

Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions Guilt-Trial Experience and Premature Decision Making

William J. Bowers

Marla Sandys

Benjamin D. Steiner

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

William J. Bowers, Marla Sandys, and Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions Guilt-Trial Experience and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998)
Available at: <http://scholarship.law.cornell.edu/clr/vol83/iss6/3>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

FORECLOSED IMPARTIALITY IN CAPITAL SENTENCING: JURORS' PREDISPOSITIONS, GUILT-TRIAL EXPERIENCE, AND PREMATURE DECISION MAKING

William J. Bowers,†
Marla Sandys††
& Benjamin D. Steiner†††

ABSTRACT

The bifurcation of the capital trial into separate guilt and sentencing phases is the most decisive and uniform change in the administration of the death penalty under the capital statutes approved in *Gregg v. Georgia*¹ and companion cases. By law, jurors make the life or death sentencing decision at a separate penalty trial after the determination of guilt in accordance with carefully drawn sentencing instructions. These sentencing instructions are intended to guide the exercise of sentencing discretion by articulating those aggravating and mitigating considerations that are relevant to this decision. In this way, the exercise of capital sentencing discretion is to be guided and thus freed of constitutionally impermissible caprice, arbitrariness, and discrimination. The Supreme Court has underscored the importance of a separate and independent sentencing decision in *Morgan v. Illinois*,² requiring that capital jurors give effect to the statutory considerations that are appropriate for the sentencing decision.³

† Principal Research Scientist, College of Criminal Justice, Northeastern University, and the Principal Investigator of the National Science Foundation-sponsored Capital Jury Project underway in fifteen states. Professor Bowers received his Ph.D. in Sociology from Columbia University in 1966.

†† Associate Professor of Criminal Justice at Indiana University. Professor Sandys received her Ph.D. in Social Psychology from the University of Kentucky in 1990.

††† Associate Research Scientist, College of Criminal Justice, Northeastern University, and a Ph.D. candidate in Sociology at Northeastern University.

The authors wish to acknowledge their gratitude to James Acker, David Baldus, Samuel Gross, Jordan Steiker, Scott Sundby, and Ronald Tabak for especially thoughtful responses to this work in progress. The authors also wish to acknowledge the support of the National Science Foundation for this research.

¹ 428 U.S. 153 (1976).

² 504 U.S. 719 (1992).

³ See *id.* at 729 ("A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.").

Interviews with 916 capital jurors in eleven states reveal, however, that many jurors reached a personal decision concerning punishment before the sentencing stage of the trial, before hearing the evidence or arguments concerning the appropriate punishment, and before the judge's instructions for making the sentencing decision. Moreover, most of the jurors, who indicated a stand on punishment at the guilt stage of the trial said they were "absolutely convinced" of their early stands on punishment and adhered to them throughout the course of the trial.

This Article examines the sources of such early punishment decision making. Specifically, it explores (1) the extent to which these stands are the product of jurors' predispositions toward death as punishment and (2) the extent to which early punishment decisions derive from jurors' experiences and deliberations during the guilt portion of the trial. The analysis reveals a substantial failure to purge capital sentencing of jurors who are predisposed to death as punishment and who will not give effect to the constitutional protections of the sentencing guidelines.

INTRODUCTION: THE MOST ENDURING LEGACY OF <i>GREGG</i>	1478
I. PREMATURE PUNISHMENT DECISION MAKING: THE EMPIRICAL REALITY	1486
A. Punishment Stands at the Guilt Stage of the Trial ..	1487
B. Certainty of Early Stands on Punishment	1489
C. Consistency of Jurors' Adherence to Early Stands on Punishment	1491
D. Timing of Early Punishment Stands.....	1494
E. Reasons for Early Punishment Stands	1496
1. <i>Early Pro-Death Jurors</i>	1497
2. <i>Early Pro-Life Jurors</i>	1500
II. PREJUDGMENT AND QUALIFICATION FOR CAPITAL JURY SERVICE	1503
A. Acceptability of Death as Punishment.....	1504
B. Death as the Only Acceptable Punishment.....	1506
C. Death as a Deterrent, as Legally Required, as Morally Justified	1507
D. The Effects of Death Penalty Predispositions and Beliefs	1510
1. <i>The Early Pro-Death Decision</i>	1511
2. <i>The Early Pro-Life Decision</i>	1514
III. THE GUILT DECISION: RELUCTANCE AND THE CONFOUNDING OF GUILT AND PUNISHMENT	1515
A. The Guilt Decision	1516
B. The Nature of Guilt Deliberations	1518
C. The Discussion of Punishment During Guilt Deliberations	1521

1. <i>Temptations and Pressures to Talk About Punishment at Guilt Deliberations</i>	1522
2. <i>Pro-Death Influences and Advocacy During Guilt Deliberations</i>	1523
3. <i>Pro-Life Influences and Arguments During Guilt Deliberations</i>	1526
IV. A PERSPECTIVE ON CAPITAL JURY BIAS	1529
A. The Contours of Premature Decision Making	1531
B. The Counterweight of Lingering Doubt	1533
C. The Challenge Is Ominous	1537
D. Corrupting the Guilt Decision	1539
E. Is Impartiality Necessarily Foreclosed?	1540
CONCLUSION	1546
APPENDIX A	1548
APPENDIX B	1552

TABLES

TABLE 1	1488
TABLE 2	1490
TABLE 3	1492
TABLE 4	1493
TABLE 5	1495
TABLE 6	1505
TABLE 7	1507
TABLE 8	1509
TABLE 9	1513
TABLE 10	1516
TABLE 11	1520
TABLE 12	1535
TABLE A1	1549
TABLE B1	1553

INTRODUCTION: THE MOST ENDURING LEGACY OF *GREGG*

The Supreme Court sanctioned the return to capital punishment in its 1976 *Gregg*, *Proffitt v. Florida*,⁴ and *Jurek v. Texas*⁵ decisions. These decisions addressed statutes whose features sought to remedy the arbitrariness in capital states, that the Court had found unconstitutional in *Furman v. Georgia*.⁶ These features included (1) a bifur-

⁴ 428 U.S. 242 (1976).

⁵ 428 U.S. 262 (1976).

⁶ 408 U.S. 238 (1972).

cated trial in which the determination of punishment occurred during a separate stage of the proceedings after the determination of guilt,⁷ (2) explicit statutory guidelines for making the life or death

⁷ The rationale for the two-stage proceeding is twofold. First, jurors should make the guilt decision without the contamination of punishment considerations. Second, they are supposed to make the punishment decision in accordance with different kinds of evidence, guidelines, and instructions than those that apply to the guilt decision. Case law traditionally has prohibited jurors from hearing evidence that is relevant to punishment to prevent the contamination of the guilt decision:

Pennsylvania, prior to 1959, was alone in its policy of permitting introduction of evidence of a defendant's prior unrelated offenses, otherwise inadmissible, to be considered solely on the question of punishment, during the trial of the issue of guilt. Such evidence was limited to the official record of prior convictions and admissions of the defendant; to this extent, however, the courts overrode the common-law policy of excluding such evidence because of its prejudicial impact on the issue of guilt . . . Critics of this Pennsylvania policy argued that the need to avoid prejudice at the trial of guilt or innocence outweighed the need to provide the jury with more information about the defendant's character. To deal with the problem of prejudice and at the same time permit use of that information, they advocated the split-verdict procedure.

Recent Cases, 110 U. PA. L. REV. 1028, 1037-38 (1962) (footnote omitted). California was the first to adopt this two-stage trial with separate guilt and punishment decisions:

Prior to 1957, when its "Split-Verdict Act" was passed, California had not generally permitted the introduction of evidence of prior offenses during the trial of the issue of guilt when that evidence was to be considered solely on the question of penalty. The 1957 statute contains a general statement that evidence is to be admitted, including evidence of defendant's "background and history." In *People v. Purvis*, the California Supreme Court stated its approval of the admission during the penalty hearing not only of the official record but also of the details of prior unrelated offenses, reasoning that since the jury was required to assess the significance of defendant's past acts, it should have all information relevant to that determination, including details of defendant's conduct during the commission of prior offenses.

Id. at 1039 (footnotes omitted).

Furthermore, three members of the Court in *Gregg* acknowledged that evidence that is relevant to penalty could infect guilt determinations, noting that "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question," *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), and heralded bifurcated proceedings as the preferred procedure for eliminating the concerns of the Court in *Furman v. Georgia*, see *id.* at 191-92 (opinion of Stewart, Powell, and Stevens, JJ.). Three members of the Court wrote:

When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely [than a unitary proceeding] to ensure elimination of the constitutional deficiencies identified in *Furman*.

Id. (opinion of Stewart, Powell, and Stevens, JJ.).

decision,⁸ and (3) automatic appellate review of all death sentences by the state's highest appellate court with criminal jurisdiction.⁹

The Court extolled these features of the post-*Furman* capital statutes, finding the laws acceptable "on their face" for the protection they provided against the arbitrary or capricious imposition of the death penalty.¹⁰ The Court underscored the essential character of these innovations in its concurrent rejection of the mandatory death

⁸ The specific considerations and the manner of decision making differed by state, but each state's statute embodied a set of considerations and decision-making procedures that were to guide the discretion of capital jurors. Three members of the Court reasoned:

[T]he provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. To the extent that this problem is inherent in jury sentencing, it may not be totally correctable. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.

Gregg, 428 U.S. at 192 (opinion of Stewart, Powell, and Stevens, JJ.) (citations omitted). These Justices further underscored the newly found essential role of guidance:

Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

Id. at 193 (opinion of Stewart, Powell, and Stevens, JJ.) (citations and footnote omitted).

⁹ The requirement that all cases that involved a death sentence receive automatic review by a state appellate court seeks to guard against the excessive or disproportionate imposition of the death penalty and to ensure the greater care and reliability that three members of the Court required in capital cases:

As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.

In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*. No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."

Id. at 198 (opinion of Stewart, Powell, Stevens, JJ.) (alteration in original) (citation omitted) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

¹⁰ In *Gregg*, three Justices of the Court endorsed sentencing guidelines in the context of a bifurcated trial as the remedy to the *Furman* ills:

penalty in *Woodson v. North Carolina*¹¹ and in *Roberts v. Louisiana*.¹² In these cases, three Justices held that when an offense could result in a death sentence, the absence of both a separate hearing with explicit standards to guide sentencing discretion and appellate review of all death sentences would deny the defendant the "individualized treatment" that the Constitution guarantees.¹³

In subsequent rulings, the Court has treated these features as formalistic requirements, and, in the words of Robert Weisberg, effectively has "deregulated death."¹⁴ In these decisions, the Court has steered away from imposing upon the states anything more than minimal requirements for statutory sentencing guidelines¹⁵ and from requiring anything more than a perfunctory state-level review of capital sentences.¹⁶ Instead of giving shape and force to these specific requirements, the Court has articulated broader, more amorphous constitutional standards. In addition to requiring "individualized treatment"—the underpinning of the separate sentencing phase of the capital trial—the Court has established that "retributive stan-

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id. at 195 (opinion of Stewart, Powell, and Stevens, JJ.).

¹¹ 428 U.S. 280 (1976).

¹² 428 U.S. 325 (1976).

¹³ "Individualized treatment" means that the defendant has the right to have mitigation considered, that the court must allow him to bring evidence of specific things about himself and the crime to the jury's attention, and that the decision must be a reasoned moral choice that is open to all relevant considerations. See *Lockett v. Ohio*, 438 U.S. 586, 602-05 (1978) (opinion of Burger, C.J.); *Woodson*, 428 U.S. at 304. For an especially interesting analysis of the doctrinal complexities of mitigation in capital sentencing, see Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835 (1992) (reviewing BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* (1992)); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

¹⁴ See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305-06.

¹⁵ In *Zant v. Stephens*, 462 U.S. 862 (1983), the Court adopted a narrowing formulation of the role of aggravating circumstances that state statutes need require only that a single aggravating factor be found beyond a reasonable doubt for the imposition of the death penalty. See *id.* at 890. Guided-discretion statutes require the state to prove, beyond a reasonable doubt, the existence of at least one aggravating factor. This requirement serves to narrow the class of death-eligible offenders. See *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

¹⁶ In *Pulley v. Harris*, 465 U.S. 37 (1984), the Court eschewed appellate responsibility for any reliable assessment of proportionality in sentencing as a constitutional requirement. See *id.* at 50-51. For a review of proportionality review practice, see Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "the Appearance of Justice?"*, 87 J. CRIM. L. & CRIMINOLOGY 130 (1996).

dards" should be the fundamental basis for the capital-sentencing decision¹⁷ and that this sentencing decision should be a "reasoned moral choice."¹⁸ Furthermore, to ensure that such a reasoned, moral

¹⁷ When speaking of jury sentencing, rather than statutory justification, the Court has characterized the jury's function as a retributive assessment of the defendant's moral blameworthiness and guilt; it has made little mention of deterrence and explicitly has characterized incapacitation as a secondary consideration. Thus, in *Enmund v. Florida*, 458 U.S. 782 (1982), Justice O'Connor declared that "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness." *Id.* at 825 (O'Connor, J., dissenting). In *Tison v. Arizona*, 481 U.S. 137 (1987), the Court explained that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Id.* at 149. The Court initially rejected the use of victim-impact evidence in *Booth v. Maryland*, 482 U.S. 496 (1987), saying that such evidence is inadmissible because it "could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." *Id.* at 505. When the Court later accepted such victim-impact evidence in *Payne v. Tennessee*, 501 U.S. 808 (1991), it did so not by discounting considerations of retribution, but by broadening them to include assessment of the harm of the defendant's crime as well as his blameworthiness for it. *See id.* at 825. In addressing Texas's capital statute, which requires a specific finding of the defendant's future dangerousness for a death sentence to be imposed, *see Jurek v. Texas*, 428 U.S. 262, 267-68 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), the Court affirmed the primacy of retributive over incapacitative purposes. The Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989), thus held that "it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." *Id.* at 327-28. In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Court explicitly gave secondary standing to the goal of incapacitation, stating that "incapacitation has never been embraced as a sufficient justification for the death penalty" and that "retribution clearly plays a more prominent role in a capital case." *Id.* at 461, 462. Justice Stevens concluded, "In the context of capital felony cases, . . . the question whether the death sentence is an appropriate, non-excessive response to the particular facts of the case will depend on the retribution justification." *Id.* at 480 (Stevens, J., concurring in part and dissenting in part).

For the view that the Eighth Amendment requires desert-based sentencing, see Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 387-94 (1992). For an analysis of the contradictions between the retributive and incapacitative purposes of capital punishment, see Patricia P. Perlmutter, *Frightened into Selecting Death: The Use of Future Dangerousness in Death Penalty Cases and the Resultant Sacrifice of Individualized Sentencing* (Sept. 9, 1998) (unpublished manuscript, on file with author). For indications of the failure of post-*Furman* statutes to achieve retributive purposes in practice, see Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 412-16 (1994). For the argument that conspicuous victim aggravation is displacing retributive concerns, see Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE* (Austin Sarat ed., forthcoming 1999).

¹⁸ In *Penry*, the Court found that under the Texas statute in question, "the jury was unable to express its 'reasoned moral response'" to Penry's mitigating evidence of mental retardation and childhood abuse "in determining whether death was the appropriate punishment." 492 U.S. at 322. The jury must be "provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 328. "[F]ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.'" *Id.* at 328 (internal quotation marks omitted) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in judgment) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))). Furthermore, a capital jury's discretion must remain unaffected by the "risk that the death penalty will be imposed

sentencing decision will conform to retributive standards and the doctrine of individualized treatment, the Court has required that jurors receive any evidence of mitigation and that they give effect to this evidence in their decision making:

Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.¹⁹

Hence, despite giving states wide latitude in deciding how to guide both the capital-sentencing decision and its review on appeal, the Court has anchored the capital-sentencing decision firmly in the separate penalty stage of a bifurcated trial and has articulated the essence of this decision as a reasoned moral judgment. Furthermore, the Court has required that this reasoned moral judgment conform to retributive considerations and rest on the characteristics of the crime and of the individual defendant. In this way, the separate penalty stage of a capital trial seeks to ensure that those responsible for the defendant's punishment will make a reasoned moral choice in light of the evidence of aggravation and mitigation.²⁰

These developments have recast the qualifications for capital jury service. The law has long accepted the premise that some prospective jurors do not meet the qualifications of service. Before *Witherspoon v. Illinois*,²¹ citizens could face disqualification from capital jury service if

in spite of factors which may call for a less severe penalty." *Sumner v. Shuman*, 483 U.S. 66, 76 n.4 (1987) (internal quotation marks omitted) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 119 (1982) (O'Connor, J. concurring) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (opinion of Burger, C.J.)); *see also* *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988) ("Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (recognizing "the need for reliability in the determination that death is the appropriate punishment in a specific case").

¹⁹ *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982). The Court reaffirmed this position in *Skipper v. South Carolina*, 476 U.S. 1 (1986), by stating, "These rules [of *Eddings*] are now well established, and the State does not question them." *Id.* at 4.

²⁰ This narrowing function of aggravating circumstances could result from legislative limitations of death-eligible offenses or from the requirement that juries find one such circumstance before imposing the death penalty. *See Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988). The selection of whom is to receive a sentence of death, however, "is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant*, 462 U.S. at 879 (citing *Eddings*, 455 U.S. at 110-12). In short, aggravating circumstances determine who is eligible for a sentence of death and mitigating circumstances serve as the basis of discretion in selecting who will receive a sentence of death.

²¹ 391 U.S. 510 (1968).

they had reservations or scruples against the death penalty. *Witherspoon* narrowed the legitimate grounds for disqualification by allowing jurors with such scruples to serve unless they could not be impartial in deciding guilt or could not vote for the death penalty if the defendant was found guilty of capital murder. After *Gregg* and its companion cases reinstated capital punishment with sentencing guidelines, the Court again altered the qualification standards for capital jury service in *Adams v. Texas*²² and *Wainwright v. Witt*.²³ These decisions recast the issue of qualification in terms of whether prospective capital jurors would be willing and able to abide by sentencing guidelines that typically would require them to consider aggravating and mitigating factors.²⁴

While the *Witt* standard appears neutral in noting that either extreme support for or opposition to the death penalty may impair the performance of capital jurors, the language of the opinion itself speaks solely in terms of the possible exclusion of death penalty opponents.²⁵ Seven years later, the decision in *Morgan v. Illinois*²⁶ explicitly extended the qualification standard to include proponents of capital punishment by requiring that they be "life qualified":

A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may

²² 448 U.S. 38 (1980).

²³ 469 U.S. 412 (1985).

²⁴ The new standard for death qualification became "whether the juror's views [on capital punishment] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams*, 448 U.S. at 45).

²⁵ For instance, the Court noted in *Witt*:

[I]t does not make sense to require simply that a juror not "automatically" vote against the death penalty; whether or not a venireman *might* vote for death under certain *personal* standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge.

Id. at 422. As Thompson has noted however, "[t]he major thrust of *Witt* is to make the standard for exclusion more lenient." See William C. Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree*, 13 LAW & HUM. BEHAV. 185, 207 (1989). And there is empirical support for *Witt* excluding more prospective jurors than *Witherspoon*: "the *Witt* standard was found to exclude significantly more potential jurors (21.2%) than the *Witherspoon* standard (13.6%) from capital jury service." Michael L. Neises & Ronald C. Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared*, 5 BEHAV. SCI. & L. 479, 485 (1987).

²⁶ 504 U.S. 719 (1992).

challenge for cause any prospective juror who maintains such views.²⁷

Morgan explicitly requires that capital jurors give effect to mitigation, not merely that the defense has permission to present such evidence, as Justice Scalia argues in dissent.²⁸ In arriving at the sentencing decision, "Any juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial."²⁹ In essence, jurors must not simply be ready to hear evidence and arguments concerning aggravating and mitigating circumstances; rather, they must be willing to give effect to these considerations in their decision making.³⁰ Jurors who decide the defendant's punishment without waiting to hear the evidence and arguments at the penalty stage of the trial, as well as the judge's instructions for making the sentencing decision, quite obviously violate the defendant's right to an impartial jury—one that makes a reasoned moral choice of either life or death.

To summarize, post-*Furman* capital statutes have provided standards to guide jurors in making the sentencing decision at a separate penalty stage of the trial—a stage that occurs after the jurors have entered a guilty verdict for capital murder.³¹ At this subsequent phase of the trial, the trial judge instructs the jury about how to reach this decision within the statutory guidelines.³² Standards for the selection of capital jurors have evolved to ensure that the jurors, in good faith, will consider, and will give effect to the guidelines and circumstances the statute directs them to make the basis of their sentencing decisions.³³ To qualify for capital jury service, prospective jurors must have the ability and must be willing to follow the guiding considerations in deciding whether the defendant should live or die.³⁴ Prospective jurors who cannot take these considerations fully into account fail

²⁷ *Id.* at 729.

²⁸ *See id.* at 744 (Scalia, J., dissenting).

²⁹ *Id.* at 739. In keeping with the language of *Witt*, jurors who would not consider mitigation cannot follow the law: "[T]he belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law. Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law." *Id.* at 735 (citation omitted).

³⁰ The Court went even further in articulating that due process demands that a jury at the sentencing phase "must stand impartial and indifferent to the extent commanded by the Sixth Amendment." *Id.* at 727. Moreover, the requirement of impartiality extends to "any jury that will undertake capital sentencing." *Id.* at 728.

³¹ *See supra* note 7 and accompanying text.

³² *See supra* note 8 and accompanying text.

³³ *See supra* note 19 and accompanying text.

³⁴ *See supra* notes 21-24 and accompanying text.

to meet the constitutionally mandated standards of impartiality in capital sentencing and therefore must not serve as capital jurors.³⁵

The principal question that we address here concerns how well these expectations regarding the selection and performance of capital jurors are being realized in practice. Are there capital jurors who cannot or do not give effect to the legally authorized sentencing considerations? Can we identify these partial potential jurors before they actually earn seats on a capital jury? To answer these questions, we turned to capital jurors who actually made sentencing decisions and then explained to us how they did so.³⁶

I

PREMATURE PUNISHMENT DECISION MAKING: THE EMPIRICAL REALITY

Our attention now shifts to an empirical examination of premature decision making among capital jurors. The inquiry focuses on what makes some jurors take a stand on the defendant's punishment before the sentencing stage of the trial and how this premature decision affects the role that jurors play in the jury's decision-making process. The data for this investigation come from the Capital Jury Project ("CJP"), which is a study of the decision making of capital jurors underway in fifteen states.³⁷ These fifteen states reflect the principal variations in guided-discretion capital statutes.³⁸ Twenty to thirty full capital trials³⁹ were chosen within each of these states to represent

³⁵ See *supra* notes 29-30 and accompanying text.

