
ARTICLES

THE DEADLY PARADOX OF CAPITAL JURORS

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We examine support for the death penalty among a unique group of respondents: 187 citizens who actually served as jurors in capital trials in South Carolina. We find that capital jurors support the death penalty as much as, if not more than, members of the general public. Yet capital jurors, like poll respondents, harbor doubts about the penalty's fairness. Moreover, jurors—black jurors and Southern Baptists in particular—are ready to abandon their support for the death penalty when the alternative to death is life imprisonment without the possibility of parole, especially when combined with a requirement of restitution. Support for the death penalty thus exists side-by-side with doubts about its fairness and a distinct preference for some alternative to it. What explains this deadly paradox?

We hypothesize that the paradox arises where democratic politics fail to make life imprisonment without parole one of the alternatives to death,

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or where democratic education fails to inform or to persuade jurors that capital defendants sentenced to life imprisonment will really remain in prison for the rest of their lives.

INTRODUCTION

Most people support the death penalty. So say the polls.¹ Yet the polls also say that many people are ready to abandon the death penalty if the alternative to it is life imprisonment without the possibility of parole, especially when combined with a requirement that the defendant make restitution to the victim's family.² Support for the death penalty is thus wide, but perhaps not deep.

But how seriously should we take all of this? After all, the polls can be wrong—Dewey did *not* beat Truman. Poll results often depend on the way, the order, and the context in which the questions are asked. As far as the death penalty goes, however, none of these variables appears to make much difference.³ No matter how one asks the question the results are more or less the same. Still, public opinion polls *do* suffer from at least one major defect: Respondents never really have to *deal* with the death penalty. They never have to look a capital defendant in the eye; never have to cast a vote for life or death; never have to think about living with a verdict.⁴

1. See, e.g., Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, J. SOC. ISSUES, Summer 1994, at 19, 20 fig.1 (showing trends in attitudes toward the death penalty since 1936); James Alan Fox, Michael L. Radelet & Julie L. Bonsteel, *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 503, 517 fig.1 (1990-91) (same); Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1450 fig.1 (1998) (same since 1952); Mark Gillespie, *Public Opinion Supports Death Penalty*, at <http://www.gallup.com/poll/releases/pr990224.asp> (Feb. 24, 1999).

2. See, e.g., William Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 LAW & SOC'Y REV. 157, 164 tbl.1.B (1993) (presenting data from seven polls conducted between 1986 and 1991); William J. Bowers, Margaret Vandiver & Patricia H. Dugan, *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 90-91 tbl.1.B (1994) (presenting data from eleven polls conducted between 1986 and 1994); Edmund F. McGarrell & Marla Sandys, *The Misperception of Public Opinion Toward Capital Punishment*, 39 AM. BEHAV. SCI. 500, 506 tbl.2 (1996) (summarizing data from 1993 Indiana poll).

3. See Ellsworth & Gross, *supra* note 1, at 24 (noting the "absence of systematic differences between the results of competing polls that phrase their questions about capital punishment differently").

4. *Cf. id.* at 39 (finding that "people are far more likely to favor the death penalty in the abstract than they are to favor it in specific, concrete cases") (citations omitted).

Capital jurors do. Exploring the contours of support for the death penalty among jurors who have actually lived through a death penalty trial might yield insights that will forever elude the polls. What *do* capital jurors think about capital punishment? Do they support it as much as the public does? Would they, like the general public, really prefer something else?

Using data gathered from the South Carolina segment of the nationwide Capital Jury Project,⁵ we find that capital jurors, like members of the general public, do indeed support the death penalty. But jurors, like members of the general public, have doubts about how fairly the penalty is administered. Moreover, and yet again like members of the general public, jurors are also prepared to abandon the death penalty in favor of life imprisonment without parole (LWOP), especially if the offender is also required to make restitution to the victim's family (LWOP+).⁶

But *why* do jurors, like members of the public, continue to support the death penalty if they have doubts about it, and if they would really prefer LWOP or LWOP+? What accounts for this paradox?

We suggest that this paradox ultimately reflects a collective failure. It reflects a failure of democratic politics, a failure of democratic education, or both. Jurors prefer LWOP or LWOP+ over the death penalty. In states where the alternative to death is neither, politics has failed to give jurors an option they prefer. Where LWOP *is* the alternative, jurors either do not know about it, or do not believe it really means the defendant will, in fact, never be released on parole. Here education has failed.

