

4-1-1996

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## Recommended Citation

Eisenberg, Theodore; Garvey, Stephen P.; and Wells, Martin T., "Jury Responsibility in Capital Sentencing: An Empirical Study" (1996). *Cornell Law Faculty Publications*. Paper 357.

<http://scholarship.law.cornell.edu/facpub/357>

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# Jury Responsibility in Capital Sentencing: An Empirical Study

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Ready . . . Aim . . . *Fire!* A life is taken. Each marksman seemingly bears responsibility for the condemned's death. But, in accord with tradition, one squad member—no one knows who—fires a blank, giving all members a chance to deny responsibility.<sup>1</sup> Avoiding responsibility for another's death, even when the state authorizes it, is a widely held impulse. English judges who pronounced a death sentence would don a black hat, symbolizing that it was the law and the state, not the judge, that had condemned the defendant. Jurors, no less than executioners and judges, must deal with this awesome burden.

The law allows executioners to deny responsibility for what they have done by making it possible for them to believe they have not done it. The law treats members of capital sentencing juries quite differently. It seeks to ensure that they feel responsible for sentencing a defendant to death. This differential treatment rests

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<sup>†</sup> Professor of Law, Cornell Law School. Primary funding for this project was provided by National Science Foundation Grant # SES 90-13252. Supplementary funding was supplied by the Cornell Law School and the former South Carolina Death Penalty Resource Center. We would like to thank Taron Brown, Deborah Czuba, Ryan Faulkner, H. Matthew Horlacher, Marta Kahn, Lisa Kimbrough, David Kully, Mary Parasiliti, Michael Jay Stoltzfus, Erika Verrill, Mary Beth Welch, and Doug Wise for conducting the interviews, Eric Ehrenberg and Jason Ehrenberg for research assistance and designing the database, Drucy Glass for supervising the interviewing process, Laura Myers and Drucy Glass for training the interviewers, Kevin Clermont, Steven Clymer, Sheri Johnson, Robert Kent, Jeffrey Rachlinski, Stewart Schwab, and Steven Shiffrin for their comments, and Karen Wilson for her invaluable assistance with the data.

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1. See Shannon Tangman, *Delaware Hangs Double Murderer; And in Utah, Firing Squad Gets Prepared*, USA TODAY, Jan. 25, 1996, at A3. Gary Gilmore, the first inmate executed after the Supreme Court upheld the constitutionality of the death penalty in 1976, was, until very recently, the only inmate in the post-*Furman* era to be executed by firing squad. In any event, whether the blank round is a truly effective device for avoiding responsibility is dubious. The truth of the matter is that most members of firing squads will probably be able to tell whether the round they fired was live or a blank, since the recoil given off by a blank round is noticeably weaker than that given off by a live one.

on a presumed link between a capital sentencer's willingness to accept responsibility for the sentence she imposes and the accuracy and reliability of that sentence. A reliable sentence requires a responsible sentencer, but if in fact jurors do not believe they are responsible, the resulting sentence is rendered unreliable. Moreover, because the capital sentencing process is so complex and involves so many actors, jurors can always shift responsibility from their shoulders onto someone else's. The result, critics assert, is a capital sentencing system that makes death sentences at once unreliable and too easy to impose.<sup>2</sup>

Using interviews of 153 jurors who sat in South Carolina capital cases, this article examines empirically whether capital sentencing jurors assume responsibility for the sentence they impose. Part I describes the constitutional doctrine relating to jury responsibility and sets out two different "models" of jury responsibility in the capital sentencing context. Part II describes the data used in this study and the applicable state-law, South Carolina's, governing the penalty phase. Part III explores the extent to which jurors accept responsibility for the capital sentencing decision and whether variation in accepting responsibility helps explain sentencing patterns. Part IV addresses the factors that influence jurors' sense of responsibility. Part V offers our conclusions and discusses possible reforms.

We emphasize at the outset that the data are not free from ambiguity because the concept of responsibility is itself not free from ambiguity. Among other things, responsibility may refer to "role responsibility," which relates to the obligations one has flowing from a role one has assumed.<sup>3</sup> In the capital sentencing context, role responsibility focuses on whether jurors understand and accept the primary responsibility they have for the defendant's sentence in the role they have assumed as sentencer. As between the two potentially responsible legal actors at the sentencing phase, jury and judge, who do jurors believe bears responsibility for the defendant's sentence? Alternatively, responsibility may refer to "causal responsibility," which relates to whether or not, and how strongly, someone or something figures in the causal chain leading to some outcome.<sup>4</sup> Causal responsibility includes all the

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2. See, e.g., Michael Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283 (1989); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 391, 392.

3. Cf. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 212-14 (1968).

4. Cf. *id.* at 214-15.

factors that might be responsible for the defendant's sentence, including, most importantly, the conduct of the defendant himself.

Although these notions of responsibility are distinct, they are not mutually exclusive. Accepting role responsibility has causal overtones. A juror who accepts role responsibility may well view himself as more causally responsible for a death sentence than would a juror who rejects role responsibility. Because of this overlap, jurors responding to interview questions may have interpreted responsibility to refer to either or both of these senses of responsibility. In some cases the dominant notion of responsibility probably shifted as the question bearing on responsibility changed.

Nevertheless, the results suggest that distinguishing between these two kinds of responsibility is useful and illuminating. Briefly, we find that most jurors accept role responsibility for the capital sentencing decision, though a significant minority do not. Most jurors understand and acknowledge the primary role they play in sentencing a defendant to life or death. However, beliefs that cannot easily be changed limit the degree to which jurors view themselves as causing the defendant's sentence. Jurors view defendants as primarily responsible for setting off the sequence of events leading to the sentencing decision and do not believe that most death sentences will be carried out. While legal rules may be able to enhance jurors' sense of role responsibility, their sense of causal responsibility depends on facts and circumstances less amenable to change.

Against a background of most jurors accepting role responsibility, we find limited evidence that jurors who impose life sentences accept more responsibility than do jurors who impose death sentences. In a bivariate model, a modest correlation exists between acceptance of role responsibility and sentencing outcome. In a multivariate model of the factors explaining the acceptance of responsibility, however, the difference between jurors who imposed life and jurors who imposed death all but disappears. Finally, we find that it is difficult to explain why some jurors accepted responsibility while others did not.

### I. CONSTITUTIONAL DOCTRINE & MODELS OF JUROR RESPONSIBILITY

A juror's sense of responsibility is important in capital sentencing because it is required for a "reliable" sentence. A central feature of a capital trial's penalty phase is the jury's broad discretion to determine the defendant's sentence.<sup>5</sup> Once the jury finds

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5. All capital trials are bifurcated into a guilt phase and a penalty phase. In the guilt

that the state has established a single, non-vague statutory aggravating circumstance, it is generally free to consider a wide range of aggravating and mitigating evidence.<sup>6</sup> The penalty phase is built on the idea that such discretion is needed to enable the jury to reach a "reliable" or "appropriate" sentence. Yet precisely because the jury enjoys such freedom, the outcome of a capital sentencing proceeding depends significantly on how each juror understands the task before him. Part of that understanding is the juror's sense of responsibility for his decision. Accordingly, in *Caldwell v. Mississippi*<sup>7</sup> the Supreme Court held that a capital sentencing juror must not believe that the responsibility for the defendant's sentence rests somewhere other than with him, since a sentence imposed by a juror under this impression is thought to be unreliable.<sup>8</sup>

The rule announced in *Caldwell* rests on the assumption that a death sentence is unreliable if it is imposed by a sentencer who does not see herself as responsible for the defendant's sentence.<sup>9</sup> The moral quality of the capital sentencing decision depends on the sentencer believing she is responsible for the sentence. A sentencer who believes she alone bears responsibility for the defendant's fate will attend to her task with the requisite degree of moral seriousness, and a decision made without such seriousness is less reliable. If a sentencer believes, or has been led to believe, that she does not bear full responsibility, either because she can defer to another actor's prior decision or can delegate her sentencing authority to a subsequent actor in the process, then the reliability of the sentencer's decision is for that reason suspect. In our terminol-

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phase the jury determines whether or not the defendant is guilty of a capital offense. In the penalty phase the jury determines whether or not the punishment shall be death or a term of imprisonment. In South Carolina, the focus of this study, the authority to determine a capital defendant's sentence is, as in most states, ultimately vested in the jury. In a handful of other states the judge or panel of judges imposes sentence. Colorado recently switched from jury sentencing to sentencing by a three-member panel of judges, apparently in an effort to bypass the reluctance of Colorado juries to impose death. See Brian Weber, *Coloradans Queasy About Death Penalty—Harlan Case Builds Support for 3-Judge System to Relieve Juries of Responsibility*, ROCKY MTN. NEWS, June 23, 1995, at A42.

6. See, e.g., *Barclay v. Florida*, 463 U.S. 939 (1983); *Zant v. Stephens*, 462 U.S. 862 (1983).

7. 472 U.S. 320 (1985).

8. *Id.* at 328-29.

9. *Id.* at 329. Not all those who have studied capital sentencing would agree that the sentencer should believe she bears responsibility for the sentence. According to the 1953 Report of the Royal Commission on Capital Punishment, some members of the English judiciary objected to vesting trial judges with discretion to impose death or life imprisonment, since the "exercise of such a discretion would impose on the Judge a heavy, indeed an intolerable responsibility." ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT, 1949-53, CMD 8932, at 191.

ogy, *Caldwell* insists that jurors understand and accept the role the law assigns them as capital sentencers.<sup>10</sup>

### A. *The Caldwell Model*

Two basic models have informed thinking about juror responsibility in capital sentencing. The first model, implicit in the Supreme Court's discussion in *Caldwell*, takes an optimistic view about the willingness and ability of jurors to assume responsibility for the choice they must make. The second model, which draws on the work of psychologist Stanley Milgram, takes a less sanguine view. We turn first to the *Caldwell* model.

The defendant's counsel in *Caldwell* tried to impress on the sentencing jury the serious nature of the task confronting it. His "arguments were in large part pleas that the jury confront both the gravity and the responsibility of calling for another's death, even in the context of a capital sentencing proceeding."<sup>11</sup> "In response, the prosecutor sought to minimize the jury's sense of the importance of its role."<sup>12</sup> In closing the prosecutor said:

Now, they [the defense] would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable . . . [T]hey know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so.<sup>13</sup>

The defendant was sentenced to death.

In the Supreme Court Justice Marshall, writing for four other justices, held that the prosecutor's statements violated the Eighth Amendment's ban on cruel and unusual punishments.<sup>14</sup> "[I]t is constitutionally impermissible," he wrote, "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."<sup>15</sup> This was so because ju-

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10. *Caldwell*, 472 U.S. at 328-31. It is possible to view *Caldwell* as also insisting that jurors feel causal responsibility. Accepting role responsibility for the sentencing decision renders the sentencer a cause of the sentence. But the case's context constrains the possible causal agents under consideration by the Court. *Caldwell* did not prohibit references to defendant's blameworthiness or brutality. To the extent *Caldwell* is about causal responsibility, it is constrained to considering only the possible causal agents at issue in the case, those responsible for the sentencing outcome.

11. *Id.* at 324.

12. *Id.* at 325.

13. *Id.* at 325-26.

14. *Id.* at 328-29.