³⁶ The Court in *Lockhart v. McCree*, 476 U.S. 162 (1986), faulted earlier death qualification studies for failing to study real jurors in real cases rather than mock jurors in simulations of capital trials. See *id.* at 171. The trouble with the empirical studies, the Court complained, was that the study participants "were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant. [The Court has] serious doubts about the value of these [mock jury] studies in predicting the behavior of actual jurors." *Id.* (footnote omitted). The research in this Article answers this challenge. *Id.* at 171.

³⁷ This research commenced in 1990 with funding from the Law and Social Sciences Program of the National Science Foundation, grant No. NSF SES-9013252.

³⁸ The initial sample of eight states represented the principal forms of post-*Furman* capital statutes—"threshold," "balancing," and "directed" statutes—insofar as possible, states with "traditional" and "narrowing" definitions of capital murder. For a detailed discussion of the distinctions among these different types of early post-*Furman* capital statutes, see Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 101-19 (1980); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1699-1712 (1974). States were subsequently added to enhance the representation of such statutory forms and to incorporate the distinction between statutes that make the jury sentencing decision binding and those that permit the judge to override the jury's decision. For further details about sampling states, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1077-79 (1995).

³⁹ We define "full capital trials" as trials in which the defendant was charged with a murder that is punishable by death, convicted of that murder in the guilt phase of the trial, and sentenced to life or death by a jury in the sentencing phase of the trial.

both life and death sentencing outcomes.⁴⁰ For each of these trials the investigators selected a target sample of four jurors⁴¹ for personal interviews, which averaged three to four hours in length.⁴² The findings presented below are based upon interviews with 916 jurors from 257 capital trials in those eleven states⁴³ in which interviews have been completed with at least forty jurors from ten capital trials.⁴⁴

A. Punishment Stands at the Guilt Stage of the Trial

Keeping an "open mind" and resisting temptations or pressures to reach a premature decision are surely the quintessential qualifications for jury service. A juror should reach a decision concerning punishment only after hearing the evidence, the arguments, and the instructions for making that decision. Next we examine the extent to which capital jurors fail to abide by this requirement in making their life or death decisions.

⁴⁰ The sampling plan for each state called for an equal representation of trials that ended in life and death sentencing decisions to maximize the potential for comparing and contrasting jurors in these cases within each state. Investigators used various strategies to stratify and balance the representation of life and death cases in terms, for example, of regions within the state or of urban and rural locations. For further details, see Bowers, *supra* note 38, at 1080 nn.200-04. In three states, the selection of cases was not state wide. Thus, in California, in Florida, and in Texas the original design called for geographically restricted samples as a result of the large numbers of capital trials and the impracticalities of covering these entire states. For details of the sampling strategy within these states, see *id.* at 1080. Hence, the selection did not draw the samples of jurors to be strictly representative within states or within the nation as a whole, but to maximize analytic comparisons.

⁴¹ Investigators exercised discretion to conduct additional interviews in cases for which the initial interviews raised questions that further interviews might have helped to resolve. In two states, Kentucky and Virginia, the investigators drew samples of more than four jurors from cases in which the minimum sample of trials with either life or death outcomes could not be met within the initial time frame for data collection. Investigators did not always meet the target sample of four jurors per case because of difficulties in applying the sampling and replacement protocol, in locating jurors whose addresses and phone numbers had changed, were not initially correct, or were not sufficiently detailed, and in surveying the jurors who were unwilling to interview despite a \$20 incentive payment. For more details on the juror interview, see *id.* at 1082-83. At present, 26 trials are represented by a single juror, 32 by two jurors, 54 by three jurors, 122 by four jurors, 24 by five jurors, eight by six jurors, and one by eight jurors.

⁴² We designed the interviews to chronicle the jurors' experiences and thoughts over the course of the trial, to identify points at which various influences may have come into play, and to reveal the ways in which jurors had reached their sentencing decisions. Interviewers asked jurors both structured questions with designated response options and open-ended questions that called for detailed, narrative accounts of their experiences as capital jurors.

⁴³ These 11 states that Table 1 lists were responsible for 64.9% of the 3,153 persons on death row in the summer of 1996 and for 73.7% of the 335 who were executed between 1977 and the summer of 1996. See NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW U.S.A. REPORTER 1049-81 (1997).

⁴⁴ Interviews completed thus far with capital jurors in Indiana, in Louisiana, in New Jersey, and in Tennessee are excluded because these criteria have not yet been met.

To learn when jurors decide the defendant's punishment, we asked them what, at various points of the trial, they thought the defendant's punishment should be. The first of these questions came in the section of the interview that dealt with the guilt trial. It read, "After the jury found [defendant's name] guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think [defendant's name] should be given: (1) a death sentence, (2) a life sentence, [or were you] (3) undecided?" Table 1 displays the jurors' responses to this question for each participating state and for the sample as a whole.

TABLE 1
JURORS' STANDS ON PUNISHMENT AT GUILT TRIAL BY STATE

State	Percent taking each stand on punishment			(No. of jurors)
	Death	Undecided	Life	
Alabama	21.2	46.2	32.7	(52)
California	26.1	57.7	16.2	(142)
Florida	24.8	52.1	23.1	(117)
Georgia	31.8	39.4	28.8	(66)
Kentucky	34.3	41.7	24.1	(108)
Missouri	27.3	58.2	14.5	(55)
North Carolina	29.2	56.9	13.9	(72)
Pennsylvania	36.2	44.7	19.1	(47)
South Carolina	33.3	52.3	14.4	(111)
Texas	28.0	66.0	6.0	(50)
Virginia	18.2	52.3	29.5	(44)
All states	28.6	51.7	19.7	(864)

NOTE: Some 52 jurors (5.8%) who did not answer the question about their stand on punishment at the guilt stage of the trial are excluded from all tabulations in which this variable appears. Percentaging is by row in Tables 1 and 6; otherwise by column.

Virtually half of the capital jurors (48.3%) in the eleven CJP states indicated that they thought they knew what the punishment should be during the guilt phase of the trial. Three of ten jurors said the punishment should be death, two of ten said it should be life, and the other five of ten were undecided at this early stage of the trial.⁴⁵ Moreover, the data show that sizable proportions of jurors in nearly all of the states took a stand on punishment before the penalty stage of the trial. In four states, a majority of the jurors took such a stand—Georgia (60.6%), Pennsylvania (55.3%), Kentucky (58.4%), and Alabama (53.9%). At least four of ten jurors took such a stand in ten of

⁴⁵ An earlier stage of this research found similar results. See Bowers, *supra* note 38, at 1089. These findings derived from a sample of 684 capital jurors from seven states including Alabama, California, Florida, Georgia, Kentucky, North Carolina, and South Carolina. See *id.* at 1086 n.221.

the eleven CJP states; Texas, with less than half as many early pro-life jurors as any other state, is the one exception.

This blatant departure from the Court's expectations concerning the timing of jurors' sentencing decisions suggests that post-*Furman* capital statutes are not operating as the Court supposed. Many jurors do not appear to wait either for evidence and arguments regarding the appropriate punishment or for the guidance of sentencing instructions before making their punishment decisions. The possibility does exist, however, that jurors' responses to this question reflect only tentative impressions rather than firm prejudgments concerning the defendant's punishment. This supposition might be the case if jurors who took a stand told us that they were doubtful or tentative about the punishment at this early point in the trial or if a substantial fraction of those who took these early stands subsequently abandoned their initial commitments.

B. Certainty of Early Stands on Punishment

How strongly convinced were jurors of their early stands on punishment? We asked this follow-up question of jurors who said they thought they knew what the punishment should be during the guilt stage of the trial. Specifically, if jurors said they thought they knew after the guilt trial but before the presentation of sentencing evidence or testimony what the defendant's punishment should be, the interviewer was instructed to ask, "How strongly did you think so?" Jurors could answer "absolutely convinced," "pretty sure," or "not too sure." Table 2, shows their responses. For purposes of comparison, in Table 2 we also show the certainty of jurors' stands on punishment after the sentencing stage of the trial but before sentencing deliberations, (1) for all jurors who took a stand on punishment at the sentencing stage of the trial, (2) for those who were undecided at guilt but took a stand on sentencing, and (3) for those who took the same stand at both the guilt and sentencing stages of the trial.

Most jurors who said they took a stand for either life or death during the guilt stage of the trial told us that they were "absolutely convinced" of their stand at that early point. Seven out of ten who took a pro-death stand and six of ten who said the punishment should be life were "absolutely convinced." Moreover, nearly all of the remaining jurors who took a stand said they were "pretty sure." Only a meager two to five percent of those who said they knew what the punishment should be at the guilt stage characterized themselves as "not too sure."⁴⁶ Hence, these jurors did not give a tentative or faint affir-

⁴⁶ These figures also correspond quite closely to the results of an earlier stage of the research. See Bowers, *supra* note 38, at 1090 tbl.6 (finding that 64.6% were "absolutely convinced," 30.5% were "pretty sure," and 4.8% were "not too sure").

TABLE 2
CERTAINTY OF JURORS' DEATH AND LIFE STANDS ON PUNISHMENT AT
GUILT AND PENALTY STAGES OF THE TRIAL

Certainty of stand	Stand after guilt trial		Stand after penalty trial		Stand at penalty trial among those undecided at guilt		Stand at penalty trial among those with same stand at guilt	
	Death (n=245) (%)	Life (n=166) (%)	Death (n=358) (%)	Life (n=203) (%)	Death (n=123) (%)	Life (n=67) (%)	Death (n=205) (%)	Life (n=122) (%)
	Absolutely convinced	67.3	60.2	72.1	64.0	58.5	47.8	81.0
Pretty sure	29.4	34.3	27.7	32.0	41.5	44.8	18.5	23.8
Not too sure	2.4	4.8	0.3	3.9	0.0	7.5	0.5	0.8

mation of their positions. To the contrary, most boldly affirmed that they were convinced of what the punishment should be without reservations, even before hearing the evidence and arguments at the sentencing stage of the trial, before hearing the judge's sentencing instructions, and before hearing the opinions and arguments of their fellow jurors.

Indeed, jurors who took a stand on punishment at the guilt stage of the trial were convinced of their stands very nearly as much as those who took this stand after hearing evidence, arguments, and instructions on sentencing. The number of those jurors who were absolutely convinced of their stands on punishment increased by only five percentage points between the guilt and the penalty phases of the trial. Furthermore, the even greater certainty of jurors who already had taken the same stand on punishment at the guilt stage accounts for this slight increase in certainty after the penalty trial. Those who were undecided on punishment at guilt proved less certain about the life or death stands they took on punishment after the penalty trial than those who took such stands at the guilt stage of the trial. Only those jurors who already had taken a stand for death or for life at the guilt stage and then adhered to it at the penalty stage were more convinced of their stands after the penalty stage of the trial.

Thus, those who think they know what the punishment should be at the guilt stage of the trial are even more convinced or firm in their premature decisions than those who reach such a decision only after the penalty phase of the trial. This evidence suggests that these early punishment stands may dominate jurors' subsequent thinking about punishment and that jurors are apt to hold tenaciously to their early punishment stands thereafter. We turn next to an empirical assessment of this possibility.

C. Consistency of Jurors' Adherence to Early Stands on Punishment

Examining the most common pathways that jurors follow in reaching their final punishment decisions after taking early stands on punishment provides an illuminating way of seeing the influence of an early stand on punishment in the decision-making process. In addition to the two decision points shown in Table 2, we asked jurors about the stand they took at the jury's first and final votes on punishment. Thus, we can classify jurors according to when they took a stand: (1) after the guilt stage of the trial, but before the sentencing stage; (2) after the judge's sentencing instructions to the jury, but before the jury's deliberations on punishment; (3) at the jury's first vote on punishment; and (4) at the jury's final vote on punishment. We can designate this four-step punishment pathway by the stand that the jurors took at each of these points: whether they either took a stand for death ("D") or for life ("L") or were undecided ("U") at the first three points of the pathway and whether they took a stand for death or for life at the final decision point. For example, we might describe the decision-making patterns UUUD and UUUL as "keeping an open mind" about punishment throughout the decision process. In these pathways, jurors remain undecided about punishment from the guilt stage of the trial through the evidence, the arguments, and the instructions concerning punishment until after the jury's first vote on punishment.

In Table 3, we have tabulated the most common four-step punishment decision pathways for three categories of jurors: those jurors who took an early pro-death stand, those jurors who took an early pro-life stand, and those jurors who were undecided on punishment at the guilt stage of the trial. The table shows all pathways that at least five percent of the jurors in each of these groups followed. There are three such pathways for the early pro-death jurors, four for the early pro-life jurors, and six for those jurors who were undecided at guilt. More than four of five jurors at each starting point followed one of the designated pathways.⁴⁷

Most conspicuously, jurors who take early pro-death and early pro-life stands tend to hold their initial stands for the rest of the decision-making process. Virtually six of ten jurors who thought at the guilt stage of the trial that either death or life was the right punishment held steadfastly to that conviction for the rest of the proceed-

⁴⁷ Note that the one in five jurors at each starting point who did not follow one of the pathways designated in the table do comprise the full sample of each starting point and will therefore be relevant to some conclusion based on data in Table 3.

TABLE 3
PUNISHMENT DECISION PATHWAYS OF JURORS WITH DIFFERENT STANDS
ON PUNISHMENT AT THE GUILT STAGE OF THE TRIAL

Death stand at guilt (n = 241)		Life stand at guilt (n = 169)		Undecided at guilt (n = 440)	
Pathways	Percent	Pathways	Percent	Pathways	Percent
DDDD	59.3	LLLL	60.4	UDDD	22.3
DDDL	19.3	LULL	9.5	UUDD	18.6
DUDD	5.8	LLLD	7.7	UULL	15.5
		LDDD	5.3	ULLL	10.5
				UUUD	10.0
				UUUL	6.6

NOTE: The four step pathways are represented by four character strings of the following letters: "D" for death, "L" for life, and "U" for undecided, at the four successive points in the decision process.

ings. Of the 41.6% who strayed from the strict pro-death pathway,⁴⁸ almost half (20.0%) kept their commitment to death as punishment until the final decision point (DDDL). We know from ongoing analyses that this eleventh-hour conversion to life among these otherwise consistently pro-death jurors typically is a step that they reluctantly take to avoid a hung jury on punishment rather than a genuine last-minute conversion to the belief that the defendant actually deserves a life sentence.⁴⁹ Nearly four of five early pro-death jurors (78.6%) followed an unbroken pro-death pathway at least until the final punishment vote. A few (5.8%) became uncertain about punishment after hearing the sentencing instructions but returned to their pro-death commitment once jury deliberations commenced (DUDD).

Early pro-life jurors who departed from the strictly pro-life pathway were not as concentrated in one main alternative. The largest variant (9.5%) from this theme—LULL—was jurors who interrupted their pro-life commitment at the point of sentencing instructions, but returned to their initial positions for the two points during sentencing deliberations. The other two pathways that at least five percent of the early pro-life jurors followed—LLLD and LDDD—ended in a death vote. As in the case of the DDDL variant, the cross-over to death at the final point in the decision process—LLLD—might reflect an unwillingness to block the will of the other jurors rather than a genuine conversion regarding the appropriate punishment. The other cross

⁴⁸ Note here that the 41.6% includes all pathways starting with D that were followed by fewer than 5% of the jurors (not shown in Table 3) as well as the DUDD and DDDL pathways (included in the table).

⁴⁹ See William J. Bowers & Benjamin D. Steiner, *Choosing Life or Death: Sentencing Dynamics in Capital Cases, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 309, 336-37 (James R. Acker et al. eds., 1998); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 *IND. L.J.* 1183, 1207 (1995).

over—LDDD—appears to be a change that occurred during or after the sentencing stage of the trial and persisted thereafter.

Jurors who were undecided at the guilt stage displayed a markedly different pattern. No dominant or typical pathway characterizes their progression. In fact, no more than one in four of these jurors followed a particular pathway. These six pathways are alike in that they represent a period of indecision that precedes a permanent commitment to life or death. More of these initially undecided jurors moved to a death commitment than to a life commitment (50.9% versus 32.6%), and most of them made such a commitment before the final vote on punishment (66.9% versus 16.6%). In other words, the pathways UUUD and UUUL, which entail keeping an open mind until the final decision point, are the least common of the six pathways followed by at least five percent of the initially undecided jurors.

This tendency of jurors who take an early stand on punishment to stick with it suggests that they are largely unreceptive to both evidence and arguments presented later in the trial. In effect, many jurors seem to reach a decision about the defendant's punishment on the basis of what they learn during the guilt stage of the trial, rendering the evidence, the arguments, and the instructions of the penalty phase irrelevant. A simple question late in the interview that asked jurors to summarize how they made the life or death sentencing decision confirms the single-minded approach premature decision-making capital jurors took: their tendency to give effect to the same considerations in sentencing as in guilt. The question read, "Some jurors feel that the decisions about guilt and punishment go together once they understand what happened and why; other jurors feel these are separate decisions based on different considerations. Which comes closest to the approach you took?" The responses of early pro-death, undecided, and early pro-life jurors appear in Table 4.

TABLE 4

PERCENT SAYING ITS GUILT AND PUNISHMENT DECISIONS WERE MADE ON THE BASIS OF THE SAME OR DIFFERENT CONSIDERATIONS

Basis of guilt and punishment decisions	Death (<i>n</i> =244) (%)	Undecided (<i>n</i> =443) (%)	Life (<i>n</i> =170) (%)
Together, on the basis of similar considerations	43.9	17.6	31.8
Separately, on the basis of different considerations	48.4	73.1	58.2
Not sure, can't choose	7.8	9.3	10.0

The tendency to make both decisions at the same time and on the basis of the same considerations is distinctively characteristic of the early decision makers, especially the early pro-death jurors. Early

decision makers were twice as likely as undecided jurors to say that they made the guilt and punishment decisions on similar grounds; early pro-death jurors were somewhat more than twice as likely and early pro-life jurors were slightly less than twice as likely. By contrast, nearly three of four jurors (73.1%) who were undecided on punishment at the guilt stage said they made the guilt and punishment decision on different grounds. This statement is true of less than half of the early pro-death jurors (48.4%) and not many more than half of the early pro-life jurors (58.2%). Thus, jurors' own perceptions of how they made their punishment decisions confirm the distinctive failure of many premature punishment decision makers to give effect to different considerations in sentencing and in guilt. Beyond convincing jurors of the defendant's guilt, the presentation of guilt evidence appears to have a substantial additional effect of persuading them of what the punishment should be—more often that it should be a death rather than a life sentence.

The prevalence of premature decision making among nearly half of the capital jurors, its substantial presence in nearly all CJP states, the certainty that jurors feel about their early punishment stands, the consistency with which early pro-life or pro-death jurors stick to their stands thereafter, and their acknowledgements that they made their guilt and punishment decisions on essentially the same grounds raise this additional question: How do jurors reach these firm stands on punishment so early in the trial? In the next section, we take a closer look at jurors' early decision making, focusing specifically on when they took their punishment stands during the guilt stage of the trial and the specific reasons they gave for taking these stands.

D. Timing of Early Punishment Stands

After jurors who took a stand on punishment at the guilt stage of the trial had indicated how convinced they were of their stands, the interviewer was instructed to inquire about when the juror reached his or her opinion during this phase. The following list of points during the guilt trial served as prompts: "pretrial, jury selection, guilt evidence, arguments, instructions, or deliberations." Table 5 presents the distribution of their responses coded into seven categories; the first six identify stages in the course of the guilt trial, the seventh contains responses that could not be coded with respect to timing.⁵⁰ Jurors' responses are shown in Table 5 separately for early pro-life and early pro-death jurors.

⁵⁰ Excluded from this tabulation are some 20 pro-death and 25 pro-life jurors who did not respond to the open ended probe.

TABLE 5

WHEN JURORS FIRST THOUGHT THEY KNEW WHAT THE PUNISHMENT SHOULD BE AMONG THOSE WHO TOOK A DEATH OR LIFE STAND ON PUNISHMENT AT THE GUILT STAGE OF THE TRIAL

	Death (<i>n</i> =227) (%)	Life (<i>n</i> =146) (%)
Prior to opening statements	1.8	6.2
Guilt evidence	54.6	39.0
Closing arguments	6.6	2.1
Judge's instructions	5.3	3.4
Jury deliberations	10.1	28.1
After guilt verdict	14.5	15.1
Indeterminate	7.0	6.2

NOTE: Some 20 early pro-death and 25 early pro-life jurors who gave no response are excluded from the percentages.

Most jurors who said they were absolutely convinced or pretty sure of what the punishment should be during the guilt phase of the trial were able to be more specific about when during the guilt trial they had formed their stands on punishment. Excluding those jurors who did not respond, about half (48.5%) of all jurors who took a stand on punishment prior to the sentencing stage of the trial said the presentation of evidence was the point at which they formed their opinion on punishment.⁵¹ Yet, this relatively early point in the guilt trial was more critical for pro-death than for pro-life jurors; 54.6% of the former but only 39.0% of the latter said this was when they first thought they knew what the punishment should be.⁵² Beyond convincing jurors of the defendant's guilt, then, the presentation of guilt evidence appears to have a substantial additional effect of persuading them of what the punishment should be—more often that it should be a death than a life sentence.

Especially notable is the divergence between life and death jurors at the guilt-deliberations stage of the trial. Pro-life jurors were two to three times more likely than pro-death jurors to cite jury deliberations as the critical point in their decision making; 28.1% of the pro-life but only 10.1% of the pro-death jurors claimed that this was when they first knew what the punishment should be. Evidently, the discussion of guilt prompted a number of pro-life jurors to realize or to finalize

⁵¹ We should note that among the probes for timing, we omitted "opening arguments" as a possible point of influence; hence, some jurors who may have identified that point as critical in their decision making might have selected the "guilt evidence" category.

⁵² A further examination of the data reveals that the discrepancy at this point between pro-death and pro-life jurors is due primarily to the greater tendency of pro-death jurors who said they were "absolutely convinced" about the punishment to cite the presumption of evidence as the critical point.

their stands on the defendant's punishment. Some of these jurors may have had misgivings about the defendant's guilt during the presentation of guilt evidence, but failed to consider the implications of these misgivings for punishment until guilt deliberations. Perhaps at this point they began to negotiate a trade off between guilt and punishment. In other words, some who may be reluctant to agree to a capital verdict may agree to enter a guilty verdict in exchange for the agreement of other jurors not to impose the death penalty.

