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The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims

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THE CAPITAL JURY AND EMPATHY: THE PROBLEM OF WORTHY AND UNWORTHY VICTIMS

Scott E. Sundby†

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INTRODUCTION

The Capital Jury Project (CJP) was undertaken in an effort to understand how capital juries make the immensely difficult legal and moral decision of whether to sentence a defendant to death.[1] By in-

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1 *See generally* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) (describing Capital Jury Project's purposes and procedures).

terviewing jurors who have actually served on capital cases, the CJP has revealed factors that are consistently at the heart of every capital jury's decision. The CJP has found, for instance, that concern about the defendant's future dangerousness and the possibility that he may someday be released from prison is a staple of almost every juror's deliberations.[2]

Although identifying common themes raised by jury deliberations from case to case is obviously important and helpful, one of the fascinating aspects of the CJP is the opportunity to examine those factors that often invoke dramatically different responses from jury to jury. For example, why do jurors in some cases reverently single out a professional expert as the witness who ultimately swayed their vote against death, but in other cases view professional experts as "charlatans" or "bozos" who undermined the defense's case for life?[3] Or, why do jurors in cases in which the death penalty was imposed almost invariably state that the defendant's lack of remorse was one of their chief reasons for choosing death, and yet jurors in life cases who reject the death penalty also consistently believe that their defendants were remorseless?[4] Solving riddles like these can be particularly useful in understanding jury behavior, because the process forces researchers to go beyond the jurors' answers to abstract questions and to delve into the deeper layers of how juries undertake their decision-making duties.

This Article's general topic—the role that the victim plays in a capital jury's sentencing decision—was partly inspired by such a riddle. It is fairly standard fare for capital defense attorneys trying to persuade the jury that their client should not be sentenced to death to argue that the death penalty was meant to be reserved for the "worst of the worst." The lawyer often will stress to the jury that although the defendant committed a highly regrettable murder, his crime still was not at the level of a Hitler, a Charlie Manson, a Ted Bundy, a Son of

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2 *See* William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 664–70 (1999); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 4–9 (1993). Concerns about the defendant's future dangerousness may in turn be a manifestation of the jury's view of the defendant's lack of remorse and the seriousness of the crime. *See* Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 291 (2001).

3 For an answer to the professional expert riddle, see Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1139–44 (1997) (concluding from CJP data that professional experts are most persuasive when they explain or provide context to evidence provided by other witnesses).

4 For an answer to the remorse riddle, see Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998); *see also* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) (reporting results of an empirical study).

Sam, a Timothy McVeigh, or whoever is the embodiment of pure evil *du jour.* The hope underlying the argument, of course, is that the jury will agree that the death penalty should be reserved only for killers so horrible that their names instinctively induce a collective gasp of horror, and that the jurors also will agree that the defendant does not belong among such elite evil company.

Intriguingly, CJP research shows that jurors' reactions to this argument varied dramatically. Some jurors reported that the argument had "backfired" in the jury room by generating a fair amount of anger in the jury, and had actually added to the jury's sentiment for a death sentence. Other jurors, however, stated that the argument had helped crystalize their jury's deliberations and pointed them in the direction of a life sentence, because it made them realize that the defendant was not the type of person for whom the death penalty was intended. The following riddle thus emerged from the interviews: why were some jurors open to the "compared-to-other-murderers" argument while others became inflamed at the very idea that a hierarchy of heinousness exists?

As this Article shows, the answer to this riddle reflects how capital juries generally use a victim's characteristics and behavior in making their sentencing decision.[5] By using data from the California segment of the CJP,[6] this Article examines from several different angles how jurors use victim attributes in their deliberations. In particular, the Article attempts to decipher whether jurors in fact do make distinctions between "worthy" and "unworthy" victims in deciding whether to impose a death sentence, a topic about which courts and commentators have speculated at length.

I
WORTHY AND UNWORTHY VICTIMS: DO JURORS DRAW A HYPOTHETICAL DISTINCTION?

A central part of the Supreme Court's back-and-forth debate over the role of victim impact evidence (VIE) at capital sentencing trials has focused on the concern that jurors might value the lives of certain victims more than those of others. For instance, in holding that VIE was constitutionally proscribed, Justice Powell argued for the majority

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5 *See* discussion *infra* Part III.

6 The author served as the Principal Investigator of the California segment of the CJP. The data for this Article were gathered by interviewing jurors from thirty-seven California cases in which the death penalty was sought. Nineteen of the cases resulted in an imposition of a death sentence, seventeen led to a sentence of life without parole (LWOP), and one ended in a hung jury over the penalty. Each juror participated in an interview that on average lasted three hours, answering questions designed to elicit both qualitative and quantitative data regarding how his or her jury deliberated and what factors influenced his or her decision.

in *Booth v. Maryland* that "there [is no] justification for permitting [the death penalty] decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character."[7] He added in a footnote that "[w]e are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions."[8] The *Booth* dissenters did not dispute that jurors might in fact value certain victims more highly than others, but saw such an argument as missing the point that VIE is meant to highlight the victim as an individual rather than draw comparisons among victims.[9] The dissenters' view eventually prevailed, as the Court in *Payne v. Tennessee* overruled *Booth* and allowed the introduction of VIE.[10]

The Court's line of cases dealing with VIE thus raises a critical question: do capital jurors distinguish between "worthy" and "less worthy" victims? The initial answer, based on interviews with jurors who served on capital juries, would appear to be no. Indeed, when asked the question in the abstract, capital jurors tend to be remarkably egalitarian in their views on how a victim's status would influence their decision of whether to impose the death penalty.

Jurors were asked whether certain victim characteristics would make them: (1) "much more likely to vote for death," (2) "slightly more likely to vote for death," (3) "just as likely to vote for death," (4) "slightly less likely to vote for death," or (5) "much less likely to vote for death." Of the various victim types posited to the jurors (female, child, respected person, stranger, troublemaker, criminal record, alcoholic, drug addict, came from a "loving family"), only the child victim had a pronounced effect on the juror's hypothetical decision, with

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7 482 U.S. 496, 506 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991). The *Booth* majority also based its decision on the belief that the victim's characteristics did not bear on the defendant's culpability, and that VIE would lead to "arbitrary" factors, such as the articulateness of the victim's survivors, determining which capital defendants lived or died. *See id.* at 505.

8 *Id.* at 506 n.8.

9 *See id.* at 517 (White, J., dissenting) (arguing that the sentencer's consideration of the "particularized harm" caused by a victim's death is permissible so long as it does not involve reliance on impermissible factors such as a victim's race). In *Payne v. Tennessee*, Chief Justice Rehnquist wrote:

> As a general matter, . . . victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.

501 U.S. at 823.

10 *Payne*, 501 U.S. at 828–30.

more than half of the jurors (53%) stating that a child victim would make them "much more likely" to send the defendant to the death chamber.[11] This strong reaction in cases in which the victim is a child is unsurprising,[12] as the child victim touches practically every rational and emotional chord calling for the severest punishment possible: the heightened vulnerability of a child, the child's loss of a chance to fulfill life's opportunities, a parent's grief over the loss of a child, and the depravity demonstrated by someone who would prey on a child.

Although the jurors' reactions to the child victim might be expected, the failure of other victim types to trigger a strong reaction is perhaps a bit surprising. Compared to the 53% of jurors who were "much more likely" to vote for death if the victim was a child, the other victim types triggered a much weaker reaction. The next strongest victim type influencing jurors toward death was the victim who "had a loving family," but only 6% of the jurors said that such a victim type made them "much more likely" to vote for death.[13] A female victim provoked the "much more likely to vote for death" response in only 5% of the jurors.[14] The fact that the victim was a "respected member of the community" led a mere 3% of the jurors to say that they would be "much more likely" to vote for a sentence of death.[15]

A similar lack of a pronounced impact occurred on the other end of the spectrum with victim types that might be viewed as "less worthy" and thus might be more likely to sway a juror away from a death sentence. The highest levels of response for a victim type that made a juror "much less likely to vote for death" were the 4% for a victim who had a criminal record and the 3% for a victim who was a "known troublemaker."[16] No other victim type caused more than 2% of the jurors to say that a given victim factor would move them strongly toward a life verdict.[17]

Although the percentage of jurors who say that a particular victim factor would affect their vote increases moderately when they are asked whether a factor would lean them "slightly" toward life or death, the far more striking finding is the percentage of jurors who say that victim factors simply would have no effect on their vote. Setting to

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11 *See infra* Table 1. Appendix Table 1 provides a full breakdown of juror responses to hypothetical victim types. All tables in the body of this Article that present only partial data are presented with full data in a corresponding Appendix Table. As a result of rounding, percentages in the Tables and Appendix Tables may not add up to 100%.

12 Stephen Garvey found a similarly strong response to child victims in the South Carolina segment of the CJP. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1556 (1998).

13 *See infra* Table 1.

14 *See infra* Table 1.

15 *See infra* Table 1.

16 *See infra* Table 1.