15. *Id.* The Court has subsequently read *Caldwell* narrowly, such that the prosecutor's

rors who had been led to believe they were not responsible for the defendant's sentence would, according to Justice Marshall, be more likely to impose an "unreliable" sentence than would jurors who had not been so misled.<sup>16</sup>

Justice Marshall gave two reasons why jurors might, if given the opportunity, delegate to an appellate court their responsibility for imposing the sentence they believed the defendant deserved.<sup>17</sup> The first was to "send a message."<sup>18</sup> Jurors who had been led to believe that an appellate court would decide the defendant's true sentence might be inclined to impose death in order to express their outrage at the defendant's conduct, confident that the proper sentence, whatever it ought to be, would later be imposed on appeal.<sup>19</sup> The second was simply to avoid any anxiety bound up with being forced to determine if another person was to be put to death.<sup>20</sup> As Justice Marshall explained, a capital sentencing jury is made up of members of the community "placed in a very unfamiliar situation and called upon to make a very difficult and uncomfortable choice."<sup>21</sup> They are "given only partial guidance" in reaching a decision and are left with "substantial discretion."<sup>22</sup> Under these circumstances they may welcome some way to decide not to decide, thus silently delegating sentencing responsibility to a distant appellate court.<sup>23</sup>

This delegation would, Justice Marshall reasoned, not only generate unreliable sentences, it would generate unreliable

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statements must not only risk undermining the jury's sense of responsibility, but must also misstate or misrepresent applicable state law. *See, e.g., Romano v. Oklahoma*, 114 S. Ct. 2004, 2009-10 (1994); *Sawyer v. Smith*, 497 U.S. 227, 233-41 (1990); *Dugger v. Adams*, 489 U.S. 401, 407-08 (1989).

16. *Caldwell*, 472 U.S. at 330. Moreover, the appropriate sentence would not have been assessed on appeal, since the scope of appellate review in Mississippi did not extend to *de novo* redetermination of the sentence. *See id.* Indeed, even if appellate review did encompass such a redetermination, a sentence determined in the first instance on appeal would be morally suspect. Appellate courts decide on the basis of paper records. *See Clemons v. Mississippi*, 494 U.S. 738, 763 (1990). They do not see the defendant in the flesh. Never having had "to confront and examine the individuality of the defendant" undermines the ability of appellate tribunals to function as sentencers. *Id.* at 770 (Blackmon, J., concurring in the judgement in part and dissenting in part). Nonetheless, the Court in *Clemons* upheld the authority of state supreme courts, when they invalidate an aggravating circumstance, to "reweigh" the remaining aggravating circumstances, if any, against the mitigating circumstances and, if appropriate, affirm the death sentence. *Id.* at 738, 754.

17. *Caldwell*, 472 U.S. at 330.

18. *Id.* at 331.

19. *Id.* at 332.

20. *Id.* at 332-33.

21. *Id.* at 333.

22. *Id.*

23. *Id.*

sentences biased in favor of death.<sup>24</sup> A jury wishing to delegate its sentencing responsibility might think that the only way it could effectively do so would be to choose death, since a life sentence would be unreviewable on appeal.<sup>25</sup> The jury might correctly realize that while a death sentence could be reversed or reduced on appeal for error during the penalty phase, a life sentence could not be increased.<sup>26</sup> A jury wishing to delegate responsibility might thus impose death, even if it otherwise concluded that the most appropriate sentence was life imprisonment.<sup>27</sup> In short, the defendant would not only be denied a fair determination of his sentence but the process would be skewed in favor of death.<sup>28</sup>

The image of juror responsibility implicit in *Caldwell* is, on balance, an optimistic one, since it "take[s] as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should [live or] die at the hands of the State."<sup>29</sup> Capital jurors are, on this view, ready, willing and able to accept responsibility for the choice they must make. At the same time, however, jurors are seen as having an incentive to avoid making that decision, either to avoid responsibility altogether and wash their hands of it, or to send a retributive message, safe in the knowledge that the appropriate sentence would be imposed sometime later on in the process.<sup>30</sup> In short, this model predicts that capital jurors will accept responsibility unless openly encouraged not to.

### B. *The Milgram Model*

*Caldwell's* assumption that jurors normally accept responsibility for capital sentencing has been questioned. Stanley Milgram's famous experimental results on obedience to authority<sup>31</sup> dominate much of the thinking about how capital jurors deal with the question of sentencing responsibility.<sup>32</sup> His results present a much less

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24. *Id.*

25. *Id.* at 322.

26. *Id.* at 332.

27. *Id.*

28. *Id.*

29. *Id.* at 329.

30. *Id.* at 329-32.

31. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974).

32. See, e.g., William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1093 & nn.229-30 (1995) [hereinafter Bowers, *Capital Jury Project*]; Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1223, 1230 & n.37 (1995); Joseph L. Hoffman, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1137 (1995); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Con-*



optimistic vision of the willingness or ability of capital jurors to accept responsibility for their sentencing choice, since on this view the very nature of the capital sentencing decision will send jurors on a search to find someone or something else to assume responsibility for what they do. They need no prompting or encouragement from the prosecutor.

1. *The Milgram Experiments.* Milgram's experiment involved the fundamental moral principle that "one should not inflict suffering on a helpless person who is neither harmful nor threatening to oneself."<sup>33</sup> He tested adherence to this principle by seeing whether people would obey an authority figure whose instructions were to violate the principle.<sup>34</sup> "A person coming to our laboratory will be ordered to act against another individual in increasingly severe fashion. Accordingly, the pressures for disobedience will build up. At a point not known beforehand, the subject may refuse to carry out this command, withdrawing from the experiment."<sup>35</sup> The increasingly severe action was the administration by the subject of increasingly severe electric shocks to a "student/Learner" who gave incorrect answers to questions posed by the "subject/Teacher" in response to instructions issued by the "authority figure/Experimenter."

The subjects were surprisingly obedient to Experimenter's orders to administer the shocks, which were in fact feigned. Milgram hypothesized that the subjects' willingness to violate deeply held moral norms against inflicting pain was the consequence of achieving what he labeled an "agentic state." In this agentic state, a person "sees himself as an agent for carrying out another person's wishes."<sup>36</sup> As a mere agent the individual absolves himself of responsibility for his acts. "In this condition the individual no longer views himself as responsible for his own actions but defines himself as an instrument for carrying out the wishes of others."<sup>37</sup>

2. *Implications for Capital Sentencing.* At a general level, Milgram's and other psychological results provide a basis for hypothesizing about juror responsibility in capital cases. Faced with the task of deciding whether or not the defendant will be con-

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*stitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 335, 413 n.293 (1995); Weisberg, *supra* note 2, at 305, 343.

33. MILGRAM, *supra* note 31, at 13.

34. *Id.* at 13-14.

35. *Id.*

36. *Id.* at 133.

37. *Id.* at 134.

demned, capital sentencing jurors, especially those who in fact sentence to death, may seek to shift responsibility to another source, such as the law or the judge,<sup>38</sup> whether they have been encouraged to or not.

Yet Milgram's experiments provide a useful analogy to capital sentencing only at a general level. Substantial differences separate Milgram's setting and capital sentencing. First, Milgram's subjects thought they were inflicting pain on experimental volunteers, whose only "wrongdoing" was answering a question incorrectly. Capital jurors pass sentence on defendants convicted of aggravated murder. Only those opposed to the death penalty on moral grounds would be in a position approximating that of Milgram's subjects. Second, even though they did not know the experiment they were actually part of, Milgram's subjects knew they were part of some experiment. One can not experimentally replicate a capital sentencing decision. Third, Milgram's experimental setting reduced the possible causes of punishment to three: the authority figure, the subject, and the shocked victim.<sup>39</sup> There was no overlay of law and criminal behavior to complicate the causal mechanism resulting in the infliction of pain. Finally, Milgram's subjects believed they were administering the electric shocks themselves but were not asked to determine what the punishment should be. Capital sentencing would more closely replicate Milgram's experiment if jurors were told or believed that they themselves would be the ones to actually execute a death sentence but that they were not necessarily responsible for choosing it.

These differences complicate the experiments' implications for theorizing about how capital case jurors will deal with responsibility. In the sentencing context, the content of role and causal responsibility, and their relationship, differ from the experimental context. First, there is more room to differentiate between role responsibility and causal responsibility than in the experimental set-

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38. Cf. HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* (1989) (examining social psychology of questionable acts committed under orders from authority); Steven J. Sherman, *The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law*, 70 *IND. L.J.* 1241, 1241 (1995) (claiming that perceived responsibility affects decisionmaking and sentencing decision); Claudia M. Worrell, *Psychiatric Prediction of Dangerousness in Capital Sentencing: The Quest for Innocent Authority*, 5 *BEHAV. SCI. & L.* 433, 438-43 (1987) (discussing juror deferral to psychiatrists).

39. MILGRAM, *supra* note 31, at 21, 51. An aloof source of authority for the punishment could be viewed as a fourth possible causal agent. At several points the authority figure tells the subject that "The experiment requires that you go on," or gives stronger commands. *Id.* Milgram's experiment does not try to separate the role of the authority figure from that of abstract "science" as a source of authority.

ting. Milgram's controlled environment limited the difference between role responsibility and causal responsibility. Role responsibility meant responsibility for administering the feigned shock. Responsibility for the role of punishment administrator could only be ascribed to subject or Experimenter. Causal responsibility introduced only one new factor, Learner, whom some subjects did blame.<sup>40</sup> Responsibility for the shocks, whether role or causal, could only be ascribed to subject, Experimenter, and Learner. Causal responsibility for capital sentencing introduces the law, the judge, the defendant, and perhaps other possible sources. In the world of capital sentencing, as the results presented below show, the gap between the two kinds of responsibility is unavoidably large, and jurors do, it seems, differentiate between the two.

Second, causal responsibility is less complicated in the laboratory. The criminal defendant's causal role is more substantial and complex than that of the shocked Milgram Learner. Learner was not guilty of a morally wrongful act. Moreover, the law's causal role transcends that of Experimenter or of the scientific method Experimenter represents. The trial judge fulfills a role more analogous to that of Experimenter. The law is an overlay on top of his authority. Given the defendant's wrongful behavior, the role of law in capital sentencing, and the wider gap between causal and role responsibility, jurors' notions of responsibility may not be directly comparable to, or predictable from, Milgram's experiments. Indeed, to the limited extent our results can be compared with Milgram's, capital jurors accept more role responsibility than Milgram's subjects, while causal responsibility was more diffuse.

Lastly, it bears noting that the Milgram model of how jurors will try to shed responsibility may, as applied to capital sentencing, rest on an understanding of responsibility that makes the model impossible to disprove. The model may understand "responsibility" such that no morally respectable human being who *really* accepted "responsibility" could ever sentence a fellow human being to death.<sup>41</sup> The cognitive dissonance jurors must suffer under such circumstances would simply be too much for them. Yet, in fact, jurors continue to sentence fellow citizens to death, over 3,000 of them since 1972. Thus, so the argument goes, these jurors must necessarily be assigning responsibility elsewhere. This claim is treated as an analytic truth. What it means to accept responsibility in capital sentencing is never to impose a death sentence; a death

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40. *Id.* at 204.