Part I describes the data. Part II examines the nature and sources of death penalty support among jurors. Part III examines the doubts jurors have about the death penalty, as well as the preference they express for an alternative to it. We conclude with a description of the deadly paradox that results, suggesting its roots can be traced to one or both of two failures—one of democratic politics, the other of democratic education.

I. THE CAPITAL JURY PROJECT IN SOUTH CAROLINA

The data analyzed here were gathered as part of the Capital Jury Project (CJP), a National Science Foundation-funded, multistate research

5. For a description of the Capital Jury Project, see *infra* Part I.

6. See tbl.6 *infra* Part III.B.

effort.⁷ Before the CJP, researchers trying to explain juror dynamics in capital cases tended to rely on general population surveys, anecdotal information drawn from individual cases, and material in written records. Data systematically gathered from jurors who served on capital cases were unavailable. The CJP therefore provides a rich source of information about the beliefs and decisionmaking processes of capital jurors.

Our analysis uses data gathered from the CJP's efforts in South Carolina, the state with by far the largest share of the CJP's total data. Jurors who sat in fifty-three South Carolina murder cases were randomly sampled, with a goal of four juror interviews per case. Our sample includes one hundred jurors who sat on one of twenty-eight cases resulting in a death sentence, and eighty-seven jurors who sat on one of twenty-five cases resulting in a life sentence. Although our data are limited to South

7. For an overview of the CJP, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

Quantitative analyses of CJP data to date can be found in John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue"*, 86 CORNELL L. REV. 397 (2001) (South Carolina data); William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (multistate data); 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 (1998) (multistate data); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) [hereinafter Eisenberg et al., *Remorse*] (South Carolina data); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996) [hereinafter Eisenberg et al., *Responsibility*] (South Carolina data); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (South Carolina data); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) [hereinafter Garvey, *Aggravation and Mitigation*] (South Carolina data); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000) (South Carolina data); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995) (North Carolina data); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183 (1995) (Kentucky data); Benjamin D. Steiner, William J. Bowers & Austin Sarat, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461 (1999) (multistate data); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) (California data); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Jurors Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (California data); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death* (Nov. 28, 2000) [hereinafter Eisenberg et al., *Forecasting*] (unpublished manuscript, on file with the *Southern California Law Review*).

Qualitative analyses of CJP data to date can be found in Joseph L. Hoffmann, *Where's The Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995) (Indiana data); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103 (1995) (Georgia data).

Carolina jurors, published research using multistate data suggests that South Carolina jurors behave much the same as do jurors elsewhere.⁸

The cases studied represent the bulk of South Carolina capital cases brought between 1986 and the summer of 1997. The South Carolina Omnibus Criminal Justice Improvements Act,⁹ enacted in 1986, substantially changed the standards of parole in capital cases and provided a natural point at which to begin collecting data. The sampling in later years is less comprehensive than that in earlier years.¹⁰

The interview instrument, designed and tested by the CJP, covered all phases of the guilt and sentencing trials.¹¹ The data include facts about the crime; racial, economic, and other characteristics of the defendant, the victim, and their families; the process of juror deliberation; and the performance of the defense counsel, the prosecutor, and the judge. The interviews also included questions about juror demographics (including sex, age, and race), as well as jurors' views on the death penalty and its administration.

Data derived from juror interviews have unique methodological potential; they also have unique limitations. For example, jurors may not be well equipped to identify or to evaluate the factors that influence their own thinking,¹² or the answers they give may reflect to some degree the answers they think the interviewer wants to hear.¹³ So, too, a juror's memory may have faded between the time of the trial and the time of the interview.¹⁴ Perhaps most importantly, interviews were conducted after jurors had served, not before. Consequently, no one can know for certain that a juror's post-trial responses represent what he or she actually believed

8. See, e.g., Eisenberg et al., *Responsibility*, *supra* note 7, at 354 (noting similar pattern of responses between multistate CJP data and South Carolina CJP data); Garvey, *Aggravation and Mitigation*, *supra* note 7, at 1575-76 (same).

9. 1986 S.C. Acts 2955, 2983. A few defendants in the sample were resentenced due to errors in their initial sentencing trial. We include only data from the initial trials, not from the retrials.