17 *See infra* Table 1.

one side the child-victim situation, in which only 23% of the jurors said that a victim who was a child would not affect their vote, the vast majority of jurors when asked about each victim type replied that the factor would not tip them even slightly toward either life or death.[18] Indeed, apart from the child-victim, the hypothetical victim who triggered the strongest response from jurors (a "known troublemaker") still had more than two-thirds (68%) of the jurors saying that the factor would not affect their vote at all.[19] The "no effect" response, therefore, is by far the most prevalent juror outlook for every factor (except the child victim), whether the victim was a "respected member of the community" (86%), a "stranger to the community" (96%), had an alcohol (92%) or drug (89%) problem, or came from a loving family (76%).[20]

Thus, in a manner consistent with the findings from the South Carolina segment of the CJP,[21] the California jurors tended to value all victims equally when asked how they would make their punishment calculation. Table I sets forth the percentages of juror responses to the various victim factors:

TABLE 1
EFFECT OF VICTIM TYPE ON JUROR'S SENTENCING DECISION

Victim Type	No Effect	Much More Likely to Impose Death	Much Less Likely to Impose Death
Stranger in the community (n = 144)	96%	1%	1%
Was an alcoholic (n = 143)	92%	1%	1%
Was a drug addict (n = 142)	89%	1%	2%
Female (n = 130)	87%	5%	1%
Respected member of community (n = 132)	86%	3%	2%
Had a loving family (n = 127)	76%	6%	2%
Had a criminal record (n = 143)	73%	3%	4%
Known troublemaker (n = 145)	68%	1%	3%
Child (n = 140)	23%	53%	1%

18 *See infra* Appendix Table 1.
19 *See infra* Appendix Table 1.
20 *See infra* Table 1.
21 *See* Garvey, *supra* note 12, at 1556–58.

II
WORTHY AND UNWORTHY VICTIMS: DO JURORS DRAW A REAL WORLD DISTINCTION?

At first blush, then, these findings suggest that the *Booth* Court's concern that jurors would assign different values of worth to victims was largely unfounded. As Part I indicates, when asked in the abstract, the vast majority of jurors state that their decision would not be swayed even "slightly" by whether the victim was a sterling member of the community or someone with a criminal past. The only victim type that seems to make a significant difference to jurors is that of a child, and one suspects that Justice Powell's arbitrariness concerns were not focused on a jury's understandably heightened horror and outrage at the murder of a child, in part because a child victim would reflect on the defendant's culpability in choosing a vulnerable victim.[22]

Yet, as often is the case with empirical research (or with voir dire, as lawyers occasionally discover to their dismay), honest answers to hypothetical questions sometimes do not match up with how individuals put a particular principle into action. No reason exists to believe that the jurors were not answering honestly when they said that they would be indifferent to whether a victim was a Phi Beta Kappa honors student or an unemployed drug addict. That reply, however, is in response to a general question that implicitly is prefaced with the phrase, "if all things were equal," as in: "If a defendant were to brutally rob and murder a person standing on a street corner because he needed drug money, would it make a difference to you if the victim were [a respected member of the community, a stranger, or someone with a criminal record]?" As every capital defense lawyer knows, however, the one constant in capital cases is that all things are never equal. Context is everything, and, as will be shown, the same is true for how juries process victim attributes.

Stephen Garvey, in evaluating South Carolina capital jurors' almost identical answers to the hypothetical questions, wisely advised that the apparent conclusion that "jurors value the lives of all victims equally" must be approached with "extreme caution."[23] He warned that "[a]ctions speak louder than words" and pointed to several fac-

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22 If the defendant, however, was unaware that a child victim was involved (for example, because the defendant believed that no children lived in the house he was setting on fire), Justice Powell might still have objected on the basis that the defendant was being held responsible for consequences that he did not anticipate. *Cf.* Booth v. Maryland, 482 U.S. 496, 504 (1987) ("Allowing the jury to rely on a [victim impact statement] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

23 Garvey, *supra* note 12, at 1556–58.

tors that might make such a general conclusion misleading.[24] And, indeed, if we go a step further and look at what juries actually discuss in the jury room and how they focus on different victim attributes, it becomes evident that although jurors may value victim types equally in the abstract, when making the death penalty decision, they place great emphasis on the victim and his or her actions.

A. Jury Discussion of the Victim: The Differences Between Life and Death Jurors

That juries pay at least some attention to the victim is evident from even a cursory examination of the jurors' descriptions of the jury's deliberations. When asked, for instance, how much of the jury discussion focused on "the reputation or character of the victim," 43% of the jurors replied that their jury spent a great deal (11%) or fair amount (32%) of time.[25] Similarly, 39% of the jurors stated that their jury spent a great deal (18%) or fair amount (21%) of time discussing the "victim's role or responsibility in the crime."[26] If, as we have seen, the vast majority of jurors state that they would be unswayed by various victim characteristics, the question naturally arises: Why are four out of ten jurors reporting that their juries spent either a fair amount or great amount of time discussing the victim's reputation and responsibility in the crime?

The first step to answering this question is to break down the data between the jurors who served on life cases ("life jurors") and those who served on death cases ("death jurors"). As Table 2 shows, after separating out the life and death juror responses, one finds that half (50%) of the life jurors surveyed reported that a great deal (9%) or fair amount (41%) of the jury discussion focused on the victim's reputation or characteristics, while only a little more than one-third (36%) of the death jurors reported that a great deal (13%) or fair amount (23%) of jury discussion was devoted to the topic.[27]

Similarly, as seen in Table 3, life jurors report significantly more jury discussion of the "victim's role or responsibility in the crime," with over half of the life jurors (53%) reporting a great deal (22%) or

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24 *Id.* at 1557–58. First, Garvey notes, "what jurors say and what they do are not necessarily the same thing." *Id.* Second, jurors tend to give more weight to a victim factor when it is actually present in a case. Garvey points out, for example, that "when the victim was in fact a female, the percentage of jurors who found that fact aggravating jumped from 4.2% to 21.3%." *Id.* at 1557. Third, at the time of the studies, juries were not allowed to hear VIE, which may now make victim characteristics more "salient" for juries. *Id.* at 1557–58. Finally, studies increasingly document the disturbing phenomenon that the victim's race is a victim characteristic that influences juries. *Id.* at 1558.

25 *See infra* Appendix Table 2.

26 *See infra* Appendix Table 2.

27 *See infra* Appendix Table 2.

TABLE 2
AMOUNT OF JURY DISCUSSION FOCUSED ON
"THE REPUTATION OR CHARACTER OF THE VICTIM"

Juror Type	A Great Deal or Fair Amount	None at All
Life Jurors (n = 68)	50%	18%
Death Jurors (n = 78)	36%	29%

fair amount (31%) of discussion, compared to the death jurors, of whom only 29% reported a great deal (15%) or fair amount (14%) of discussion.[28] One finds a significant difference at the other end of the spectrum as well, with only 18% of the life jurors saying that their jury did not discuss the victim's role or responsibility at all, compared with 41% of the death jurors who related that the topic was not discussed at all.[29]

TABLE 3
AMOUNT OF JURY DISCUSSION FOCUSED ON
"THE VICTIM'S ROLE OR RESPONSIBILITY IN THE CRIME"

Juror Type	A Great Deal or Fair Amount	None at All
Life Jurors (n = 68)	53%	18%
Death Jurors (n = 78)	29%	41%

B. Juror Perception of the Victim: The Differences Between Life and Death Jurors

So why might life and death juries spend disparate amounts of deliberation energy on the victim's attributes and actions? Part of the answer appears to be that the victim profile of those cases that resulted in a death sentence tended to be quite different compared to those that ended in a life sentence. As Table 4 shows, jurors' perceptions of whether the victims in their cases were "innocent or helpless" bore a strong correlation with the defendant's ultimate sentence of death or life: death jurors (91%) were significantly more likely than life jurors (62%) to have perceived the victim in their case as "innocent or helpless."

28 *See infra* Appendix Table 3.
29 *See infra* Appendix Table 3.

TABLE 4
JUROR'S IMPRESSION OF HOW ACCURATELY "INNOCENT OR HELPLESS" DESCRIBES THE VICTIM

Juror Type	Very Well or Fairly Well	Not at All
Life Juror (n = 70)	62%	24%
Death Juror (n = 77)	91%	5%

Not surprisingly, then, although death juries' deliberations generally did not focus heavily on the victim's character or role in the crime's events,[30] over three-quarters of the death jurors (77%) reported that their jury's discussion had focused either a great deal (35%) or fair amount (42%) on the "innocence or helplessness of the victim."[31]

This contrast between life and death jurors' perceptions also carries over to the jurors' views of other victim attributes. Life jurors, for example, were much more likely to perceive the victims in their case as having characteristics suggesting that the victims had troubles in their own lives. Tables 5, 6, and 7 present data for jurors' perceptions about whether the victim had an unstable or disturbed personality, a drug or alcohol problem, or was a "loner." For each category, life jurors were more likely to perceive that the victim exhibited such characteristics.

The life jurors, therefore, were far more likely than the death jurors to be dealing in the jury room with a victim who was not perceived as "innocent or helpless" and whose profile included areas of personal problems. This point is emphasized by comparison of the life and death jurors' responses to the question of whether they believed that the victim was "admired or respected in the community." Fully two-thirds (66%) of the life jurors believed that the phrase "admired or respected in the community" did *not* describe their victim well (21%) or at all (45%),[32] a belief that stands in marked contrast to the 61% of death jurors who believed that their victim *was* "admired or respected," as indicated in Table 8.

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30 *See* discussion *supra* Part II.A and Tables 2–3.

31 Although life juries reported spending less deliberation time than did death juries on the innocence and helplessness of the victim, 63% still reported either a great amount (26%) or fair amount (37%) of time spent discussing the factor. As compared to the death jurors, however, the life juries' deliberation time on this factor is far closer to the amount of time they spent discussing the victim's character and responsibility for the crime. *See supra* Tables 2–3. This suggests that at least part of the life juries' focus on the victim's innocence or helplessness was in relation to the victim's role in the crime (*i.e.*, asking whether the victim was in fact innocent given the victim's actions). *See* discussion *infra* Part II.C.

32 *See infra* Appendix Table 8.