41. Almost no one thought Milgram's subjects would obey the experimenter. "Only a pathological fringe, not exceeding one or two percent, was expected to proceed to the end of the shockboard." *Id.* at 31.

sentence is conclusive evidence that responsibility was not assumed. Such a claim is, of course, beyond the power and techniques of social science to disprove.

There are, in short, good reasons to question how well the Milgram model of responsibility fits capital sentencing. Nonetheless, it presents an alternative to the *Caldwell* model, and it has been, and continues to be, very influential.

## II. THE DATA AND APPLICABLE STATE LAW

Little empirical research addresses the question of jurors' sense of responsibility during the penalty phase, a gap in our understanding that has not gone unnoticed by those who must develop legal rules designed to structure capital sentencing.<sup>42</sup>

Jurors' views about the responsibility they have for the defendant's sentence raise two broad questions. The first, and most straightforward, is whether or not capital sentencing jurors believe they are "responsible" for the defendant's sentence? As we shall see, reality is more nuanced than a simple "yes" or "no" answer allows. However, if there must be a simple answer, it is "yes." Most jurors accept role responsibility, though a disquietingly large minority do not. By way of contrast, jurors find ascribing causal responsibility to be a more complex task, since other things besides the actions of the judge or jury bear a causal relationship to the defendant's sentence. The second question arises precisely because there exists inter-juror variation in accepting role responsibility—some jurors accept responsibility, while others do not: What explains these differences? Possible explanations lie in jurors' personal characteristics, in defendants' characteristics, in the facts of the crime, or in external factors such as jurors' perceptions about the role of judges and appellate courts.

After describing the data and the applicable state law, Part III addresses the question whether, and in what sense, capital jurors accept responsibility for the sentencing decision. Part IV then seeks to explain why some jurors accept role responsibility while others do not.

### A. *The Data*

The data analyzed here were gathered as part of the Capital Jury Project, a National Science Foundation-funded multistate research effort. Researchers trying to draw inferences about how jurors determine capital case sentences have tended to rely on

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42. Cf. *Romano v. Oklahoma*, 114 S. Ct. 2004, 2016 (1994) (Ginsburg, J., dissenting).

surveys of the general population, on anecdotal data from individual cases, and on material in the written record.<sup>43</sup> Data have not been systematically gathered from jurors who actually sat in capital cases. The data gathered by the Capital Jury Project are a rich source of information about jurors' attitudes toward responsibility for capital sentencing.

The results reported here are from the Capital Jury Project's efforts in South Carolina. Jurors who sat in forty-three South Carolina murder cases were randomly sampled, with a goal of four juror interviews per case. The sample includes twenty-three cases resulting in death sentences and twenty cases resulting in life sentences. The cases in the study consist of all South Carolina capital cases brought from enactment of the South Carolina Omnibus Criminal Justice Improvements Act of 1986 to when interviews were terminated in the summer of 1993.<sup>44</sup> The 1986 law worked fundamental changes in the standards of parole in capital cases and provided a logical stopping point as we worked our way backwards from the most current cases available. A total of 153 live interviews were completed by interviewers trained to work with the interview instrument.

The fifty-one-page interview instrument, designed and tested by the Capital Jury Project, covered all phases of the guilt and sentencing trials.<sup>45</sup> The data gathered include facts about the crime, racial, economic and other characteristics of the defendant, the victim, and their families, the process of juror deliberation, and the conduct of the case by defense counsel, the prosecutor, and the judge. The interviews also included questions about jurors' background characteristics and their views on the death penalty.

The methodology used imposes a limitation on the conclusiveness of the analysis. Jurors were interviewed after they had served, not before. We do not know for certain whether their reported attitudes and perceptions constituted reality at the time of the sentencing decision, or were "post facto adjustments of thought."<sup>46</sup>

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43. Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 2 (1993).

44. 1986 S.C. Acts 2983. A few defendants had to be resentenced after flaws were found in their initial sentencing proceedings. We include only the initial sentencing proceedings.

45. Juror Interview Instrument, *National Study of Juror Decision Making in Capital Cases*, Justice Research Center, College of Criminal Justice, Northeastern University (on file with the authors).

46. MILGRAM, *supra* note 31, at 204.

### B. South Carolina's Death Penalty Statute

In South Carolina if a prosecutor has given notice that the state seeks the death penalty,<sup>47</sup> a sentencing trial follows the defendant's conviction for murder.<sup>48</sup> After hearing evidence at the sentencing phase, the jury must determine whether at least one statutory aggravating circumstance is present. If an aggravating circumstance is present a jury may, but is not required to, sentence the defendant to death. Murder under aggravating circumstances includes murder committed during the commission of certain serious crimes such as kidnapping and rape, murder of a police officer, and murder by a defendant previously convicted of murder.<sup>49</sup> The jury must also consider statutory mitigating circumstances. These include lack of prior convictions for violent crime, the age or mental capacity of the defendant, duress, and provocation.<sup>50</sup> If the jury does not unanimously find in favor of death, the defendant is automatically sentenced to life imprisonment.<sup>51</sup>

Jurors' perceptions about responsibility may well vary across states, depending on state law. In South Carolina the jury's sentencing verdict is formally designated a "recommendation" to the trial judge, who has final sentencing authority. However, the South Carolina Supreme Court, relying on *Caldwell*, has "required that the trial judge convey to the jury in the sentencing phase . . . that its sentencing recommendation will be followed."<sup>52</sup> In other states,

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47. S.C. CODE ANN. § 16-3-26(A) (Law. Co-op. 1995).

48. *Id.* § 16-3-20(B).

49. *Id.* § 16-3-20(C)(a)(1), (2), (7). The other aggravating circumstances appear at *id.* §§ 16-3-20(C)(a)(3)-(6), (8)-(10).

50. *Id.* § 16-3-20(C)(b).

51. *Id.* § 16-3-20(C).

52. *State v. Bellamy*, 359 S.E.2d 63 (S.C. 1987); accord *State v. Davis*, 411 S.E.2d 222 (S.C. 1991); *State v. Sims*, 405 S.E.2d 377, 384 (S.C. 1991), *cert. denied*, 112 S. Ct. 1193 (1992); *State v. Cain*, 377 S.E.2d 556, 562-63, (S.C. 1988) *cert. denied*, 497 U.S. 1010 (1990); *State v. Middleton*, 368 S.E.2d 457, 461 (S.C.), *cert. denied*, 488 U.S. 871 (1988). Failure to inform the jury that its "recommendation" is in fact binding on the trial court is reversible error. *State v. Plemmons*, 370 S.E.2d 871, 872 (S.C. 1988).

There are no pattern jury instructions on the issue of responsibility in South Carolina. Different trial court judges convey the fact that the jury's decision is binding on the judge in different ways. See, e.g., *State v. Hudgins* (1993) ("Ladies and gentlemen of the jury, the defendant in this case, having been found guilty of murder, it is now your duty to determine which sentence I impose upon him for having been convicted of murder."); *State v. Elkins* (1991) ("[L]adies and gentlemen of the jury . . . [a]s you know, the defendant . . . has been found guilty of murder and armed robbery. Now it's your duty to determine which sentence the court impose [sic] upon the defendant for having committed the offense of murder."); *State v. Bell* (1987) ("It is your duty at this time to determine which sentence you will recommend that the court impose upon the defendant . . . Your recommendation is the sentence in this case."); *State v. Smith* (1987) ("You must decide whether to recom-

this pattern may not necessarily hold true.<sup>53</sup>

### III. RESPONSIBILITY FOR THE DEFENDANT'S SENTENCE

Four groups of interview questions shed light on whether jurors accept responsibility for capital sentences. First, interviewers asked jurors directly how the jurors allocated responsibility for determining the defendant's punishment. A second group of questions explored whether, and to what extent, jurors felt free to exercise sentencing discretion. Jurors might shed responsibility if they believed the law commanded a sentence, leaving them little discretion, or if they believed death sentences are rarely carried out, rendering their sentence less relevant. Answers to a third group of questions supplied reactions that could be proxies for feelings of responsibility. For example, jurors who exhibited symptoms of stress could be viewed as feeling responsible for their decision. Fourth, jurors' approaches to decisionmaking could shed light on their sense of responsibility. If they regard sentencing as essentially a mechanical task of adding up pros and cons, they may not feel fully responsible.

Responses to these groups of questions indicate that, as between themselves and the judge, most jurors accept role responsibility for sentencing. Jurors' sense of their causal responsibility, in contrast, is limited by a strong sense of the defendants' causal responsibility and by beliefs about how the criminal justice system operates. Jurors view defendants as primarily responsible for the situation. Furthermore, jurors' knowledge that executions occur infrequently may unavoidably diminish their sense of causal responsibility.

#### A. *Direct Questions About Responsibility*

Two questions directly ask to whom jurors ascribe responsibility. Table 1 presents these questions and the jurors' responses. Question 1-1 asked jurors "when you were considering the punish-

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mend that the court sentence the defendant to life imprisonment or sentence the defendant to death . . . . You will notice I have used the word recommendation in referring to your decision . . . . I have used this word because that is the word used in the statute itself, but, it [sic] is to understand that your decision is really more than a recommendation as you or I might use the word in everyday speech. I tell you this because the law provides that whatever your recommendation is, I as the judge[,] accept it." (transcripts of jury instructions on file with authors).

53. See Bowers, *Capital Jury Project*, *supra* note 32, at 1095 n.233 (reporting somewhat different responsibility responses in judge override states and in states in which the jury recommendation is binding).

ment, did you think that whether the defendant lived or died" was strictly or mostly the jury's responsibility, partly the jury's and partly the judge's, or mostly the judge's and appeals courts'. The most likely interpretation of this question is one involving role responsibility. The role of capital juror brings with it the obligation to follow the law. In capital sentencing "following the law" means simply deciding the "proper" sentence after considering all the relevant aggravating and mitigating circumstances. The law allocates to the jury the authority to decide what punishment the defendant will receive. Question 1-1's reference to responsibility might therefore be understood to be asking where the juror thought decision-making authority rested.

Question 1-2 asked jurors to rank various actors in the process, along with the "law," in terms of their "responsibility for the defendant's punishment." One interpretation of this question is that it, like Question 1-1, is asking about where decisionmaking authority rests. Another is that it is asking about causal responsibility, about the links in the causal chain leading to the defendant's punishment, whether life or death.