Thus, most early deciding jurors point to the presentation of guilt evidence and to jury deliberations on guilt as the points at which they made up their minds, more often for death at the presentation of guilt evidence and more often for life at jury deliberations. Fewer jurors point to other stages during the guilt trial, and there are no comparable differences between pro-death and pro-life stands on any of the other points. The narrative accounts and explanations some jurors volunteered in response to this question yield further insights about the difference in both the timing and the thinking of early pro-life and pro-death jurors.

E. Reasons for Early Punishment Stands

In response to the follow-up questions about the timing of their decisions within the guilt phase of the trial, three of ten jurors who provided information on timing also offered explanations for their early stands on punishment.⁵³ Their responses reflect reasons or influences, including particular forms or kinds of evidence, aspects or characteristics of the defendant, the conduct of the prosecution or defense attorneys, and the like. For some jurors, the influence was not temporally specific but cumulative in character, such as a situation in which the defendant's demeanor throughout the guilt trial shaped the juror's impression of his character.

In presenting these qualitative accounts in jurors' own words, we turn first to jurors who made an early decision for death and then to those who chose life. The factors underlying their respective decisions are sufficiently different to warrant a separate consideration of death and life jurors. We have identified themes that are distinctive to each type of early decision making and exemplify them below with choice responses.⁵⁴

⁵³ This 29.5% comprises some 110 of the 373 who responded to the probe about timing (69 early pro-death and 41 early pro-life jurors volunteered further comments or explanations).

⁵⁴ We identify the states from which jurors come by the standard two-letter abbreviation, and in a few instances we have altered factual information to protect the strict confidentiality of respondents.

1. *Early Pro-Death Jurors*

Many early pro-death jurors appear to have operated under a presumption that unequivocal proof of guilt justified the death penalty. A number of early pro-death jurors declared that either the law or their own personal views required them to impose death when they determined unquestionable guilt. They gave the following responses to the question concerning the timing of their decisions on punishment:

NC Juror: After the pathologist report, after I was convinced he was the one who did it.

FL Juror: When I was convinced he was guilty—when we were going through the hard evidence.

FL Juror: When I knew in my heart that he was guilty . . . as I knew he was guilty, I knew he should get death. This was after hearing the forensic evidence from prosecution.

KY Juror: We found him guilty, and I again believed in the death sentence, believe in it, so in my mind I knew what my vote would be. When he was found guilty. When everybody agreed on guilt.

CA Juror: After the jury voted guilty. The weight of the fact that all twelve individuals all believ[ed] the defendant to be guilty made me lean toward death.

FL Juror: I first thought so all of my life in a sense because it goes back to if he is guilty of premeditated murder then it follows, in my philosophy, that the death penalty is an appropriate punishment. . . . At that point I would have had to be convinced there was a reason to not apply it.

TX Juror: Uh, before we actually voted, before we went in there. I was pretty sure, I mean, I was absolutely sure, because I truly believe in what the Bible says and I think I told them this when they chose me.

For some jurors, once they were sure the defendant was guilty, the grotesque or gruesome nature of the crime convinced them that the death penalty was the correct punishment:

KY Juror: After I was convinced of his guilt because of the nature of the crime—the gruesomeness. Death penalty was appropriate in my mind. Once guilt was established that [defendant] had committed this gruesome crime. I had no problem at all determining what punishment was applicable.

CA Juror: When we found details of crime viciousness; whoever did this is deserving of death penalty.

MO Juror: Um, I'd say probably right when the prosecutor made the statement. She was stabbed twenty-two times.

SC Juror: When they started to talk about the brutality of the crime.

Jurors gave considerable attention to details of the physical evidence. Some jurors gave especially vivid accounts of the evidence and of its role in their decision making:

AL Juror: After we'd gone through all those ballistics, you know, and we'd had the bullets out of the bodies; the bullets out of the victims and what not Mm-hmm. You didn't have to This was the kind of case where you almost didn't have to argue anything because it was almost self-explanatory.

SC Juror: When they showed the photograph of that pistol, of that revolver in that tobacco barn that was in the center of my mind.

KY Juror: Now, this goes back. I mean, you want to know when I was absolutely sure? I had one little nagging question right at the end of the guilt and innocence phase. I had a question about what he did with the gun, and the prosecutor . . . um. It was in the closing arguments of the guilt/innocence phase. The closing arguments of the prosecutor.

Interviewer: Do you remember what he said?

Juror: He was talking about where [the defendant] had placed the gun in his jacket.

Interviewer: And that was what answered the question?

Juror: Yeah, I had a little nagging question about it because of something about how powder burns in a certain place. And, yeah, that nailed it down for me.

SC Juror: After we went through everything again inside, I mean, and found him, you know, guilty, we went over everything and then they brought in her clothing and all the evidence, you know, everything and you get to go over it on your own.

Many of the jurors' accounts stressed the influential role of photographs and video or audio tapes as sources of evidence that were critical in their decision making:

AL Juror: When the D.A. handed us the pictures.

CA Juror: Video tape portion of trial. [When the jury viewed a video tape of the killing that a store monitoring system had recorded.]

KY Juror: After I saw pictures and hair and semen analysis.

MO Juror: [After] looking at the pictures and seeing you know, the crime, the autopsy photos. Weighing the size of the girl as opposed to the size of the guy.

MO Juror: After I knew, when they showed us the photographs of [the victim] and how he had been murdered. I knew [the defendant] had done it by the video tape but I didn't know how severe and how gruesome it was.

FL Juror: During the evidence—when [I] saw the pictures of the victim.

In a few instances they gave vivid accounts of how photo or video evidence had affected them:

NC Juror: During the trial. I can tell you . . . when we saw pictures of this woman's body, burned Where her feet were burned off And she was burned so horribly Yet you can see the stab wounds where her body had been stabbed in Horrible, horrible pictures of this. That convinced me.

CA Juror: Just sitting there watching [a video tape of the killing from a store monitoring system]. I've seen a lot [of] stuff, but I never Even Arnold Schwarzenegger movies didn't affect me like that, you know? This wasn't make-believe, watching that video tape. The video tape was very powerful.

Interviewer: Can you describe your emotions watching the video tape?

Juror: Well, one thing is that I own a handgun, and I don't have a [inaudible] . . . to me. There's only one reason you pull out a handgun, and that's because you're gonna use it. Just the thought of him pulling out a handgun and deliberately shooting another person! Even after Vietnam and everything else. I just can't really describe it.

Interviewer: Okay, so once you saw the video tape that did it?

Juror: Yeah, that did it.

In effect, a number of jurors seemed to have a preconception that the death penalty was the appropriate punishment for murder. This predisposition became an early stand for death owing to unquestionable proof of guilt, heinous aspects of the crime, and physical evidence, especially in photographs and on audio or video tape.

In addition to the facts of the crime itself, early pro-death jurors often focused on the defendant, as an agent of the crime, to explain why they took a stand for death during the guilt stage of the trial. These accounts sometimes addressed the character or demeanor of the defendant and the likelihood of his future dangerousness if not sentenced to death.

Early pro-death jurors decried various aspects of the defendant's character, appearance, or demeanor:

KY Juror: When we walked into the jury room we could still see him. We saw him until they closed the door and then he was the first thing we saw when we come out. And I can't explain to you how he looked but I guess that's when I knew that You just know in your spirit Well, I guess that's what I'm saying. Just knew in my spirit that he was guilty and he needed to pay for it, even if he was sorry. And a lot of that probably had to do with his actions and the way he sat there. I can still see him plain as day the way he just

CA Juror: Once I was convinced that he did it, I was convinced that he was kind of cold-blooded and didn't have any feelings basically. I didn't think he was crazy or anything. I just felt he'd do anything to get what he wanted.

TX Juror: I think this feeling came about over days of watching him and knowing he could do something like that again. Knowing in my gut and with the amount of remorse he showed, which was none. I think he is without consc[ience].

A theme present in a number of early pro-death jurors' accounts is the perception of likely future dangerousness of the defendant—the likelihood that “he could do something like that again,” in the words of the juror just quoted:

TX Juror: Well capital murder is death, right—and I thought that fit, that yes. Okay you know all during the trial hearing this background on what he had done. Well while he was in jail waiting to go to trial for this he got in a fight. And I could see that to me, or it looked like somebody, he wasn't going to change. And if he was let back into society he would continue with his path of crimes.

SC Juror: When we heard all of the evidence I thought he would be dangerous if he got out and in thirty years he might still be dangerous.

CA Juror: After guilt deliberations . . . we didn't want him to get back out on the street again.

CA Juror: I feel he's like a dangerous snake. I feel that he might be a threat.

2. *Early Pro-Life Jurors*

A life sentence appears to have been the default for some early pro-life jurors. One said that she was for life unless or until something changed her mind, and another commented that taking a stand for death was harder in practice than in principle:

KY Juror: I didn't think ever that he should have been [given the death penalty], just from the evidence I heard. It wasn't a matter of changing my mind that he shouldn't, just didn't ever decide that he should.

NC Juror: [I]t's hard when you sit there and it's time for you to say should this person get life or get the death penalty. It's harder than you're thinking it's going to be when you go in there. In other words, when they're talking to you about being on the jury and asking, “Would you be able to say death penalty?” And you feel that, yes, I would, if enough evidence was there I could do it. But when that moment comes to do it, there's a little reservation in there because you start thinking, well, if you kill this person, what good is that doing? You know, that thought comes back in there.

Some jurors took an early stand for life because they believed the crime itself was not sufficiently heinous or gruesome to warrant death as punishment:

CA Juror: I could vote for the death penalty in the case of a very vicious crime. This was not, this was, [in] that sense, not a sadistic crime.

CA Juror: From the very beginning. If [this was] a gruesome crime, maybe [I] could have been swayed. Like Dahmer, Gacy, Rodriguez. This wasn't that gruesome.

Early pro-life jurors often found that some defect in the evidence against the defendant or some doubt about the role of the defendant in the crime led them to decide that death was not the appropriate punishment:

CA Juror: I didn't think about it too much during guilt, but just that I had such serious questions about the degree of murder. It was clear to me that this was not something for the death sentence.

KY Juror: I figured she was guilty, but yet, I didn't figure she done it, [not the triggerperson].

FL Juror: My feeling was that he should not receive the death sentence because he didn't commit the murder. If he had done the crime, I would have voted for death. [The juror explained elsewhere that he believed the defendant had been present at the scene but not an active participant in the crime.]

NC Juror: Upon deciding for myself that he was guilty. I find it real hard to submit someone to death if no one sees him do it. And I think that's probably our "reasonable doubt" situation that we all kept coming up with. I mean, all the evidence pointed to him, but

....

AL Juror: During the trial, forensic scientists described how the person was shot. I thought it was more he was scared, shot the guy accidentally.

When jurors came to believe that the defendant might not have been the one primarily responsible for the crime, some were ready to say life was the right punishment:

FL Juror: After the evidence, when we were deciding guilt in the jury room, because the codefendants plea bargained, there were too many people involved and it wasn't a Ted Bundy type thing.

GA Juror: [Became absolutely convinced of life on the strength of the] guilt evidence—when told that more than one person was responsible.

SC Juror: At the end of the [guilt stage testimony] yeah like I said by the time I heard all the testimony I was convinced the man was guilty and I didn't like the fact the man was testifying against the other so he could get his butt out of the sling. Like I said I'm prejudice against our judicial system because of the way we do these things. I think it's unfair to expect me as a citizen or anybody else as a citizen to sit on jury and find one person out of a group of people who commit [the crime] guilty while that other individual is allowed to go free.

Apart from the nature of the crime or the evidence of sole or primary guilt, some jurors took an early stand for life because of the defendant's background, character, or diminished responsibility for the crime:

KY Juror: I don't think a person that young, they're really not mature yet, in my opinion. So if they can be given time for someone to work with them, and maybe save a life, even though it is twenty-five years down the road, it's better to go that route than it is to say you're dead, and that's it.

KY Juror: The boy had a rough life. To me, it would not be right to kill him because of his family, his peers' actions.

SC Juror: After all the evidence of his abusive upbringing was brought out.

AL Juror: When facts were presented of his condition mentally and not being physically capable of being in society.

AL Juror: Because of his background brought out into evidence.

KY Juror: I never felt that he was in control of his facilities when he committed the crime.

Interviewer: When did you get that impression?

Juror: During the guilt phase. The testimony about the drugs. . .

KY Juror: After all the evidence, I felt like he [had] lots and lots of mental problems, that he needed the psychiatric help that he never got when he was growing up.

KY Juror: The things that influenced my own vote were they never introduced anything about prior behavior or being arrested and he's not quite bright and I don't think he planned to kill this particular lady.

These accounts suggest that jurors reach a premature decision on punishment both because of their predispositions or attitudes and because of their experiences during the guilt trial. Some early pro-death jurors found the nature of the crime and the fact of guilt sufficient. They appear to see the death penalty as the only appropriate punishment, especially when the crime was egregious. An early stand for death also seems to arise from the perception that the defendant is unrepentant and apt to repeat his crime if given the chance.

Early pro-life jurors typically raised questions about the defendant's role in, or responsibility for, the crime and found a measure of exculpation in the background or in the redemptive qualities of the defendant. For some early pro-life jurors, considerations of punishment may have become leverage in the jury's guilt decision. Negotiations about guilt and punishment may go hand-in-hand.

The next two Parts address these points. We turn first to the question of prejudgment and the qualification of jurors for service on a capital jury. In that Part, we examine the extent to which early decision making may be the product of a personal predisposition among jurors to reach a decision on punishment without waiting for or giving

effect to evidence and arguments regarding mitigation. We then turn to the guilt stage of the trial and guilt deliberations in Part III. In that Part, we highlight how what transpires at this stage of the trial fosters premature punishment decisions by, in effect, short-circuiting the decision process.

II

PREJUDGMENT AND QUALIFICATION FOR CAPITAL JURY SERVICE

Determining whether a prospective capital juror will consider aggravating and mitigating factors or otherwise follow sentencing guidelines in good faith when making the life or death punishment decision is not always easy, especially within the constraints of voir dire questioning. During jury selection, judges and attorneys necessarily rely upon a limited range of questions for this purpose. These questions typically ask whether jurors can follow the judge's instructions, and of course, the socially desirable answer jurors are naturally motivated to give is that they can—especially since they usually have had no experience of trying and failing to do so.⁵⁵ Thus, prospective jurors may neither know themselves, nor recognize that they do not know some of the answers to these questions. Furthermore, the evidence suggests that a single question or a narrow line of questioning may be a poor means of determining how prospective jurors think in ways that may impede their compliance with the constitutionally imposed standards.⁵⁶

If attorneys and judges could determine which jurors will take stands on punishment before the sentencing stage of the trial, which jurors will be absolutely convinced of their stands, and which jurors will stick tenaciously to their stands thereafter, it would be possible to purge the jury of these unqualified members. Voir dire questioning surely identifies people who could not or would not suitably serve as capital jurors and probably also dismisses some who could and would perform correctly. The critical question is: How can people who will

⁵⁵ In *Witt*, the Court itself acknowledged this point:

[D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

Wainwright v. Witt, 469 U.S. 412, 424-25 (1985).

⁵⁶ See Ronald C. Dillehay & Marla R. Sandys, *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification*, 20 LAW & HUM. BEHAV. 147, 148-52 (1996).

not serve properly as capital jurors be identified? In other words, how is it that many unqualified prospective jurors slip through the sieve?⁵⁷

As jurors' accounts indicate, there are several reasons why jurors may take an early pro-death stand.⁵⁸ Our interviews show that some jurors decided that death was the right punishment once they became convinced of the defendant's guilt. Others reached this decision when they saw evidence of a crime that they considered so heinous that death was, in their minds, the only acceptable form of punishment. Thus during the guilt stage of the trial, these jurors' values and predispositions made the death penalty appear to be the only viable option. Once they had learned the ghastly details of the crime, neither facts nor evidence of mitigation were relevant. They simply concluded that death was the only acceptable punishment for this kind of crime.

A. Acceptability of Death as Punishment

If jurors are to give effect to aggravating considerations in their decision making, they cannot regard the death penalty as an unacceptable option. Likewise, if they are to give effect to mitigating considerations, they must not regard the death penalty as the only acceptable punishment for the crime they are considering. To identify jurors' personal feelings toward the death penalty that might impair their proper functioning as members of a capital jury, we asked them about the acceptability of the death penalty for nine specific kinds of crimes. The question read, "Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following specific kinds of murder and other crimes?" The question then listed seven different forms of murder as well as two other violent offenses—attempted murder with premeditation and rape with permanent injury to the victim. Table 6 shows the jurors' responses to each of these crimes.

Astonishingly, more than half of the jurors said that they believed that death was the only acceptable punishment for three of the seven kinds of murder: repeat murder, premeditated murder, and multiple murder. Nearly half of the jurors identified death as the only acceptable punishment for the killing of either a police officer or prison guard or for a murder by a drug dealer.⁵⁹ Almost a quarter of the

⁵⁷ See *id.* at 159 (estimating that as many as 28% of persons who serve as capital jurors may not be qualified for this service under the *Witt* standard because they automatically would vote for death).

⁵⁸ See *supra* Part I.E.1.

⁵⁹ Although each of these five situations contains an element of aggravation (i.e., prior killing, premeditation, multiple victims, cop killing, and drug related killing) that various state statutes identify as a factor in deciding the appropriateness of the death pen-

TABLE 6
 PERCENT OF CAPITAL JURORS WHO FEEL THE DEATH PENALTY IS ONLY
 ACCEPTABLE, SOMETIMES ACCEPTABLE, OR UNACCEPTABLE AS
 PUNISHMENT FOR VARIOUS CRIMES

Various crimes	Only acceptable	Sometimes acceptable	Unacceptable	(No. of Jurors)
Murder by someone previously convicted of murder	70.4	27.4	2.2	(892)
A planned, premeditated murder	57.0	40.5	2.5	(888)
Murders in which more than one victim is killed	52.0	45.2	2.8	(892)
Killing of a police officer or prison guard	47.9	48.6	3.5	(888)
Murder by a drug dealer	45.5	50.8	3.7	(890)
When an outsider to the community kills an admired and respected member of the community	21.5	73.4	5.1	(883)
A killing that occurs during another crime	23.1	69.2	7.6	(891)
A rape with permanent injury to the victim	24.4	55.0	20.7	(886)
A planned murder, when the victim survives	15.7	52.5	31.9	(888)

jurors said that death was the only acceptable punishment for three of the remaining four crimes⁶⁰—including rape without murder, for which the imposition of the death penalty would be unconstitutional.⁶¹ Only for a planned murder in which the victim survives did decidedly fewer than one in four jurors (15.7%) say that death was the only acceptable punishment.⁶²

By contrast, very few jurors (between 2.2% and 7.6%) believed that death was unacceptable as punishment for any of the seven kinds of murder in Table 6. One in five jurors said that the death penalty

alty, no one or all of these aggravating factors by law make death the "only acceptable" punishment.

⁶⁰ Decidedly fewer jurors viewed the death penalty as the only acceptable punishment for felony murder than for the first five types of murder in Table 6, even though an accompanying felony is also an aggravating statutory circumstance. Relatively speaking, this suggests public misgivings about the felony rule.

⁶¹ See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (opinion of White, J.) (ruling that the death penalty is unconstitutional for the rape of an adult woman).

⁶² One might argue that these figures somewhat overstate the extent to which jurors believe that death is the only acceptable punishment. Had we also included "most acceptable" or "usually acceptable" as response options, some jurors who responded "only acceptable" might have chosen one of these options instead.

was unacceptable for rape with permanent injury and one in three said that it was unacceptable for attempted murder with premeditation. In neither situation, however, is the death penalty actually an available option. Only in the case of a planned murder in which the victim survives did more jurors say that the death penalty was unacceptable than that it was the only acceptable punishment.⁶³

It thus appears that a sizable number of persons that qualify for service as capital jurors after the attorneys and the trial judge question them nevertheless fail to appreciate or to personally accept the principle, established in *Woodson*, that the death penalty is never the "only acceptable" punishment for a capital offense. The fact that so many jurors said they feel the death penalty was the only acceptable punishment for most kinds of murder in Table 6 implies the presence of a widespread predisposition toward death as the "right" punishment for aggravated murder⁶⁴—a predisposition that could lead to a premature punishment decision.

B. Death as the Only Acceptable Punishment

To explore the likely effect of a predisposition toward death as the "only acceptable" punishment, we constructed a simple index that counts the number of the seven different forms of murder in Table 6.⁶⁵ With this index of Death as the Only Acceptable Punishment ("DOAP") we can examine the association between a predisposition for which a juror feels the death penalty is the only acceptable punishment and tendency of jurors to reach an early decision concerning punishment. We have grouped the eight possible values of this index—ranging from zero to seven—into four categories and show the percentage in each category for early pro-death, undecided, and early pro-life jurors in Table 7.

⁶³ Apparently, the outcome of the murderous act, rather than the perpetrators' intentions, preparations, and premeditation, is the critical factor in jurors' minds when applying the death penalty, as it is in the law.

⁶⁴ If the jurors on a capital case are to give effect in their decision making to aggravating considerations, they cannot regard the death penalty as an unacceptable punishment. See *Witherspoon v. Illinois*, 391 U.S. 510, 519-20 (1968). Likewise, if they are to give effect to mitigation, they cannot regard the death penalty as the only acceptable punishment for the crime they are considering. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). They must see the death penalty as sometimes acceptable for these crimes and view their task as deciding whether or not it is the appropriate punishment in the case at hand.

⁶⁵ Because we asked jurors about the acceptability of the death penalty not before but after they had served on a capital case, it could be that their responses are the product of having served rather than an indication of either their feelings or their predispositions prior to this service. We demonstrate in Appendix A that the DOAP index is properly understood as a reflection of feelings held prior to jury service, and hence a predisposition that leads to early punishment stands.