TABLE 5
JUROR'S IMPRESSION OF HOW ACCURATELY "HAD AN UNSTABLE OR DISTURBED PERSONALITY" DESCRIBES THE VICTIM

Juror Type	Very Well or Fairly Well	Not at All
Life Juror (n = 61)	38%	49%
Death Juror (n = 58)	7%	79%

Especially striking from the jurors' answers to this question is the strength of the life jurors' negative perception, with close to half of the life jurors (45%) choosing the harshest response of "not at all"

TABLE 6
JUROR'S IMPRESSION OF HOW ACCURATELY "HAD A PROBLEM WITH DRUGS OR ALCOHOL" DESCRIBES THE VICTIM

Juror Type	Very Well or Fairly Well	Not at All
Life Juror (n = 58)	50%	40%
Death Juror (n = 57)	23%	63%

when asked if their case's victim was "admired or respected" (another 21% chose the phrase "not well") compared to only 18% of the death jurors who responded "not at all" (with an additional 21% saying the description fit "not well").[33]

TABLE 7
JUROR'S IMPRESSION OF HOW ACCURATELY "LONER WITHOUT MANY FRIENDS" DESCRIBES THE VICTIM

Juror Type	Very Well or Fairly Well	Not at All
Life Juror (n = 58)	33%	41%
Death Juror (n = 53)	8%	58%

C. The Clue to Solving the "Worthy" and "Unworthy" Victim Puzzle

We now know that life juries are more likely than death juries to have focused during their deliberations on the victim's characteristics,

[33] *See infra* Appendix Table 8.

TABLE 8
JUROR'S IMPRESSION OF HOW ACCURATELY "WAS ADMIRED OR RESPECTED IN THE COMMUNITY" DESCRIBES THE VICTIM

Juror Type	Very Well or Fairly Well	Not Well or Not at All
Life Juror (n = 67)	34%	66%
Death Juror (n = 67)	61%	39%

reputation and role in the crime. The data also suggest a fairly strong correlation between a juror's perception that the victim had a troubled life (*e.g.*, had a drug or alcohol problem) and an inclination to choose a life sentence rather than a death sentence. Are jurors, then, contradicting their earlier abstract claims of not being influenced by a victim's attributes? Recall, for instance, that 92% of all jurors stated that whether a victim was an alcoholic would not affect their vote, 89% made the same statement with respect to a drug addiction, 86% avowed that the victim's status as a respected member of the community would not influence their decision, and 68% believed that they would be unaffected if the victim turned out to be a known troublemaker.[34] Yet, all of these factors seem to correlate fairly strongly with the sentencing outcome.

The answer appears not to be that jurors are deceiving themselves (or the interviewers) as to the effects the factors have on them, but, rather, that they are now considering the factors in concrete rather than abstract contexts. Keep in mind that once actual cases are involved, the jurors no longer are considering the value of hypothetical victims who are killed under identical circumstances (*e.g.*, a random robbery on the street), but are learning about a victim's attributes from particularized evidence of how *this* defendant came to kill *this* victim. And, as it turns out, those victim attributes that correlate with a life sentence—drug use, alcohol abuse, unstable personality—tend to manifest themselves in the cases through evidence of victim behavior that can be termed "high-risk" or "antisocial." In other words, when the jury actually hears about victims with alcohol or drug problems, these problems usually are presented through guilt-phase evidence that places before the jury a specter of behavior far different from the behavior of an average law-abiding person. The victim, for example, may have been shooting up drugs with the defendant or may have been hanging out in a biker bar. By contrast, victims perceived by jurors as possessing more "worthy" attributes are found in fact pat-

34 *See supra* notes 19–20 and accompanying text; *see also supra* Table 1 (reporting these results).

terns in which the victim was an "innocent" minding her own business, a fact pattern that, as we will see, correlates strongly with a sentence of death.

An immediate sense of the importance that jurors place on the victim's behavior can be gained by examining the substantial differences between life and death jurors' responses when asked, "In your mind, how well does 'too careless or reckless' describe the victim?"

TABLE 9
JUROR'S IMPRESSION OF HOW ACCURATELY "TOO CARELESS OR RECKLESS" DESCRIBES THE VICTIM

Juror Type	Very Well or Fairly Well	Not at All
Life Juror (n = 64)	51%	33%
Death Juror (n = 70)	11%	71%

As Table 9 shows, a significant likelihood existed that life jurors perceived their victims as having engaged in careless or reckless behavior, with over half of the life jurors (51%) agreeing that the words "too careless or reckless" described the victim at least fairly well. In rather stark contrast, only 11% of the death jurors agreed that the phrase characterized the victim's behavior fairly well or very well. This contrast in the perception of victim's behavior is further highlighted by looking at the other end of the spectrum: although over two-thirds of the death jurors (71%) completely disagreed with a description of the victim in their cases as "too careless or reckless" (responding that the phrase described their victim "not at all"), only one-third of the life jurors (33%) saw the victim in the same light. These perceptions are, of course, consistent with the earlier finding that death cases were considerably more likely to have a victim who was perceived as "innocent or helpless" than were the life cases.[35]

The importance of the victim's behavior to the jurors' decision can be further tested by shifting focus from the jurors' perceptions of the victim to an analysis of the penalty outcomes based on the victim's actions. One can begin by simply analyzing the cases based on whether the murder victim was a "random" victim (*e.g.*, the clerk who happened to be working at the store that the defendant decided to rob) or "a nonrandom victim" (that is, someone who had personal interaction with the defendant prior to the killing, such as the defen-

35 *See* discussion *supra* Part II.B and Table 4.

dant's girlfriend).[36] If this Article's working thesis is correct that jurors tend to value victims who played no role in the crime more than those who engaged in some type of risky or antisocial behavior, one would expect cases involving a random victim (by definition someone who played no role in bringing about the crime) to correlate closely with a death sentence. As seen in Table 10, the outcomes of the random-victim cases in fact support the hypothesis that if the victim was an "innocent" in the crime, the jury becomes more likely to return a death sentence.

TABLE 10
OUTCOME OF CASES INVOLVING RANDOM AND NONRANDOM VICTIMS

Victim Type	Death	Life	Hung Jury
Random	10	1	1
Nonrandom	9	16	0

This strong tendency of the random-victim cases to end in a death sentence is also consistent with the earlier finding that death jurors consistently saw their victims as more "innocent and helpless" than did jurors in the life cases.[37]

One can gain further insight into the importance that juries place on the victim's actions by focusing on the "nonrandom" victim category of cases. If we break the nonrandom victim cases into two subcategories of "risk-taking/antisocial victims"[38] (*e.g.*, the victim was a gang member) and "non-risk-taking victims" (*e.g.*, a fellow employee at work), we find the following results:

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36 Several of the victims who are classified as nonrandom did not know the defendant prior to the events leading up to the crime, but had interactions with the defendant beyond a random nonpersonal encounter. For example, the victim may have purchased drugs from the defendant or may have met the defendant at a bar the night of the killing and left with him.

37 *See* discussion *supra* Part II.B and Table 4.

38 This category encompasses victims who voluntarily engaged in behavior that a law-abiding person would see as likely to bring the individual into contact with dangerous individuals, such as a gang member, and also victims who engaged in antisocial behavior that made the jurors view the victim unsympathetically (*e.g.*, the victim was abusive in his or her relationship with the defendant). Naturally, these two characteristics are not mutually exclusive, as victims who engaged in high-risk activities often were viewed unsympathetically by the jurors as antisocial.

TABLE 11
OUTCOME OF CASES INVOLVING NONRANDOM VICTIMS

Victim Type	Death	Life
Risk-Taking/Antisocial Victims	5	11
Non-Risk-Taking Victims	4	5

As would be expected from the prior findings based on juror perceptions,[39] juries were less inclined to impose a death sentence in cases in which the victim would be viewed as "too careless or reckless" because of risk-taking behavior, as compared to cases with an "innocent and helpless" victim.

Juries' leanings toward life in cases with risk-taking victims become even more noticeable if the cases involving victims who were involved in a drug deal are taken into account. The six cases involving drug deals between the defendant and the victim appear to exist as a *sui generis* category of risk-taking victim cases. In three of the cases, the juries reacted like juries in other cases involving high-risk or antisocial victims, using the victim's voluntary decision to engage in such behavior as one reason to opt for life rather than death.[40] In the other three cases, however, the jurors' narratives indicated more of an attitude that the chance to sentence the defendant drug dealer to death provided something akin to a "two-for-one" opportunity because the victim drug dealer already was dead. If we take the six drug-dealing cases out of the risk-taking mix, the skewing of the sentencing decisions toward a life sentence becomes even more evident, as seen in Table 12.

TABLE 12
OUTCOME OF RISK-TAKING VICTIM CASES EXCLUDING THOSE ENGAGED IN DRUG DEALS

Victim Type	Death	Life
Risk-Taking/Antisocial Victims (excluding drug deal related crimes)	2	8

The victim's role in the crime also helps explain differences between life and death outcomes based on other victim types. At first glance, for instance, the raw numbers for various victim categories suggest that juries are more likely to give a death sentence if the case had a female victim (58% of cases with a female victim resulted in a death sentence) rather than a male victim (48% of the cases resulted

39 *See* discussion *supra* Part II.B–C and Tables 4, 9.

