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How Juries Decide Death: The Contributions of the Capital Jury Project†

VALERIE P. HANS*

INTRODUCTION

In 1988 I concluded a review of what was then known about capital jury decision-making with the following observations:

> [T]he penalty phase presents significant incongruities. The jurors are charged with representing the community's judgment, yet the voir dire and challenge processes have eliminated significant segments of the public from the jury. Jurors have been influenced by preceding events during voir dire questioning and the trial in pivotal ways, yet they are instructed to focus only on aggravating and mitigating evidence. They are told to ignore their emotions in perhaps one of the most emotionally charged decisions they will ever make, when a human life quite literally hangs in the balance. The court's assistance is limited to technical legal advice, likely to be mysterious and difficult to follow. . . .
>
> Whether the penalty phase jury is fully equipped to handle its burden remains an unanswered question. . . . [T]here are gaps in our knowledge of how the jury confronts the problem of deciding death.[1]

Seven years later, some of these gaps are being filled by the groundbreaking work of the Capital Jury Project.

Not since the Chicago Jury Project of the 1950's has there been a comparable national study of jury decision-making. The Chicago Jury Project, sponsored by the Ford Foundation, was the first systematic empirical examination of the institution of the jury. The Project undertook a coordinated set of studies, including courtroom observations of voir dire, interviews with jurors, mock jury simulations, and a centerpiece project examining judge-jury disagreement. It resulted in several books and scores of articles that greatly expanded our knowledge of the jury's decision-making process. Harry Kalven, Jr., and Hans Zeisel, two central figures of the Chicago Jury Project, described the results of their landmark study of judge-jury disagreement in the monograph *The American Jury*.[2] It was a remarkable contribution and stimulated generations of scholars to undertake empirical work on the jury.[3]

In my view, the Capital Jury Project has similar potential. Its scope is broad and its potential for enhancing our theoretical understanding of juror decision-making is considerable. It promises to illuminate the now-mysterious

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1. Valerie P. Hans, *Death by Jury*, *in* CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 149, 171 (Kenneth C. Haas & James A. Inciardi eds., 1988) (© Copyright 1988 by Sage Publications, Inc. Reprinted by permission of Sage Publications, Inc.).

2. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

3. See Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323 (1991), for a retrospective account of the Chicago Jury Project, including a description of some of its methodological strengths and limitations, and a discussion of its impact on the field of jury studies.

processes by which jurors decide on life and death. Even at this relatively early stage, it is generating data and exciting new hypotheses that other scholars are discussing and debating. Indeed, the Capital Jury Project is likely to revolutionize our thinking not only about death penalty juries but also about our system of administering capital punishment.

The impressive papers presented at the National Conference on Juries and the Death Penalty (many of which are published in this Symposium) illustrate the breadth and exciting potential of the Capital Jury Project. In this brief Commentary, I cannot do justice to them. Rather, my remarks will be limited to a few issues raised by this extraordinary set of papers that have critically important implications for our theoretical and practical understanding of the jury.

I. THE POWER OF THE INTERVIEW METHODOLOGY

To date, much of the research on jury decision-making has relied upon the technique of jury simulation. Under this research method, subjects are given cases and asked to play the role of jurors. Typically, some aspect of the case is held constant for some subjects and varied for others. Comparing the responses of the experimental and control groups provides information regarding the impact of the manipulated factor on jury decision processes.

Many psychologists trained in experimental methodology became attracted to the jury as a vehicle for testing theories about individual and group decision-making, and they undertook jury simulation studies in substantial numbers. Based as it is on laboratory research methods, jury simulation has some clear advantages in terms of its ability to allow researchers to make causal inferences and to control for extraneous factors. Aware of the potential biases that inevitably arise in face-to-face interviews, many researchers shied away from the interview method.

Nevertheless, the interviewing of jurors has become newly popular as a significant technique in the field of jury studies. Problems of artificiality have characterized many jury simulation experiments. In addition, sole reliance on jury simulation methodology has been criticized by scholars and the courts alike.[4] Thus, a number of scholars have turned to other methods, including juror interviews, to supplement simulation work.

Several years ago I began interviewing civil jurors in a multimethodological study of how the jury responds to cases involving businesses and corporations.[5] My students and I interviewed jurors in various locations, including

4. *See* Lockhart v. McCree, 476 U.S. 162 (1986) (criticizing experimental research on death-qualified juries); Robert M. Bray & Norbert L. Kerr, *Methodological Considerations in the Study of the Psychology of the Courtroom*, *in* THE PSYCHOLOGY OF THE COURTROOM 287 (Norbert L. Kerr & Robert M. Bray eds., 1982) (analyzing criticisms of various methodological approaches to the study of juries); Wayne Weiten & Shari Seidman Diamond, *A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics*, 3 LAW & HUM. BEHAV. 71 (1979) (cataloging the methodological problems with jury simulation studies).