10. In the regression models reported in Parts II.B and III.B we account for the different sampling rates for the two sentencing outcomes, with life sentences being oversampled relative to death sentences. We also account for the fact that not all juror responses are independent of one another, i.e., with few exceptions, more than one interviewed juror sat on each case. See, e.g., C.J. Skinner, *Introduction to Part A*, in *ANALYSIS OF COMPLEX SURVEYS* 23 (C.J. Skinner et al. eds., 1989).

11. Justice Research Ctr., Northeastern Univ., *Juror Interview Instrument: National Study of Juror Decision Making in Capital Cases* (June 6, 1997) (unpublished manuscript, on file with the *Southern California Law Review*).

12. See, e.g., Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 *IND. L.J.* 1233, 1235 (1995).

13. See, e.g., *id.* at 1236.

14. See, e.g., *id.* at 1235-36.

at the time of trial, rather than what he or she came to believe afterward.¹⁵ Where possible, we control for the sentence a juror voted to impose in an effort to mitigate the risk of such hindsight bias.¹⁶

II. JURORS SUPPORT THE DEATH PENALTY

We begin with a brief review of prior findings of support for the death penalty among members of the general public. We then review what the jurors we interviewed had to say.

A. PUBLIC SUPPORT

Information about public attitudes toward capital punishment comes from a variety of public opinion polls. The basic story is simple enough. For a brief moment in the mid-1960s, a slight majority of the public actually opposed capital punishment. Since then, however, support for capital punishment steadily increased, finally leveling off in the early 1980s at around (until very recently) 70–75%.¹⁷

Public support for the death penalty is usually measured through standard polling questions. For example, one poll (General Social Survey) typically asked, “Do you favor or oppose the death penalty for persons convicted of murder?”¹⁸ Another (Gallup) asked, “Are you in favor of the death penalty for persons convicted of murder?”¹⁹ Yet another (Harris) asked, “Do you believe in capital punishment (the death penalty) or are you opposed?”²⁰ While the way in which a question is asked can often

15. See, e.g., *id.*

16. If an association survives after the sentence a juror voted to impose has been controlled for, the association is less likely to be a product of hindsight bias.

17. See sources cited *supra* note 1.

18. Ellsworth & Gross, *supra* note 1, at 24. Gallup polls conducted during February, June, and August–September 2000 show that public support for the death penalty has dropped to 66–67%, the lowest level of support in nineteen years. See *Gallup Poll*, at http://www.gallup.com/poll/indicators/indeath_pen.asp (last visited Nov. 27, 2000); Frank Newport, *Support for Death Penalty Drops to Lowest Level in 19 Years, Although Still High at 66%*, at <http://www.gallup.com/poll/releases/pr000224.asp> (Feb. 24, 2000). A Harris poll conducted in August 2000 reported a similar drop. See Humphrey Taylor, *Support for Death Penalty Down Sharply Since Last Year, But Still 64% to 25% in Favor*, at http://www.harrisinteractive.com/harris_poll/index.asp?PID=101 (Aug. 2, 2000). A helpful collection of links to recent national and state polls can be found at <http://www.deathpenaltyinfo.org/Polls.html>. For a comprehensive analysis of this recent trend, see Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in *CAPITAL PUNISHMENT AND THE AMERICAN FUTURE* (Stephen P. Garvey ed., forthcoming 2001).

19. Ellsworth & Gross, *supra* note 1, at 24.

20. *Id.*

influence the answer, what's "striking"²¹ about the death penalty is the "absence of systematic differences between the results of competing polls that phrase their questions about capital punishment differently."²²

In addition to widespread and stable support, two other important lessons emerge from the death penalty polling data. First, support for the death penalty varies based on certain demographic characteristics, most notably race and sex.²³ Whites support the death penalty more than blacks, and men more than women.²⁴ Support for the death penalty has also been slightly stronger among Westerners than among Southerners, Easterners, and Midwesterners,²⁵ but such regional differences have faded to the vanishing point.²⁶ Likewise, the wealthy have tended to support it more than the poor;²⁷ suburbanites more than members of rural or urban populations;²⁸ Republicans more than Democrats;²⁹ the old more than the young;³⁰ and the married more than singles.³¹ More recent research suggests that members of white fundamentalist churches support the death

21. *Id.*

22. *Id.* For example, Ellsworth and Gross conclude that varying the form of the standard polling question—e.g., formal balance ("favor or oppose [death penalty] vs. favor [death penalty]"); context ("death penalty for such crimes as . . . killing a police officer"); spelling out a popular justification (death penalty "as [a] possible solution[] to the increased crime rate"); and form of endorsement ("[d]o you favor or oppose . . . bringing back the death penalty" vs. "[a]re there any crimes for which the death penalty is justified")—made little or no difference. *Id.* at 24–25.