**Table 1. Direct Questions About Responsibility**<sup>54</sup>

**1-1. When you were considering the punishment, did you think that whether defendant lived or died was . . . (some responses paraphrased) (Form Question IV.12)**

	life jurors		death jurors		totals	
	N	%	N	%	N	%
strictly the jury's responsibility and no one else's	26	37%	16	21%	42	28%
mostly the jury's responsibility, but the judge or appeals courts take over responsibility whenever they overrule or change the jury's decision	17	24%	29	37%	46	31%
partly jury's and partly judge's and appeals courts'	19	27%	15	19%	34	23%
mostly judge's and appeals courts'; we make the first decision but they make the final decision	8	11%	18	23%	26	18%
<b>totals</b>	<b>70</b>	<b>47%</b>	<b>78</b>	<b>53%</b>	<b>148</b>	<b>100%</b>

Kendall's  $\tau$  p = .071

**1-2. Rank the following from "most" through "least" responsible for defendant's punishment. Give 1 for most through 5 for least responsible (Form Question IV.13)**

actor	1=most		2		3		4		5=least	
	N	%	N	%	N	%	N	%	N	%
defendant because his/her conduct is what actually determined the punishment	78	52%	13	8%	8	5%	12	8%	38	26%
the law that states what punishment applies	41	27%	64	42%	15	10%	17	11%	13	9%
the individual juror . . .	17	11%	34	23%	44	30%	24	16%	31	21%
the jury that votes for the sentence	11	7%	29	19%	57	38%	51	34%	2	1%
the judge who imposes the sentence	4	3%	11	7%	25	17%	44	30%	65	44%

54. Since there is a natural ordering to the responses to Question 1-1, Kendall's  $\tau$  test is



In responding to Question 1-1, substantial majorities of jurors in both life and death cases indicate that the jury is mostly responsible for whether the defendant lived or died. Question 1-1's "totals" column shows that 59 percent of jurors stated that the life or death decision was mostly or strictly the jury's responsibility. The response "partly jury's and partly judge's" is ambiguous and could be counted as the jury taking substantial responsibility even if not a clear majority of it. This would raise the level of jurors accepting substantial responsibility to over 80 percent. Put another way, only 18 percent of the jurors responded that whether the defendant lived or died was mostly the responsibility of the judge and the appeals courts. This pattern of responses is largely the same as that reported in a study using Capital Jury Project data from several states.<sup>55</sup>

Question 1-2 offers the jurors more possible sources of responsibility, adding the law, the individual jurors, and the defendant as possible responses. Given these added choices, the jurors ascribed the bulk of responsibility to the defendant and the law. The juror and jury responses ranked far behind. The law and the defendant were viewed as most responsible, the judge the least responsible, and the jury and individual jurors were in the middle. The jurors seem to view the defendant, presumably due to his or her acts, as the primary force responsible for punishment. The law, which authorizes the punishment, was the other major force. Again, the responses replicate those in a study reporting multi-state data.<sup>56</sup>

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used to test the significance of the relationship between responsibility and sentencing outcome. Another test of significance takes account of the fact that, since the sentencing decision allows no intra-case variation, the data contain only forty-three sentencing outcomes, not one for each of the 153 jurors interviewed. If one regards responsibility as a covariate of the life-death decision, it is appropriate to compute a mean value of responsibility for each of the forty-three cases. A Wilcoxon rank-sum test of the significance of these mean responsibility values and sentencing outcomes yields  $p=.141$ . See ALAN AGRESTI, CATEGORICAL DATA ANALYSIS 306-85 (1990).

55. Bowers, *Capital Jury Project*, *supra* note 32, at 1096 (tab. 11). Additional reactions to Question 1-1's responses are possible. *Id.* It is disturbing that 18% or even 41% of the jurors do not acknowledge greater role responsibility, but casual conversations with colleagues confirm our instinct that the results show a surprising degree of acceptance of responsibility by jurors. While striving for greater levels of responsibility is desirable, the data do not suggest a hypothesized massive abdication of responsibility by jurors. *But see* William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 223 (1996) [hereinafter Bowers, *Tilted Toward Death*] ("Most capital jurors disclaim primary or sole responsibility for the awesome life or death decision they must make.")

Another interview question probed what sentence jurors perceived the judge as favoring. Jurors who voted the way they thought the judge would vote could be viewed as shifting responsibility to the judge. The vast majority of jurors, however, 128 of 151 (85%), reported having "no idea what the judge favored or opposed." (Form Question III.C.18).

56. Bowers, *Capital Jury Project*, *supra* note 32, at 1094 (tab. 10); *see also* Bowers,

At one level, the responses to Question 1-2 seem to undermine the responses to Question 1-1. How can jurors, who accept the bulk of responsibility in Question 1-1, view themselves as such minor actors in response to Question 1-2? More directly, does Question 1-2 confirm the notion, premised on the Milgram model, that jurors try to spurn decisionmaking responsibility? Not necessarily.

First, Question 1-2, when juxtaposed to Question 1-1, could easily be interpreted by a respondent as asking a different question. While Question 1-1 focuses on who among those with some role in the decisionmaking process is responsible for deciding between life or death, Question 1-2 takes a broader perspective and includes a wider range of possible determinants, including the law and the defendant. Question 1-2 could thus have been construed as asking a question about causal responsibility: "What caused the defendant to receive the punishment he did?" Question 1-1, in contrast, seems more likely to have been construed as asking about the locus of decisionmaking authority and about role responsibility: "Who had the authority to decide whether the defendant lived or died?" With Question 1-2 immediately following Question 1-1 in the interview, it would be natural to view Question 1-2 as focusing on a different issue and not merely rephrasing the Question 1-1 inquiry.

Insofar as Question 1-1 focuses on and isolates the jurors' beliefs about decisionmaking authority, it represents the more relevant inquiry for constitutional law purposes. The Supreme Court's opinions dealing with juror responsibility are not primarily concerned with how jurors would allocate causal responsibility among all the actors and factors listed in Question 1-2. Neither the law nor the defendant have the same relationship to the death-penalty decision as do the judge and jury. By the time the capital sentencing decision is made, the defendant is no longer a relevant decisionmaker in the system, and the law, for its part, is fixed. The most plausible candidates to whom responsibility for the defendant's sentence can be allocated are the judge and the jury.

Second, when Question 1-2 is viewed as a more encompassing question about causal responsibility the juror responses are not implausible. Of the string of causes leading to a death sentence, there is no doubt that the defendant, through his or her acts, is the *sine qua non* of the punishment ultimately imposed. The law is also a "but for" cause, since without a statute expressly authorizing capital punishment, the defendant could not have been sentenced to death. Without the defendant's acts, without the death-authorizing

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*Tilted Toward Death*, *supra* note 55, at 222-23.

legal framework, the jurors would not have been where they were: deciding life and death in a capital case. One can accept the pattern of Question 1-2's responses on their face without concluding they undermine the responses to Question 1-1.<sup>57</sup>

Third, the polar responses about the defendant's responsibility in Question 1-2 also suggest some confusion about the question. The two most common responses to the defendant's level of responsibility were "most" and "least." Most jurors (52 percent) said the defendant was the "most responsible" for punishment, but many (26 percent) said the defendant was "least responsible." Since the question allowed three levels of intermediate responses, this pattern is jarring and is not replicated for any of the other four factors in Question 1-2. This unusual pattern of responses to the defendant's responsibility suggests that different jurors interpreted Question 1-2 differently. To some, the defendant was most responsible because the defendant committed the crime. To others, the defendant was least responsible because, having committed the crime, the defendant no longer had any part to play in deciding punishment. Question 1-2 thus admits of two possible interpretations, both of which find some support in the responses. Exactly what to make of the Question 1-2 responses is therefore uncertain.

In sum, responses to Question 1-2 do not undermine the conclusion drawn from responses to Question 1-1 that most jurors accept responsibility. Question 1-2 is perhaps best understood as approaching the idea of responsibility from a different perspective and tapping a different notion of responsibility. Many jurors probably interpreted it as asking a question about causal responsibility. Jurors clearly interpreted at least one part of the question—that dealing with the defendant's responsibility—differently, generating a peculiar pattern of responses. Taken together, the responses to Question 1-1 and 1-2 show the importance of what is asked. When given a chance to take into account multiple causes, jurors ranked themselves ahead of judges in responsibility but behind other elements of the complete system. When pinned down to two relevant actors, themselves and judges, most jurors understood and acknowledged the central and predominant role they play.<sup>58</sup>

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57. See Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 *IND. L.J.* 1233, 1237 (1995) ("I believe that the defendant's perceived responsibility could be considered along an independent dimension, and that jurors themselves could still experience a sense of personal responsibility for their own actions.").

58. Although they do not change the thrust of the results reported in Table 1, it is worth noting the responses to Questions 1-1 and 1-2 broken down by individual jurors' first vote during the penalty-phase deliberations. Of those jurors who first voted for death, 26.2% said in response to Question 1-1 that responsibility was strictly the jury's, while 17.9% said it was mostly the judge's and appeals courts'. Of those jurors who first voted for life, 39.6%

Data on assignment of responsibility from the Milgram experiments help place the responses to Questions 1-1 and 1-2 in perspective. Table 2 shows Milgram's reports of his subjects' assignment of responsibility.<sup>59</sup> We have added the second row to suggest the relationships among Milgram's actors and the analogous capital-sentencing actor. With three possible persons among whom to apportion responsibility, Milgram's subjects (the "Teacher" column in Table 2) tended to blame themselves or the authority figure, "Experimenter." Both defiant subjects, those who at some point refused to subject "Learner" to electric shocks, and obedient subjects, those who administered the full range of shocks, tended not to blame Learner.<sup>60</sup>

Table 2. Assignment of Responsibility by Milgram's Subjects

(Analogous Sentencing Actor)	<i>N</i>	<i>Experimenter</i> ( <i>Judge/Law</i> )	<i>Teacher/subject</i> ( <i>Jury</i> )	<i>Learner</i> ( <i>Defendant</i> )
Defiant Subjects	61	38.8%	48.4%	12.8%
Obedient Subjects	57	38.4	36.3	25.3

Comparing Table 2 with the responses to Question 1-2 shows capital case jurors were more inclined to assign responsibility to the criminal defendant than Milgram's subjects were inclined to assign responsibility to Learner. This could show a greater tendency to shift responsibility, but an alternative interpretation is available. The defendants sentenced by the jurors were more blameworthy than were Milgram's Learners. Learners had done nothing more than volunteer for an experiment and answer a few questions incorrectly.<sup>61</sup> The defendants had been convicted of aggravated murder.

Rather than compare Table 2 with Question 1-2, we might more appropriately compare it with Question 1-1. By reducing Table 2's responses to Experimenter and Teacher, we can loosely compare Table 2 with responses to Question 1-1, which limits as-

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said responsibility was strictly the jury's, while 18.8% said it was mostly the judge's and appeals courts'. Of those jurors who first voted for death, 60.2% said in response to Question 1-2 that the defendant was most responsible for his punishment, while 19.3% said he was least responsible; of those who first voted for life, 40.8% said the defendant was most responsible, while 30.6% said he was least responsible.

59. Table 2 is based on MILGRAM, *supra* note 31, at 203 (tab. 9).

60. Defiant subjects differed from obedient subjects in their willingness to accept responsibility and their lesser tendency to assign responsibility to Learner, but neither group assigned much responsibility to Learner and the differences between the two groups were not striking.

61. MILGRAM, *supra* note 31, at 204. Milgram reports the reasons for blaming the Learners as follows: "When questioned on this matter, they point to the fact that he volunteered for the experiment and did not learn very efficiently." *Id.*

signment of responsibility to judge and jury. Such a reduction of Table 2 raises the question of how to treat the portion of responsibility ascribed to Learner. Do we ignore the Learner responses or do we ascribe a portion of them to Experimenter and Teacher? The precise method of eliminating Learner's portion of responsibility turns out not to be very important. However one recharacterizes the Experimenter and Teacher responses in Table 2, the responses to Question 1-1 indicate that capital case jurors accepted more responsibility vis-à-vis the judge than Milgram's subjects accepted vis-à-vis their authority figure, Experimenter.<sup>62</sup> As between the two primary sentencing actors, judge and jury, capital case jurors shifted responsibility *less* than the Milgram subjects did.