5. *See* Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85 (1992); Valerie P. Hans & Krista Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 68 IND. L.J. 1297 (1993).

their homes and places of business. In the interviews, we used a semi-structured interview schedule similar in format to that used by the researchers from the Capital Jury Project. Without question it was the most deeply involving and exciting research I have ever conducted. For me, time stood still as jurors gave accounts of how they decided whether a corporation was liable, and reflected on the challenges they faced in determining an appropriate damage award.

I experienced a similar reaction to the use of interviews by the Capital Jury Project. What impresses me in this set of articles by researchers associated with the Project is how powerful the interview method can be with jurors in capital cases. The articles make for spellbinding reading as one follows the jurors through the process that leads them first to grapple with the awesome responsibility they have been given, and then to choose with other jury members life or death for a fellow citizen.

Interviews are also valuable in that, by allowing jurors a voice, they can reveal things for which we did not initially know to look. In my own research, I was prepared to find that jurors are prejudiced against corporations and willing to award large amounts to the plaintiffs who sue companies. Instead, I found a strong tendency among jurors to blame the injured plaintiffs for their own misfortunes and to express neutral or even positive reactions to the corporate defendants. Austin Sarat reports another such surprise. He finds a remarkable divergence in the ways in which capital jurors discuss the trial.[6] They report graphic memories of the murder weapons, and are able to recount the injuries of the murder victims in great detail. In contrast, when asked about their own responsibility for executing another human being, jurors talk "about their decision to condemn [the defendant] to death as if that decision were somehow made elsewhere, as if they were not actually making choices or authorizing anything."[7] The defendant's violence is vividly recalled, yet the legal rules governing the jury's decision on death are barely comprehended and poorly remembered.[8]

The interview method seems particularly well-suited for exploring how jurors cope with the idea of their own responsibility for an execution. Indeed, it is difficult to imagine how one might successfully simulate the gravity of this type of decision in a research laboratory. I have more to say below about the use of the interview method to study comprehension of jury instructions.

Of course, the interview technique possesses certain limitations. Researchers have discovered that individuals are not particularly good at assessing the impact of factors that affect their thinking.[9] Jurors' memories will deteriorate

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6. *See* Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1124-27 (1995).

7. *Id.* at 1130.

8. *See* James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing: Guided or Misguided?*, 70 IND. L.J. 1161, 1168-69 (1995).

9. *See* Richard E. Nisbett & Timothy Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977) (concluding that verbal reports of mental events are often inaccurate and incomplete).

and change over time.[10] They are likely to be influenced by the hindsight bias.[11] And they will experience pressures to present themselves in a socially desirable way to the interviewer. Nevertheless, researchers who are aware of these limitations still have much to gain from the Capital Jury Project's interviews with death penalty jurors.

II. THE JUROR'S SENSE OF RESPONSIBILITY FOR A DEATH SENTENCE

Several of the articles describe the process by which jurors are led by the procedures of guided discretion to abdicate responsibility for their decision on death. The jurors' accounts are compelling in this regard, and are particularly striking in the jurisdiction of Indiana, in which the jury's role is advisory.[12]

For me, the evidence about jurors' responsibility seems to point in two directions. Yes, jurors report relief at having others take part of the responsibility for the death decision, as Hoffmann, Sandys, and Sarat describe.[13] But what is equally clear is that jurors struggle with their own responsibility for executing another. Jurors report that they are unable to sleep; that they are driven to reduce stress; and that they remain haunted by the experience for years.[14] Thus, they experience a good deal of conflict and dismay over their task. Deciding death is not something that is easily reduced to an algebraic exercise of weighing aggravating and mitigating circumstances. Rather, it is quite difficult for jurors to re-frame their decision on death. Hoffmann and Sarat acknowledge this reality, but stress the jurors' abdication of responsibility.[15] I would also emphasize the jurors' seriousness of purpose and the way in which they appear to be deeply troubled by their participation as indicative of just how difficult the decision to impose the death penalty is.

An important item included in the interview schedules asks jurors to rank a number of potential actors in terms of their responsibility for the defendant's punishment.[16] Jurors are given the choices of the defendant, the juror, the jury, the judge, and the law. I suspect that jurors found this question ambiguous and challenging. At least two distinct elements might be differentiated. First, how responsible is the defendant for the crime, and for the punishment that follows the crime? The norm of individual responsibility is

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10. David M. Sanbonmatsu et al., *Remembering Less and Inferring More: Effects of Time of Judgment on Inferences About Unknown Attributes*, 61 J. PERSONALITY & SOC. PSYCHOL. 546 (1991) (showing how the passage of time affects memory).