TABLE 7
INDEX OF DEATH AS THE ONLY ACCEPTABLE PUNISHMENT BY STAND ON
PUNISHMENT AT GUILT STAGE OF TRIAL

Score on DOAP index (number of "only acceptable")	Death (<i>n</i> =235) (%)	Undecided (<i>n</i> =428) (%)	Life (<i>n</i> =166) (%)
0-1	14.9	38.1	48.2
2-3	22.6	21.3	19.9
4-5	26.0	22.0	23.5
6-7	36.6	18.7	8.4

The early pro-death jurors have the highest scores on the DOAP index. They were much more likely than the others to identify death as the only acceptable punishment for six or seven of these kinds of killings, and they were much less likely to identify death as the only acceptable punishment for none or just one of these crimes. Though the early pro-life jurors tend to score lower than the others on DOAP, they are generally closer to the undecided jurors than the early pro-death jurors.⁶⁶ Thus, the predisposition to view death as the only acceptable punishment for various kinds of murder appears to encourage jurors to take a pro-death stand on the defendant's punishment before the sentencing stage of the trial, and to a lesser degree, this predisposition encourages jurors to remain undecided rather than take an early pro-life stand.

Jurors' responses to these seven questions appear to reflect a predisposition toward seeing death as the right punishment soon after learning about the nature of the crime and the evidence of the defendant's guilt. If neither the judge nor the attorneys detect this predisposition during voir dire, the jury will contain members who are especially prone to take a stand for death prior to, and irrespective of, evidence and arguments at the sentencing stage.

C. Death as a Deterrent, as Legally Required, as Morally Justified

A belief in the death penalty's retributive value, its moral justification, and its utility as a deterrent might well accompany the predisposition to view death as the only acceptable punishment for murder. These beliefs are consonant with the view that the death penalty is

⁶⁶ While there is a tendency for the small number of jurors who say the death penalty is unacceptable for these forms of murder to take an early pro-life stand on punishment, very few jurors actually say the death penalty is unacceptable for any of these kinds of murder, owing perhaps to the effectiveness of efforts to purge prospective pro-life jurors during jury selection. Thus, seeing the death penalty as unacceptable does not account for much of the tendency to take an early pro-life stand.

both an appropriate and a necessary punishment for various kinds of murder. This panoply of surrounding and supporting beliefs serve as well to promote an early decision on punishment independently of the support they provide for a predisposition toward death as punishment.

To explore this possibility, we examine jurors' expressed agreement with six statements about the death penalty that appeared in a battery of statements about crime and punishment. Jurors could agree or disagree "strongly," "moderately," or "slightly" with each statement or say they were "not sure." Table 8 shows the percentages of those jurors that strongly agreed and who agreed moderately or slightly with each statement about the death penalty. We show these percentages separately for jurors who were pro-death, pro-life, and undecided on punishment at the guilt stage of the trial.

Early pro-death and pro-life jurors greatly differ in their death penalty belief profiles. The differences extend beyond merely agreeing more or less on the same statements; these profiles differ in the particular beliefs that distinguish early pro-life and pro-death jurors from the others, especially the jurors who were undecided at guilt. In effect, the undecided jurors may be seen to represent a normative reference group and the early pro-death and pro-life jurors to constitute distinctive departures from this norm.

The jurors who took an early pro-death stand were decidedly more likely than the others to agree strongly that the death penalty should be required for a serious intentional killing and to agree strongly that the increased use of the death penalty would reduce murders. They were less likely than the others to agree at all (combining "strongly," "moderately," and "slightly") that they personally have moral doubts about death as a punishment. The early pro-death jurors depart from the undecided jurors by at least fifteen percentage points in each of these respects; by fully 22.3 points in strong agreement that the death penalty should be required for a serious intentional killing. In particular, the belief that the death penalty should be required for a serious intentional murder may reflect a personal predisposition to view death as the only acceptable punishment for various kinds of killings.⁶⁷ Again, the data confirm that an early pro-death stand tends to be accompanied by a belief that the death penalty should be mandatory, by faith in its deterrent utility, and by the absence of moral doubts about death as punishment.

Early pro-life jurors show a different pattern. Their responses differ from those of the undecided jurors by less than ten percentage

⁶⁷ In fact, the association (Gamma) between DOAP and "be required" is .629, whereas DOAP's association with the other death penalty belief variables ranges between .115 and .426.

TABLE 8
 JURORS' AGREEMENT WITH DEATH PENALTY BELIEF STATEMENTS BY
 STAND ON PUNISHMENT AT GUILT STAGE OF TRIAL

Belief statements	Death (%)	Undecided (%)	Life (%)
You wish we had a better way than the death penalty of stopping murders			
Strongly agree	51.9	60.1	60.5
Agree moderately or slightly	23.5	22.9	22.2
Do not agree	24.7	17.0	17.4
The death penalty is too arbitrary because some people are executed while others serve prison terms for the same crimes			
Strongly agree	52.5	44.7	53.6
Agree moderately or slightly	31.0	36.9	33.1
Do not agree	16.5	18.3	13.3
If the death penalty were enforced more often there would be fewer murders in this country			
Strongly agree	50.6	30.3	33.7
Agree moderately or slightly	28.8	30.5	27.7
Do not agree	20.6	39.2	38.6
Defendants who can afford good lawyers almost never get a death sentence			
Strongly agree	25.5	18.2	29.9
Agree moderately or slightly	33.3	35.7	33.5
Do not agree	41.2	46.1	36.5
The death penalty should be required when one is convicted of a serious intentional murder			
Strongly agree	59.3	37.0	32.9
Agree moderately or slightly	25.5	28.0	25.1
Do not agree	15.2	34.9	41.9
You have moral doubts about death as punishment			
Strongly agree	6.2	12.6	21.6
Agree moderately or slightly	17.3	26.0	22.8
Do not agree	76.5	61.4	55.7

NOTE: The percentages are based on numbers within the following ranges: death, 247 to 248; undecided, 438 to 440; life, 170 to 171.

points in most death penalty beliefs. They depart from the undecided by ten points only in the number who strongly agreed that defendants who can afford good lawyers almost never get the death penalty, suggesting that they suspect more than the undecided jurors that the imposition of the death penalty is economically biased. Those jurors who remained undecided on punishment at the guilt stage, in comparison to jurors who took a stand either way, appear to be slightly less suspicious of the death penalty's fairness; they are slightly less likely than the early deciders of either stripe to see the death penalty as too

arbitrary or economically biased. Notably, whatever their punishment stands at guilt, jurors agree most strongly with statements that imply ambivalence about capital punishment, that express concern that the imposition of the death penalty is too arbitrary, and that express a personal wish for a better way of stopping murderers than the death penalty.⁶⁸

D. The Effects of Death Penalty Predispositions and Beliefs

The critical next question we address is the extent to which these specific death penalty beliefs and the predisposition to see death as the only acceptable punishment for various kinds of murder contribute to the likelihood that jurors will take an early pro-death or pro-life stand.⁶⁹ Since different beliefs distinguish early pro-death and early pro-life jurors from those who were undecided at guilt, we must assess the effects of these beliefs separately for the pro-death and pro-life stands. To determine the character of these variables as predictors of early decision making, we examine their effects on the following three distinct aspects of early decision making: whether jurors took these stands at the guilt stage, whether they were certain of these stands at this stage, and whether they consistently adhered to these stands later in the trial. To evaluate the effects of these beliefs and feelings toward death independently of one another, we employ logistic multiple regression analysis.⁷⁰

More specifically, our analytic strategy incorporates the following four features: (1) We examine the influences of these factors separately on early pro-death and early pro-life decision making. Since different death penalty beliefs are associated with early pro-death and

⁶⁸ Jurors' agreement with these death penalty belief statements approximates the results of citizens surveys. See William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 81 (1994) ("These surveys have found that as few as one in four people are staunch death penalty advocates who will accept no alternative and that as many as two out of four people are reluctant supporters who *accept* the death penalty but would *prefer* an alternative.").

⁶⁹ See Appendix A for a test of the assumption that jurors' death penalty feelings as measured by the DOAP index and by the death penalty belief statements are properly interpreted as causally prior to the punishment stands they take during the guilt stage of the trial.

⁷⁰ Logistic regression is a statistical technique used to predict or account for variation in a dependent variable with one or more independent variables that is designed specifically for the case in which the dependent variable is a two category, "either/or," dichotomy (e.g., voted *either* for a life sentence *or* for the death penalty). The strength of predictors is reflected in the logistic regression coefficients (B values). The statistical significance of their effects is shown by the estimated probabilities (Sig. values) that the effects would occur by chance. As an alternative to the more common linear regression technique, logistic regression is used to avoid the problems associated with heteroscedasticity and predictions beyond the two category range of the dependent variable. See SCOTT MENARD, *APPLIED LOGISTIC REGRESSION ANALYSIS* (1995); see generally ERIC A. HANUSHEK & JOHN E. JACKSON, *STATISTICAL METHODS FOR SOCIAL SCIENTISTS* 190-93 (1977).

early pro-life stands, failing to examine them separately as predictors of each kind of stand would give a confounded picture of attitudinal effects.⁷¹ (2) We contrast both early pro-death and early pro-life jurors with those jurors who were undecided about punishment at the guilt stage of the trial.⁷² The class of jurors who wait to make this decision until the sentencing stage of the trial or later thus serves as the common normative reference category for each kind of early decision making. (3) We examine alternative aspects of early decision making that include not only the stand jurors took but also the certainty and consistency of their stands. Specifically we examine the following dichotomous dependent variables: whether the juror took a death (or life) stand at the guilt stage of the trial ("stand"), whether the juror was absolutely convinced of his or her death (or life) stand at the guilt stage ("certainty"), and whether the juror remained consistently convinced of his or her initial death (or life) stand from the guilt stage through the jury's first vote on punishment ("consistency").⁷³ (4) We present belief statements logistic regression estimates separately for the DOAP predisposition variable alone, for the six death penalty belief statements and then for the DOAP predisposition index and the belief statements together. This methodology enables us to assess both the redundancy and the independence of these variables as predictors of each kind of early decision making. The logistic regression estimates appear in Table 9.

1. *The Early Pro-Death Decision*

By itself, DOAP, the measure of a predisposition toward death as the only acceptable punishment is a highly significant predictor of an

⁷¹ This issue is commonly discussed in the literature on regression analysis as "specification error" or "model misspecification." Misspecification may result in biased logistic regression estimates, coefficients which are systematically overestimated or underestimated. See MENARD, *supra* note 70, at 58.

⁷² This yields a stringent or conservative test of predictive effects. It partitions the predictive power of variables that inversely effect early pro-death and early pro-life stands into two components. It also reduces the effective sample size for evaluating the statistical significance of predicted effects because the modeling of the early pro-death decision eliminates jurors who took an early pro-life stand, and vice versa for the early pro-life decision.

⁷³ These variables are defined operationally as follows: "stand": death (or life) = 1, undecided = 0, else missing; "certainty": absolutely convinced of death (or life) = 1, undecided = 0, else missing; "consistency": death (or life) at guilt, death (or life) after sentencing instructions, and death (or life) at first vote on punishment = 1, undecided at guilt = 0, else missing.

We also examined a combined measure of certainty and consistency that identified as the test group those jurors who were absolutely convinced of their stand on punishment after the guilt but before the penalty stage of the trial who were absolutely convinced after the penalty trial but before punishment deliberations, and who were consistent between their first vote on punishment and their initial stand on punishment. The results of this analysis (not presented here) were essentially consistent with those for the other measures in Table 9.

early pro-death decision. Its effect is evident across the board, not only on taking such a stand at guilt but also on the certainty and consistency with which jurors hold such stands. As a predictor of each aspect of taking an early pro-death stand, it is statistically significant beyond the .001 probability level, indicating that the likelihood is less than 1 in 1,000 of this relationship occurring by chance.

Of the six death penalty beliefs considered together, three are significant independent predictors⁷⁴ of taking an early pro-death stand on punishment, of feeling certain about this stand, and of consistently holding to this stand thereafter. The three predictors, in order of the strength of their effects (*B* values), are the following: the belief that the death penalty should be required for serious intentional murder ("Be required"), the belief in the death penalty's deterrent effect for murder ("Deterrent"), and the absence of moral doubts about death as punishment ("Moral doubts").⁷⁵ In other words, the same three factors in the same order predict that a juror will take an early pro-death stand, become absolutely convinced of that stand, and hold that stand consistently through the jury's first penalty vote. These same three beliefs in the same order best distinguish early pro-death and undecided jurors shown in Table 8, even before controlling for the independence of their effects by means of logistic regression. Evidently, they are significant independent predictors of taking an early, certain, and consistent pro-death stand.

When we include both the DOAP index and the death penalty belief variables in the logistic regression analysis, the most evident change is the reduction in the estimated effects of "only acceptable" and "be required." The estimated effects of both variables are noticeably reduced on the several measures of early pro-death stand; in fact, "be required" actually fails to reach the .05 significance level (at $p = .062$) on the certainty measure. Quite obviously, the DOAP index, which taps jurors' views of death as the only acceptable punishment for various kinds of murder, and "be required," which taps the belief that the death penalty should be required for a serious intentional murder, share some of the same predictive power. The former reflects a personal prejudgment about the "one and only right punishment," a single-minded view that rules out alternatives. The latter pertains to the official or legal embodiment of such a personal predis-

⁷⁴ We scored the belief statements on a five point metric: strongly agree = 1; moderately or slightly agree = 2; not sure = 3; slightly or moderately disagree = 4; strongly disagree = 5. Since these belief variables are scaled on the same metric, their *B* values are directly comparable. The measure of death penalty predisposition, DOAP, is grouped into the four categories shown in Table 7 and its *B* value is not, therefore, directly comparable with those of the belief variables.

⁷⁵ All estimated effects are statistically significant beyond the conventional two-tailed .05 probability level; the least significant is $p = .015$.

TABLE 9
 LOGISTIC REGRESSION ESTIMATES OF THE EFFECTS OF DEATH PENALTY
 FEELINGS AND BELIEFS ON THREE MEASURES OF EARLY PRO-DEATH AND
 EARLY PRO-LIFE DECISION MAKING

	Took stand at guilt		Certain stand at guilt		Consistent stand after guilt	
	B	Sig	B	Sig	B	Sig
EARLY PRO-DEATH DECISIONMAKING						
DOAP Index						
Only acceptable	-.486	.0000	-.577	.0000	-.484	.0000
Constant	1.83	.0000	2.49	.0000	2.07	.0000
R_L^2	.052		.070		.051	
Belief variables						
Need better way	-.042	.519	-.052	.475	-.093	.181
Too arbitrary	.030	.704	.083	.377	.032	.707
Deterrent	.218	.001	.288	.000	.198	.008
Economic bias	.043	.498	.108	.151	.075	.288
Be required	.327	.000	.325	.000	.333	.000
Moral doubts	-.171	.007	-.270	.000	-.172	.015
Constant	-.009	.979	.430	.325	.305	.449
R_L^2	.077		.110		.081	
Both DOAP and beliefs						
Only acceptable	-.261	.003	-.322	.002	-.256	.009
Need better way	-.008	.898	-.011	.877	-.058	.420
Too arbitrary	-.028	.730	.027	.775	-.028	.755
Deterrent	.218	.002	.273	.001	.198	.010
Economic bias	.055	.400	.118	.128	.087	.226
Be required	.220	.009	.192	.062	.220	.017
Moral doubts	-.168	.010	-.267	.000	-.174	.016
Constant	.882	.080	1.56	.009	1.198	.030
R_L^2	.092		.128		.094	
EARLY PRO-LIFE DECISIONMAKING						
DOAP index						
Only acceptable	.241	.004	.201	.054	.384	.000
Constant	.448	.020	1.076	.000	.580	.009
R_L^2	.011		.007		.026	
Belief variables						
Need better way	-.047	.562	-.018	.849	.001	.988
Too arbitrary	.130	.175	.104	.366	.137	.227
Deterrent	.046	.513	.071	.413	.008	.915
Economic bias	.201	.007	.220	.017	.269	.002
Be required	-.141	.049	-.172	.049	-.166	.046
Moral doubts	.055	.405	-.055	.505	.042	.588
Constant	.343	.377	1.221	.011	.689	.128
R_L^2	.022		.019		.031	
Both DOAP and beliefs						
Only acceptable	.300	.004	.287	.025	.463	.000
Need better way	-.067	.416	-.041	.679	-.036	.725
Too arbitrary	.155	.111	.130	.268	.175	.133
Deterrent	.080	.268	.105	.241	.050	.556
Economic bias	.218	.003	.235	.011	.291	.001
Be required	-.042	.597	-.074	.445	-.011	.899
Moral doubts	.029	.670	-.077	.360	.014	.851
Constant	-.603	.229	.294	.634	-.723	.221
R_L^2	.034		.031		.056	

position, at least with respect to an intentional murder. The fact that both remain essentially independent, albeit reduced, predictors of reaching an early pro-death decision, of the certainty of this decision, and of the tenacious consistency in holding it testifies to the complementary roles both of personal feelings and of social justification in reaching an early death decision—even though such factors run contrary to the constitutional prohibition against the death penalty as the “only acceptable” or as a “required” punishment for any crime.⁷⁶

2. *The Early Pro-Life Decision*

The predictors of an early pro-life decision are fewer and weaker than those of an early pro-death decision. Alone DOAP shows a negative effect on taking an early pro-life stand. Apparently, the less likely jurors are to see the death penalty as the only acceptable punishment, the more likely they are to take a pro-life stand. An examination of the six death penalty beliefs as a group without DOAP shows that “economic bias” is the strongest predictor in terms of *B* values and significance levels, followed by “be required.” Both are significant predictors of all three aspects of taking a pro-life stand at guilt, though “be required” is barely below the .05 significance level (.049, .049, and .046).

When we include both the DOAP index and the six death penalty belief variables in the regression, the presence, certainty, and consistency of an early pro-life stand are all predicted significantly by only two variables: DOAP and “economic bias.” However, “be required” loses virtually all independent predictive power. On the one hand, the data suggest that feeling that death is the only acceptable punishment for various kinds of aggravated murder tends to keep jurors undecided on punishment who might in the absence of such a predisposition become committed to a pro life stand at guilt. And on the other hand, the data suggest that viewing the imposition of the death penalty as biased by social class or by economic status hence imposed disproportionately against poor or disadvantaged defendants, may encourage jurors to take an early pro-life stand.

These data thus confirm that jurors’ death penalty feelings and beliefs effectively predict the likelihood of an early pro-death commitment. This effect is decidedly stronger than the one that exists for an early pro-life commitment. The R_i^2 for predicting early death stands is typically twice those for the early life stands.⁷⁷ Though the DOAP index is a significant positive predictor of early pro-death and a negative

⁷⁶ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

⁷⁷ The R_i^2 statistic in Table 9 is an analog to the R^2 in linear regression and is roughly the proportion of the variance in the dependent variable attributable to the independent

predictor of early pro-life, it is a stronger predictor of pro-death than pro-life stands. More death penalty belief variables affect pro-death than pro-life stands. Jurors who believe the death penalty should be legally required for intentional murder, is useful as a deterrent, and is morally unobjectionable tend to take early pro-death stands, but only those jurors who see the death penalty as economically biased tend to take early pro-life stands. These specific death penalty beliefs predict one or the other but not both early pro-death and early pro-life stands; in effect, they are early pro-death or early pro-life specific predictors.⁷⁸ And finally, the four significant predictors of an early pro-death stand are properly interpreted as causally prior predispositions that jurors bring with them to the capital trial; whereas, the two significant predictors of an early pro-life stand on punishment fail the test of causal priority as indicated in Appendix A.

III

THE GUILT DECISION: RELUCTANCE AND THE CONFOUNDING OF GUILT AND PUNISHMENT

A number of jurors referred to their experiences during the guilt stage of the trial when explaining why they took a stand on punishment before the sentencing stage of the trial. Early pro-life jurors were especially likely to say that the jury's deliberations on guilt had shaped their position on the defendant's punishment; pro-death jurors were more apt to point to the presentation of evidence during the guilt trial. We now examine in more detail how the guilt stage of the trial influences the early decision making of capital jurors. We first look at the jurors' own guilt decision-making and then turn to the broader contexts of the guilt trial and guilt deliberations.

or predictor variable(s) included in the regression. See DAVID W. HOSMER, JR. & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* 148 (1989).

Data on guilt-trial and crime characteristics indicate that the greater readiness of pro-death jurors to reach the guilt decision without waiting for jury deliberations is not due to a difference in the nature of the guilt trials or crimes to which they were exposed. See Appendix B.

⁷⁸ Other questions about crime and the administration of justice reflect broader values within which death penalty beliefs and predispositions appear to develop. Those values included statements about concern for civil liberties, for defendant's rights, for crime victims, and for due process; about a mistrust of prosecutors or defense attorneys; and about the desire for harsh or punitive sanctions. In effect, clusters of these statements might represent value orientations that have a bearing on early decision making either directly or by sustaining more death-penalty-specific beliefs that do have such effects. We must, however, defer the exploration of this broader context of values and attitudes that sustain and support jurors' death-penalty-specific beliefs and feelings because it would take us beyond the scope of this symposium contribution.

A. The Guilt Decision

To learn about jurors' guilt decision making, we asked them when, during the guilt trial and deliberations, they decided on the defendant's guilt. We first asked them where they stood on the defendant's guilt after the judge's instructions regarding guilt, but before the jury began its deliberations. We then asked them what position they took at the jury's first vote on guilt. Finally, we asked them whether some jurors were at all reluctant to join the majority on the defendant's guilt and whether they were among these reluctant jurors. The responses to these questions are shown in Table 10 separately for those who were pro-death, pro-life, and undecided at the guilt stage of the trial.

TABLE 10
JURORS' STANDS ON GUILT AT SEVERAL POINTS DURING THE GUILT TRIAL BY THEIR EARLY STANDS ON PUNISHMENT

	Stand on punishment prior to penalty trial (%)		
	Death (n=243)	Undecided (n=431)	Life (n=167)
After you heard the judge's instructions to the jury for deciding guilt, but before you began deliberating with the other jurors, did you then think the defendant was . . .			
Guilty of capital murder	88.1	60.3	44.9
Guilty, but not of capital murder	3.3	10.2	28.7
Not guilty	.4	.5	3.0
Undecided	8.2	28.9	23.4
When the first jury vote was taken [during guilt deliberations] how did you vote?	Death (n=242)	Undecided (n=434)	Life (n=165)
Guilty of capital murder	94.6	84.6	61.8
Guilty of a lesser crime	1.7	6.0	16.4
Not guilty	.8	2.3	9.7
Undecided	2.5	7.1	12.1
Were any jurors reluctant to go along with the majority on the defendant's guilt? If so, were you at all reluctant?	Death. (n=246)	Undecided (n=442)	Life (n=166)
No, none were reluctant	57.3	58.1	38.6
Yes, some were reluctant, but I was not	35.8	29.0	35.5
Yes, I was reluctant	6.9	12.9	25.9

A sharp contrast appears between early pro-death and early pro-life jurors with regard to deciding the defendant's guilt. The early pro-death jurors were quick to decide that the defendant was guilty of capital murder and were relatively sure of themselves. Virtually nine of ten (88.1%) early pro-death jurors said that they thought the defen-

dant was guilty before they started deliberations.⁷⁹ In marked contrast, fewer than half (44.9%) of the early pro-life jurors had decided, before deliberating on guilt with their fellow jurors, that the defendant was guilty of capital murder.⁸⁰ In comparison to the other jurors, early pro-life jurors were more likely to believe that although the defendant was guilty of murder, he was not guilty of capital murder, the chief implication of which is that the defendant would not be eligible for the death penalty. Very few jurors (1% of the total sample) believed that the defendant was actually not guilty of murder.