23. *E.g.*, Gross, *supra* note 1, at 1451 (noting that race and sex are the "two major demographic predictors of death penalty attitudes").

24. *See, e.g.*, Fox et al., *supra* note 1, at 503, 518 fig.2b, 519 fig.2c; Gross, *supra* note 1, at 1451.

25. *See, e.g.*, Fox et al., *supra* note 1, at 503, 520 fig.2e; Gross, *supra* note 1, at 1451 ("Past studies generally have found that Westerners favored the death penalty the most, while Easterners and Midwesterners favored it the least."). One recent study examined support for the death penalty among Southerners and found that:

[F]or some who live in the South, a southern upbringing does *not* result in attitudes significantly different from those of other Americans. These southerners' opinions regarding capital punishment mirror those of the general population. On the other hand, *certain southerners* do appear significantly more punitive compared to both their fellow southerners and nonsoutherners. These individuals possess other attitudes and behaviors associated with greater aggressiveness toward criminals: political conservatism, religious fundamentalism, and racial intolerance originating in negative views of Blacks.

Marian J. Borg, *The Southern Subculture of Punitiveness? Regional Variation in Support for Capital Punishment*, 34 J. RES. CRIME & DELINQ. 25, 41 (1997).

26. *See* Gross, *supra* note 1, at 1451 (citing a 1994 poll that "suggests that death penalty attitudes are becoming more homogeneous across the country").

27. *See, e.g.*, Fox et al., *supra* note 1, at 522 fig.2i.

28. *See, e.g., id.* at 520 fig.2f.

29. *See, e.g., id.* at 521 fig.2g.

30. *See, e.g., id.* at 503 (noting that while the "young have traditionally been more opposed to the death penalty, . . . the difference has narrowed in recent years, probably representing greater conservatism among the young"). *See also id.* at 518 fig.2a.

31. *See, e.g., id.* at 519 fig.2d.

penalty more than do members of either black fundamentalist churches or nonfundamentalist churches.³²

Second, support for the death penalty tends to be “symbolic” or “ideological.”³³ That is, it tends to be relatively immune to evidence and argument that run contrary to a respondent’s initial position. In his concurring opinion in *Furman v. Georgia*, Justice Marshall famously hypothesized that the public only supported the death penalty because its members were unaware, among other things, of how arbitrarily and discriminatorily it was enforced, how poorly it functioned as a deterrent, and how costly it was to administer.³⁴ According to Marshall, if people knew more about these features of the death penalty and its administration, public support for capital punishment would wither away.³⁵

Subsequent empirical study has cast doubt on the so-called “Marshall hypothesis.”³⁶ Many people do in fact recognize the problems involved in the penalty’s administration. For example, national polls show that a near-majority understands that “Blacks are more likely to be sentenced to death than Whites” and that “poor defendants were more likely to be sentenced to death than rich defendants.”³⁷ Yet support for the death penalty remains high.³⁸

32. See sources cited *infra* note 52.

33. See, e.g., Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 157 (1983) (“[A]ttitudes toward the death penalty serve an emotional, symbolic function.”); Tom R. Tyler & Renee Weber, *Support for the Death Penalty; Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC’Y REV. 21, 43 (1982) (“Citizens’ policy preferences concerning the use of the death penalty are a reflection of their basic values, not a result of their specific concerns about crime.”).

34. 408 U.S. 238, 362–63 (1972) (Marshall, J., concurring).