11. Jonathan D. Casper et al., *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 LAW & HUM. BEHAV. 291 (1989) (demonstrating a hindsight bias in juror decision-making).

12. *See* Joseph L. Hoffmann, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1146-47 (1995).

13. *See id.* at 1153; Marla Sandys, *Cross-Overs—Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1209 (1995); Sarat, *supra* note 6, at 1130.

14. *See* Hoffmann, *supra* note 12, at 1155.

15. *See id.* at 1157; Sarat, *supra* note 6, at 1128.

16. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1094 (1995).

strongly held and widely shared. It is not surprising that almost six out of every ten jurors responded to this general question about responsibility by placing the lion's share on the defendant.[17] The Capital Jury Project researchers assert that this suggests that jurors are not taking on the responsibility for the death sentence themselves. But 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.

Second, there is the fascinating allocation of responsibility among the jurors, the judge, and the law. Although only a minority of jurors focused on these actors in ranking responsibility, it is interesting to observe that in states such as Indiana and Florida in which juries provide only advisory opinions, Bowers finds that jurors assign less responsibility to the jury than do jurors from states in which the jury's decision is binding on the court.[18] Here, the jurors are absolutely correct: They *do* play only one part in the collective decision to execute another human being. Their role is a significant and unique one, but it coexists with the roles of other decision-makers at other choice points. The troubling and important question raised by the Capital Jury Project's research is whether the provisions designed to protect against disparity and error have produced such a diffusion of responsibility that the sentencing jury no longer feels an appropriate level of personal responsibility for its actions. The insights about how jurors grapple with this responsibility, and how their sense of responsibility is affected by law, are sure to be some of the lasting contributions of the Capital Jury Project.

III. PROBLEMS WITH GUIDED DISCRETION

The Capital Jury Project presents us with the opportunity to assess the nation's twenty-year experiment in guiding the discretion of the sentencing jury during a separate penalty phase. The findings are disquieting. Many jurors have reached their decisions regarding whether the defendant deserves capital punishment before the penalty phase.[19] In fact, three-fourths of the jurors interviewed in the first seven states by Capital Jury Project researchers reported that the judicial instructions "simply provided a framework for the decision most jurors had already made."[20] At one level, these findings suggest the stunning irrelevance of guided discretion statutes and instructions. Most jurors have formed strong impressions about the defendant's candidacy for death before they have even begun the penalty phase. Considering the research on the cognitive processes underlying juror decision-making,[21] it

17. *Id.*

18. *Id.* at 1095 n.233.

19. *See id.* at 1090; Sandys, *supra* note 13, at 1191-95.

20. Bowers, *supra* note 16, at 1093.

21. *See* Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making, in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192 (Reid Hastie ed., 1993) (arguing that jurors construct plausible and coherent stories from trial evidence).

will be an uphill battle to attempt to guide and instruct the jury in the sentencing phase. Judicial instructions are unlikely to guide the jury in any meaningful way.

Yet, the interviews also provide strong evidence that the efforts to guide the discretion of jurors are *not* irrelevant at all. All the same, these findings are disquieting too. The instructions appear to lessen the responsibility that jurors feel for the death sentence. And, importantly, as has been shown in other jury research, the judicial instructions are frequently employed as persuasive arguments in group decision-making, especially to convince the minority to go along with the rest of the jury.[22] The instructions are perhaps ideal face-saving devices for a minority juror who is looking for a way to exit gracefully. Even if judicial instructions are misused or misrepresented within the deliberation, few other jurors will be able to correct legal errors.

The instructions also badly confuse jurors. The paper by James Luginbuhl and Julie Howe shows significant misunderstanding of jury instructions in the penalty phase.[23] Particularly troubling, of course, is the misunderstanding of the concept of mitigating evidence and how it is to be used in decision-making. Luginbuhl and Howe convincingly demonstrate how these misunderstandings systematically predispose jurors to favor death.[24]

While interviews are an excellent technique for learning about how jurors understand their own responsibilities, the use of interviews to study miscomprehension of judicial instructions is more problematic. We cannot rely exclusively on jurors' reports about whether they understood the instructions. Past research indicates that even when jurors demonstrably misconstrue important instructions, they are likely to report that they had no problems with the judge's instructions about the law.[25] In addition, juror recall of judicial instructions is likely to be quite susceptible to decay over time. Jurors who actually understood and correctly applied a judicial instruction at the trial may be unable to report it during an interview some time later.

More convincing proof that jurors misunderstand death penalty instructions may be found in the jury simulations conducted by Luginbuhl[26] and the research done in connection with the case of James Free.[27] Mr. Free, who

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22. *See* Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 222-23 (1989).

23. *See* Luginbuhl & Howe, *supra* note 8, at 1165-75.