Although Milgram's responsibility results are a useful reference point, the comparison is limited because Milgram did not explicitly give his subjects an opportunity to choose whether or not to shock the victim. Jurors do explicitly make this choice. That capital jurors felt more responsible may simply reflect Milgram's efforts to make his subjects feel no responsibility.

### B. *Impact of the Law and the Legal System on Responsibility*

Jurors' beliefs about the discretion allowed them by the law and about the legal system's actual operation may provide additional insights into their sense of responsibility. First, jurors who believe that the law commands a particular sentence may feel less role responsibility than jurors who believe they have discretion to select the sentence. Second, jurors' beliefs about the legal system's actual operation may influence responsibility. For example, jurors who believe no one is actually executed may not feel the burden of sentencing responsibility as much as jurors who believe death sentences are regularly carried out.

Four interview questions probed jurors' beliefs about how much freedom the law gave them to determine the defendant's

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62. If one eliminates the Learner responses, the defiant subjects apportioned responsibility  $48.4\% / (48.4\% + 38.4\%) = 55.5\%$  to themselves (Teacher) and the obedient subjects accepted less responsibility. If one reallocates all of the Learners' shares to Teacher then the defiant subjects accepted 61.2% of responsibility and the obedient subjects accepted 61.6% of responsibility. In contrast, Question 1-1 shows 59% of jurors accepting all or most responsibility and 23% accepting part responsibility. If we transform acceptance of all responsibility to 100%, "mostly jury's" to 75%, "partly jury's" to 50% and "mostly judge's" to 25%, then jurors responding to Question 1-1 accepted 67% of responsibility. If we take a less extreme view of mostly and make "mostly jury's" 60% and "mostly judge's" 40%, the results do not materially change. Jurors did not accept substantially less responsibility than Milgram's subjects.

sentence.<sup>63</sup> Table 3 reports the questions and summarizes the responses.

**Table 3. Jurors' Beliefs About the Discretion the Law Allowed Them**

**3-1. After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that defendant's conduct was heinous, vile or depraved? (Form Question III.C.17)**

	life jurors		death jurors		totals	
	N	%	N	%	N	%
yes	24	35%	26	33%	50	34%
no	45	65%	52	67%	97	66%
<b>totals</b>	<b>69</b>	<b>47%</b>	<b>78</b>	<b>53%</b>	<b>147</b>	<b>100%</b>

Fisher's exact test  $p = .863$

**3-2. After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that defendant would be dangerous in the future? (Form Question III.C.17)**

	life jurors		death jurors		totals	
	N	%	N	%	N	%
yes	18	26%	26	33%	44	30%
no	51	74%	53	67%	104	70%
<b>totals</b>	<b>69</b>	<b>47%</b>	<b>79</b>	<b>53%</b>	<b>148</b>	<b>100%</b>

Fisher's exact test  $p = .375$

**3-3. To the best of your memory, was the jury required to impose a death sentence, or free to choose between death and a lesser sentence, if it found . . . (Form Question V.5)**

	death required		free to choose	
	N	%	N	%
one or more factors favoring a death sentence	10	7%	124	93%
one or more factors favoring a death sentence & none opposing it	24	19%	105	81%
more factors favoring than opposing a death sentence	11	9%	118	91%
stronger factors favoring than opposing a death sentence	13	10%	117	90%
an equal balance between factors favoring & opposing a death sentence	1	2%	125	98%

**3-4. To the best of your memory, was the jury required to impose a sentence of life or less or free to choose between death and a lesser sentence, if it found . . . (Form Question V.9)**

	life or less required		free to choose	
	N	%	N	%
one or more factors opposing a death sentence	14	11%	113	89%
one or more factors opposing a death sentence & none favoring it	24	19%	103	81%
more factors opposing than favoring a death sentence	22	17%	111	83%
stronger factors opposing than favoring a death sentence	23	18%	107	82%
an equal balance between factors favoring & opposing a death sentence	11	8%	122	92%

63. A related question asked: "Did you believe that once you had convicted defendant of murder, the law of this state made the death penalty . . ." (Form Question III.B.13). Eighty-four jurors (56%) responded "just one available punishment," 49 (33%) responded "the most appropriate punishment," and 16 (11%) responded "the only appropriate punishment." Since the question read in terms of the appropriateness of the punishment, the responses' relationship to responsibility are ambiguous. Jurors may have thought that they had freedom under the law to choose the sentence but that a particular sentence was most appropriate. The questions in Table 3 focus more directly on whether the law compelled a particular sentencing outcome.

Questions 3-1 to 3-4 probed jurors' beliefs about their sentencing discretion. Questions 3-1 and 3-2 explored jurors' beliefs about discretion given their findings about the crime and the defendant's dangerousness. Questions 3-3 and 3-4 asked about discretion in light of a more general assessment of the factors opposing and favoring a death sentence. Jurors who believed they had discretion should be more apt to acknowledge responsibility than jurors who believed that the law dictated the sentence. Conversely, jurors who believed they had no discretion to select a sentence, which the law simply dictated in light of findings of heinousness or dangerousness, should be less likely to accept responsibility.

The responses to Questions 3-1 to 3-4 are consistent with the responses to Question 1-1. Questions 3-1 and 3-2 show that a substantial majority of jurors did not believe that the law required a death sentence even if they believed the evidence proved heinousness or dangerousness. Thus, most jurors did not shift responsibility away from themselves and towards a legally mandated death sentence. Interestingly, jurors who thought they were required to sentence to death if they found heinousness, tended to accept *more* role responsibility, compared to the judge, than jurors who did not think death was required. This effect approaches statistical significance ( $p = .072$ ).<sup>64</sup> There was no statistically significant relationship between responsibility and jurors believing they were required to sentence to death if they found dangerousness ( $p = .952$ ).

Questions 3-3 and 3-4 show that jurors believe they have considerable freedom to choose a life or death sentence regardless of the number or weight of aggravating and mitigating factors. However the combination of factors favoring or opposing a death sentence were characterized, at least 81 percent of the jurors believed they were free to choose the sentence.<sup>65</sup> Jurors thus regard themselves as free to exercise discretion, a result consistent with the finding that most jurors accept role responsibility.

However, Table 3 also reveals a disturbing finding about a significant minority of jurors. Nearly one-third of the jurors were under the mistaken impression that the law required a death sentence if they found heinousness or dangerousness, a result replicated in a multi-state study of the interview data.<sup>66</sup> These jurors failed to understand the scope of their own discretion. Interest-

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64. We used Kendall's  $\tau$  to test the significance of the relationship between the "yes/no" responses to Question 3-1 and the responses to responsibility Question 1-1. See *supra* note 54.

65. None of the responses summarized for Questions 3-3 or 3-4 were significantly correlated ( $p < .05$ ) with sentencing outcome or with Question 1-1.

66. Bowers, *Capital Jury Project*, *supra* note 32, at 1091 (tab. 7).

ingly, this confusion does not correlate strongly with the jurors' sentencing behavior.<sup>67</sup> There is no statistically significant correlation between an erroneously constrained view of their discretion and whether jurors sentenced to life or death.

Further insight into jurors' perceived responsibility comes from jurors' beliefs about how the legal system operates after their sentencing decision. Post-trial activity plays a prominent role in capital cases, and appeals now can take several years. Jurors' views on post-trial review of their decisions can help refine the interpretation of the direct responsibility questions. After all, the prosecutor's mistake in *Caldwell* was to suggest that the jurors' sentencing decision would be revisited on appeal.

In Questions 4-1 to 4-3, the jurors were asked about their beliefs regarding the chances that the trial judge or an appellate court would accept or reject the sentence they imposed, and about whether death sentences would actually be carried out. Table 4 summarizes the questions and responses.

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67. Similar confusion about other aspects of the law are discussed in Eisenberg & Wells, *supra* note 43, at 10-11; Haney, *supra* note 32, at 1229-30; and James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 *IND. L.J.* 1161, 1165-75 (1995).



**Table 4. Trial Judge's and Appellate Courts' Role**

**4-1. How likely did you think it was that murderers sentenced to death in this state will be executed? (Form Question IV.8)**

	life jurors		death jurors		total	
	N	%	N	%	N	%
nearly all will eventually be executed	6	9%	1	1%	7	5%
most will be executed	6	9%	11	14%	17	11%
about half will be executed	7	10%	8	10%	15	10%
less than half will be executed	10	14%	16	20%	26	17%
very few will ever be executed	41	59%	43	54%	84	56%
<b>totals</b>	<b>70</b>	<b>47%</b>	<b>79</b>	<b>53%</b>	<b>149</b>	<b>100%</b>

Pearson's  $\chi^2(4) = 6.0193$ ;  $p = .198$

**4-2. How likely did you think it was that a jury decision for the death penalty would be accepted or rejected by the trial judge? (Form Question IV.9)**

	life jurors		death jurors		totals	
	N	%	N	%	N	%
judge must accept the jury's decision; it's final	33	47%	40	49%	73	48%
judge would probably accept the jury's decision	19	27%	29	36%	48	32%
judge would probably reject the jury's decision	1	1%	0	0%	1	1%
had no idea what the judge would do	18	26%	12	15%	30	20%
<b>totals</b>	<b>71</b>	<b>47%</b>	<b>81</b>	<b>53%</b>	<b>152</b>	<b>100%</b>

Pearson's  $\chi^2(3) = 4.3153$ ;  $p = .229$

**4-3. How likely did you think it was that a death sentence in this case would be accepted or rejected by the appeals courts? (Form Question IV.10)**

	life jurors		death jurors		totals	
	N	%	N	%	N	%
appeals courts accept nearly all death sentences	7	10%	10	12%	17	11%
appeals courts accept most death sentences	7	10%	13	16%	20	13%
appeals courts reject as many as they accept	5	7%	8	10%	13	9%
appeals courts reject most death sentences	4	6%	3	4%	7	5%
appeals court[s] reject nearly all death sentences	8	11%	3	4%	11	7%
had no idea what the appeals courts would do	40	56%	44	54%	84	55%
<b>totals</b>	<b>71</b>	<b>47%</b>	<b>81</b>	<b>53%</b>	<b>152</b>	<b>100%</b>

Pearson's  $\chi^2(5) = 4.9915$ ;  $p = .417$

The responses to these questions both confirm and complicate interpretation of the responses to Table 1's direct responsibility questions. The responses to Questions 4-2 and 4-3 indicate that jurors do not believe their decision will likely be revised by the trial judge or appellate judges. Question 4-3 shows that a substantial majority of jurors reported having had no idea what an appeals court would do. Of those expressing an opinion about what the appeals courts do, more thought death sentences would be upheld than struck down. This suggests that jurors do not view appeals courts as displacing their responsibility for the sentence imposed. Question 4-2 asks jurors about how they think the trial judge will likely react to their sentencing decision. It too provides little evi-

dence that jurors turn to the trial court to escape responsibility. The great majority of jurors thought the trial judge "must" or "would probably" accept their sentencing decision.<sup>68</sup>

Questions 4-2 and 4-3 thus reveal a similar pattern. Jurors, when directly asked about likely behavior of trial and appellate judges, do not respond in ways that would suggest they shed substantial role responsibility.