40 For an explanation of why jurors might have this tendency, see discussion *infra* Part III.

in a death sentence); if the case had a married victim (85%) rather than a single or divorced victim (33%); and if the case's victim was a parent (60%) rather than a childless victim (27%).[41]

Importantly, however, within each of these subcategories, the cases that resulted in a life sentence generally were still those in which the jurors perceived the victim as a risk-taker or as someone engaging in antisocial behavior. For example, although almost two-thirds of the cases with victims who were parents resulted in a death sentence (60% of the cases overall), if the parent victim was involved in high-risk behavior, only one-quarter (25%) of the cases resulted in a death sentence, while 83% of the cases in which the parent victim did not engage in such behavior resulted in death sentences.[42] If one is willing to generalize that married victims, female victims and victims with children[43] are less likely to engage in high-risk behavior than are their single, male, and childless counterparts, then the fact that cases with these victim types are more likely to produce a death sentence makes sense given the emphasis that jurors place on the victim's behavior (and, at least within the California CJP sample, victims who were married, female and had children were more likely to fall within the random and non-risk-taking cases than were victims who were unmarried, male and childless).

III
JURORS AND EMPATHY FOR THE VICTIM

A. "There, but for the Grace of God, Go I . . . ."

What has been shown, then, is that although jurors may be genuinely egalitarian in their generalized views of various victim attributes, in the jury room their reactions are influenced by the victim's involvement in the crime and relationship to the defendant. In other words, jurors may not care in the abstract whether the victim was a banker or a welfare recipient. They do care, however, if the banker was murdered while cruising a seedy adult bookstore late at night instead of during a robbery while honorably carrying out his duties at the bank.

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41 *See infra* Appendix Table 10. Cases involving multiple victims also carried a greater likelihood of a death sentence than those involving a single victim (65% of cases with multiple victims resulted in a death sentence as compared to 29% of cases with a single victim). *See infra* Appendix Table 10. As with the other subcategories, the likelihood of a death sentence or life sentence with either multiple- or single-victim cases varied according to the victim's risk-taking or antisocial behavior.

42 The one exception was the married-victim category, in which only a single case existed with a risk-taking victim, and that case did result in a death sentence. Part of the difficulty in drawing valid conclusions once cases are broken down into these subcategories is that the sample size often becomes small, which argues for caution in their interpretation.

43 Some victims obviously will have more than one of these attributes.

That jurors would react most harshly toward defendants who chose their victims randomly is not surprising upon reflection. An individual who preys upon randomly chosen victims poses the starkest image of the dangerous individual, and future dangerousness consistently has emerged as one of the strongest factors for predicting a death sentence.[44] Such a defendant is someone against whom society cannot protect itself, because he simply will pick out the most vulnerable individual at the time of his crime. The lack of any ties with the victim also diminishes the probability that a mitigating explanation for the murder exists (*e.g.*, that the victim had abusively treated the defendant), leaving the jury with the perception of the defendant as an evil person targeting innocent bystanders.

Adding to this already frightening specter is the fact that the randomly targeted victim is quite apt to invoke within the juror a strong sense of identification with the victim and a sense of "there, but for the grace of God, go I." The randomly chosen victim generally was engaged in an activity that the jurors themselves would have done hundreds of times, such as withdrawing money from an ATM, filling up the car with gas, or using a public restroom. The tendency of jurors in interviews to describe the random victim as having been in the "wrong place at the wrong time" took on a mantra effect. The following juror's comment was typical of such responses:

> She was just innocent. She happened to be in the wrong place at the wrong time . . . . I guess that part sticks out when you see her face down on the floor. I mean they surprised her in her bedroom at gunpoint and executed her. One can't even feel safe in one's own home.[45]

This inclination to identify with the randomly chosen victim can be seen through several indicators. First, as Table 13 indicates, death jurors were more likely than life jurors to state that they had "imagined" themselves in the victim's position.

TABLE 13
COMPARISON OF LIFE AND DEATH JURORS' RESPONSES TO "DID YOU IMAGINE YOURSELF IN THE VICTIM'S SITUATION?"

Juror Type	Yes	No
Life Juror	37%	63%
Death Juror	56%	44%

44 *See supra* note 2 and accompanying text.

45 The author has verified all of the quotations in this Article for accuracy against the primary source (*i.e.*, the tape or interviewer's notes). The Article's descriptions of cases are based on the jurors' recollections. When necessary, the author has bracketed material to protect the anonymity of the jurors or to clarify the context of a quotation. To protect confidentiality, the author maintains a file of all of the materials used in this Article.

Moreover, as Tables 14 and 15 show, jurors were considerably more likely to have envisioned themselves in the victim's position in the random victim and non-risk-taking victim cases (cases that tended toward death) than in the nonrandom and high-risk victim cases (cases that tended toward a life sentence).

TABLE 14
COMPARISON OF JURORS' RESPONSES IN RANDOM AND NONRANDOM CASES TO "DID YOU IMAGINE YOURSELF IN THE VICTIM'S SITUATION?"

Juror Type	Yes	No
Random	65%	35%
Nonrandom	38%	62%

The jurors' identification with the random victim's fate also surfaced through the jurors' narratives. In addition to the recurring

TABLE 15
COMPARISON OF JURORS' RESPONSES BASED ON VICTIM'S RISK-TAKING BEHAVIOR TO "DID YOU IMAGINE YOURSELF IN THE VICTIM'S SITUATION?"

Juror Type	Very Well or Fairly Well	Not at All
Non-Risk-Taking Victim	56%	44%
High-Risk and/or Antisocial Victim	34%	66%

statement that such victims were in the "wrong place at the wrong time," jurors would use phrases like "she ran out of luck," "it just wasn't his day" or "she was just minding her own business" to capture the crime's randomness. Jurors in these cases also often described the victim in terms that expressly cast the victim as Everyman or Everywoman, providing descriptions such as: "she was just average Mrs. America"; "she could have been anyone's daughter" (this juror then immediately added a personalizing description, "she could have been my daughter"); "a typical school teacher"; "a typical middle-class college student"; "just an average teenager."

Often most striking in these cases, though, was when a juror would interweave the events that befell the victim with the juror's own life. Consider, for example, how the juror in the following quotation interchanges the facts leading up to the crime with her own daily commute and then imagines herself in the victim's situation:

> The victim was an elderly woman, 73 years old. She was driving to the airport and taking [the interstate]. And [that interstate] is a road I travel all the time because that's the way I come home from

> work. Anyway, she had a breakdown on her car. She would have been beyond my stop anyway, I get off over on the [Smith Street] exit—when you're going to the airport you have to go to the [Jones Street] exit and pick up [another road]. Her car had broken down and a "good Samaritan" stopped to help her, but instead he coerced her into the car—or she probably went willingly, I'm sure she willingly went in because he must have been such a nice man, helping her along the way. And she got into the truck with him and instead of taking her to where he said, he probably said he was taking her to a gasoline station or whatever—he took her into a secluded area and went ahead and just completely murdered her with what they call the "coup de grace." He emptied his entire gun into her and then threw her body out of his truck. He took off even her raincoat.
>
> I feel the fright of the woman, because I'm also a woman on the road. If you want to say what it has done to me, it's made me become more careful, but, yet, the vulnerability of this woman, and the situation that happened could happen to anyone. I imagine that fear—the minute she realized that he was not going to take her to the gas station. I would imagine that it would have been tremendously frightening at that point, when you know you're captured and there's nothing you can do—you're just panicky. That would be to me, traumatic.

The juror added that after the trial she and every other woman on the jury immediately went out and purchased car phones.

A juror's remarks in a case in which the victim was robbed and killed while using an ATM similarly demonstrate how jurors often personalized the victim's fate. After describing the victim as "a regular working guy," the juror responded to the question, "Did the victim remind you of someone . . . ?" as follows:

> Me. At the time he was killed, because of his age, same as myself. Kind of a coincidence there, just because of the age thing, and, plus, he was doing something, you know, a normal person does probably without thinking about it, just going to an ATM machine. So it was just kind of, you know, normal circumstances, he just happened to be at the wrong place at the wrong time.

When asked the single most important factor in sentencing the defendant to death, the juror returned to the idea that the victim was just a "regular" guy doing an everyday activity:

> I guess a lot of it was the circumstances, you know, the guy is killed in broad daylight going to an ATM to get some money because he's going to do some work around his house. It's something everybody does on an everyday basis in broad daylight. It could have been anybody, so there's an outrage to it.

This theme was echoed by the other jurors in the same case. One juror, after being asked if the crime was "bloody," responded nega-

tively, but then felt it important to explain why, because of the victim's innocence, the crime was horrible nevertheless:

> I wouldn't say it was bloody. You mean how it struck me? Well, the only word I can think of would be merciless, but I wouldn't say it was bloody. I don't know, truthfully, that it was bloody. They didn't say that and they didn't show any pictures, so I can't truthfully say it was bloody. But it was a merciless killing. It should never have happened, [the victim] was just an innocent bystander, so to speak.

Another juror in the case was most disturbed by the fact that the victim "was a careful man": he had "put his money in his wallet before he turned away from the [ATM]," and he had gone to the ATM during the day (the juror noted that ATMs are "especially scary if you go in the evening; I never go in the evening, I go during the day"). Yet despite all of his precautions, "it's just that you know, he, there wasn't anything, any other way he could have been that would have stopped what happened."

