against which to judge the proportion of death decisions. There simply is no such standard. Diminishing the responsibility felt by jurors from the level of responsibility that is experienced under current procedures and practices might result in too many death penalty decisions. Increasing the responsibility experienced by jurors from the level of responsibility experienced under current procedures and practices might result in too few death penalty decisions.

Without an objective standard of judgment, the "correct" number of death penalty decisions depends on one's values. At one extreme, the "correct" number of death penalty decisions for a person who does not believe in capital punishment is clearly zero, in which case the greater the responsibility experienced by jurors, the better. At the other extreme, the "correct" number of death penalty decisions for the one who believes in maximum punishment and holds an "eye-for-an-eye" value system is very large. In this case, the less responsibility experienced by jurors, the better.

24. Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERS. & SOC. PSYCHOL. 21, 31 (1988).

In addition to one's value system, whether a life or death decision is correct in the eyes of a juror, the public, or perhaps even the law, depends on which type of error is more acceptable in a capital sentencing procedure. In a sentencing decision, there are two types of errors that a juror or judge might make. A defendant might be wrongly sentenced to death, or a defendant might be wrongly allowed to live. It is difficult to know how jurors might think about the issue of which kind of error is more important or which kind of error should be given the greater weight, but it is almost certain that jurors *do* think about this issue. It is therefore instructive to analyze the factors involved in such thinking.

For the error of wrongly sentencing a defendant to death, there are three ways in which this decision might be costly to the juror. The first (and worst possible) case occurs when the defendant is executed, and it is then discovered that he is (or may have been) innocent of the crime. This situation would clearly be very painful for the jurors, and illustrates the terrible consequence a death decision would bring if the decision were in error. In a second scenario, the jurors might believe that the defendant may come to lead a productive life while in prison or in the community-at-large after parole if he is not executed. This outcome is not knowable, of course, because once the defendant is executed, we have no access to a counter-factual world in which the defendant might have lived. Nevertheless, the issue is no doubt one that jurors consider. In a third case, the jurors might experience great guilt in the future, after the defendant is executed, simply because a human life has been taken. Such reasoning involves thinking about the future, and while people are notoriously poor at predicting their own future behavior or their own future feelings,²⁵ such considerations of future feelings are clear in many of the comments of the jurors who were interviewed in the CJP.²⁶

With regard to the error of wrongly foregoing the death penalty for a long prison sentence, there is only one real consideration. The murderer may live to kill again, either within prison, or after release from prison. For a jury that sentences a murderer to imprisonment rather than death and later learns of subsequent killings by this murderer, the emotional pain would be great.

It is difficult to know exactly how a juror might think about the possible errors that could follow from a sentencing decision, but such considerations (in addition to the level of personally experienced responsibility) are bound to be an important part of the sentencing decision. If the trial or the instructions make salient a particular type of error, this will likely tip the balance in favor of one decision or the other.

25. Steven J. Sherman, *On the Self-Erasing Nature of Errors of Prediction*, 39 J. PERS. & SOC. PSYCHOL. 211, 217 (1980); see also Daniel Kahneman & Jackie Snell, *Predicting a Changing Taste: Do People Know What They Will Like?* 5 J. BEHAV. DECISION MAKING 187, 197-98 (1992).

26. See Hoffmann, *supra* note 1, at 1146 ("Before you [sentence the defendant to death], make sure that you can sleep tonight or next week or the rest of your life with what you've done.") (quoting an unidentified Indiana juror describing his argument to his peers against imposing a death sentence).