Responses to Question 4-1 are interestingly and disturbingly different. On the whole, jurors simply do not believe that defendants sentenced to death will in fact ever be executed. A clear majority say that "very few" death-sentenced defendants will ever be executed, and about 70 percent of jurors believe that "less than half" or "very few" will be executed. It is not clear who jurors believe block executions because Questions 4-2 and 4-3 suggest that they attribute the dearth of executions to neither trial judges nor appellate judges. Perhaps jurors do not know what an appeals court will do in their case but believe that, in many cases, appeals courts prevent executions.

Whatever the source of jurors' beliefs, the responses to Question 4-1 suggest a limit on how much responsibility jurors can feel for their sentencing decision. Even though Question 1-1 indicates that jurors understand and accept role responsibility for their sentencing decision, the weight and impact of that understanding and belief must be diminished insofar as most jurors believe death sentences are rarely carried out. Still, at the time of the survey, South Carolina's capital statute had been in effect for 16 years and three inmates had been executed. Juror responses to Question 4-1 thus fairly reflect how the system had been functioning. Respondents cannot ignore as jurors what they know as citizens.<sup>69</sup> Jurors' beliefs about the frequency of executions do not significantly correlate with their reported levels of role responsibility; however, it should be noted that of the very few (7) respondents who believed "nearly all" death sentences will be executed, most (6 out of 7)

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68. Although 48% of the jurors said the judge *must* accept the jury's decision, which is the largest response to Question 4-2, this figure is still troublingly small. Capital sentencing juries should, in the absence of legal error, harbor no uncertainty about the finality of the decision they make. Question 4-2 suggests ample room to improve juror understanding about their role in capital sentencing.

69. Anecdotal evidence supports the observation that jurors who believe death sentences will in fact be carried out are less apt to return them. For example, when the state of Louisiana executed several inmates within the course of a couple weeks, a trend which received considerable media attention in Louisiana, there was a noticeable drop in the number of death sentences subsequently returned by capital juries. See Jason DeParle, *Abstract Death Penalty Meets Real Execution*, N.Y. TIMES, June 30, 1991, at E2.

voted for life.<sup>70</sup>

### C. Proxies for Responsibility

Accepting responsibility for a difficult decision can generate tangible side-effects. Three interview questions explored juror reactions to capital jury service that might be associated with jurors' attitudes towards responsibility. One question asked whether jurors found their capital jury experience emotionally upsetting. A second asked whether, during the trial or right after it, jurors had nightmares or other tangible symptoms of stress. A third asked how jurors would feel if again asked to serve on a capital case. Table 5 summarizes these questions and the responses.<sup>71</sup>

**Table 5. Proxies for Responsibility**

**5-1. Did you find the experience emotionally upsetting? (Form Question IX.23)**

	life jurors		death jurors		totals	
	N	%	N	%	N	%
yes	52	73%	51	65%	103	69%
no	19	27%	28	35%	47	31%
<b>totals</b>	<b>71</b>	<b>47%</b>	<b>79</b>	<b>53%</b>	<b>150</b>	<b>100%</b>

Fisher's exact test  $p = .292$

**5-2. During the trial or right after it, did you have any trouble sleeping, any bad dreams or nightmares, or lose your appetite? (Form Question IX.24)**

	life jurors		death jurors		totals	
	N	%	N	%	N	%
yes	30	42%	27	34%	57	38%
no	41	58%	52	66%	93	62%
<b>totals</b>	<b>71</b>	<b>47%</b>	<b>79</b>	<b>53%</b>	<b>150</b>	<b>100%</b>

Fisher's exact test  $p = .318$

**5-3. How would you feel if you were asked to serve on another death penalty case? Would you . . . (Form Question IX.25)**

	life jurors		death jurors		totals	
	N	%	N	%	N	%
welcome the opportunity	21	30%	20	27%	41	28%
do so reluctantly	25	35%	34	47%	59	41%
try to get out of it	14	20%	11	15%	25	17%
refuse to do so	11	15%	8	11%	19	13%
<b>totals</b>	<b>71</b>	<b>49%</b>	<b>73</b>	<b>51%</b>	<b>144</b>	<b>100%</b>

70. Correlating Question 4-1 with responsibility Question 1-1 yields  $p = .385$  (based on Kendall's  $\tau$ ). A Wilcoxon rank-sum test of sentencing outcome and the case means of the perceived likelihood of execution yields  $p = .601$ . See *supra* note 54.

71. A Wilcoxon rank-sum test of sentencing outcome and the forty-three case means of "yes" responses for Question 5-1 yields  $p = .480$ . See *supra* note 54. For Question 5-2 the Wilcoxon rank-sum test  $p = .730$ , and for Question 5-3  $p = .429$ .

Table 5 shows that, in the responses to Question 5-1, 103 of 150 jurors found the experience to be emotionally upsetting. Such a reaction may suggest that jurors accepted responsibility for their sentencing decision.<sup>72</sup> A person is less likely to be upset about her choices and actions if she does not accept responsibility for them. Question 5-2 also shows that a substantial minority of jurors, 38 percent, exhibit tangible symptoms of stress during or after the trial. This, too, may suggest acceptance of responsibility. What to make of the responses to Question 5-2 is difficult because we lack a baseline. Our instinct is that an experience that yields tangible symptoms of stress in more than one-third of its participants is not one in which decisionmaking was taken lightly. Question 5-3 asked how amenable jurors would be to serving again in a capital case. About 30 percent stated that they would try to get out of it or refuse to serve. Forty-one percent indicated that they would serve reluctantly. Twenty-eight percent, a surprisingly large number to us, indicated that they would welcome the opportunity. Nevertheless, the dominance of reluctance and refusal again is consistent with jurors having accepted responsibility.

Other possible explanations exist for the patterns of responses in Table 5. Something other than the burden of capital decision-making may have triggered the upset response, the signs of stress, and the reluctance to serve again.<sup>73</sup> Hearing the details of an aggravated murder is emotionally upsetting, and being forced to be away from job or family could make one reluctant to serve again. Nonetheless, the responses are consistent with the acceptance of responsibility, and, on balance, suggest that jurors did not take the experience lightly. Of the questions in Table 5, only the one asking about repeat service significantly correlates with juror responses to responsibility in Question 1-1.<sup>74</sup> Jurors who accepted greater responsibility were less likely to want to serve again. Finding the experience upsetting or exhibiting stress, however, does not help explain juror allocation of responsibility between judge and jury.

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72. See Hans, *supra* note 57, at 1236 (suggesting relationship between juror reactions and acceptance of responsibility).

73. Capital trials are emotionally upsetting for any number of reasons apart from the death-selection decision itself. See, e.g., Stanley M. Kaplan, *Death, So Say We All*, *PSYCHOL. TODAY*, July 1985, at 48, 50.

74. Kendall's  $\tau$  correlating Question 5-1 with responsibility Question 1-1 yields  $p = .913$ ; Kendall's  $\tau$  correlating Question 5-2 with responsibility Question 1-1 yields  $p = .481$ ; Kendall's  $\tau$  correlating Question 5-3 with responsibility Question 1-1 yields  $p = .055$ .

#### D. *Decision Models and Responsibility*

Jurors whose decisionmaking process leads them to "calculate" the sentence may feel a reduced sense of responsibility. If the proper sentence can be arrived at through a mechanical thought process, that process becomes responsible for the sentence, not the juror's own moral judgment. Two questions directly probed how jurors arrived at their decision. Table 6 presents the questions and responses.

Question 6-1 shows that 44 percent of jurors did not report using a calculation-like decision model. Twenty-four percent did report adding up and weighing factors to a "minor" extent and 32 percent reported adding up and weighing factors to a "major" extent. Thus, most jurors did employ some mechanical reasoning processes to arrive at a sentencing decision. Yet even those who relied on an adding up and weighing process may not have been mechanically calculating a sentence in a manner that would reduce the juror's sense of responsibility. The way Question 6-1 is worded would allow those who approached sentencing in a non-mechanical manner to answer something other than "no." Mechanical or not, the sentencing decision almost always involves some weighing of factors. The question does not probe *how* mechanistically that weighing process is being conducted. Finally, the responses to Question 6-1 do not significantly correlate with the levels of role responsibility reported in Question 1-1.<sup>75</sup>

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75. Kendall's  $\tau$  correlating Question 6-1's responses with responsibility Question 1-1 yields  $p = .750$ . For reservations about self-reports of internal decisionmaking strategies, see Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 35 J. PERSONALITY & SOC. PSYCHOL. 250 (1977).

**Table 6. Jurors' Decision Models**

**6-1. In making your punishment decision, did you "add up" the factors in favor of a death sentence and "add up" the factors against a death sentence, and then "weigh" one side against the other side? (Form Question IV.A.5)**

	N	%
no, not at all	66	44%
yes, to a minor extent	36	24%
yes, to a major extent	49	32%
totals	151	100%

**6-2. Of the following ways jurors make such hard decisions, rank them in order of importance for your punishment decision.**

Rank from 1 for most through 4 for least important (Form Question IV.A.6)

	1=most		2		3		4=least	
	N	%	N	%	N	%	N	%
comparing or contrasting with other cases or murderers you knew about	3	2%	2	1%	14	10%	125	87%
putting together your own story of what happened and why in this case	38	27%	28	20%	65	45%	12	8%
adding up the factors for and against a death sentence and weighing one side against the other	46	32%	56	39%	35	24%	6	4%
finding one specific factor or aspect of the case that makes it clear what the punishment should be	61	41%	56	38%	28	19%	3	2%

Question 6-2 shows that the most important decisionmaking component was identifying a specific factor that triggered a sentencing response. Adding up and weighing factors was next in importance. Again, however, weighing factors does not necessarily suggest reluctance to acknowledge responsibility. Moreover, Questions 3-3 and 3-4 show that, regardless of the outcome of the process of counting or comparing factors, jurors believed they were free to sentence to life or death. The responses in Table 6 may simply show that a balancing metaphor in some way captures how many jurors would describe the process by which they determined the defendant's sentence.

\* \* \*

In summary, responses to several different interview questions suggest a relatively consistent picture of juror sentencing responsibility. The "average" juror understands and accepts the key role he plays in determining the defendant's sentencing; does not view the law as forcing him to reach a particular sentence; does not view a death decision as something that the courts will likely reverse; and finds his service on a capital jury emotionally upsetting. On the other hand, he does not think it very likely that any death sentence he imposes will actually ever be carried out. Finally, although in arriving at a sentence he probably added up and weighed aggravating and mitigating factors, it is unclear that he did so in a fashion which would undermine his responsibility for the sentence he imposed. Together, these responses suggest that the "average" juror felt a reasonably firm sense of role responsibil-

ity for the sentence he imposed. The "average" juror is not the juror the Milgram model would lead us to expect to find; he is closer to the juror portrayed in the *Caldwell* model.

On the other hand, not all jurors are the "average" juror. A substantial and disturbing minority of jurors do not accept role responsibility for the sentence they impose; a substantial minority of jurors (erroneously) report that they are required to impose death if they find the defendant's act was heinous or the defendant himself a future danger, even though most jurors at the same time (correctly) report that the law leaves them free to choose which sentence to impose; most jurors do not think the defendant will be executed; and, although most jurors report being upset by the experience of serving on a capital jury, most do not experience tangible symptoms of distress. If the "average" juror is closer to the *Caldwell* model, at least some jurors seem closer to the Milgram model.