Particularly poignant were the cases in which the jurors imagined themselves in the victim's position during his or her last moments or as one of the victim's survivors dealing with the victim's murder. As the following sampling of quotations illustrates, jurors often would depict such moments in chilling terms:

> I was trying to imagine during the trial how I would have felt had that been my mother's body up there on the [autopsy] pictures and the granddaughter who was especially close to her grandmother [seeing the pictures]. It was easy to see that she very much cared about her.
>
> **********
>
> Interviewer: Is there anything about this case that sticks in your mind?
>
> Juror: The execution of the daughter. Her being tied up where she was probably trying to squirm away and she was being kind of methodically executed. I think that would kind of stick with me a little bit.
>
> **********
>
> I keep thinking about [the eight-year-old daughter] who discovered the bodies. She will never be the same. She was just, I guess still is, hysterical. I can imagine an eight year old coming home. She came home from school, came in through the front door, and found her mother [murdered]. She turned around and ran out screaming.
>
> **********
>
> He had her life in his hands. At that point, she was a total victim, standing there naked in the cold. It was up to him what was going to happen to her next. It was so cold-blooded, it was so unnecessary.
>
> **********

> Interviewer: Is there anything about this case that sticks in your mind?
> Juror: How frightened the victim must have been in the last moments.
>
> **********
>
> When [the defendant, Mike] grabbed the victim, she was talking to her mother on the phone. The mother heard her being dragged off. He shot her in the head and then stabbed her numerous times. I could have shot him.
> Both of the victims reminded me of my mother and sister. Suppose he did this to my mother and sister. I had no remorse for giving him the death penalty. [The defendant] cried when he got the death penalty. [I thought,] Geez, [Mike], you didn't ask those ladies what they felt. He's [310] on Death Row, so he's got a while.
>
> **********
>
> It was just very, very sickening. If this would be your wife or your mother laying on the ground in her beautiful evening gown, being shot for nothing, her life taken for nothing. It's just disgusting.
>
> **********
>
> I think as a woman you can't help but always think about being raped. So I'd have to say 'yes,' [I did imagine myself in her situation].
>
> **********
>
> I keep thinking about how horrible it must have been for that woman during those last few hours of her life.
>
> **********
>
> I saw the [victim's family] sitting [in the courtroom], listening, and I guess I tried to imagine how they were feeling, sitting there, watching things going on, pictures being shown about the murder and the things being said about [how they found] her. I was trying to imagine how they felt about that. You never know, I guess, unless you're in that situation.
>
> **********
>
> [The defendant] had told his girlfriend that [the victim] had squealed like a pig and pled for his life and I just kept seeing that in my mind, a twenty-seven-year-old man with two kids on his hands and knees begging for his life and he shot him anyway. I just can't imagine how his life was at that moment.

In a number of the cases, jurors did not even need to imagine the victim's state of mind, because a victim from one of the defendant's prior crimes testified during the penalty phase. As would be expected, these witnesses had an especially powerful impact on the jurors as they watched the witness testify. A juror described one such witness as

> terrified and when she got through testifying she couldn't move. It took every ounce of her strength to be in the room with him and to re-live the crime. She was completely exhausted. She just stayed

> there [in the witness chair]. We all left, and I have no idea how long she stayed there.

Another juror said of the same witness, "We felt that she was very brave to come and testify. It must have been difficult for her to go over the details of the attack while sitting and facing the defendant."

B. High-Risk, Antisocial, and Unsympathetic Victims

By contrast, the jurors in the cases involving nonrandom victims generally dealt with fact scenarios in which they were unlikely to imagine themselves confronting someone like the defendant.[46] This lack of identification with the victim was true even in the cases not involving high-risk victims, because these cases often involved matters individualized to the defendant's relationship with the victim, such as a soured romantic relationship or a troubled family situation.[47]

As would be expected, though, the lack of identification was especially evident in cases in which the victim had engaged in high-risk behavior. Unlike in the random-victim cases, the jurors simply did not have a feeling of "there, but for the grace of God, go I" when hearing about victims who had, for example, been involved in a drug deal, had been a member of a prison gang, or had allowed themselves to be "picked up" at pornographic bookstores or seedy taverns. One juror typified the reaction to high-risk victims when, after being asked if the victim was "innocent," he commented, "I wouldn't say she was an innocent victim, because, well, what was she doing in the biker bar?" Or, as a juror in another case said, "They were all dope fiends; they provided each other dope. [The victim] reminded me of people who get so screwed up that something bad was bound to happen to them—maybe not this serious, but something bad."

Not surprisingly, given that the jurors as law-abiding individuals were unlikely to find themselves engaged in drug deals or hanging out at biker bars, the jurors found these fact patterns less personally threatening and thus were not as likely to see the defendant as posing a future danger if given a life sentence. Consider how one juror in explaining the jury's life sentence rather remarkably cabins a defendant's violent tendencies to the world of drug dealing:

> Everybody came to the conclusion that nobody felt threatened by him as long as they were not a competitor in selling drugs or not a threat to him—either a business threat or a physical threat. *They felt he was probably the kind of guy you can have over, have dinner with, discuss politics, whatever.* Now, if you were a rival or in conflict over drugs—his business—then he would have no compunction about removing you as an obstacle with whatever it took.

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46 *See supra* Table 15.

47 *See infra* Appendix Table 11.

Another juror in the same case somewhat cavalierly characterized the defendant's double killing as "just business" in the same tone that a lawyer might use in describing the representation of an unpleasant client. These jurors did not personalize the danger that the defendant represented because they saw it as limited to drug dealing, and the jurors clearly did not see themselves as likely to be buying crack on a street corner late some night.

Moreover, jurors viewed many high-risk victims as unsympathetic or even unlikable. Jurors in these cases would give opinions like, "She was a hippie sort of person, a bit of a gypsy. I've known people like that. I didn't approve of her actions, because she put herself in danger. She was very unwise." Another juror describing the same victim speculated that "she might have had, well not a death wish, but a lack of self-confidence" because she had also previously been in a relationship involving physical abuse.

In another case, the victim had been "picked up" at a gay adult bookstore late at night and murdered. Several jurors appeared troubled by the victim's homosexuality itself. One juror expressly stated that he was "disgusted" that the victim was gay, and another juror, when asked if the victim was "admired or respected in the community," chose the "not very well" response, adding that the victim was "gay and on his way out [of the community]." Still another juror, when asked the standard questionnaire inquiry of whether the victim was "disturbed or unstable," stated, "He had been a married man with children who later in life decided to admit he was gay." The juror then quickly added, "I doubt if that fits here."

Even those jurors who did not expressly disapprove of the victim's sexuality almost universally had qualms about what they saw as a promiscuous lifestyle. One juror expressed "sadness over [the victim's] lifestyle's toll: he had TB, was gay, impotent and had to use drugs for an erection. He was having sex constantly with other men." Another juror articulated his uneasiness with the victim's lifestyle by stating, "I think, you know, his lifestyle he's certainly entitled to, but it—the lifestyle—is somewhat disturbing, I guess." Many of the jurors focused in particular on what they saw as the victim's risk taking. One juror, when asked if the victim had been reckless, replied, "Yes, in the sense of going to a bookstore and being picked up—careless, reckless, you could say other things about it too."[48] Another juror, when asked if

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48 When asked if he had imagined himself in the victim's family's position, the same juror elaborated:

> It might be interesting to know them. My problem with them is, and I don't know whether this fits into your thing, I'm not, well, I guess I'm critical of them in the sense of, they should have, the guy had a real poor lifestyle and it seemed to me his family knew about it. There was little evidence that they did anything to try to help the guy. The guy had a problem. So

the victim was "innocent or helpless," replied, "Helpless, yes, but not innocent." Yet another juror simply stated that if the victim had been more careful, "he would be alive today."

In a particularly memorable case, the victim, who was the defendant's girlfriend, had been very abusive. According to the jurors, she "was extremely cruel" and "pushed people further than most humans could take." One juror strung together a flurry of unflattering words to describe the victim (describing her as "a bitch, selfish, used people, aggressive, abusive"), and then went on to say that "I think she deserved what she got." Another juror, when asked about the victim, said, "It makes me sick to even think about her." By contrast, the defendant was viewed as "a very easygoing man that had been taken advantage of by this lady." On the night of the killing, the defendant had brought a gun with him "to scare her" because she had been so abusive, but she still "egged him on and egged him on and finally said, 'well, shoot me then,'" at which point he shot her.

Without more, the case probably would not have been prosecuted as capital murder, but, after killing his girlfriend, the defendant then also shot and killed the victim's brother who was in the house at the time. This second killing constituted a "special circumstance," making the defendant eligible for the death penalty. Although the jurors were troubled by the killing of the brother ("the brother just happened to be in the wrong place at the wrong time"), overall the jurors saw the defendant as someone who had found himself caught up with a bad person and made a tragic decision that he now deeply regretted. Indeed, several jurors were upset that he would never be eligible for parole, with one juror saying that the defendant "was kind of soft with me in my heart," a sentiment not normally voiced by jurors who have convicted a defendant of capital murder.

Although the jury's dislike of the girlfriend victim was unusual in its intensity, other cases also led jurors to view the victim with distaste. A juror in a drug-related killing called the victims "punks" and "lowlifes" and was quite candid about his feelings when he said, "I'll be honest with you, I guess they will be missed by their immediate family, but, as far as I am concerned, society will not miss them." A juror in a different case, in which the victim was variously described by jurors in terms such as "scumbucket of the earth" and "abusive asshole," expressed similar sentiments, though with an undercurrent of guilt that

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that's, I'm maybe not as tolerant of them as other people would be, they should have, it seems to me they have an obligation if you really love somebody and care for somebody, to set him on the right track. They didn't seem to do that. They seemed to say, "well, you are what you are and you're entitled to be that. You're not violating any law, so go ahead and do whatever you want to do." Certainly that is an attitude I don't agree with, but it is an attitude.

she should not feel that way: "The defendant wasn't out killing a bunch of people; she killed one person who wasn't of the best reputable character to begin with—now that's awful isn't it? But I guess you have to get down to that, you know?" Her mixed feelings were not unusual. Jurors in such cases frequently described the victim in negative terms and then would hurriedly add a disclaimer, like the juror who explained, "The victim was a wheeler-dealer type, a very conniving person. At the time of the killing, he was being investigated for murdering his girlfriend—do you believe that? Isn't it interesting? So maybe it was a mercy killing [laughs]. Uh, not that it justified him being murdered." And although juries in such cases occasionally had a "pox-on-both-your-houses" reaction and gave the death penalty—especially if both the defendant and victim were part of a narcotics transaction gone awry—the far more common reaction was to give a life sentence when the jury saw the victim as distasteful. An interviewer could quickly get a sense of a juror's view of the victim, because one of the first questions asked of a juror was the victim's occupation. If the juror disliked the victim, the reply would be along the lines of "pimping."