By the jury's first vote on guilt, most of the jurors, who were not convinced that the defendant was guilty of capital murder prior to deliberations came around to this view; early pro-life jurors were the exception. At the first ballot on guilt, the 11.9% among early pro-death jurors initially unwilling to say "guilty of capital murder" dropped to 5.4%, and the 39.7% among those undecided on punishment fell to 15.4%. Among early pro-life jurors, however, the deliberations before the first jury vote reduced the percent who did not believe the defendant was guilty of capital murder by less than a third, from 55.1% to 38.2%. In other words, at the first vote on guilt almost four of ten early pro-life jurors still were not convinced beyond a reasonable doubt that the defendant was guilty of capital murder. Again, most of the early pro-life jurors who had not yet joined the majority held the view that the defendant was guilty but not of capital murder.⁸¹

Finally, the early pro-life jurors were twice as likely as the undecided jurors (25.9% versus 12.9%) and nearly four times as likely as

⁷⁹ Early pro-death jurors were also much more likely to be "absolutely convinced" of their pre-deliberation guilty judgments than jurors who were undecided on punishment or who took an early pro-life stand at guilt. This distinction appears in their responses to the follow-up question: "If [before guilt deliberations you believed the defendant was] guilty of capital or noncapital murder, how strongly did you think so?"

STAND ON PUNISHMENT AT GUILT

Certainty of guilt	Death (n=219) (%)	Undecided (n=259) (%)	Life (n=77) (%)
Absolutely convinced	87.2	68.0	61.0
Pretty sure	11.9	30.1	35.1
Not too sure	0.5	1.2	3.9
Answered not guilty	0.5	0.8	0.0

⁸⁰ Data on guilt-trial and crime characteristics in Appendix B indicate that the difference between early pro-death and early pro-life jurors in readiness to reach the guilt decision without waiting for jury deliberations is not due to a difference in the nature of the guilt trials or crimes to which they were exposed.

⁸¹ The increase in the percentage of early pro-life jurors who said the defendant was "not guilty" by the first jury vote on guilt may simply reflect the likelihood that the first ballot vote of some juries was limited to the choice between guilty or not guilty of capital murder.

the early pro-death jurors (25.9% versus 6.9%) to say that they personally were reluctant to go along with the final verdict that the defendant was guilty of capital murder. Evidently, reservations about the capital murder verdict, especially the view that the defendant may have been guilty of murder but not of capital murder, were an important contributing factor in taking an early pro-life stand on the defendant's punishment.

B. The Nature of Guilt Deliberations

The hesitation and reluctance of some jurors in reaching a guilt verdict on capital murder raise questions about the nature of deliberations on guilt, especially among early pro-life jurors. We know from jurors' accounts of both the timing and the reasons for their early stands on punishment that early pro-life jurors were especially likely to cite jury deliberations as the time at which they reached their decision regarding punishment and to give explanations that pertained to the nature of jury deliberations.⁸² We therefore might expect to learn more about the sources of their early pro-life decision making through a closer examination of guilt deliberations. In a section of the interview devoted to guilt deliberations, the interviewer asked five questions about what jurors did and did not do to reach their verdicts on the defendant's guilt.⁸³ We show the jurors' responses to these five questions in Table 11.

Most jurors said that during guilt deliberations they discussed the meaning of the term "proof beyond a reasonable doubt" and interrupted their deliberations at least once to ask the judge a question. The jurors' reports suggest little difference on these matters among jurors who took different stands on punishment at the guilt stage. Whatever their punishment stands, between six and seven of every ten jurors (59.7% to 72.1%) reported each of these activities.⁸⁴

⁸² See *supra* Part I.D-E.

⁸³ Another question on guilt deliberations listed some 21 topics that might have been discussed and asked jurors how much the discussion during guilt deliberations focused on each of them. The topics included matters that were essential and possibly relevant for the determination of guilt as well as issues of relevance for determining the defendant's punishment, but that were apt to confound guilt considerations. The question asked the jurors to indicate whether each factor was discussed a great deal, a fair amount, not much, or not at all during jury deliberations on guilt. Because of space limitations, we simply summarize jurors' responses concerning these 21 topics on which discussion might have focused, as they pertain to the results presented in connection with Table 12.

⁸⁴ With regard to the substance of guilt deliberations, one battery of questions delved deeper into the matters of discussion. Jurors indicated that, appropriately, they had devoted most of their attention during guilt deliberations to topics traditionally of concern in determining the defendant's guilt. Among the ten most commonly discussed issues are: the defendant's role or responsibility in the crime, the strengths or weaknesses of the evidence of guilt, the meaning of "proof beyond a reasonable doubt," the judge's instructions to the jury, the defendant's motives or reasons for the crime, and the believability of cer-

Almost half of all jurors reported discussing whether the defendant was guilty of murder but not of capital murder, but here, early pro-life jurors were more likely than the undecided and early pro-death jurors less likely than the undecided to say this matter was discussed. The greater tendency of early pro-life jurors to acknowledge discussion of whether the defendant was guilty of noncapital murder may be because this very concern appears to have kept early pro-life jurors from joining a capital murder guilty verdict prior to guilt deliberations and from voting to convict of capital murder on the first ballot during deliberations (as Table 9 suggests). They certainly would have noticed and quite possibly even would have initiated any discussion of this issue. On the other hand, the early pro-death jurors certainly would have had no interest in raising this matter. They might have viewed such discussion as irrelevant or frivolous. For this reason, early pro-life jurors may have been more likely and early pro-death jurors may have been less likely to think of or to remember a discussion of this matter.

The most surprising and disturbing finding is the extent to which jurors discussed the legally irrelevant and likely confounding matter of the defendant's punishment during their determination of guilt. Three to four of every ten jurors (33.6% to 45.7%) indicated that what the defendant's punishment could be, would be, or should be was discussed during guilt deliberations. This discussion explicitly includes talk of whether the defendant should or would get the death penalty and of what the punishment would be if the jury convicted the defendant of less than capital murder.⁸⁵ Furthermore, the jurors who made premature punishment decisions—both early pro-death and early pro-life jurors—were more apt to say that the issue of the defendant's punishment came up during guilt deliberations.

tain witnesses. Moreover, jurors substantially agree, whatever their early stand on punishment, on the extent to which each of these six topics received a great deal of discussion during jury deliberations. The largest difference between undecided and either early pro-death or early pro-life jurors was 5.9%. At least a third of the respondents reported that each of the ten most commonly discussed topics were discussed a "great deal."

⁸⁵ The discussion of punishment during guilt deliberations is even more extensive than either of these questions alone reveals. Some 50.4% of the jurors said punishment was discussed on one or the other of these two questions. Furthermore, "jurors' feelings about the right punishment" was one of the 21 topics of discussion that another question about guilt deliberations addressed. See *supra* notes 83-84. Roughly half of the jurors said it was discussed a "great deal" during guilt deliberations: 53.6% of the early pro-death jurors, 54.3% of the early pro-life jurors, and 45.9% of those undecided on punishment at guilt. When we consider jurors who said at least a "fair amount," (combining "great deal" and "fair amount"), almost two-thirds acknowledged that the right punishment was discussed, and the difference between those decided and undecided at guilt was even greater: 69.3% among pro-death jurors, 75.7% among pro-life jurors, and 58.9% among the undecided.

TABLE 11
ASPECTS OF GUILT DELIBERATIONS BY JURORS' STANDS ON PUNISHMENT
AT THE GUILT STAGE OF THE TRIAL

	Stand on punishment at guilt stage of trial (%)		
	Death (n=228)	Undecided (n=394)	Life (n=151)
Was there any discussion among the jurors about the meaning of "proof beyond a reasonable doubt"?			
Yes	66.2	72.1	70.9
No	33.8	27.9	29.1
During your guilt deliberations, did the jury stop to ask the judge any questions? .			
Yes	63.9	66.7	59.7
No	36.1	33.3	40.3
Was there any discussion of whether [the defendant] was guilty of murder, but not of capital murder?			
Yes	36.1	46.9	53.3
No	63.9	52.8	46.1
In deciding guilt, did jurors talk about whether or not [defendant's name] would, or should, get the death penalty?			
Yes	44.2	33.6	45.7
No	55.8	66.4	53.7
In deciding guilt, was there any discussion of what the punishment might be if the defendant was found guilty of less than capital murder?			
Yes	34.5	30.4	38.6
No	65.5	69.6	61.4

Early pro-life jurors proved the most likely to indicate that the jury discussed punishment during guilt deliberations. Since the nature of the punishment is implicit in the belief that the defendant, even if guilty, may not be guilty of capital murder, it would be reasonable for early pro-life jurors who are concerned with the level of guilt likewise to be concerned with the kind of punishment. They might agree to go along with a capital murder verdict but refuse to vote for the death penalty—a trade off between the level of guilt and the kind of punishment.

Early pro-death jurors are also more likely than the undecided to say that punishment was discussed during guilt deliberations in response to both questions on this matter. For them, the discussion of punishment may mean death penalty advocacy⁸⁶ because nine of ten

⁸⁶ With respect to noncapital murder, a few more early pro-death jurors said there had been discussion of punishment (Question 5) than of guilt (Question 3). Apparently,

of the early pro-death jurors already had decided guilt before the jury's guilt deliberations—many said their recognition of what the punishment should be came during the presentation of evidence at the guilt trial, many came to the case with the notion that death is the only acceptable punishment for various kinds of murder, and many felt that death should be required for serious intentional murder. Perhaps for these jurors the only remaining task at guilt deliberations was to persuade other jurors to impose the punishment of death.⁸⁷

C. The Discussion of Punishment During Guilt Deliberations

What do jurors say and do when they discuss the defendant's punishment during guilt deliberations? Do they use guilt deliberations to lobby for the punishment that they have come to believe is correct? Do their stands on punishment affect their guilt decision making? The jurors themselves provide the answers to these critical questions. Following the question, "In deciding guilt, did jurors talk about whether or not [the defendant] would, or should, get the death penalty," the interviewer then asked the jurors who answered "yes," the further question: "What did they say?" The responses to this follow-up probe convey the essence of their discussions about punishment during guilt deliberations.

Jurors' accounts of punishment discussions during guilt deliberations reflect three basic themes: (1) the temptations and pressures to talk about the defendant's punishment during guilt deliberations, (2) the dynamics of pro-death influences and advocacy in these discussions, and (3) the character of pro-life influences and arguments. Drawn from jurors' responses to the follow-up question concerning the discussion of punishment during guilt deliberations,⁸⁸ the ex-

discussion of this issue was relevant to early pro-death jurors chiefly in the context of punishment, perhaps because a noncapital conviction would forfeit the punishment that they deemed appropriate.

⁸⁷ In this connection, prominent among the 21 topics that were discussed during guilt deliberations, *see supra* note 83, are punishment-related concerns that reflect two of the most general and commonly used aggravating factors in the determination of punishment—the heinous nature of the crime and the future dangerousness of the defendant. Specifically, the topics of discussion were described as the "brutal or vile manner of the killing" (Topic 3), the "pain and suffering of the victim" (Topic 9), and the "defendant's dangerousness, if ever back in society" (Topic 10).

Though jurors responded uniformly with respect to guilt related issues, their responses concerning the discussion of punishment varied. The early pro-death jurors reported more often than did the undecided jurors that discussion of these aggravating factors did occur during guilt deliberations. Conversely, the early pro-life jurors reported discussion of these factors less often than did the undecided jurors. These differences underscore the early pro-death jurors' likely use of guilt deliberations to advocate the death penalty.

⁸⁸ We confirmed that jurors were not confusing guilt and penalty deliberations by reviewing their responses, and those of other jurors from the same case, to the various questions about guilt and penalty deliberations.

cerpts that follow illustrate these three themes. We selected some sixty excerpts from the 329 responses that indicated that there was discussion of punishment during guilt deliberations.⁸⁹

1. *Temptations and Pressures to Talk about Punishment at Guilt Deliberations*

A number of jurors reported that the issue of punishment came up during guilt deliberations, but said they resisted the temptation to talk about it, recognizing that punishment was an inappropriate consideration at that point in the proceedings:

CA Juror: Again, whenever something like that would come up, when someone would say something to that, there was always somebody and usually our jury foreman, who reminded us again of the judge's instructions. So, the discussion was kept pretty much on track.

FL Juror: It was a concern of the jury that if we find him guilty, will we have to give him the death penalty or something to that effect. [The foreman] stopped the discussion, saying it wasn't a consideration at this point.

NC Juror: Maybe a couple of jurors mentioned it because we went around the room and we let everyone air their opinions. I think everybody needed to talk. I remember two gentlemen who said things and I stopped them and said we haven't gotten that far yet. I can understand your feelings but we need to get past that.

But not all jurors resisted the temptation to discuss the defendant's punishment during guilt deliberations:

CA Juror: We were split. You cannot sit there and not discuss it.

NC Juror: Some did. We weren't supposed to, but some did.

VA Juror: We weren't supposed to but we did. I remember a discussion going around, if he is found guilty, will we sentence him to death or not.

When the matter of punishment did arise during guilt deliberations, some jurors tried to resist the temptation to take punishment into account, although their comments suggest that guilt and punishment remained linked in their minds:

FL Juror: That was one of the things we had to keep separating because there was a tendency to want to do both at the same time. Yes, we think he's guilty but if we do then that means he gets the death penalty and do we want that? Yes, there was a problem of

⁸⁹ We identify the states from which jurors come by the standard two-letter abbreviation, and in a few instances we have altered factual information to protect the strict confidentiality of respondents. In our choice of excerpts, we have sought to reflect common observations and themes with relatively brief passages from jurors in different states. We checked the transcriptions of all excerpts for accuracy by listening to the tape recorded interviews for a second time.

keeping the two halves of the trial separated. . . . There was a lot of mixed feelings coming in there, issues like feeling sorry for the man, the fear of what if he doesn't go to prison and comes out to do the same thing. So there were a lot of things entering or trying to enter into the guilty decision which had nothing to do with his guilt. SC Juror: I remember one [juror], it just came up, we made him stop talking because we weren't even supposed to talk about it. [He] said if we find him guilty then you know what our punishment will have to be We often thought about that.

FL Juror: It came up and I had to try to prevent this from being brought up—I was the foreman. Some felt that he was black and should fry.

2. *Pro-Death Influences and Advocacy During Guilt Deliberations*

During guilt deliberations, some jurors thought that a capital murder verdict meant the death penalty—sometimes because they thought the law mandated it and sometimes because they saw it as either the right or the only acceptable punishment:

AL Juror: They knew if they voted capital, then he would be put to death.

CA Juror: If we found him guilty, guilty with special circumstances, then it was an automatic death penalty.

FL Juror: [A] majority of us felt he deserved death penalty because he was guilty from the evidence.

SC Juror: Some jurors said right off he should get [the] death penalty.

Less circumspect jurors openly and forcefully advocated death as punishment during guilt deliberations:

CA Juror: Even though they weren't supposed to, there was some angry people in there, there was some people screaming, "Hang him!" "We'll shoot the bastard!" You know?

SC Juror: They wanted to go and hang him immediately, most of them.

TX Juror: The son of a bitch ought to be hung.

FL Juror: At first they all wanted death, they wanted to fry those black boys⁹⁰ They felt like these two black boys took a white man's life, we're going to burn them; that's the impression I got from a lot of the jurors I really believed they wanted to burn both of those guys because they were black and because the white defendant had a plea bargain and we didn't even hear his testimony.

Jurors' discussions during guilt deliberations of the prosecution's *voir dire* questioning, of the trial judge's charging instructions, and of

⁹⁰ Although the same imagery of "frying a black defendant" appears here and in an earlier excerpt from a Florida case, *see* Part III.C.2, the two jurors are from different cases.

statutory “special circumstances” apparently reinforced the mistaken impression that death was the legally appropriate or legally prescribed punishment:

FL Juror: I believe everyone had a good idea that if he was found guilty of first-degree murder then it looked like the death penalty. I think everyone had that in mind because they were very persistent in picking the jury about the death penalty, especially the prosecution.

NC Juror: It was agreed that it would be the death penalty because of the way we were being charged—[regarding] torture or financial gain.

CA Juror: Well, just going through the guilty part, it was all in the back of our minds that if we made a decision on his guilt on the facts given to us, that it almost automatically made it mandatory that it would be a death penalty, because he was being tried for special circumstances, and he was being found guilty on special circumstances, so we know that with special circumstances came the death penalty.

During guilt deliberations, some jurors also associated specific aggravating characteristics of the crime, especially the killing of a police officer or of more than one victim, with the presumption that death was the appropriate punishment:

VA Juror: Some people right away said that because he'd killed a policeman, some people thought that immediately meant he should get the death penalty.

CA Juror: We felt that the crime did merit the death penalty and we discussed [it] a great deal . . . well, simply, that he had killed these two people.

TX Juror: [I] [d]o not see any way he should not be executed for taking two lives.

Jurors also believed during guilt deliberations that the presence of factors, such as malice, premeditation, and brutality justified the application of the death penalty. This reasoning shifted the focus from the nature of the crime to both the motives and the actions of the defendant:

FL Juror: We decided that if it was premeditated, he deserved to die.

AL Juror: Well, deliberately killing him like he did, beating him and then walking him back, that's why most of them wanted the death penalty; got him up and walked him, after he beat him with a tire tool.

FL Juror: [The] majority felt [he] should get [the death penalty]. It was cold and calculating. He took another life without even thinking about it. We didn't feel he deserved another chance because the girl didn't get a chance.

Jurors also advocated the death penalty during guilt deliberations for purposes of incapacitation. Just as some wanted death for retributive reasons, others claimed that it was necessary to keep the defendant from repeating his crime:⁹¹

VA Juror: [T]here were several, two or three people, that were leaning towards the death penalty because of his violent nature. They wanted to be positive [he'd] never [get] out of prison. It was even mentioned that maybe he would come after one of [the jurors]. If he got drunk again and remembered so-and-so who stuck out on the jury, he would come after them.

CA Juror: Well, he might get out. What if he gets out? He'll do it again. What would he do to the other prisoners? He may injure them in some way if he's kept in prison for life.

KY Juror: Well, some believed that he shouldn't be able to get back out. They wanted him to be put away forever. They didn't want him to have a chance to get back out.

NC Juror: They felt that he should get [death] because people get out too soon and he would be out on the street in such a short period of years. And one juror, [in] particular, had a little girl about three years old. She said, "My daughter would be out then; he would come along and kill her." And so it was a feeling that he should not enter society again.

Some pro-death jurors took advantage of the guilt deliberations to neutralize the misgivings of others about imposing the death penalty. They argue that jurors are not personally responsible for the defendant's death, that the judge is the one who imposes the death penalty, and that the defendant is not apt to be executed:

TX Juror: A few of them didn't know if they could sentence a person to death and that's when we were using persuasive tactics by saying, you are not sentencing him to death . . . , the judge is the one who will pronounce the sentence. They—this is not very nice—but they just weren't too bright. They didn't understand. You could tell them, no, you don't sentence them; the judge does and that made it okay.

KY Juror: This one lady, not wanting to give him the death penalty, that was the main thing, and that was a religious belief with her. She said she just didn't think it was right if he killed someone to kill him. . . . We talked more on what I said before, he's not going to die anyway, they're not going to put him in the chair, he's going to have appeals and appeals and more appeals, and probably die of old age. But he will be controlled more on death row.

GA Juror: [S]ome people do not really, truly, they could not see this as [not] killing somebody. Basically, that's what they're saying: If I

⁹¹ For an extensive examination of the role of incapacitation in capital sentencing, see William J. Bowers & Benjamin D. Steiner, *An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. (forthcoming Feb. 1999).

vote for the death penalty, I'm killing that person. Rather than just being a juror, they were looking at it personally.

3. *Pro-Life Influences and Arguments During Guilt Deliberations*

FL Juror: There were two who disagreed with death and didn't feel it was applicable under any circumstance.

NC Juror: One juror said she would not vote for death.

AL Juror: Some didn't want to be a part of [the defendant's] dying in the chair.

VA Juror: There was a couple of women in there and they really had reservations whether or not they could give somebody the death penalty.

FL Juror: One juror couldn't decide on guilt because of fear of [the defendant's] receiving the death penalty.

In some instances all or most of the jurors had decided by the time of guilt deliberations that they would not vote for the death penalty, stating that the death penalty was not appropriate for this kind of crime or for this kind of defendant:

AL Juror: No one felt death was appropriate.

CA Juror: [We came to an a]lmost unanimous decision that [the crime] did not warrant [the] death penalty.

FL Juror: They went against the death penalty and said no, he shouldn't get it.

In most instances, jurors who voiced opposition to the death penalty during guilt deliberations gave specific reasons relating to concerns about mitigation, to doubts about aggravation, or to misgivings about the proof of guilt. Some cited mitigating considerations such as the defendant's age and the absence of a serious prior criminal record:

GA Juror: No, they weren't gonna give it to him, not at his age.

VA Juror: [At h]is age, life imprisonment would be adequate.

FL Juror: We thought that since it was his first real crime, maybe he could do something with his life.

Some expressed doubts about the aggravation of the crime:

NC Juror: What if it was self defense?

NC Juror: [We had q]uestion[s] as to whether [the defendant] killed [the victim] intentionally. Everyone wanted to keep him out of society, but many did not want death.

AL Juror: They didn't want him to be sent to jail; they wanted him in a mental institution.

AL Juror: She may have had sex with the defendant, maybe it wasn't rape.

Jurors frequently expressed reservations about death during guilt deliberations either when they were uncertain about who specifically

had committed the killing or when an accomplice had not received a death sentence:

KY Juror: [It] seemed during the trial that [we] couldn't determine who actually did the killing, which left one choice that whatever one got the other did too.

NC Juror: During the guilt deliberations, . . . some jurors felt the accomplice was getting off and therefore the defendant should not get death.