At this point, two objections to our conclusions are worth noting. Both of these objections ultimately question the validity, or import, of the jurors' self-ascription of responsibility reported in Question 1-1 and on which much of our analysis rests. The first objection questions the jurors' self-ascription of responsibility on the ground that jurors who *truly* accepted responsibility would simply not have been able to impose death sentences. This claim ultimately rests on a tautology. If accepting responsibility necessarily entails sentencing to life, then of course no death-sentencing jurors accept responsibility. The second objection questions jurors' self-ascription of responsibility on the ground that the jurors may not have been truthful. We have no way to refute this claim but we do note a pattern of responses to other questions that are consistent with jurors' responses to the direct questions about responsibility. If jurors are not telling the truth about where they believe responsibility rests, their responsibility responses are at least consistent with their responses to other questions that bear on responsibility.

#### IV. EXPLAINING JURORS' SENSE OF RESPONSIBILITY

Having described jurors' sense of role responsibility, we now explore the factors that might explain it. Although responses to Question 1-1 show a strong sense of juror responsibility, the responses vary. Of the four possible responses, none is chosen by more than 31 percent or less than 18 percent of the jurors. Thus, there is a reasonable amount of inter-juror variation to try to account for.

Since this is the first study of its kind, no prior empirical re-

sults exist to help formulate hypotheses. We therefore employ a data analytic approach rather than trying to develop a theoretical model from first principles.<sup>76</sup> The interview instrument contains hundreds of variables, many of which could be thought to bear on a juror's sense of responsibility. For example, it contains questions about the seriousness of the crime, the defendant's characteristics, the jurors' personal characteristics, the jurors' personal decision-making processes, and the jurors' perceptions about the role of other actors, such as judges and appeals courts. Few of these variables exhibit a statistically significant correlation with the jurors' responses to the question whether jurors or judges are responsible for the life and death decision (Question 1-1). We report here only the factors that do in fact bear a noteworthy relationship to Question 1-1. Of course, in any individual study, these relationships could arise as a matter of chance. Other researchers can assess whether their data replicate our findings or whether these results are a consequence of chance.

#### A. *Factors Influencing Perceptions of Responsibility*

Table 7 reports the factors that most strongly correlate with jurors' responses to Question 1-1. The first two columns of Table 7 describe the factor, show its relationship to the jurors' sense of responsibility, and report the significance level of the relationship. The third column shows the number of juror interviews included in the significance level calculation. The fourth, fifth, and sixth columns report, respectively, the mean, minimum and maximum values for each factor.

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76. See generally JOHN W. TUKEY, *EXPLORATORY DATA ANALYSIS* (1977).



TABLE 7. FACTORS INFLUENCING JURORS' SENSE OF RESPONSIBILITY

	<i>correlates with</i>	<i>N</i>	<i>mean</i>	<i>min</i>	<i>max</i>
<b>Factors Related to the Crime</b>					
the vicious or brutal nature of the killing (Form Question IV.1)	jury responsible*	147	1.371	1	4
defendant had planned or intended to kill the victim, but might not be the one who did so (Form Question IV.2)	jury responsible**	139	1.895	1	2
the killing was committed while defendant was under the influence of an extreme mental or emotional disturbance (Form Question IV.B.1.a)	judge responsible*	139	.280	0	1
defendant is female (Form Question II.A.4.c)	judge responsible*	148	.052	0	1
<b>Jurors' Method of Processing the Case</b>					
juror tends to decide guilt and punishment together based on similar considerations rather than separately based on different considerations (Form Question IV.A.1)	jury responsible**	130	1.684	1	2
presence of specific feature in a case that made juror feel he knew proper punishment (Form Question IV.A.4)	jury responsible**	147	.735	0	1
<b>Jurors' Personal Background Characteristics</b>					
juror active in politics (Form Question IX.9)	judge responsible**	145	.053	0	1
juror's religion had an impact on decision (Form Question IX.14)	jury responsible*	147	.318	0	1
<b>Relationships with Judge, Other Jurors, Prosecutors</b>					
judge acted friendly toward jurors (Form Question VI.1)	judge responsible**	147	1.325	1	4
judge was someone you came to admire (Form Question VI.1)	judge responsible***	145	1.779	1	4
Did you know any of the other jurors before the trial? (Form Question VII.13)	judge responsible**	148	.382	0	1
prosecutors have to be watched carefully, since they will use any means they can to get convictions (Form Question VIII.0)	judge responsible**	137	3.600	1	6
<b>Death Sentence Imposed</b>					
death sentence imposed	judge responsible*	148	.536	0	1

\* p &lt; .1; \*\* p &lt; .05; \*\*\* p &lt; .01

Two features related to the crime correlate with a greater sense of juror responsibility. Jurors reported a greater sense of responsibility when the vicious or brutal nature of the killing played a role in their decisionmaking. The increased culpability of the defendant in such cases may trigger a greater willingness to accept responsibility for the decision. Likewise, jurors accepted increased responsibility if they believed the defendant had planned or intended to kill the victim, even if he was not the actual triggerperson.

Two features related to the crime correlated with a reduced sense of juror responsibility. If jurors reported that the killing occurred under the influence of an extreme mental or emotional disturbance, they tended to ascribe greater responsibility to the judge. This may reflect the notion that such defendants are entitled to an insanity-like defense, at least at the sentencing stage, which the jurors associate with the law or the judge. The last crime-related factor suggests that jurors are less willing to accept responsibility for the capital sentencing decision for female defendants than for male defendants. Note, however, that only two cases involved female defendants.

All these responses are consistent with the influence jurors report when some specific feature of a case stands out to them. Jurors who felt they could point to a specific feature in a case that made them feel they knew the proper punishment tended to accept responsibility. This is not surprising because, having identified a specific important factor, it would be difficult to associate that factor's influence with increased judicial responsibility.

The other case processing variable that influences juror responsibility levels suggests the significance of jurors' decisionmaking models. Jurors who respond that they decide guilt and punishment together based on similar considerations tend to view the jury as responsible for the life or death decision. Jurors who indicate that they tend to decide guilt and punishment separately based on different considerations assign more responsibility to the judge. Perhaps these latter jurors tend to view the punishment decision as governed by legal standards that, when applied, mandate an outcome. They may view the judge and the law that mandates the outcome as one and ascribe responsibility to the judge when they believe the law constrains them.

Of the jurors' personal background characteristics, only two significantly correlate with their reported sense of responsibility. Jurors who reported that they were active in politics tended to shift responsibility for the death penalty decision towards the judge. This comports with a stereotype that politicians don't like to be held accountable for anything, and whose main political goal

is to avoid blame. Jurors who stated that religion influenced their sentencing decision tended to accept a greater share of responsibility than jurors who reported religion as less important. The influence of religion suggests that these jurors have been taught to accept responsibility for their actions.

Jurors' relationships with other actors in the case processing system also correlated with their reported responsibility levels. Their reaction to the judge was especially important. Jurors who reported that the judge acted friendly toward them, or who came to admire the judge, were more inclined to ascribe responsibility to the judge than were other jurors. These reactions are understandable, since one is generally more willing to allocate responsibility to those about whom one feels positively.

Jurors' who knew other jurors before the trial tended to allocate responsibility to judges. Anonymity among one's fellow jurors somehow made it easier to accept responsibility. Lastly, jurors who reported less trust of prosecutors also tended to ascribe responsibility to judges. Perhaps jurors view the judge as the primary watchdog of prosecutor behavior.

### B. *Multivariate Analysis*

Table 7 assesses the factors influencing responsibility in isolation from one another. In actual decisionmaking, several factors can act simultaneously. This suggests the need to analyze the data using a statistical approach that allows simultaneous consideration of multiple influences on juror responsibility. Table 8 assesses the Table 7 factors using regression-like models that permit studying the influence of those factors simultaneously. Ordered logit is used because the dependent variable (live or die responsibility reported in Question 1-1) is ordinal and takes on more than two values.<sup>77</sup>

The first column in Table 8 describes each factor included in the models. The second column, which reproduces the second column of Table 7, indicates whether the presence of the factor, regardless of the sign of its coefficient in the models, correlates with greater judge or jury responsibility. The five model columns present different models of the jurors' reported allocation of responsibility between judge and jury. Each numerical entry in a model

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77. See AGRESTI, *supra* note 54. The data involve multiple interviews per case and we explored models to account for this feature. Using a random effects regression model, the results do not materially differ from those reported in Table 8. In the fixed effects model, dummy variables identifying each case were, as a group, insignificant. But the defendant's sex could not be included for lack of intra-case variation and the viciousness of the crime was of less statistical significance.

column is the coefficient associated with the row factor for the ordered logit model represented by the column.

For example, the -.58 entry in the first row of the "model (1)" column shows that, in an ordered logit model of responsibility, the variable "vicious or brutal nature of the killing" had a coefficient of -.58. Low values for this variable, which is coded on a one to four scale (see Table 7), correspond to greater presence of viciousness. Low values of the dependent responsibility variable correspond to greater jury responsibility. The minus sign on the coefficient for viciousness therefore indicates that a decrease in the viciousness code (which corresponds to an *increase* in the presence of viciousness) points toward a *decrease* in value of the dependent variable. Increased viciousness thus points towards greater jury responsibility, as reported in Table 8's second column. The second column's summary of the direction of the effect of the increased presence of each row factor avoids the need to trace the direction of the relationship for each row based on the particular coding of each row factor.

**TABLE 8. ORDERED LOGIT MODELS: FACTORS INFLUENCING JURORS' SENSE OF RESPONSIBILITY**

Dependent Variable = who bears responsibility for whether defendant lives or dies

(coded on a 1 to 4 scale with 1 corresponding to jurors being most responsible and 4 corresponding to judges being most responsible)

	correlates with	model (1)	model (2)	model (3)	model (4)	model (5)
<b>Factors Related to the Crime</b>						
vicious or brutal nature of the killing	jury responsible	-.58*	-.52*	-.59**	-.54**	-.49*
planned to, but might not have, killed the victim	jury responsible	-1.61**	-1.53**	-1.51***	-1.54***	-1.50**
killing committed under influence of mental disturbance	judge responsible	.37	-	-	-	-
defendant is female	judge responsible	1.52*	1.52*	1.79**	2.15***	1.97**
<b>Jurors' Method of Processing the Case</b>						
decides guilt and punishment together	jury responsible	1.73***	1.90***	1.86***	1.18***	1.34***
specific feature made juror feel he knew proper punishment	jury responsible	-.89*	-.58	-	-	-
<b>Jurors' Personal Background Characteristics</b>						
juror active in politics	judge responsible	1.09	1.05	-	-	1.47**
juror's religion had an impact on decision	jury responsible	-.23	-	-	-	-
<b>Relationships with Judge, Other Jurors, Prosecutors</b>						
judge acted friendly toward jurors	judge responsible	-.19	-	-	-	-
judge was someone you came to admire	judge responsible	.60**	.56**	.50**	.64***	.64***
Did you know any of the other jurors before the trial?	judge responsible	1.02**	.99**	.98**	-	-
prosecutors have to be watched carefully	judge responsible	-.26**	-.33***	-.38***	-	-
<b>Death Sentence Imposed</b>						
death sentence imposed	judge responsible	-.11	-.13	-.14	.02	.08
probability > $\chi^2$		<.0001	<.0001	<.0001	<.0001	<.0001
pseudo R-squared		.19	.18	.17	.11	.12
log likelihood		-111.20	-121.01	-126.23	-144.65	-138.96
number of jurors in model		102	109	112	120	117

\*p < .1, \*\*p < .05, \*\*\*p < .01

Table 8 confirms the influence of several factors listed in Table 7. In one or more of the models in Table 8, most of the Table 7 factors are statistically significant at or beyond the .1 level. All of the statistically significant factors retain the direction of their influence on responsibility (correlating with judge or jury responsibility) reported in Table 7.