C. Solving the Riddle

How readily a juror can identify with the victim and her activities at the time of the killing thus appears to be a powerful influence on how jurors make their sentencing decision. Moreover, the differing levels of empathy help solve the riddle that began this Article's inquiry into how capital juries react to different victim types.

Recall that the "he's-not-a-Hitler-Manson-Bundy" argument generated strong but very different reactions from many of the jurors. Some jurors took umbrage at what they perceived to be the implicit argument that the death penalty should be reserved only for "sensational" or "headline crimes." Or, as one juror sarcastically summarized the argument, "because someone merely killed a regular human being, they should get a lesser sentence."

Yet, for other juries, the argument became a central focus of the jury's discussion—"something to latch onto." Interestingly, these jurors also were uneasy with the notion of comparing murders, and their explanations were laced with apologetic statements such as, "like I said, you hate to grade murders," or "it sounds horrible, but the murder wasn't heinous enough." One juror, after summarizing her thinking that "a death sentence is the top of the line, and this was not a top-of-the-line murder, this was not a worst case scenario," immediately added the guilty afterthought that she did not mean "to devalue one man's life." Despite their unease, however, these jurors were willing to go the extra step and compare the defendant to other murder-

ers. The following juror's description of her reasoning process was fairly typical of those jurors who were receptive to the argument comparing murders:

> During the arguments at the punishment phase, the attorney said that [Richard] wasn't the worst of the worst, and it gave me something to latch onto. His attorney also stressed how [Richard] had found some meaning to life while in prison. To me it just seemed [Richard] was not the worst of the worst. He did not fit into my vision of what the death penalty is for. The defense attorney suggested that. They mentioned on a scale of heinous crimes, there were worse ones.
>
> So, anyway, we talked all these things over and came to the conclusion—all but one of us—came to the conclusion that the crime was not the, quote unquote, worst of the worst. That's what the defense attorney had given us, and it was kind of a phrase that stuck with all of us.
>
> I thought about a scale—the cliché of thinking about Manson, but that kind of crime, that kind of mass murder, serial murder involving children or women as the worst. I don't know why that seems to me—children in particular and, unfairly, women before men. Well, when I compared this crime of [Richard's], even though it was a terrible crime, it didn't really compare with the worst I could imagine. If it had been some kind of slaughter, that would be different.

After finishing her description of how she had compared crimes, the juror concluded with the obligatory *mea culpa*: "I think it's kind of unfortunate that [Richard's] crime, which was very bad, doesn't seem all that bad."

So what explains why some jurors were open to comparisons and others became offended at the very idea that a hierarchy of heinousness exists? The explanation appears to rest at least in part with the prior finding that a juror's empathy with the victim plays an important role in her decision. In almost all of the cases in which jurors were willing to ponder where the defendant's crime fell on the spectrum of murderers, the victim was one with whom the jurors were not likely to identify. This lack of victim identification seemed to enable jurors to mentally step back and assess how this particular killing compared to the broader universe of murders. For example, in one case in which the defense attorneys made the comparison argument, most of the jurors reacted favorably despite the defendant's two brutal torture murders. Tellingly, the defendant had "picked up" the victims in an extremely seedy part of town where the victims were street kids peddling sex and drugs. The jurors felt sympathy for them, but not empathy, and were able to conclude that, despite their brutality, the defendant's crimes still were not the "worst of the worst." Revealingly, the one juror in this case who was most resistant to the comparison

argument was a juror whose own past largely paralleled those of the victims.

By contrast, when the victim was a "there-but-for-the-grace-of-God-go-I"-type victim, jurors were far more likely to feel affronted at the proposed comparison. One need not have a doctorate in psychology to postulate that in this type of case the jurors appear to hear the defense's argument that "this murder of Everyman wasn't so bad compared to . . ." as a tacit suggestion that their lives, *the jurors' lives*, are being devalued by proxy. After all, if this victim's demise does not warrant the death penalty because she was not a victim of a "headline crime," but was merely a "regular human being" at the "wrong place at the wrong time," then the jurors' lives also may be discounted someday because they did not have the "good fortune" to be dismembered by a notorious killer rather than dispatched by a garden-variety killer.

IV

FINAL THOUGHTS ON WORTHY AND UNWORTHY VICTIMS

The California CJP data suggest that a juror's perception of the victim's character and role in the crime can have an important influence on a juror's inclination to vote for death or life in a capital case. Because the California CJP cases offer a wide range of victim types and behavior, the data are particularly helpful in testing whether the jurors' views of the victim and her actions influence the death penalty decision. This broad spectrum of victim types, however, also raises a caveat in applying the findings to other jurisdictions:[49] the jurors' views of the victim may not be as reliable a predictor in a jurisdiction where prosecutors pursue the death penalty only (or primarily) in cases in which the victim is randomly chosen or in which the victim is likely to have been perceived as an "innocent" because she did not engage in high-risk or antisocial behavior. In such a jurisdiction, one would expect other factors to play a heightened role in explaining the difference between life and death cases.[50] To the extent jurors do

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49 This caveat also applies to California, as the CJP involved a sampling of cases from different counties in California, but might not include a representative array of victim types for any one county. A particular county, for instance, might have guidelines for seeking the death penalty that in practice would limit cases seeking the death penalty to those involving non-risk-taking victims. Another county, on the other hand, might have a policy of asking for the death penalty in every case involving special circumstances (*e.g.*, to avoid charges of racial bias), which would likely produce a wide range of victim types.

50 The data suggest, though, that even in such a jurisdiction, randomly chosen victims would produce a greater likelihood of a death sentence than would the non-random victim cases. *See supra* Table 10. One might also expect that such a jurisdiction would have a higher percentage of death verdicts in cases in which the death penalty was sought than would a jurisdiction that pursued a death sentence in cases involving a wide range of victim behavior.

distinguish between victims based upon their behavior, however, this Article's findings raise several issues of broad concern.

A. Victim Impact Statements

This Article began with the *Booth* Court's concern regarding whether, if allowed to hear VIE, jurors might distinguish between worthy and unworthy victims in making their death penalty decision. This Article's findings indicate that the answer to the question is not a simple "yes" or "no."

At least within the California CJP group of cases, jurors appear to place significant weight on the victim's character and actions in making their choice between a life and death sentence. In this sense, then, jurors do distinguish between "worthy" and "unworthy" victims: random victims who do not engage in risky behavior are more apt to be deemed "worthy" (and their murderers more deserving of the death penalty) than are victims who engage in risky, antisocial behavior (and whose murderers are viewed as less deserving of the death penalty). As we have seen, however, jurors appear to react most strongly to the victim's specific actions leading up to the crime, rather than to the victim's general status or reputation. As noted earlier, the differences between life and death outcomes within any one demographic category tend to correlate with the victim's risk taking and whether the victim was randomly chosen.[51]

Granted, it still can be argued that a jury making life and death determinations based on guilt-phase evidence that suggests that the victim was "of questionable character" because she was buying drugs from the defendant (or, vice versa, that she was a "sterling member of the community" because the guilt-phase evidence shows that she was dutifully doing her job when randomly robbed and killed), runs afoul of the concern that the death penalty will be arbitrarily imposed based on victim characteristics. Such a view, however, does not appear to have been the *Booth* majority's core concern, which focused more on social class and standing than on the victim's actions,[52] and would run against the general view of criminal jurisprudence that a victim's actions can bear on the defendant's culpability and just deserts.[53]

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51 *See supra* Part II.C.

52 *See supra* notes 7–8 and accompanying text. Although the California CJP sample sizes are far too small to have statistical significance, the percentage of death sentences for "white collar" victims (60% based on five cases), "blue collar" victims (60% based on 15 cases) and unemployed victims (50% based on only two victims) do not raise immediate red flags. Further study is needed to see whether social status makes a difference within any one category of victims once they are categorized based on their actions.

53 *See generally* Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002) (discussing provocation as a justification or excuse defense).

Even more fundamentally, trying to banish such evidence from the guilt phase poses serious practical problems. Justice Souter, in his *Payne* concurrence, argued that a prohibition against VIE realistically could never be implemented because juries inevitably will learn facts about the victim at the guilt phase that they will take into account at the sentencing phase.[54] If, as Justice Souter argues, it would be almost impossible to keep out evidence about the crime that sheds a positive light on the victim (he gives the hypothetical example of a minister who is murdered while running an errand to the church and the killing is witnessed by his wife and daughter),[55] it would be even more difficult to keep out guilt-phase evidence placing the victim in a negative light, such as evidence that the victim was killed as part of a drug deal with the defendant.

Particularly telling on this score and adding substance to Justice Souter's argument is the fact that most of the cases in the California CJP were tried while VIE was still barred in California.[56] Indeed, one of the jurors' most common complaints during the interviews was how unfair it was that the jury heard all about the defendant but learned almost nothing about the victim. As one juror said:

> We didn't have a lot of evidence about [the victim]. We weren't supposed to take the victim into consideration, the fact that his family was left without a father and those kinds of things. It's almost like he, personally, didn't matter. It's kind of depressing to think of—it didn't really matter about him as an individual.