GA Juror: [I]f [the co-perpetrator] doesn't get [death], [the defendant] should get life.

Some jurors who voiced opposition to the death penalty during guilt deliberations expressed reservations about the evidence of guilt, including its circumstantial character, the absence of eye witnesses, and indeed, the possibility of mistake:

FL Juror: Because there was no real hard evidence, no witnesses, et cetera. It was all paperwork evidence. He was guilty, but it wasn't a for-sure thing so we couldn't see putting him to death. We could have been wrong and you never really know for sure.

GA Juror: No one saw [him] do it.

VA Juror: [I]t was hard, going through all this. Knowing this was a human being involved, and hoping you have the right person.

NC Juror: [I]f something comes up and [he's] not guilty, I think that's what he was afraid of.

VA Juror: Because of the severity of the death penalty, there was some concern about what if the evidence was wrong.

For some jurors, guilt deliberations became the place for negotiating or for forcing a trade off between guilt and punishment. One or more jurors with some doubts, possibly reasonable doubts, about a capital murder verdict nevertheless may have agreed to vote guilty of capital murder in exchange for an agreement with pro-death jurors to abandon the death penalty. However reluctantly, in this way, both sides would have avoided the stigma of being a hung jury on either guilt or punishment. Furthermore, this compromise forfeits the punishment decision to guilt considerations; perhaps less obviously, it also contaminates the guilt decision with punishment concerns and thereby nullifies a lesser guilt verdict:

AL Juror: To sell the two [holdouts], we won't go for death penalty. They said we made an agreement.

TX Juror: One [juror] said [his] reason for voting guilty [of capital murder was] because he was not going to impose [the] death penalty and [he was] afraid some[one] else would give [the] death penalty. [He d]idn't want [a] hung jury.

SC Juror: It was almost a—this may sound petty—but it was almost a trade off, with the juror, with the other jury members. We'll go along with the [capital] guilty [verdict] but there won't be a death

[sentence]. I mean it was like four days deliberation on guilt and two hours on sentencing.

AL Juror: Uh, it was probably contrary to the rules and it was certainly contrary to the judge's instructions. But the discussion came up when we were trying to determine guilt or innocence of a capital crime. At that stage, we discussed the possible penalties and [a] very unusual situation arose in the jury room. . . . A couple of the jurors, . . . one in particular . . . were disposed not to find him guilty of a capital crime So in order to get a verdict, we had to discuss the penalty prematurely. . . . Um everybody was finally convinced that he shot the victim intentionally, and that it was not accidental. But even acknowledging that, we still had two people who in the face of that evidence, and after themselves acknowledging it, were still not inclined to find him guilty of a capital crime unless the other jurors agreed not to recommend the death penalty. . . . Um as an aside, even after . . . [we] returned to the jury room to deliberate the punishment, which had already been decided for all practical purposes, one of the people recanted and decided she really was not in favor of the verdict of guilty of a capital [crime]. . . . She was not going to go along with the decision, after the jurors had been polled in court and she had concurred in the verdict. It was quite a touchy situation.

Interviewer: Was it the same one that said she would not vote for capital murder?

Juror: That's right, she got the other jurors to agree in advance not to vote for capital punishment for her to agree to go along with capital murder and then she tried to change her mind after the fact. The surprising thing is that she appeared to be one of the better educated, uh articulate members of the jury.

Of course, not all jurors who have misgivings about the defendant's guilt of capital murder will weather the anticipated response of other jurors or negotiate a guilt for punishment tradeoff.

MO Juror: Um, just the fact that me personally, I didn't want to find him guilty in the 1st [place]. . . .

Interviewer: Did you feel pushed?

Juror: I gave up. I knew that I couldn't make enough people understand that that's not the way we had to do it, and the way we ended up doing it, was totally screwed up. But um, I gave up because I knew that if I had stuck to my guns that we might be there another day or two, and I would, it would be a hung jury, you know, no ifs, ands, or buts about it. And I was afraid that, who knows, maybe another trial, the guy might get totally off and so I gave up in that way.

These excerpts elucidate the statistical findings. Jurors experience a strong temptation to talk about punishment at guilt, even when they know it is inappropriate. In some instances jurors manage to overcome the temptation; in others, the temptation prevails. When

punishment is part of the discussion, pro-death jurors often declare—sometimes in forceful, impassioned words—that the law requires death or that the character of the crime or of the defendant demands it. They emphasize the cruelty or the premeditation of the offender and the aggravated character of the crime; they stress the need for incapacitation as well as retribution. They argue that the jury was selected for its ability to impose death, and they allay others' reluctance to impose death by saying that jurors must not feel personally responsible for the defendant's punishment, that judges are the ones who actually impose the sentence, and that the death penalty is seldom carried out. These pro-death jurors cannot comprehend the rationale or the motivation of the pro-life jurors, who in the eyes of the pro-death jurors, simply refuse to fulfill their civic duty.

For their part, the pro-life jurors declare that the death penalty is inappropriate for this kind of crime or is unacceptable for this defendant. They express concerns about the parity of punishment with co-defendants or coperpetrators, doubts about the aggravation of the crime, and misgivings about the guilt evidence. They are concerned that the defendant may not have committed capital murder. It is only after much soul searching and deliberation that some are able to convict the defendant of capital murder. Lingering doubts about the defendant's guilt convince them that the sentence should be life, not death. Ultimately, and not always successfully, they may try to negotiate or to force a trade off of guilt for punishment, in which they accede to a capital murder conviction in exchange for no death sentence.

IV

A PERSPECTIVE ON CAPITAL JURY BIAS

The implications are daunting. One half of the capital jurors take a stand on the defendant's punishment before they even see the full inventory of evidence, of arguments, and of instructions for making the punishment decision. Most who do so are absolutely convinced of their early stands and stick with them consistently thereafter. This premature decision making appears to violate the precept of guided capital sentencing discretion that *Gregg* and its companion cases endorsed as the remedy for the arbitrariness and caprice that *Furman* held unconstitutional.

Furthermore, half again as many of those who take an early stand believe the punishment should be a death sentence as believe it should be a life sentence. These early pro-death stands clearly violate

the Court's rulings in *Lockett v. Ohio*,⁹² in *Eddings v. Oklahoma*,⁹³ in *Skipper v. South Carolina*⁹⁴ and in *Morgan v. Illinois*⁹⁵ that the sentencer be presented with, and give effect to, all relevant evidence of mitigation in making the sentencing decision. Because the defendant may not present this evidence until the later sentencing stage of a capital trial, deciding that death is the appropriate punishment at guilt obviously violates this requirement.⁹⁶ It is less certain whether the juror who believes, or even becomes absolutely convinced, at the guilt stage that life is the right punishment is failing to comply with sentencing requirements. The Constitution requires that capital jurors, despite their death penalty beliefs or attitudes, remain fair and impartial in the determination of guilt, refrain from an automatic vote for life, and avoid predispositions that would prevent or substantially impair the performance of their duties. But it also entitles jurors to decide individually whether mitigation is sufficient to reject a death sentence, whatever the aggravation. In effect, when a juror becomes unalterably convinced that the death penalty is not appropriate in light of mitigating considerations, that juror's decision to block a death sentence comports with sentencing requirements.⁹⁷

⁹² 438 U.S. 586 (1978).

⁹³ 455 U.S. 104 (1982).

⁹⁴ 476 U.S. 1 (1986).

⁹⁵ 504 U.S. 719 (1992).

⁹⁶ In effect, these are jurors who took punishment stands without even being exposed, much less giving effect, to the evidence of mitigation reserved for presentation at the subsequent penalty stage of the trial, in violation of what *Morgan* requires of persons who serve as capital jurors. See 504 U.S. at 729 (noting that jurors must act "in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require").

⁹⁷ This decision is in accord with the view in *Lockett* that "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 438 U.S. at 605 (opinion of Burger, C.J.). The standard of proof beyond a reasonable doubt and the agreement of all 12 jurors are necessary for findings of aggravation but not of mitigation; the individual juror may judge that mitigation is sufficient to block a death sentence without the concurrence of other jurors if he finds that it is proven to his own personal satisfaction. See *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990); *Mills v. Maryland*, 486 U.S. 367, 384 (1988). This difference respects the critical role of mitigation as the essence of the punishment decision, once findings of aggravation have narrowed the class of death eligible offenders. See *Zant v. Stephens*, 462 U.S. 862, 878 (1983). The sentencing decision is thus an individual moral judgment; each juror's stand on the defendant's punishment should be a "reasoned moral response," apart from the judgments of other jurors. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). And while *Morgan* holds that jurors must be able to give full effect to sentencing considerations, it is concerned with "life qualification," that is, seeking to ensure that jurors will give effect to mitigation that is largely reserved for presentation at the sentencing stage of the trial. See 504 U.S. at 728-29.

A. The Contours of Premature Decision Making

The contours of premature decision making differ for early pro-death and early pro-life jurors. The early pro-death jurors tend to reach their stand on punishment sooner in the guilt trial. Most first reach a decision concerning punishment during the presentation of guilt evidence. Many offer proof of guilt as reasons for their early pro-death stands.⁹⁸ They also cite the heinous character of the crime and the compelling nature of certain evidence, especially pictures of the crime scene and videotapes of the crime in progress. Few wait for guilt deliberations to reach their pro-death stand. They were likely instead to use guilt deliberations as a time to advocate the death penalty and to warn other jurors of the defendant's dangerous propensities, of his possible release, and of his potential retaliation even against his jurors. Some seek to allay reluctant jurors' sense of responsibility for the punishment, arguing that the judge imposes it, that appellate courts will review it, and that executions are rare.⁹⁹

Early pro-life jurors show a different decision-making pattern. They wait longer to reach their stand on the defendant's punishment. They typically make this decision later in the guilt stage of the trial, often during jury deliberations on guilt. Defending their stands, they state that the crime was not the kind of murder that requires the death penalty, that the defendant was not the kind of killer who should be put to death, or that the evidence was not sufficient to make them comfortable imposing a death sentence. Many of these jurors make it clear that they had reservations about the defendant's guilt of capital rather than noncapital murder. Misgivings about the level of guilt frequently keep them from agreeing to a capital murder verdict before guilt deliberations and cause them to have reservations about joining the ultimately unanimous capital-murder conviction. They frequently report that, during jury deliberations, the jury talked about whether the defendant was guilty of murder but not of capital murder, about what the punishment would be for less than capital murder, and about whether the defendant should or would get the death

⁹⁸ This mistaken presumption that death is mandatory upon conviction of capital murder is the reason that some early pro-death jurors give for their stands. See *supra* Part I.E.1. For example, a California juror commented, "what I understood was as an unbiased individual I was to weigh the evidence to find him guilty, and if I found him guilty beyond a reasonable doubt, then I had to give him the death sentence." For evidence that many capital jurors wrongly believe the death penalty is required if the evidence proves that the crime was heinous, vile, or atrocious, or that the defendant would be dangerous in the future, see Bowers, *supra* note 38, at 1091.

⁹⁹ These arguments violate the spirit if not the letter of *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) ("[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.").

penalty. Some cast their guilty vote for capital murder only after indicating that their penalty vote would be for a life sentence.

Corresponding to these differences in decision-making patterns are contrasting death penalty beliefs and predispositions of early pro-death and early pro-life jurors. The data show that early pro-death jurors are more likely than others to feel that death is the only acceptable punishment for various kinds of murder,¹⁰⁰ to believe that death should be required as punishment for a serious intentional murder,¹⁰¹ to believe in the death penalty's deterrent power, and to lack moral doubts about death as punishment. In effect, early pro-death jurors tend to hold a constellation of beliefs about capital punishment that predispose them to take an early pro-death stand. The evidence is consistent with the assumption that these are pre-existing feelings and beliefs about the death penalty, rather than consequences of capital jury service.¹⁰²

The early pro-life jurors are much closer in death penalty beliefs and predispositions to the jurors who remain undecided on punishment at guilt. The only one of six death penalty beliefs that distinguishes them from the undecided jurors is the belief that the imposition of the death penalty is economically biased, and the evidence here suggests that the difference may be owing as much to distinctiveness in the beliefs among the undecided as among those who take an early pro-life stand.¹⁰³ The early pro-life jurors are also less likely than others to see the death penalty as the only acceptable punishment for various kinds of murder, but to the extent that this predisposition distinguishes jurors who take an early pro-life stand from their peers, it also places them more in accord with legal precepts about the imposition of the death penalty.¹⁰⁴

Thus, an unmistakable pro-death tilt exists in this early decision making. As Table 1 demonstrates, early pro-death stands are one and a half times as common as early pro-life stands (28.6% versus 19.7%), and more pro-death than pro-life jurors are absolutely convinced of their stands on punishment at this early point in the trial (67.3% ver-

¹⁰⁰ Believing that death is the only acceptable punishment for aggravated murder violates *Morgan's* requirement that jurors have the ability to give effect to mitigating considerations in making their punishment decision. See 504 U.S. at 729.

¹⁰¹ Believing that the death penalty should be required is contrary to the constitutional prohibition against making the death penalty mandatory. See *Sumner v. Shuman*, 483 U.S. 66, 78 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

¹⁰² See Appendices A and B.

¹⁰³ For discussion of economic bias, see Appendix A.

¹⁰⁴ Nor do more than a handful of early pro-life jurors believe that the death penalty is "unacceptable" for these crimes, suggesting that death qualification at jury selection has been effective in purging prospective jurors with predispositions against death as punishment.

sus 60.2%). More decisive is the difference in the grounding of these early punishment stands in legally suspect beliefs and predispositions. The early pro-death jurors adhere to feelings and to beliefs that directly contradict the legal requirements for capital jury service. A belief that death is the only acceptable punishment for various kinds of murder directly contradicts the fundamental holdings of *Woodson* and *Lockett*. Hence, many early pro-death stands rest upon a legally forsaken premise.

The early pro-life jurors, on the other hand, are like those who remain undecided at guilt in most death penalty beliefs. They certainly are not different in ways that would tend to disqualify them from capital jury service. Indeed, their greater tendency to reject the proposition that death is the only acceptable punishment for various kinds of aggravated murder is more consistent with the law than are the corresponding predispositions of the other jurors, including even those who remain undecided on punishment at guilt.

B. The Counterweight of Lingering Doubt

The heaviest counterweight to this early pro-death tilt is a nagging concern or lingering doubt among a good many jurors about the defendant's guilt of capital murder. This doubt is apparent in discussion of guilt of murder but not of capital murder, in indecision and preference for a noncapital murder verdict at the jury's first vote on guilt, and in reluctance to join the final capital murder verdict.¹⁰⁵ This lingering doubt crystallizes into a pro-life stand for many during the guilt phase of the trial; it becomes an affirmative commitment to life as the appropriate punishment. The reasons they give for their early pro-life stands reveal that for many this is a moral response to remaining doubts they have about the evidence of guilt, sufficient, they often reluctantly agree, for a capital murder verdict, but not for a death sentence. This prominence of lingering doubt in fostering a pro-life commitment during the guilt phase of the trial raises a question about its persistence as a consideration and its ultimate significance in the punishment decision. To see where lingering doubt stands as a factor in the final determination of the defendant's punishment, we depart from our focus on the guilt stage of the trial and look to jurors' final punishment decisions.

Late in the CJP interview, the interviewer presented jurors with thirty-nine factors or circumstances that might have influenced their final punishment decisions and asked for each, "Was this a factor in

¹⁰⁵ Although they ultimately acceded to being convinced beyond a reasonable doubt, most early pro-life jurors (55.1%) were not convinced at the end of the guilt trial, four out of ten (39.7%) remained unconvinced at the first vote on guilt, and almost three out of ten (29.0%) joined the unanimous final vote for a capital murder verdict "reluctantly."

this case?" If the juror answered "yes," the interviewer then asked whether the factor was "very," "fairly," or "not very" important in their punishment decisions and whether it made them "much more," "slightly more," "much less," "slightly less," or "just as" likely to vote for death. Fifteen of these thirty-nine factors were predominantly mitigating in that the jurors who said it was a factor in their case responded more often that it made them "less likely" than with "more likely." Five of these factors were predominantly mitigating in that more than half of those jurors for whom it was a factor said it made them less likely to vote for death. For each of these five predominately mitigating factors, Table 12 shows (1) the importance that jurors attributed to these factors in their punishment decisions and (2) their perceptions concerning the strength of the factors on their final vote.¹⁰⁶

By far, the strongest mitigating factor was lingering doubt, the one that read, "Although the evidence was sufficient for a capital murder conviction, you had some lingering doubt that (the defendant) was the actual killer."¹⁰⁷ Some 13.4% of the jurors indicated that this was a factor present in their case; of these, 62.9% said it was very important in their punishment decision, 69.2% said it made them "less" likely, and 48.7% said "much less" likely, to vote for death. In fact, of the 116 jurors who said that this was a factor in their case, 69.5% cast their final vote for life in comparison to 41.7% of the 756 jurors who said this was not a factor in their case. Lingering doubt outstrips its nearest rival, as a "very important" sentencing consideration, the "defendant had a history of mental illness," by 18.6 percentage points; it outstrips its nearest rival that made jurors much less likely to vote for death, "the defendant was mentally retarded," by 12.3 percentage points.

These data reveal that doubt about the defendant's guilt is both a fundamental and abiding moral concern of jurors in deciding the appropriate punishment. The haunting possibility of an erroneous capital murder conviction, and even more so, the prospect of condemning and even executing an innocent person, is more formidable in jurors' decision making than any of the other mitigating considerations.¹⁰⁸ It raises the possibility that neither death nor life is the right punish-

¹⁰⁶ For each factor, the statistics presented in Table 12 are based on the subsample of jurors who said it was a factor in their case.

¹⁰⁷ This statement incorporates both cases of mistaken identity and those in which the defendant was implicated in the killing but not as the triggerman. It excludes cases in which the defendant was personally responsible for the killing, but lacked the premeditation or the intent that constitutes guilt of capital murder. Our discussion of lingering or residual doubt generally has encompassed all three of these elements.

¹⁰⁸ Two of the other mitigating considerations—mental retardation and less than 18 years of age—are sufficiently formidable to have become statutory exemptions to eligibility for capital punishment in some states. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-46a(g) (West Supp. 1998).

TABLE 12
 THE IMPORTANCE AND INFLUENCE ON THE FINAL PUNISHMENT DECISION OF FIVE MOSTLY MITIGATING CONSIDERATIONS,
 AS JUDGED BY JURORS WHO SAID EACH WAS A FACTOR IN THE CASE ON WHICH THEY SERVED

	Importance as a factor				Likelihood of a final vote for death				(No. of cases)	
	Very (%)	Fairly (%)	Not very (%)	(No. of jurors)	Much more (%)	Slightly more (%)	Just as (%)	Slightly less (%)		Much less (%)
Although the evidence was sufficient for a capital murder conviction, you had some lingering doubt that (the defendant) was the actual killer.	62.9	25.9	9.5	(116)	5.1	2.6	23.1	20.5	48.7	(78)
The defendant was mentally retarded.	43.9	24.4	31.7	(41)	3.0	3.0	39.4	18.2	36.4	(33)
The defendant was under 18 when the crime occurred.	38.1	28.6	33.3	(42)	0.0	9.4	34.4	31.3	25.0	(32)
The defendant had been seriously abused as a child.	26.4	41.2	32.4	(182)	0.7	2.9	43.1	34.3	19.0	(137)
The defendant had a history of mental illness.	44.3	26.6	29.1	(79)	3.2	8.1	38.7	29.0	21.0	(62)

ment and, indeed, that death is not appropriate as a punishment option. It might be argued that the resolution of the guilt question obviates the need, indeed the legitimacy, of taking lingering doubt into account; that once guilt has been established beyond a reasonable doubt, any further doubt should be irrelevant as a sentencing consideration. Lingering doubt, however, is clearly an unacceptable expedient in jurors' minds when the choice is between life and death. Jurors who have such doubts are manifestly unwilling to ignore them in making their punishment decisions.

We have seen that lingering doubt is a very substantial factor in reaching an early pro-life stand. We now see that it is the strongest influence in support of a final life punishment vote. We know from other studies that lingering doubt ranks among the top concerns that convince jurors to vote for a life sentence.¹⁰⁹ These data make it clear that lingering doubt, when it is present, is an integral element in forming a reasoned moral judgment about punishment. Indisputably, lingering doubt plays a central role in jurors' thinking about what punishment the defendant deserves.¹¹⁰

¹⁰⁹ A study of 54 Florida capital jurors from five death and five life cases identified lingering doubt as the most significant "operative" factor in jurors' decisions to vote for life rather than death. Some 65% of the jurors in the life cases identified lingering doubt as a factor that had contributed to their final punishment votes in response to an open-ended question that asked, "What factor was most important in your . . . ?"

A detailed examination of 152 California CJP jurors finds that lingering doubt about the capital murder guilty verdict enhances the effectiveness of a remorse defense at sentencing. The data indicate that claiming the defendant was not the perpetrator when the evidence to the contrary is strong may well undermine a remorse defense, but claiming that the conviction of capital as opposed to noncapital murder is in doubt appears to be a condition under which remorse as a penalty phase defense is especially effective. See Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998).

¹¹⁰ The tendency of jurors who experience either lingering or residual doubt to take a pro-life stand at guilt is not surprising. This phase, after all, is when lingering doubt arises. Its importance as a punishment consideration means its effect can be expected to appear without much delay. The guilt trial is also when most of the aggravation is ordinarily presented (though it is usually reiterated and sometimes supplemented at sentencing). Thus, early pro-life jurors, especially those who wait until guilt deliberations to take their stands on punishment, are apt to have wrestled with elements of aggravation as well as concern with lingering doubt during the guilt stage of the trial. Of course, taking an early stand on punishment, however convinced jurors say they were, does not amount to a demonstration that they failed thereafter to consider other elements of aggravation and mitigation, though this is surely true in some instances.

The Model Penal Code has given the trial judge the authority to deny the possibility of a capital sentence on the strength of residual doubt about the defendant's guilt. See MODEL PENAL CODE § 210.6(1)(f) (1985) (requiring the judge to refuse death eligibility if the evidence, although sufficient "to sustain the verdict, . . . does not foreclose all doubt respecting the defendant's guilt"). Yet, the U.S. Supreme Court so far has failed to recognize the right of a capital defendant to ask the jurors to consider residual doubt in the calculus of their sentencing decisions: "This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such [residual] doubts considered as a mitigating factor." *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) (opinion of White, J.).