24. *Id.* at 1177.

25. *See* Anthony N. Doob, *Canadian Juror's View of the Criminal Jury Trial*, *in* LAW REFORM COMM'N OF CANADA, STUDIES ON THE JURY 29, 60-64 (1979) (Criminal Law Series Study Paper) (finding that 97% of jurors surveyed reported that judicial instructions were easy to understand, yet one-fourth could not define the burden of proof, and at least one-half of the jurors in cases in which the defendant had a criminal record could not recall the limiting instructions that judges had given pertaining to the defendant's criminal record).

26. James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 LAW & HUM. BEHAV. 203 (1992) (showing problems in the understanding of jury instructions about mitigating evidence).

27. For excellent discussions of the empirical research and its use in the *Free* case, see Shari Seidman Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOLOGIST 423 (1993), and Judith N. Levi, *Evaluating Jury Comprehension of Illinois Capital-Sentencing Instructions*, 68 AM. SPEECH 20 (1993).

has since been executed, challenged his death sentence in part on the ground that the judicial instructions in the sentencing phase confused the jury.[28] Zeisel developed a simulation study using the facts of the *Free* case and penalty phase instructions that were similar to those given to Illinois juries in capital cases. Zeisel demonstrated empirically that members of the Illinois jury pool showed very high levels of misunderstanding of the meaning of these instructions immediately after hearing them.[29]

Even though the simulation research constitutes more convincing evidence that juries significantly misunderstand sentencing phase instructions, the work that Luginbuhl and Howe have undertaken remains highly significant. Their research based on juror interviews provides converging proof that *the same kinds of misunderstandings occur in both experimental and real capital jury decision-making*. Whether they are given these instructions in the quiet of the laboratory or the intense experience of the capital trial, whether they hear them from a researcher or a judge, and whether they report their understandings immediately or much later, people show serious comprehension problems. The interview study approach is also important because it shows how these misunderstood instructions come to play a pivotal role in jury deliberations—when jurors employ them repeatedly as persuasive devices.[30]

Thus, the findings of the Capital Jury Project point to a significant, and potentially correctable, problem with the judicial guidance given the capital jury. Research indicates that lay comprehension can be dramatically improved when judicial instructions are rewritten following psycholinguistic principles of clear speech.[31] Comprehension is most enhanced when instructions take into account jurors' prior assumptions about law.[32] By uncovering jurors' difficulties with sentencing phase instructions, and by informing us about other preexisting views held by jurors that could interfere with understanding and applying the law, the Capital Jury Project has made a vital two-fold contribution.

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28. *See* Free v. Peters, 806 F. Supp. 705 (N.D. Ill. 1992), *aff'd in part and rev'd in part*, 12 F.3d 700 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 433 (1994).

29. Although the judge accepted the evidence and overturned Free's death sentence, the Seventh Circuit reversed and reinstated the death penalty. *Free*, 12 F.3d 700.

30. *See* Hoffmann, *supra* note 12, at 1152-53.

31. *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982) (describing comprehension problems with judicial instructions and methods of rewriting instructions that will improve understanding); *see also* Levi, *supra* note 27.

32. Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857 (1991); Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507 (1993) (showing how mock jurors' prior knowledge affects their understanding of judicial instructions).

CONCLUSION

As my remarks indicate, the Capital Jury Project has begun to elucidate the once-hidden processes by which jurors decide whether a fellow citizen deserves to live or die. The articles published in this Symposium—even at this early stage—already raise significant questions about the way in which jurors cope with their awesome responsibility, and point to some very specific failures of our nation's experiment with guided discretion in capital trials. Future work promises to shed even more light on these matters. The Capital Jury Project is sure to fundamentally enrich our knowledge and understanding of jury decisions in capital trials.

Its findings also speak to broader issues in other domains. For example, in the civil justice system, there is a vigorous and highly contentious debate over the desirability of providing more judicial guidance to the jury in determining damage awards.[33] Jurors themselves report a desire for more direction from the court as they undertake this complex task. In addition, repeat litigants such as businesses have pressured state legislatures and Congress to institute greater control and limits on jury discretion in compensatory and punitive damages.[34]

Yet, the data now being generated by the Capital Jury Project sound a warning about traveling the road of greater guidance. The articles show some of the pitfalls of attempting to instruct jurors about how they should go about representing the voice of the community. Indeed, the Capital Jury Project's findings suggest that the community's voice may be transformed, muffled, or even silenced by the court's guidance.

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33. *See* Peter H. Schuck, *Mapping the Debate on Jury Reform, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306, 322-27 (Robert E. Litan ed., 1993).

34. *See, e.g.*, Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980's Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990); *see also* H.R. 1075, 104th Cong., 1st Sess. § 201 (1995).