Yet, despite the prohibition on VIE at the sentencing phase, the juror interviews demonstrate that they learned information about the victim during the guilt phase that influenced their sentencing decision.

What might one expect, then, now that VIE is formally allowed into the sentencing proceeding? Any answer must, of course, await studies of the post-*Payne* effects of VIE, but one possibility is that such evidence will not have the blanket effect on capital sentencing outcomes that one might have first expected after *Payne*.[57] If, as the find-

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54 *See* Payne v. Tennessee, 501 U.S. 808, 840–41 (1991) (Souter, J., concurring). Justice Souter did recognize the possibility of banning all references in the guilt phase to victim characteristics unknown to the defendant, or requiring separate guilt and sentencing juries, but did not believe that either measure was practically or legally feasible. *See id.* at 839–42 (Souter, J., concurring).

55 *See id.* at 840.

56 The California Supreme Court held in 1992 that evidence and argument concerning the specific harm caused by the defendant is generally admissible under state law as a circumstance of the capital crime. *See* People v. Pride, 833 P.2d 643 (Cal. 1992).

57 The South Carolina CJP, in comparing pre- and post-*Payne* cases, found that VIE had no discernable statistical effect on sentencing outcome. *See* Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 335 (2003). However, because of the possibility that the profile of victims in South Carolina cases did not include the same variety of risk-taking victims as the Califor-

ings indicate, jurors already are inclined toward a death sentence if the victim was a random or "innocent" victim,[58] learning that such a victim was indeed a "sterling member of the community" might primarily serve to confirm the jury's decision to impose a death sentence. Similarly, any "negative" evidence casting the victim as a risk taker or antisocial actor almost certainly will first have been developed during the guilt phase as evidence bearing on the commission of the crime. This guilt-phase evidence would render sentencing evidence casting the victim in an adverse light redundant in terms of the jurors' predilections.[59]

This is not to suggest, however, that the debate over VIE's effects has been much ado about nothing. Even if further studies should show that allowing VIE at the sentencing phase does not have a great overall effect on cases, it seems likely that VIE will still affect certain types of cases, such as those in which the aggravating and mitigating evidence are roughly in equipoise. As we have seen, a case involving a nonrandom victim who was not a risk taker, for example, presents a fact profile about which jurors may be on the fence going into the penalty phase, and therefore would likely be receptive to strong mitigating evidence that the defendant's life circumstances never really offered him a choice of the "high road."[60] Such a case in mitigation, however, often heavily depends upon family testimony,[61] and VIE may diminish a juror's receptivity to the power of such mitigating evidence.[62]

For instance, in one of the few California CJP cases in which VIE was allowed, a juror explained that at first he was moved by the defendant's mother's testimony when she "pleaded for life without parole so she could have some time to call him and write to him." The juror continued, however, that the defendant's mother's testimony was largely negated by the victim's mother who said, "That was not thought about when they killed [my son]. I can't talk to him. I can't write to him." The juror observed, "The battle between the two mothers was real dramatic." In the end, therefore, although the juror

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nia cases, VIE's lack of a statistical effect in South Carolina may have been caused by other factors.

58 *See supra* Part III.A.

59 *Payne* appears to allow a defendant to rebut positive VIE (although such a defense tactic is fraught with obvious peril), but does not appear to allow a defendant to introduce negative evidence about a victim as a mitigating factor. *See* Robert P. Mosteller, *The Effect of Victim-Impact Evidence on the Defense*, CRIM. JUST., Spring 1993, at 24, 63.

60 *See* Sundby, *supra* note 3, at 1136.

61 *See id.* at 1151–62.

62 *See* Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, 5 PSYCHOL. CRIME & L. 331 (1999) (finding that VIE that increased a person's positive opinion of a victim lessened the weight the person would give to mitigating evidence about the defendant).

"felt sorry" for the defendant's mother, the juror explained that, "it really did not influence us. We had to go by the facts." VIE, therefore, may prove to be most critical in those cases in which a mix of factors is pulling the jury in different directions on life and death, and information about the victim or the effect of the killing on the victim's survivors will heighten or dampen the relative influence of the various factors.[63]

If this hypothesis is correct, then one might also expect that the mix of victim cases being pursued by a jurisdiction's prosecutors (as well as the scope of VIE allowed in the jurisdiction) will influence VIE's effects. In a jurisdiction where capital case selection primarily focuses on victims who will be seen by jurors as "innocent" and stable, VIE might be less likely to play an influential role because jurors already will be leaning toward death on the "victim factor," leaving any movement toward a life sentence primarily dependent on other factors (*e.g.*, that the defendant played a lesser role in the crime).[64] Inversely, the greater the range of victim types, the more likely it is that a middle range of cases will emerge in which the "victim factor" in the guilt phase has not yet firmly cast jurors toward death or life (the clearest category of this type of case being the nonrandom but non-risk-taking victim), and in which strong, positive VIE may sway the jurors toward death. In such a jurisdiction, one would expect to find that the advent of VIE has influenced the outcome of at least this middle category of cases.

The possibility also exists that VIE might "rehabilitate" a risk-taking victim with whom the jury otherwise would not empathize.[65] The victim who met the defendant at a biker bar, for instance, might trigger a more positive reaction among jurors if VIE were to reveal that she had been a loving daughter who had nursed her mother through a long illness. If this effect does occur, the potential exists for shifting toward death sentences a group of cases that this Article's findings suggest usually would result in life sentences. Further study of VIE's effects may provide the answer to questions like these, as well as pro-

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63 Negative information about the victim might also have this effect if introduced in rebuttal to positive VIE. *Compare* Mickens v. Taylor, 122 S. Ct. 1237, 1263 n.13 (2002) (Souter, J., dissenting) (arguing that defense attorney's failure to use evidence that would have rebutted victim's mother's claim that "all [she] lived for was that boy [the victim]" demonstrated that the lawyer's conflict of interest had an "adverse effect" on the lawyer's representation of the defendant (first alteration in original) (internal quotation marks omitted)), *with id.* at 1247 (Kennedy, J., concurring) (finding that lawyer's "failure to attack the character of the seventeen-year-old victim and his mother . . . was rejected [as a strategy] likely to backfire").

64 *See* Sundby, *supra* note 4, at 1614–16.

65 *Cf.* Eisenberg et al., *supra* note 57, at 325 (finding that after VIE was allowed, juror perception of victim admirability increased in a manner "fully consistent with growing and improving use of VIE by prosecutors").

vide further insight into how jurors process evidence about the victim both apart from and in tandem with evidence regarding the victim's role in the crime.

B. The Empathetic Juror

A substantial body of experimental literature has established the basic proposition that the more a decision maker identifies and empathizes with the person being judged, the more likely the decision maker is to adopt that person's perspective.[66] This proposition stands in general accord with both the CJP jurors' narratives describing the victims in their cases and the jurors' attitudes based on the victim's actions leading up to the crime. This is not to suggest that the degree of juror empathy with the victim can fully explain the outcome of any one case or even any one juror's decision. Similar to the research findings on decision making in rape cases,[67] one would expect to find a highly complex interaction of factors entering the decision-making process of capital jurors.

To the extent, however, that juror empathy (or lack of empathy) with the murder victim does color a juror's view of factors such as the crime's seriousness or the defendant's dangerousness, defense counsel should heed the implications. Realizing that a case involving a randomly chosen victim is particularly likely to raise dangerousness concerns and to make the jurors view the offense as serious, defense counsel should think carefully before pursuing tactics that the jury might construe as suggesting that the murder was not as heinous compared to other possible crimes. Likewise, defense counsel with a case involving a risk-taking or unsympathetic victim will need to consider how best to present that information to the jury. Without entering the ethical debate of just how far defense counsel may go in raising questions about a victim's character, this Article's findings suggest that defense counsel in such a case will need to take into account that jurors appear to consider the victim's role in the crime when assessing the defendant's overall culpability.

From a broader policy standpoint, findings that appear to verify a juror's tendency to empathize with certain victim types call for continued research on the effects of race. Given prior studies that have found that the victim's race has a statistically significant effect on the

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66 *See, e.g.*, Lynda Olsen-Fulero & Solomon M. Fulero, *Commonsense Rape Judgments: An Empathy-Complexity Theory of Rape Juror Story Making*, 3 PSYCHOL. PUB. POL'Y & L. 402, 409–10 (1997) (summarizing the literature on juror empathy).

67 *See id.* at 418–20. The authors attribute the "inconsistent and confusing results of rape-responsibility research" to researchers' efforts to "fragmentize a highly complex phenomenon." *Id.* at 418.

likelihood of death sentences,[68] questions naturally arise as to the role of juror empathy in causing this effect. William Bowers and coauthors already have conducted groundbreaking work demonstrating that the race of capital jurors affects their views on issues such as lingering doubt, the defendant's dangerousness, the defendant's remorse, and the importance of the mitigation evidence.[69] If a juror's degree of empathy with the victim influences the death penalty decision, as this Article's findings suggest, it becomes important to know whether factors such as race or socioeconomic background (of either the victim or the juror) have an effect on whether a juror will empathize with certain types of victims more than others.[70]

CONCLUSION

Much debate and speculation have surrounded the question of whether juries should be allowed to consider evidence about the victim in making their capital punishment decision. Although an understanding of how capital juries use victim evidence cannot by itself resolve the debate, such an understanding can help better focus the moral and legal issues that are at stake.

A review of the California CJP data suggests that capital juries are influenced by victim evidence, at least to the extent that the evidence pertains to the victim's actions leading up to the crime. A randomly chosen victim appears to tilt the jury toward a death sentence, both because juries see a defendant who preys upon a randomly chosen victim as the most dangerous and depraved of criminals, and because jurors are most likely to empathize with a victim who is engaged in everyday activities. By contrast, a victim who is engaged in high-risk or antisocial behavior leading up to the crime is less likely to invoke an empathetic response from the jury or to provoke a sense of outrage, which, in turn, appears to make the jury less inclined to impose a death sentence.