C. The Challenge Is Ominous

A great many capital jurors do not remain impartial about punishment until the penalty phase of the trial and nevertheless serve as capital jurors. Some of them should have been disqualified at jury selection. Those jurors who believe that the death penalty is the only acceptable punishment for various forms of murder or who think that an intentional murder requires the death penalty are at odds with the law regarding the responsibility of capital jurors. Yet, the effectiveness of voir dire questioning in detecting these unqualified prospective jurors remains an open question. The present practice appears to fail in many cases.¹¹¹ Thus, jurors who should fail the test of impartiality are making life or death capital sentencing decisions.

But, even if jurors who expressed the feelings and beliefs measured by these questions were eliminated from capital jury service, much, if not most, of the problem identified here would remain unsolved. Purging such jurors would modestly reduce, but far from eliminate the tendency of capital jurors to take a premature pro-death stand on punishment.¹¹² Eliminating prospective jurors whose death penalty feelings and beliefs predispose them to premature punishment decision making would purge a demonstrated source of bias, but fall far short of achieving the impartiality that *Morgan* requires.

The duel dilemma these data reveal is not merely that a sizable number of prospective jurors manifestly predisposed to death as punishment fail to be both detected and disqualified, but also that many jurors who could not be disqualified because of their pre-existing death penalty feelings and beliefs, nevertheless become premature decision-making members of capital juries. This implies that something

¹¹¹ As the Court itself has observed, there are limits to what voir dire can accomplish. Prospective jurors will be motivated to say they can do what is asked of them. Without the experience of having tried and failed, they may assume they can when they cannot. Some jurors will purposely hedge or dissemble in their responses. Skilled attorneys may be able to identify jurors who should have been disqualified but often must use peremptory challenges as a fail safe. Jury selection procedures that will more reliably identify persons who will fail to meet constitutional standards are necessary. See Marla Sandys, Still Wondering After All These Years: The Prevalence and Influence of Automatic Death Penalty Voters on Capital Juries (May 31, 1997) (unpublished manuscript, on file with authors).

¹¹² If the R_L^2 values in Table 8 for predicting early pro-death and early pro-life stands were used as a rough estimate of the explained variance in taking these early stands on punishment, the five of ten jurors who presently take a premature stand on punishment might fall to four of ten. Early pro-death stands might fall by roughly 20% and early pro-life stands by 10%. Even these modest estimates are inflated by the fact that not all of these questions would serve substantively as grounds for disqualifying jurors under current standards; and in the case of early pro-life jurors, the predictors have failed the test of causal priority and thus bear only a spurious association with early decision making. On the other side, improved measurement of pre-existing death penalty beliefs and predispositions would increase these estimates. At least by order of magnitude, it seems safe to say that most of the problem of early decision making would remain.

in addition to prospective jurors' death penalty beliefs, indeed, something not detectable at jury selection, is also implicated in early decision making. That is to say, failing to detect and to reject persons unfit for jury service, and by implication believing the fault lies wholly with the people who serve and those who select them for service, is too narrow a perspective on the dilemma these data reveal.

Early decision making may also be a product of the structure and conduct of the capital trial, of its introduction to capital jurors, of the timing and substance of evidence, arguments, and instructions—what Craig Haney has called “structural aggravation.”¹¹³ Impressions formed early in the capital trial process may be especially influential.¹¹⁴ To the extent, for example, that the voir dire process itself conveys the message that the court has summoned the juror to impose death if the jury finds the defendant guilty of capital murder,¹¹⁵ or that the death penalty is the correct punishment by law for such a crime, jurors may feel emboldened or compelled to take an early pro-death stand on punishment. This danger is consistent with the tendency of early pro-death jurors to decide punishment sooner and more confidently than other jurors.

The forbidding character of the life or death decision may also be relevant. The magnitude and gravity of this decision may simply overwhelm instructions not to consider punishment at the guilt stage of the trial. Jurors told us that they not only talked about punishment but also did so, sometimes, explicitly acknowledging that they were violating the instructions. The data also show that during sentencing deliberations they likewise violated instructions not to talk about the alternative punishment: what they (usually wrongly) thought the punishment would be if the defendant did not receive the death pen-

¹¹³ Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1451 (1997). Haney describes “structural aggravation” as “psychological factors that the law has built into the very process of death sentencing, serving to make death verdicts more likely, even though they do not explicitly appear in any capital statute.” *Id.*

¹¹⁴ See *id.* at 1456.

Moreover, the ordering of issues placed before the capital jury not only impedes the humanization of the defendant, but it also creates an implicit contrast between the violence of the defendant and the violence the jury is later invited to authorize. Research tells us generally that, whenever events are compared in sequence, “the first one colors how the second one is perceived and judged” so that, in contexts like these, the more flagrantly inhumane the defendant’s initial acts, the more “one’s own destructive conduct will appear trifling or even benevolent.”

Id. (quoting Albert Bandura, *Mechanisms of Moral Disengagement*, in ORIGINS OF TERRORISM 161, 171 (Walter Reich ed., 1989)).

¹¹⁵ See Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAVIOR 121 (1984).

alty.¹¹⁶ Again, their interview responses often indicate that these matters are too essential to the life or death decision that confronts them not to be discussed. In other words, perhaps a major source of premature decision making inheres in the character of the decision to be made and in the human frailties of the decision makers themselves. It may be that people simply cannot reliably be counted on to forego discussing punishment during guilt deliberations or to postpone taking a stand on punishment prior to the penalty stage of the trial.

D. Corrupting the Guilt Decision

The corruption of the integrity of guilt decision making is a further ominous price being paid. The guilt trial, and particularly guilt deliberations, have become a venue for punishment advocacy and decision making. The jurors, especially early pro-death jurors, reported that the discussion during guilt deliberations focused a great deal on elements of aggravation, typically of greater relevance to the determination of punishment than guilt, such as the cruel brutal nature of the crime, the pain and suffering of the victim, and the future dangerousness of the defendant as well as whether the defendant should or would get the death penalty.¹¹⁷ In many cases, pro-death advocacy may well dominate guilt considerations, since early pro-death jurors are quicker than others to take a punishment stand.

Although early pro-life jurors are hesitant or reluctant to vote guilty of capital murder during guilt deliberations, they report talking about punishment even more than do their pro-death counterparts, especially about the punishment for noncapital murder. They, too, appear to be advocating or negotiating a guilt decision prompted by punishment considerations.¹¹⁸ In other words, juries are convicting some defendants of capital murder who they would not if the jurors did not negotiate about punishment or privately commit themselves not to vote for death. Given the ability to ensure a life sentence and the empirically demonstrated importance of lingering doubt in promoting a pro-life stand, clearly some jurors, despite reservations about proof beyond a reasonable doubt, accede to a capital murder verdict and then vote for a life sentence.¹¹⁹

¹¹⁶ See Bowers & Steiner, *supra* note 91 (manuscript at 23-25, on file with author) (describing the common judge-jury exchange regarding the alternative sentence to death, noting that the judge often may not reply to the question, and concluding that after receiving the judge's answer, the jury often quickly returns a death sentence).

¹¹⁷ See *supra* note 87.

¹¹⁸ Perhaps a brief portion of the previously quoted words of a South Carolina juror capture this best: "this may sound petty, but it was almost a trade off, with the jurors, with the other jury members. We'll go along with the guilty [of capital murder] but there won't be a death [sentence]."

¹¹⁹ Nor is the confounding of guilt decision making with punishment considerations due only to what jurors come to believe the punishment should be during the guilt stage of

The data thus demonstrate the danger of corrupting the guilt decision with punishment considerations. This very danger prompted reservations in Pennsylvania and California over a unified guilt and punishment proceeding.¹²⁰ The danger also prompted the Supreme Court to require in *Witherspoon* that prospective jurors be able to make the guilt decision apart from their attitudes or beliefs about the death penalty. The *Lockhart* Court was unwilling to concede this very point in the absence of research with "actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant."¹²¹ The evidence here reveals not only the failure to achieve impartiality in sentencing, but also the failure to protect the guilt decision from the confounding effect of premature stands on punishment, and the evidence is based on the reports of real capital jurors in real cases. The separation of guilt and punishment decisions through a bifurcated capital trial is substantially a legal fiction. In a great many cases jurors make the guilt and sentencing decisions with much the same arbitrariness and caprice that *Furman* condemned.

E. Is Impartiality Necessarily Foreclosed?

Present jury selection procedures are obviously failing to both detect and reject jurors whose feelings and beliefs about the death penalty prompt them to take and to remain committed to an early

the trial. Indeed the very evidence available to jurors for their guilt determination may be colored by how defense attorneys think this evidence will affect jurors' punishment decisions if the defendant is found guilty of capital murder. James Doyle states this point well:

The two phases are separate, but there is no firewall between them. It is axiomatic that lawyers who will be seeking mercy at the penalty phase of a trial must be wary of the portrait of their client that they paint during the guilt/innocence phase. Frequently, there is tension between the strategic goals in the two phases: The most promising guilt phase defense—for example, alibi—can present the most problematic penalty phase situation if it fails. Having found that the defendant was lying about his alibi at the guilt phase, why should a juror believe, or even care about, his tales of child abuse at the sentencing phase? A "he didn't do it" guilt phase defense undermines the defense "he's sorry he did it" at the penalty phase.

James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 423 (1996) (footnote omitted).

Scott Sundby's examination of jurors' receptivity to remorse as mitigation during the penalty phase of the trial yields empirical confirmation. In particular, he finds that jurors who convict a defendant of capital murder are less receptive to remorse as mitigation when the defense claims that the defendant was not implicated in the killing than when the claim is that the crime was a noncapital murder. See Sundby, *supra* note 109, at 1597. Thus, defense attorneys may have to decide whether to advance what they regard as the strongest guilt defense in light of the guilt evidence or a less forceful or effective one informed by how the guilt arguments are apt to play out in the jury's response to mitigation if the defendant is convicted of capital murder.

¹²⁰ See *supra* note 7.

¹²¹ *Lockhart v. McCree*, 476 U.S. 162, 171 (1986).

pro-death stand.¹²² Without radical improvements in jury selection and voir dire questioning, there will be no guarantee of jury impartiality. Even with the improvement of jury selection and, more particularly, with the removal of jurors predisposed to death, these data indicate that the presence of structural aggravation and the nature of the life or death decision itself will continue still to promote premature punishment decision making, thus discouraging a full and open evaluation of constitutionally sanctioned sentencing considerations. Beyond this, the data show that punishment concerns also invade and befoul the work of guilt decision making. Jurors frankly admit that they consider punishment in deciding guilt, despite admonitions not to do so. The inability of jurors to separate guilt and punishment considerations in their decision making is a fundamental dilemma that defies any single or simple solution, short of abandoning capital punishment.

It is not clear that jury selection can reliably detect the predispositions that demonstrably encourage jurors to take early pro-death stands and hold them unalterably thereafter. While the *Morgan* Court has explicitly sanctioned life qualification, it did not require procedural changes that might render voir dire reliable in detecting pro-death bias.¹²³ Clearly, the range or kinds of questions now employed or even permitted, the discretion judges exercise in culling out biased jurors, and attorneys' skills in conducting voir dire questioning are not sufficient to purge pro-death jurors and pro-death prospective jurors who will not abide by sentencing standards. At a minimum, defense attorneys must be permitted and must aggressively exploit their permission to question prospective jurors about the circumstances under which they think the death penalty is the "only acceptable" punishment or "should be required" as punishment. Efforts to reha-

¹²² The obvious implication is that voir dire questioning has failed to detect many pro-death jurors who should fail the test of "life qualification" for capital jury service. They may say under oath that they can disregard their personal feelings and beliefs, but the evidence shows that in practice they do not. Perhaps this is because the abstract question is an unrealistic test of the realities of jury service. At the least, far more searching and probing of voir dire is needed to detect such predispositions and to serve as the basis for dismissing such prospective jurors.

¹²³ The *Witt* standard is effectively neutral; its language provides a basis for both death and life qualification. Although it was articulated in a case of death qualification, its formulation in terms of being able to follow the responsibilities of a juror, *see* *Wainwright v. Witt*, 49 U.S. 412, 424 (1985) (noting that the "standard is whether the juror's views would" impair their ability to follow the judge's instructions), was recognized by discerning defense attorneys as an invitation to life qualification as well. These life qualification initiatives were not uniformly welcomed or even permitted, however, until the Court sanctioned them in *Morgan*. *See* *Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992) (noting that the defense may remove "[a] juror who will automatically vote for the death penalty in every case" because of his refusal "in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do").

bilitate apparently biased prospective jurors by asking them whether they could follow the judge's instructions and abide by their oaths as jurors cannot be trusted.

Drastically improved jury selection is needed simply to start the trial on an even footing. But even if this is possible, it will leave the further problems of structural aggravation and guilt contamination unattended. What more might be done to remedy these additional ills?

One response might be to subject the jurors who decided guilt to a second round of voir dire questioning to test their impartiality about making the punishment decision. New York state has adopted such a jury requalification strategy in its recently enacted capital statute.¹²⁴ The purpose is to see that jurors who participate in sentencing are free of biases that might have arisen during the guilt stage of the trial. Thoroughgoing and sensitive questioning might detect the often unspoken influences of the guilt trial experience, including even pro-death biasing effects of exposure to the first round of jury selection. In practice, however, without reform and improvement of selection standards and procedures, requalification is apt to suffer from the same faults and resulting ineffectiveness that plague the initial round of jury selection.¹²⁵ In addition, jurors who have become invested in their participation during the guilt trial will have a further incentive to believe that they can follow instructions and be objective.¹²⁶ Finally, a second voir dire prior to sentencing does nothing to correct the influ-

¹²⁴ See N.Y. CRIM. PROC. § 400.27(2) (McKinney Supp. 1998) ("Before proceeding with the jury that found the defendant guilty, the court shall determine whether any juror has a state of mind that is likely to preclude the juror from rendering an impartial decision based upon the evidence adduced during the proceeding.").

¹²⁵ Jurors will continue to be motivated to present themselves favorably, to say and believe that they can and will be objective. Furthermore, selecting a penalty-phase jury faces the same difficulties that lead to the demonstrated shortcoming in jury selection prior to the guilt phase of the trial. Jurors would be asked hypothetical question they have no realistic way of answering—they have no comparable experience on which to base their answers. The questions encourage self-serving responses. Jurors will again be tempted to give the socially desirable, legally correct, responses including, of course, that they could and would follow the judges instructions.

¹²⁶ Jurors who have committed time, effort, and ego, and especially those who think they know what the punishment should be, will have a vested interest in thinking and saying they can play by the rules. They are apt to think of themselves as open-minded and of others with whom they disagree as biased. Attorneys may be reluctant to challenge aggressively jurors who have formed an apparently solidary group during the course of the guilt trial; they may fear alienating participants whose trust they have been courting by asking them probing questions about their ability or qualifications to serve in the final climactic stage of the trial. Dismissals that do occur may largely involve jurors who come forward to confess premature decision making and excuse themselves, though they could include jurors who want to leave the jury after being attacked by others, perhaps for a minority viewpoint.

ence of punishment considerations in confounding and corrupting the guilt decision.

Another approach, which the Court originally contemplated in *Witherspoon*¹²⁷ and the dissenters reiterated in *Lockhart*,¹²⁸ involves the replacement of the guilt-phase jury with a new penalty-phase jury for sentencing.¹²⁹ This new penalty jury would at least be free of any structural aggravation associated with guilt-trial exposure, and since the guilt-trial jury would have no role in sentencing,¹³⁰ punishment considerations would not directly contaminate the guilt decision.¹³¹ The exclusive concern the penalty jury would have with the life or death decision alone would make it easier to impress upon these jurors the essentially moral rather than legal character of the decision they would be making, and the responsibility they individually must shoulder for the punishment they impose.¹³² In other words, penalty-

¹²⁷ *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The Court speculated that if a defendant were to establish that he was convicted by a jury that was less than neutral with respect to guilt,

the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment.

Id. at 520 n.18.

¹²⁸ *Lockhart v. McCree*, 476 U.S. 162, 203-05 (1986) (Marshall, J., dissenting).

¹²⁹ A penalty-trial jury would be free of the "structural aggravation" that goes with the guilt-trial experience, but as Haney has demonstrated, jury selection itself, that is the process of being questioned about the death penalty and about the ability to impose a capital sentence, tends to make jurors think death is the legally appropriate punishment. See Haney, *supra* note 113. In addition, some of this structural aggravation emanates from broader cultural understandings about crime and punishment, including for example, the widely shared and vastly mistaken belief that murderers not given the death penalty usually will be back on the streets soon, often far sooner than they are in practice. See Bowers & Steiner, *supra* note 91. How much structural aggravation can be circumvented with the impaneled of a penalty-trial jury is uncertain.

¹³⁰ Indeed, the guilt decision could then be made by a jury, free of death qualification and any associated biases. Separate guilt- and penalty-phase juries were originally advanced to purge the guilt decision of the arguable pro-prosecution and pro-guilt biases created by the removal of jurors shown to be less prosecution and less guilt prone who failed to be "death qualified." See *Lockhart*, 476 U.S. at 202 (Marshall, J., dissenting); *Witherspoon*, 391 U.S. at 520.

¹³¹ Jurors deciding guilt might still be concerned about the implications of their decision for the defendant's punishment, but they would not be tempted to vote for a capital-murder verdict when they had trouble distinguishing between reasonable and residual doubt. They could not (as they now can in all but a few states) ensure a life rather than a death sentence by deciding to vote for a life sentence at the penalty phase of the trial. A single juror cannot now ensure a life sentence in one state (Florida) where the jury's sentencing verdict does not need to be unanimous and in states where the jury's sentencing verdict is not binding on the trial judge (including Alabama, Delaware, Indiana, and Florida, as well).

¹³² For evidence that jurors do not assume foremost or primary responsibility for the defendant's punishment, see Bowers, *supra* note 38, at 1096.

trial jurors would know that the responsibility for the punishment decision rests squarely on them.¹³³

Whatever else it might accomplish, impaneling a separate penalty-phase jury runs headlong into a fundamental issue this research has raised about moral judgment in capital sentencing—the role of lingering doubt as a sentencing consideration. Jurors who decided reluctantly and only after much urging by others that a defendant was guilty of capital murder would no longer be present to render a reasoned moral response that incorporates considerations of lingering doubt in the decision on punishment.¹³⁴ Doubtless, pre-sentencing requalification also would detect and dismiss jurors with lingering doubt because this issue is relatively specific and is one the prosecution naturally would be inclined to make the focus of second round questioning.¹³⁵

We have seen that lingering doubt is critical in the decision making of many capital jurors. It is a consideration particular to their case; it is a judgment about facts of the crime or of the defendant as the jury understands them through guilt evidence and testimony; it is a concern that jurors have about the punishment decision which is fundamental to their responsibility as moral agents. We also have seen that lingering doubt is the strongest of the mitigating considerations that figure in the final punishment decisions of capital jurors. The strength of these data is they reveal what those who express the conscience of the community through capital jury service regard as morally relevant.¹³⁶

¹³³ An earlier examination of these data revealed that in two states where the trial judge may override the jury's sentencing decision, jurors are less likely than jurors in other states to accept primary responsibility for the punishment decision. See *id.* at 1095 n.233. For an examination of how jurors evade responsibility for the punishment decision in one state where the trial judge may override the jury's decision, see Joseph L. Hoffman, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 *IND. L.J.* 1137 (1995).

¹³⁴ The rationale for having the same jury judge guilt and impose sentence is that the defendant's punishment should be the product of the full trial experience of the jurors, see *Lockhart*, 476 U.S. at 181—not that both decisions are made on the basis of the same considerations, but that they should be made on the basis of the same evidence. To say that the guilt and punishment decision should be made on the basis of different considerations is only to say that one is a rule-bound factorial determination and the other is a moral judgement that entails the assessment of human qualities and of blameworthiness. It does not mean that the evidence for one is irrelevant for the other. It means only that this evidence will play a different role—on the one hand establishing guilt or innocence and on the other deciding punishment. What may be sufficient for guilt of capital murder may be insufficient for a sentence of death.

¹³⁵ That is unless lingering doubt explicitly is exempted from requalification questioning.

¹³⁶ For a parallel argument, also grounded in the empirical findings of the Capital Jury Project, that full knowledge of the death penalty alternative should be explicitly incorporated as a consideration in capital sentencing in all cases, without the limitations imposed by *Simmons v. South Carolina*, 512 U.S. 154 (1994), see Bowers & Steiner, *supra* note 91.

The Court in *California v. Brown*,¹³⁷ *Franklin v. Lynaugh*,¹³⁸ and *Penry v. Lynaugh*¹³⁹ articulated the doctrine that the capital-sentencing decision must be the product of a "reasoned moral response" to both sentencing evidence and arguments.¹⁴⁰ As the strongest pro-life consideration in punishment decision making, lingering doubt requires protection under this doctrine of "reasoned moral response."¹⁴¹ Failing to sanction lingering doubt as a constitutionally protected consideration in sentencing asks jurors to ignore an essential consideration in making a moral decision on the ultimate punishment.¹⁴² For those who have lingering doubt about the defendant's guilt, barring its consideration transforms the sentencing process into a demoralizing exercise, if not a desperate scramble to transmute lingering doubt into a legally sanctioned consideration. In other words, to not sanction residual or lingering doubt about the defendant's guilt as a punishment consideration undermines the moral character of the jury's task. To ask them to make a reasoned moral judgment about the defendant's punishment and, at the same time, to deny them the relevance of a concern they deem extremely important is to

¹³⁷ 479 U.S. 538 (1987).

¹³⁸ 487 U.S. 164 (1988).

¹³⁹ 492 U.S. 302 (1989).

¹⁴⁰ *Id.* at 322 (agreeing with defendant's argument that the jury must be allowed "to express its 'reasoned moral response' . . . in determining whether death was the appropriate punishment"); *Franklin*, 487 U.S. at 184 (O'Connor, J., concurring) ("[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." (quoting *Brown*, 479 U.S. at 545 (O'Connor, J., concurring))).

¹⁴¹ The Court has affirmed in *Lockhart* that residual doubt about guilt in jurors minds will inure to the benefit of the capital defendant. See *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (agreeing that "the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase"). In *Franklin*, it left the constitutional status of residual doubt as a sentencing consideration both unrestricted and unprotected. It stated, on the one hand, that residual doubt is not affirmatively guaranteed under the *Lockett v. Ohio*, 438 U.S. 586 (1978), definition of a mitigating consideration as a characteristic of the defendant, his record, or the crime, see 487 U.S. at 174 (opinion of White, J.), but it also granted that states may require jurors to consider lingering doubt in making their punishment decisions as a matter of state law, see *id.* at 173 (opinion of White, J.). The doctrine that capital sentencing must be "a reasoned moral response," as subsequently articulated in *Penry*, provides the constitutional grounding for protecting lingering doubt's standing as a mitigating consideration in capital sentencing. The evidence of its fundamental role in the capital-sentencing decisions of these jurors provides the empirical justification.