With respect to factors related to the crime, Table 8 shows that the viciousness of the crime, the fact that the defendant might not have killed the victim, and the fact that the defendant was female all influence the jurors' reported level of responsibility. That the homicide might have been committed under the influence of a mental disturbance, however, is a small and statistically insignificant influence when other factors are taken into account.

In all of Table 8's models, one aspect of how jurors process cases is quite influential. Jurors who report that they decide guilt and punishment together tend to ascribe responsibility to the judge. Whether jurors can point to a specific feature of the case is of reduced significance in model (2) and was insignificant in models (3) through (5). The variable representing whether jurors are active in politics has a large coefficient in all of the models in which it is included—models 1, 2, and 5—and the effect is statistically significant in model (5). Whether jurors' report religion as having an impact on their decision turns out to be unimportant when other factors are taken into account.

All of the models in Table 8 include, as an explanatory variable, whether a death sentence resulted. This variable not only fails to achieve conventional levels of statistical significance in any model, it is small in magnitude and undergoes a sign change depending on what other variables are in the model.

Jurors' views of the judge is an important influence on their allocation of responsibility. Jurors who report that the judge was someone they came to admire tended to ascribe more responsibility to the judge than did other jurors. When other factors are taken into account, the judge's friendliness towards jurors was a small, insignificant influence on the allocation of responsibility. Jurors' views of prosecutors and whether they knew other jurors correlate with their views of responsibility.

Some of the explanatory factors might be expected to correlate with whether a death sentence was imposed. For example, jurors reporting that the killing was vicious or brutal might correlate with a death outcome. Table 8 indicates that the results are robust to the inclusion of the sentencing outcome as an added explanatory variable. Jurors' reported allocation of responsibility is driven by at least some forces that do not duplicate the forces shaping the decision to vote for life or death.

We hesitate to make too much of Table 7's factors because the most striking feature of the effort to explain juror responsibility responses may be not how much, but how little, we can explain. Given how many different things jurors were asked about in the survey, the models' overall explanatory power is surprisingly weak. Two reasons for the meager results are possible. First, it may be that the jurors' responses to the responsibility question (Question 1-1) are basically random. Nothing explains them well because there is nothing to explain. Second, their responses may correlate with factors not revealed in the interview. Defendant characteristics, juror characteristics, facts about the crime, and the many other facts gathered are not the sources of jurors' feelings about responsibility. Further study would be required to detect those sources.<sup>78</sup>

### C. *Responsibility's Role in Capital Sentencing Outcomes*

Concerns about the risk that capital sentencing juries assign responsibility for sentencing to someone other than themselves rest largely on the premise that capital jurors who lack an "appropriate" sense of responsibility are more likely to impose death sentences than are jurors who possess an "appropriate" sense of responsibility. To examine this hypothesized link between death and responsibility, we next explore whether jurors' ascriptions of responsibility help explain whether they sentenced to life or death.

The data with which to explore the sentencing decision are, in one respect, more limited than are the data used to explore the allocation of responsibility. There is no intra-case variation in the sentencing variable. That is, for a given defendant, all the jurors interviewed voted to impose the same sentence, either life or death. The responsibility variable, in contrast, does allow for intra-case variation. Jurors in the same case could and did have different views of the allocation of responsibility between themselves and judges. Thus, while there were 153 potential observations for the responsibility variable, the number of observations for the sentencing variable is limited to the number of different cases, 43, not the number of jurors interviewed. We collapsed the data to 43 cases from the 153 interviews and computed a mean responsibility value for each case.

Returning to Table 1's Question 1-1, when asked to assign re-

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78. Milgram had similar difficulty in using other variables to explain the degrees of obedience and disobedience in his subjects. MILGRAM, *supra* note 31, at 205. He concluded, "I am certain that there is a complex personality basis to obedience and disobedience. But I know we have not found it." *Id.*

responsibility between jury and judge, most respondents accepted responsibility. They did so whether they sentenced to life or death. Of jurors who sat in life cases, 43 of 70 (61%) thought that whether the defendant lived or died was strictly or mostly the jury's responsibility. Of jurors who sat in death cases, 45 of 78 (58%) thought that whether the defendant lived or died was strictly or mostly the jury's responsibility. These results suggest no strong correlation between case outcomes and allocation of responsibility.

The responses to Question 1-1 do, however, contain some evidence of such a correlation. The two possible extreme responses to the question ("strictly jury's responsibility" and "mostly judge's responsibility") show noticeable variation between juries that sentenced to life imprisonment and those that sentenced to death. Twenty-six of 70 (37%) life jurors believed sentencing was strictly the jury's responsibility while only 16 of 78 (21%) death jurors shared this belief. Moreover, only 8 of 70 (11%) life jurors ascribed responsibility "mostly to judges," whereas 18 of 78 (23%) death jurors ascribed responsibility "mostly to judges."

A modest correlation thus exists between rejection of responsibility and sentencing to death. Jurors who assign sentencing responsibility to judges are more likely to have imposed death. This result is consistent with the thesis that jurors want to blame someone else when they condemn. However, the differences between life and death jurors are significant only at the .14 level,<sup>79</sup> and all of Table 8's multivariate models suggest weak and insignificant correlations between outcome and responsibility.<sup>80</sup> Furthermore, as Table 1 shows, any correlation exists within an overall pattern in which jurors accept responsibility for the life or death decision, regardless of outcome. We thus cannot reject the hypothesis of no significant relationship between jurors' perceptions of responsibility and the sentencing outcome.

One might expect to find a relationship between sentencing outcome and the responses to Question 4-1, where jurors indicate they believe that few defendants will ever be executed. If Question 4-1 measures responsibility, and if jurors who accept responsibility are less likely to vote for death, the responses to Question 4-1 should correlate with sentencing outcome. However, except for the handful of jurors who believe nearly all murderers sentenced to

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79. See *supra* note 54.

80. Logistic regression models in which life or death is the dependent variable and case-by-case means of Question 1-1's responses are used as an independent variable also do not allow us to reject the hypothesis of independence. But the coefficients are not trivially small. If more cases were available, this relationship could be more usefully explored.



death will eventually be executed (7 of 149=5%), there is no clear distinction between jurors who voted for life imprisonment and those who voted for death. Overall, there is no statistically significant difference in the responses to Question 4-1 based on whether jurors voted for life imprisonment or death.

Nor do the responses to Question 4-1 help explain the responses to Question 1-1. Models in which responses to Question 1-1 are sought to be explained as a function of responses to Question 4-1 have little or no explanatory power.<sup>81</sup> The jurors who respond to Question 1-1 by saying that the jury is responsible for the sentence are thus not necessarily those who respond that very few defendants sentenced to death will ever be executed.

## V. CONCLUSION & PROPOSED REFORMS

Eighth Amendment doctrine presupposes that an "adequate" sense of responsibility is needed to certify the reliability of the death-selection decision; that jurors will accept responsibility unless invited and encouraged to abdicate it; and that jurors who lack the requisite sense of responsibility will be more apt to return a death sentence than would jurors possessing that sense. The *Caldwell* rule rests on these assumptions and is designed to guard against the risk of responsibility-shifting, which in turn guards against the risk of an unreliable death sentence.

We have tried to test the assumptions underlying *Caldwell*. The first assumption—that an adequate sense of responsibility is necessary for a reliable sentence—we cannot test, since it is based on a normative theory about what features a capital sentencing process must exhibit if its results are to be "reliable." We can, however, test the other assumptions—that jurors will generally accept responsibility unless told not to, and that jurors who do not see themselves as responsible will tend to vote for death. As to the first of these assumptions, the data suggest that jurors generally *do* understand and accept the role they play and the responsibility they have for determining the defendant's sentence. The "average" juror is thus closer to the *Caldwell* model than to the Milgram model. As to the second assumption, the data suggest that while jurors who do not accept responsibility may indeed be more apt to vote for death, the correlation between acceptance of responsibility and sentencing outcome is relatively weak.

Our findings also suggest that when jurors consider the universe of causes leading to the punishment the defendant receives,

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81. We have explored these relationships with ordinary least squares models, random effects models, binary logit models, and ordered logit models.

they do not and will not ignore the defendant's actions. They seem anxious to emphasize the defendant's responsibility for his fate, for it was his conduct that ultimately triggered the sequence of events leading up to the sentencing decision. In addition, most jurors do not think their decision will in fact lead to the defendant's execution, since most jurors believe most death sentences are never carried out. While this may erode jurors' sense of responsibility, we should not expect jurors to disregard the fact that executions are, relatively speaking, infrequent events. For these reasons, we should not expect jurors to acknowledge an unrealistically high level of causal responsibility. Getting them to understand and accept the key role they have in determining the defendant's sentence may be all we can realistically ask.

Even though our findings suggest that jurors generally accept responsibility for the sentence they impose, the data also suggest ample room for improvement. Many jurors continue to misunderstand or understate their responsibility for the sentencing decision. Although these jurors constitute a minority, given the correlation, however slight, between acceptance of responsibility and death, jury instructions can and should be crafted to reduce the size of this minority. For example, *Caldwell* might be transformed from a negative rule into an affirmative one, as Professor Hoffman has recently urged.<sup>82</sup> In other words, rather than simply stop prosecutors from telling jurors that sentencing responsibility rests elsewhere, it would be better to openly and routinely instruct jurors that the decision they are about to make is, despite its legal trappings, a moral one and that, in the absence of legal error, their judgment will be final.<sup>83</sup> Jurors should also be expressly told that they are free to impose a life sentence even if they find the defendant's crime heinous, or the defendant himself to constitute a future danger, and that weighing aggravating and mitigating circumstances is not meant to preempt, or provide a substitute for, the exercise of their own moral judgment in arriving at the defendant's sentence. Finally, jurors might also be instructed that, in the absence of legal

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82. Hoffman, *supra* note 32, at 1157. In addition, our analysis should not be understood to suggest that the *Caldwell* rule itself is "wrong" or misguided, or that prosecutors should be free to tell jurors, implicitly or explicitly, that their sentencing verdict will be reviewed on the "merits" on appeal or that they are not responsible for the defendant's sentence. Our analysis simply suggests that, under existing law, jurors generally do accept responsibility for the choice they make during the penalty phase. How much of this acceptance can be attributed to the impact of *Caldwell* we cannot tell, since all the jurors we studied participated in capital trials conducted after *Caldwell*.

83. This is not true in states, such as Florida, Indiana, Alabama, and Delaware, that legally divide sentencing responsibility between judge and jury, with the jury issuing a non-binding recommendation to the judge, who may then "override" it.

error, their decision will not only be final, but also that, if they return a death sentence, their judgment will in the normal course of events ultimately lead to the defendant's execution. Taking these steps would help ensure that capital jurors fully understand their "truly awesome responsibility."<sup>84</sup>

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