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68 The most comprehensive statistical look at the death penalty is the Baldus Study, which used multiple regression analysis accounting for 230 possible factors. *See* David C. Baldus et al., *Law and Statistics in Conflict: Reflections on* McCleskey v. Kemp, *in* HANDBOOK OF PSYCHOLOGY AND LAW 251 (D.K. Kagehiro & W.S. Laufer eds., 1992) (presenting statistical research indicating that an African-American defendant who kills a white victim has a significantly greater likelihood of receiving a sentence of death); *see also* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (presenting the results of research on racial disparities in capital sentencing in Philadelphia).

69 William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001).

70 *See generally* RANDALL KENNEDY, RACE, CRIME AND THE LAW 347–50 (1997) (discussing the role of race and empathy in the criminal justice system). The California CJP did not include sufficient numbers of victims from different racial and ethnic groups to allow reliable conclusions to be drawn about how the victim's race might affect juror empathy.

These findings suggest, therefore, that even without the formal admission of VIE at the penalty phase, victim evidence from the guilt phase will play a role in the sentencing decision, an effect that Justice Souter predicted in his *Booth* concurrence. Further research is needed to determine whether VIE has its own independent effect on the jury's sentencing decision or mainly serves to reinforce the jury's sentencing inclination coming out of the guilt phase. The finding that jurors are likely to empathize with certain victims also highlights the need to determine whether such empathy is limited to the victim's role in the crime (a factor the criminal law has traditionally accepted as legitimate) or extends further to illegitimate factors such as race and socioeconomic status.

APPENDIX TABLES

APPENDIX TABLE 1
EFFECT OF VICTIM TYPE ON JUROR'S DECISION TO SENTENCE DEATH

Victim Type	Much More Likely	Slightly More Likely	No Effect	Slightly Less Likely	Much Less Likely
Stranger in the community (n = 144)	1%	1%	96%	0%	1%
Was an alcoholic (n = 143)	1%	1%	92%	6%	1%
Was a drug addict (n = 142)	1%	2%	89%	6%	2%
Female (n = 130)	5%	5%	87%	2%	1%
Respected member of community (n = 132)	3%	8%	86%	2%	2%
Had a loving family (n = 127)	6%	14%	76%	2%	2%
Had a criminal record (n = 143)	3%	6%	73%	15%	4%
Known troublemaker (n = 145)	1%	3%	68%	25%	3%
Child (n = 140)	53%	24%	23%	0%	1%

APPENDIX TABLE 2
AMOUNT OF JURY DISCUSSION TIME FOCUSED ON "THE REPUTATION OR CHARACTER OF THE VICTIM"

Juror Type	Great Deal	Fair Amount	Not Much	None at All
All Jurors (n = 150)[1]	11%	32%	33%	25%
Life Jurors (n = 68)	9%	41%	32%	18%
Death Jurors (n = 78)	13%	23%	35%	29%

[1] The overall number of jurors reporting responses includes the responses of four jurors who served on a jury that hung on the sentence; consequently, the n factor for "all jurors" is higher than that of the life and death jurors added together.

APPENDIX TABLE 3
AMOUNT OF JURY DISCUSSION TIME FOCUSED ON
"THE VICTIM'S ROLE OR RESPONSIBILITY IN THE CRIME"

Juror Type	A Great Deal	A Fair Amount	Not Much	None at All
All Jurors (n = 150)[1]	18%	21%	30%	31%
Life Jurors (n = 68)	22%	31%	29%	18%
Death Jurors (n = 78)	15%	14%	29%	41%

[1] The overall number of jurors reporting responses includes the responses of four jurors who served on a jury that hung on the sentence; consequently, the n factor for "all jurors" is higher than that of the life and death jurors added together.

APPENDIX TABLE 4
JUROR'S IMPRESSION OF HOW ACCURATELY
"INNOCENT OR HELPLESS" DESCRIBES THE VICTIM

Juror Type	Very Well	Fairly Well	Not Well	Not at All
Life Juror (n = 70)	46% (32)	16% (11)	14% (10)	24% (17)
Death Juror (n = 77)	86% (66)	5% (4)	4% (3)	5% (4)

APPENDIX TABLE 5
JUROR'S IMPRESSION OF HOW ACCURATELY
"HAD AN UNSTABLE OR DISTURBED PERSONALITY"
DESCRIBES THE VICTIM

Juror Type	Very Well	Fairly Well	Not Well	Not at All
Life Juror (n = 61)	12% (7)	26% (16)	13% (8)	49% (30)
Death Juror (n = 58)	2% (1)	5% (3)	14% (8)	79% (46)

APPENDIX TABLE 6
JUROR'S IMPRESSION OF HOW ACCURATELY
"HAD A PROBLEM WITH DRUGS OR ALCOHOL" DESCRIBES THE VICTIM

Juror Type	Very Well	Fairly Well	Not Well	Not at All
Life Juror (n = 58)	28% (16)	22% (13)	10% (6)	40% (23)
Death Juror (n = 57)	14% (8)	9% (5)	14% (8)	63% (36)

APPENDIX TABLE 7
JUROR'S IMPRESSION OF HOW ACCURATELY
"LONER WITHOUT MANY FRIENDS" DESCRIBES THE VICTIM

Juror Type	Very Well	Fairly Well	Not Well	Not at All
Life Juror (n = 58)	7% (4)	26% (15)	26% (15)	41% (24)
Death Juror (n = 53)	0% (0)	8% (4)	34% (18)	58% (31)

APPENDIX TABLE 8
JUROR'S IMPRESSION OF HOW ACCURATELY
"ADMIRED OR RESPECTED IN THE COMMUNITY" DESCRIBES THE VICTIM

Juror Type	Very Well	Fairly Well	Not Well	Not at All
Life Juror (n = 67)	18% (12)	16% (11)	21% (14)	45% (30)
Death Juror (n = 67)	22% (15)	39% (26)	21% (14)	18% (12)

APPENDIX TABLE 9
JUROR'S IMPRESSION OF HOW ACCURATELY
"TOO CARELESS OR RECKLESS" DESCRIBES THE VICTIM

Juror Type	Very Well	Fairly Well	Not Well	Not at All
Life Juror (n = 64)	31% (20)	20% (13)	16% (10)	33% (21)
Death Juror (n = 70)	4% (3)	7% (5)	17% (12)	71% (50)

APPENDIX TABLE 10
SENTENCING OUTCOME BASED ON VICTIM TYPE AND RISK TAKING

Victim Classisfication	Number of Cases	Death	Life	Hung
Number of Victims				
Single Victims	14	29% (4)	71% (10)	0% (0)
No-risk	9	44% (4)	56% (5)	0% (0)
Risk Taking	5	0% (0)	100% (5)	0% (0)
Multiple Victims	23	65% (15)	30% (7)	4% (1)
No-risk	12	92% (11)	0% (0)	8% (1)
Risk Taking	11	36% (4)	64% (7)	0% (0)
Victim's Gender				
Female	12	58% (7)	42% (5)	0% (0)
No-risk	9	67% (6)	33% (3)	0% (0)
Risk Taking	3	33% (1)	67% (2)	0% (0)
Male	25	48% (12)	48% (12)	4% (1)
No-risk	12	75% (9)	17% (2)	8% (1)
Risk Taking	13	23% (3)	77% (10)	0% (0)
Victim's Marital Status				
Single/Divorced	22	33% (7)	68% (15)	0% (0)
No-risk	8	63% (5)	38% (3)	0% (0)
Risk Taking	14	14% (2)	86% (12)	0% (0)
Married	13	85% (11)	8% (1)	8% (1)
No-risk	12	83% (10)	8% (1)	8% (1)
Risk Taking	1	100% (1)	0% (0)	0% (0)
Victim's Parental Status				
Had Children	20	60% (12)	35% (7)	5% (1)
No-risk	12	83% (10)	8% (1)	8% (1)
Risk Taking	8	25% (2)	75% (6)	0% (0)
No Children	11	27% (3)	73% (8)	0% (0)
No-risk	5	40% (2)	60% (3)	0% (0)
Risk Taking	6	17% (1)	83% (5)	0% (0)

Note: Because of juror uncertainty over the victim's marital status in 2 cases and parental status in 6 cases, those classifications do not include all 37 cases.

APPENDIX TABLE 11 (FOR TABLES 13–15)
JURORS' IMAGINING SELVES IN VICTIM'S POSITION

Juror Type	(Sample Size)	Imagined Self in Victim's Position	Did Not Imagine Self in Victim's Position
		% of Jurors	% of Jurors
		By Penalty	
All Jurors	(n = 152)	47	53
Life Juror	(n = 70)	37	63
Death Juror	(n = 78)	56	44
Hung Juror	(n = 4)	25	75
		By Relation	
Random Victim Cases	(n = 49)	65	35
Life Juror	(n = 6)	67	33
Death Juror	(n = 39)	69	31
Hung Juror	(n = 4)	25	75
Nonrandom Victim Cases	(n = 103)	38	62
Life Juror	(n = 64)	34	66
Death Juror	(n = 39)	44	56
		By Risk	
No Risk Victim Cases	(n = 88)	56	44
Life Juror	(n = 22)	50	50
Death Juror	(n = 62)	60	40
Hung Juror	(n = 4)	25	75
Risk-Taking Victims	(n = 64)	34	66
Life Juror	(n = 48)	31	69
Death Juror	(n = 16)	44	56