The Ohio Supreme Court's recent ruling in *State v. McGuire*, 686 N.E.2d 1112 (1997), disallowing lingering doubt as a mitigating consideration on *Lockett* grounds might appropriately provide the occasion for U.S. Supreme Court review of this matter in light of the newly available evidence of lingering doubt's fundamental role in the capital sentencing decisions of these jurors who actually made the life or death sentencing decision.

¹⁴² See Bowers & Steiner, *supra* note 91; see also Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1115-18 (1995) (discussing the relationship between a jury and the values of its community); Sundby, *supra* note 109, at 1577-83 (discussing the impact of residual doubt on jurors' decisions).

trivialize their task.¹⁴³ Denying the defense the right to argue or receive an instruction on lingering doubt would contribute still further to the structural aggravation of the trial process.

CONCLUSION

The conundrum is this: Many jurors make premature pro-death punishment decisions, and most of them are absolutely convinced that death is the right punishment and stick with it thereafter. Pre-existing feelings that death is the only acceptable punishment for many kinds of aggravated murder and the belief that premeditated murder requires the death penalty substantially contribute to an early pro-death stand. This reality is manifestly contrary to the principles of capital sentencing in *Lockett v. Ohio*.¹⁴⁴ Early pro-life stands are largely independent of death penalty values or predispositions but they are strongly influenced by lingering doubt about the defendant's guilt. The strength of lingering doubt as a mitigating consideration among capital jurors demonstrates that it is essential to the moral character of capital sentencing. The Supreme Court so far has failed to grant or to recognize the place of lingering doubt as an essential ingredient of a reasoned moral judgement. The guilt trial has become a venue for advocating punishment stands and for injecting punishment considerations into the guilt decision. This shift is a reflection of both unspoken assumptions about the purpose of the capital trial and the unique character and gravity of the decision. Whatever the reasons, the consequence is a system gone awry from the start.

We see no easy or obvious remedy. Improvements in initial jury selection are essential. Jury requalification or replacement at sentencing offers benefits but harbors dire consequences especially insofar as it would nullify lingering doubt as a sentencing consideration. If lingering doubt were exempted from consideration in requalifying jurors for sentencing it could be preserved as a sentencing consideration. What can be done about these problems is purely speculation at this point. This research merely identifies the faults and demonstrates the dire need for correctives that will relieve the presently foreclosed impartiality in capital sentencing. Without empirical scrutiny, we can only guess how they might work. But the obvious point is that current practice is drastically at odds with constitutional principles required for the imposition of the death pen-

¹⁴³ Just as the courts have failed to appreciate that fully informing jurors of the punishments from which they must choose is critical for their decision making, acknowledging the relevance of and granting the right to consider lingering doubt in deciding punishment, especially capital punishment, is essential if they are to understand that their obligation and responsibility is to give a reasoned moral response to the evidence and arguments presented to them.

¹⁴⁴ 438 U.S. 586 (1978).

alty. Doesn't the Supreme Court have an obligation not to ignore this empirical reality in favor of the current legal fiction?

APPENDIX A

A TEST FOR CAUSAL PRIORITY

Since we asked jurors questions about the death penalty only after they had served on a capital case, it is possible that their responses are the product of having served rather than an indication of their feelings, beliefs, or predispositions prior to this service. Accordingly, jurors who voted to impose the death penalty might thereafter justify or rationalize their decision by characterizing it as the only acceptable choice at the time of their decision, thus prompting them to generalize their justification in this case to other aggravated kinds of killings. Similar after-the-fact rationalizations may apply to beliefs about the death penalty's effectiveness as a deterrent, the wish to see the death penalty required for intentional murder, the feelings of moral doubt about capital punishment, and the like.

If these feelings and beliefs are rationalizations or reactions to one's imposition of a death or life sentence, rather than predispositions, then they should show a stronger association with jurors' final sentencing decisions than with their earlier stands on punishment. It might also be supposed that jurors' responses reflect their cumulative experiences over the course of the trial. If so, the association between jurors' responses and their stands on the defendant's punishment should become progressively stronger as the trial unfolds.

A test of this challenge to the causal interpretation of jurors' responses to the death penalty acceptability and belief variables appears in Table A1. It shows the association (Gamma coefficients) of both the DOAP and the six death penalty belief variables with jurors' punishment stands at the four successive points in the decision process in Table 3—at the guilt trial, after sentencing instructions, at the first vote on punishment, and at the final punishment vote. Because different feelings and beliefs distinguish early pro-death and early pro-life jurors, it was necessary to assess their associations with measures that are specific to one stand and independent of the other.

Specifically, Table A1 shows the Gamma coefficients of DOAP and of each of the six belief variables with three alternative dichotomous indicators of jurors' stands on punishment: first is the contrast between taking a death or a life stand, death/life (death = 1, life = 0, undecided omitted); second is the difference between taking a death stand and remaining undecided, death/undecided (death = 1, undecided = 0, life omitted); and third is the difference between taking a life stand and remaining undecided, life/undecided (life = 1, undecided = 0, death omitted). At the final vote on punishment, at which point no jurors remained undecided, the Gamma coefficients are undefined for death/undecided and life/undecided.

TABLE A1
ASSOCIATION (GAMMA) BETWEEN DEATH AS ONLY ACCEPTABLE
INDEX AND JURORS' STANDS ON PUNISHMENT AT
FOUR POINTS DURING THE TRIAL

	Guilt trial		Penalty instruction		1st vote on punishment		Final vote on punishment	
	G	Sig.	G	Sig.	G	Sig.	G	Sig.
DOAP (only acceptable)								
Death/life	-.567	.000	-.446	.000	-.441	.000	-.248	.000
Death/undecided	-.396	.000	-.209	.000	-.138	.076	—	—
Life/undecided	.197	.004	.256	.000	.281	.000	—	—
Want better way								
Death/life	-.172	.000	-.242	.000	-.247	.000	-.184	.001
Death/undecided	-.167	.000	-.195	.000	-.277	.000	—	—
Life/undecided	.005	.947	.046	.564	-.018	.851	—	—
Too arbitrary								
Death/life	-.041	.106	-.136	.060	-.145	.017	-.089	.110
Death/undecided	-.109	.101	-.068	.281	-.210	.013	—	—
Life/undecided	.156	.040	.072	.341	-.069	.462	—	—
Deterrent								
Death/life	.321	.000	.223	.000	.255	.000	.134	.006
Death/undecided	.352	.000	.223	.000	.275	.000	—	—
Life/undecided	.022	.742	-.004	.944	.005	.939	—	—
Economic bias								
Death/life	-.095	.191	-.059	.361	-.064	.238	-.094	.053
Death/undecided	.093	.112	.009	.862	.033	.663	—	—
Life/undecided	.194	.003	.068	.303	.095	.225	—	—
Be required								
Death/life	.487	.000	.339	.000	.343	.011	.169	.000
Death/undecided	.408	.000	.245	.000	.207	.011	—	—
Life/undecided	-.102	.133	-.123	.073	-.161	.038	—	—
Moral doubts								
Death/life	-.389	.000	-.316	.000	-.255	.000	-.139	.005
Death/undecided	-.292	.000	-.189	.001	-.291	.000	—	—
Life/undecided	.124	.072	.158	.019	-.036	.654	—	—

NOTE: The Gamma ("G") coefficients are based on the four category version of DOAP (shown in Table 7) and five category versions of the six attitude statements (shown in Table 8).

The pattern of associations supports the interpretation that DOAP is a measure of a predisposition rather than of a rationale, a predisposition that encourages an early pro-death stand on the defendant's punishment. Regarding the choice between death and life and between death and remaining undecided, the associations are strongest at the initial guilt stage of the trial and diminish at successive points thereafter. In other words, the pattern appears to reflect a personal predisposition that encourages jurors to take a pro-death stand that is most strongly manifested at first and is progressively attenuated over the course of the trial.

Also consistent with the assumption of causal priority, the three belief statements that most distinguish the early pro-death jurors from others—"deterrent," "be required," and "moral doubts"—are associated most strongly with the pro-death stand at the guilt phase; thereafter, the associations decrease with some minor reversals, becoming weakest at the final vote on punishment (defined only for the death/life variable). This pattern is strongest and most consistent for "be required," but holds as well for both the death/life and the death/undecided comparisons with regard to the "deterrent" and "moral doubts" statements.

The possibility that DOAP may restrain jurors from taking a pro-life stand at guilt is not supported by the data. In contrast with the choice between life and remaining undecided, the Gamma coefficients are weaker and the pattern is the reverse. That is, the association between pro-life stands and DOAP are negative and increase as the trial proceeds. Perhaps taking a pro-life stand later in the trial discourages jurors from thinking that death is the only acceptable punishment for aggravated murder. A second possibility is that a juror's belief that death is the only acceptable punishment for these killings tends to keep undecided jurors from taking a pro-life stand later in the trial. Either way, the weaker association at guilt is apt to be primarily a spurious reflection of the stronger association later in the trial. At the guilt stage, it is doubtful that a predisposition toward the death penalty, at least according to the DOAP, has an independent causal effect on whether a juror remains undecided or takes a pro-life stand.

For "economic bias," which is the statement that most distinguishes early pro-life jurors from the undecided at guilt, the question of causal priority is ambiguous at best. The association between "economic bias" and the "death/life" choice is relatively weak and is constant over the four decision points, lending no greater support for this variable as a predisposition than as a rationale. The association with the life/undecided choice is, however, distinctively stronger at guilt than later in the trial, suggesting in this case that "economic bias" does exercise an initial pro-life influence on jurors. The contrast between the death/life and the death/undecided patterns, however, reflects the fact that the undecided, but not the pro-death, jurors at guilt are less likely to agree with the statement concerning economic bias. Indeed, as Table 8 shows, fewer undecided jurors (18.2%) than either pro-life (29.9%) or pro-death jurors (25.5%) agreed strongly with this statement. Hence, the pattern of associations simply may reflect the effects of factors that tend to depress agreement with the economic bias statement among the undecided jurors at guilt. Support for the causal priority of "economic bias" is not, therefore, consistent or clear.

To summarize, the four measures of death penalty feelings and beliefs that predict an early pro-death stand show patterns of association over the course of the trial with punishment stands that are consistent with the assumption that they function as predeterminants of an early pro-death stand and, certainly, not as rationalizations for a final punishment decision. In contrast, the two measures that significantly predict an early pro-life stand do not show patterns of associations that are fully consistent with the assumption of causal priority. This does not question the stability of these beliefs, but suggests that any direct association with an early pro-life stand may be spurious. The pattern of associations in the case of DOAP may reflect a delayed tendency of this predisposition to influence the choice between remaining undecided and taking a pro-life stand, or it may reflect a change in belief about the death penalty to comport with a punishment decision that takes shape later in the trial. The pattern in the case of "economic bias" may be as much a reflection of factors distinctive to remaining undecided at guilt as of taking an early pro-life stand on punishment.

APPENDIX B

A TEST OF DIFFERENTIAL EXPOSURE TO GUILT EVIDENCE
AND TYPE OF CRIME

It is possible, of course, that jurors who took an early pro-death stand on the defendant's punishment at the guilt stage of the trial served on different kinds of cases or confronted different kinds of evidence than did those who remained undecided. If this occurred, it could have contributed to—though not justify—their tendency to take a premature stand on punishment. In the case of early pro-life jurors, as well, distinctive differences in the kinds of both crimes and evidence at the guilt trials on which they served could indeed have encouraged their early stands against the death penalty.

This possibility suggests that the apparent effects of death penalty feelings and beliefs on premature punishment decision making (shown in Table 9) could be the result of differences in the kinds of cases on which jurors serve. Although the evidence in Appendix A is consistent with the proposition that certain death penalty feelings and beliefs lead jurors to take early pro-death stands, it does not rule out the possibility that exposure to the nature of the crime and to the evidence of guilt early in the trial rather than jurors' predispositions tends to shape jurors' premature stands on the defendant's punishment. In other words, to the extent that early pro-death and pro-life jurors were exposed to different kinds of crimes and evidence than the undecided jurors, such differences could be responsible for the association we have observed between death penalty views and early stands on punishment.

We need, therefore, to see whether jurors who took different stands on punishment were exposed to different kinds of crimes and evidence of guilt. In particular, because these expressed death penalty views have been firmly linked to early punishment decision making for pro-death jurors, if not for pro-life jurors (Appendix A), it is essential to determine whether early pro-death jurors were more commonly confronted with indications of guilt backed up by forensic analysis, by fingerprint samples, by eyewitness identification, and by similar evidence or with different kinds of killings. If there is no evidence that jurors who take an early pro-death stand on punishment are exposed to different kinds of cases or evidence, then this challenge to our interpretation of death penalty feelings and beliefs as predispositions developed prior to jury service will fail. This is the matter to which we now turn.

The interview asked about the duration of the guilt trial, about the number of prosecution and defense witnesses, about prosecution evidence linking the defendant to the crime, and about defense argu-

ments for a not guilty verdict. It also contained questions about the nature of the crime, including the relationship between offender and victim. The responses of early pro-death, undecided, and early pro-life jurors to these questions appear in Table B1.

TABLE B1
GUILT-TRIAL EVIDENCE AND TYPE OF CRIME BY JURORS' STANDS ON
PUNISHMENT AT THE GUILT STAGE OF THE TRIAL

Characteristics	Death		Undecided		Life	
	% (Base no.)		% (Base no.)		% (Base no.)	
Guilt-trial characteristics						
A. Guilt-trial duration and number of witnesses						
Four or more days to hear guilt evidence	66.3	(237)	64.3	(420)	65.0	(163)
Eight or more testified for prosecution	57.6	(226)	62.5	(416)	57.9	(152)
Five or more testified for defense	44.1	(222)	45.2	(407)	47.4	(150)
B. Prosecution evidence linking the defendant to the crime						
Formal confession to authorities by the defendant	39.3	(247)	40.0	(445)	42.0	(169)
Testimony of an accomplice or codefendant	30.0	(247)	31.3	(444)	27.5	(167)
Fingerprint identification	45.7	(247)	43.6	(443)	35.5	(166)
Other scientific evidence such as blood or hair analysis, ballistics tests, etc.	76.4	(246)	84.2	(443)	72.8	(169)
Testimony of a medical or forensic expert	90.2	(246)	93.7	(444)	87.0	(169)
Photographs of the crime scene	96.4	(247)	96.9	(445)	92.4	(170)
Photographs of the victim's body, showing the manner of the killing	87.0	(247)	89.4	(443)	88.2	(170)
C. Testimony of a witness other than the police or an accomplice						
Actually saw the defendant commit the crime	21.5	(246)	21.1	(445)	19.5	(169)
Heard the defendant admit committing the crime	31.1	(244)	29.5	(441)	26.5	(170)
Could place the defendant at the time and location of the crime	66.7	(246)	62.7	(445)	56.5	(170)
Knew of a motive the defendant had for the crime	38.6	(246)	36.9	(442)	43.1	(167)
D. Defense's main reasons for a not guilty verdict						
The defendant had no role whatsoever in the killing	42.2	(244)	30.6	(434)	38.8	(170)
The defendant had only a minor role in the killing	16.8	(244)	19.3	(435)	18.8	(170)
The defendant killed in self-defense	9.4	(244)	9.6	(436)	6.5	(169)
The defendant killed in defense of others	0.8	(245)	2.8	(436)	3.5	(170)
The victim or others provoked the defendant	21.4	(243)	27.4	(435)	23.8	(168)
It was an unintentional or impulsive act	33.9	(242)	44.7	(436)	45.2	(168)
It was an accident or mistake	16.5	(243)	17.4	(436)	16.0	(169)
The defendant was mentally ill and could not fully appreciate the wrongfulness of his or her actions	24.6	(244)	26.1	(437)	25.0	(168)
The defendant was insane	6.2	(242)	5.7	(437)	4.1	(169)

Continued on next page

Table B1—*continued*

Characteristics	Death		Undecided		Life	
	%	(Base no.)	%	(Base no.)	%	(Base no.)
The defendant simply was not proved guilty beyond a reasonable doubt	55.0	(242)	54.6	(438)	56.8	(169)
E. Defendant testified and believability of testimony						
Defendant testified at the guilt stage of the trial	34.2	(243)	32.8	(433)	36.4	(162)
Juror found some testimony at guilt hard to believe	50.4	(244)	49.8	(438)	52.1	(167)
Crime characteristics						
F. Multiple victims and offenders						
More than one person killed	26.1	(245)	26.1	(445)	21.6	(171)
Persons also seriously injured	23.3	(240)	19.9	(428)	13.8	(159)
More than one person responsible for the killing	28.2	(241)	30.8	(425)	35.4	(164)
G. Offender/victim relationship						
Acquaintances	39.2	(237)	45.3	(428)	45.8	(166)
Strangers	40.4	(240)	39.0	(428)	30.7	(166)
Friends	23.9	(238)	25.5	(427)	27.4	(168)
Lovers	12.2	(238)	13.4	(424)	14.5	(166)
Neighbors	13.0	(239)	10.8	(425)	9.6	(167)
Co-workers	10.9	(238)	12.4	(426)	10.8	(166)
Other family relations	12.5	(240)	8.6	(431)	10.7	(169)
Spouse or ex-spouse	7.6	(238)	7.9	(429)	9.6	(167)
Employer/employee	6.7	(238)	8.5	(425)	7.2	(167)
Tenant/landlord	1.3	(238)	1.9	(423)	6.0	(166)

NOTE: The percentages in this table are shown with the base figure immediately to the right in parenthesis. Contrary to the convention followed in showing percentages in other tables, the remainder of the cases (lacking the characteristic in question) that sum to 100% are omitted.

There is little indication that early pro-death jurors served on juries different from those on which the undecided jurors sat, and the indications of differences between undecided and early pro-life jurors are only slightly greater. By no means do the differences suffice to challenge the interpretation of the death penalty feelings and beliefs we examined as predispositions that jurors bring with them to the case on which they serve.

The responses of early pro-death and undecided jurors are remarkably similar. The difference is less than three percentage points for twenty-nine of the thirty-nine comparisons; the median difference is 1.8 percentage points. Of guilt-trial characteristics (Sections A-E), only two of twenty-six comparisons show a ten point difference between early pro-death and undecided jurors; in only two more instances does the difference reach five points. Furthermore, in three of the four differences that exceed five points, the undecided jurors appear to be out of line; that is, the early pro-death and early pro-life jurors are closer to one another than either is to the undecided jurors. Only the report that the defense argued the killing "was an unintentional or impulsive act" distinguishes the early pro-death jurors from both the undecided and early pro-life jurors by as much as ten percentage points. And, this one modest difference in reports of what

the defense argued could well reflect a tendency for early pro-death jurors, who also are typically early to decide guilt, simply to regard this argument as frivolous.

Differences between the early pro-life and undecided jurors at guilt are more numerous but no more sizable. Of the thirty-nine comparisons, nine differences exceed five percentage points, but only one reaches ten points. Regarding exposure to guilt-trial evidence and arguments (Sections A-E), the early pro-life jurors differed from the undecided by at least five points in seven instances. They were less likely to say the prosecution used fingerprint identification, other scientific evidence such as blood or hair analysis, ballistics and other tests, and testimony of a medical or forensic expert. They were also less apt to report that a witness other than either an accomplice or the police could place the defendant at the time and location of the crime, but more apt to say such a witness knew of a motive the defendant had for the crime. They also were more apt to report that the defense argued that the defendant had no role whatsoever in the crime, but less likely to report that the defendant testified in his or her own behalf at the guilt trial. In the one instance, regarding "other scientific evidence," for which the difference reached ten percentage points, it was again the undecideds who seemed out of line with both the early pro-life and early pro-death jurors.

Nor do early pro-death and pro-life jurors differ much from the undecided jurors in the kinds of killings to which they were exposed (Sections F and G). In the number killed, the number injured, and the number responsible for the killing, early pro-death jurors differed from the undecided jurors at most by 3.4 percentage points. Between early pro-life and undecided jurors, the differences are slightly larger, but only one exceeds five points; namely, the percent saying that someone other than the murder victim was seriously hurt. While the differences between early pro-life and undecided jurors are small, the first two are in the direction of a less aggravated crime and the third may reflect a quandary about responsibility for the killing on the part of early pro-life jurors.

Regarding the relationship between offender and victim, differences between undecided jurors and those who took an early stand on punishment exceeded five percentage points in two instances: early pro-death jurors were 6.1 points less likely than undecided jurors to say the offender and victim were acquainted, and early pro-life jurors were 8.3 points less apt than the undecided jurors to say the offender and victim were strangers. No other differences between undecided jurors and those who took a stand on punishment at guilt reach five percentage points. Because the first three categories (acquaintances, strangers, and friends) are relatively general characterizations, to-

gether they would seem to encompass the other seven, more specific categories, exhausting the range of offender-victim relationships. (In fact, the percentages designated as acquaintances, strangers, or friends do come to within ten percentage points of one hundred percent for each category of jurors classified by their punishment stands at guilt.) The more specific relationship categories do not, unfortunately, shed further light on the contents of the more general characterizations. That is to say, there are no specific categories of acquaintance relationships less common by as much as even two points among early pro-death than undecided jurors. And the stranger characterization is not further refined by any of the more specific categories, which in all cases pertain to people who know one another.

In sum, jurors who took an early pro-death stand were not different in the kinds of cases to which they were exposed than those who were undecided. They are within two or three percentage points in all but a very few respects, and the observed discrepancies do not suggest any systematic difference. In the case of early pro-life jurors, the differences with the undecided jurors are slight, but consistent with the proposition that early pro-life jurors may be serving on cases with more room for uncertainty about guilt. The possibility that early pro-life jurors may, in small measure, have been exposed to different kinds of cases than undecided jurors is not inconsistent, however, with our interpretation of the role of death penalty beliefs and feelings in promoting early stands on punishment. Because the causal nature of the effects of death penalty feelings and beliefs are reliably affirmed only for taking an early pro-death stand (Appendix A), the differential exposure of early pro-life jurors stands poses no challenge to the interpretation of such feelings and beliefs as predispositions that foster premature pro-death stands.