35. See *id.* at 369 (Marshall, J., concurring) (“Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.”).

36. See, e.g., Robert M. Bohm, Louise J. Clark & Adrian F. Aveni, *Knowledge and Death Penalty Opinion: A Panel Study*, 21 J. CRIM. JUST. 29, 43 (1993) (suggesting “cautiously . . . that ‘classroom knowledge’ may not prove an especially effective method for changing most death penalty opinions”); Robert M. Bohm, Louise J. Clark & Adrian F. Aveni, *Knowledge and Death Penalty Opinion: A Test of the Marshall Hypothesis*, 28 RES. CRIME & DELINQ. 360, 381 (1991) (“[K]nowledge, at least classroom knowledge, may not convince a majority of those who favor the death penalty to oppose it, especially those people who support the death penalty on grounds of retribution.”); Robert M. Bohm & Ronald E. Vogel, *A Comparison of Factors Associated with Uninformed and Informed Death Penalty Opinions*, 22 J. CRIM. JUST. 125, 141 (1994) (“[T]he results of this study . . . suggest that knowledge about the death penalty . . . might not play a particularly important role in changing ideas pertinent to support or opposition of the death penalty.”).

37. Ellsworth & Gross, *supra* note 1, at 35.

38. See, e.g., *id.* at 36 (“[T]he inescapable conclusion is that a large proportion of the American public already believes the death penalty is unfair, but supports it nonetheless.”).

Why might that be? According to Phoebe Ellsworth and Samuel Gross, the answer is ideology: The reasons people give for supporting or opposing the death penalty do not actually determine their attitude toward it. On the contrary, if anything, the relationship runs in the opposite direction: Their attitude determines their reasons.³⁹ As Gross puts it: “For most Americans, a position on capital punishment is an aspect of self-identification,”⁴⁰ and facts alone are unlikely to change a person’s identity.

Nonetheless, we will suggest that support for the death penalty may not be so immutable. Opinions *can* change. Indeed, recent events suggest that some people have abandoned their support for the death penalty because DNA testing has put a human face on the risk of executing an innocent person.⁴¹ But we suggest here that lasting change may come less from giving people more information about the death penalty and more from giving them—and convincing them that they truly have available—a meaningful alternative to death that both punishes the defendant and keeps him or her off the streets for good.

B. JUROR SUPPORT

How do jurors compare to the general public? Although the interviews we conducted collected information about a number of juror characteristics, we limit our analysis to the five characteristics most commonly reported in opinion polls: sex, race, religion, age, and socioeconomic status.⁴²

39. *E.g., id.* at 26 (“The ‘reasons’ are determined by the attitude, not the reverse.”).

40. Gross, *supra* note 1, at 1452.

41. *See, e.g.,* Taylor, *supra* note 18 (“The recent debate about the quality of justice in murder trials, the overturning of several convictions as a result of DNA tests, and the resulting moratorium on executions in Illinois, have clearly had an impact on public attitudes to the death penalty.”).

42. Descriptive statistics for each of these variables are as follows:

Descriptive Statistics—Juror Characteristics				
	Mean	Minimum	Maximum	<i>n</i>
Black female	.10	0	1	187
Black male	.08	0	1	187
White female	.44	0	1	187
White male	.37	0	1	187
Socioeconomic status	1.90	1	3	187
Age	44.30	22	75	186
Southern Baptist	.18	0	1	187

We base socioeconomic status on education and income levels. Education is coded on a zero to six scale, with zero indicating a grade school education and six indicating attendance at graduate or professional school. Income is based on a one to six scale, with one corresponding to income of less than \$10,000 and six corresponding to income of \$75,000 or more. We added these two numeric scales

1. *A First Look*

Two questions on the CJP survey probed juror support for the death penalty. One asked, “Do you now generally favor or oppose the death penalty for convicted murderers?” with answers ranging from “strongly favor” to “strongly oppose.” Table 1 gives the responses, both in the aggregate and as a function of sex, race, socioeconomic status, and Southern Baptist religious affiliation.⁴³

Table 1

“Do you now generally favor or oppose the death penalty for convicted murderers?” (% responding)						
	<i>Strongly favor</i>	<i>Somewhat favor</i>	<i>Somewhat oppose</i>	<i>Strongly oppose</i>	<i>p-value</i>	<i>n</i>
All	36	44	16	4		174
Sex						
Male	28	54	11	6	0.216	81
Female	43	35	19	2		93
Race						
White	41	43	12	5	0.004	145
Black	14	50	36	0		28
Socioeconomic status						
Low	48	31	21	0	0.039	62
Middle	35	46	12	7		68
High	20	61	14	5		44
Religion						
Southern Baptist	56	35	9	0	0.005	34
Other religion	31	46	17	5		140

Note—The “*p*-value” column reports the statistical significance of a test of the hypothesis that no difference exists in the responses across subcategories. For example, the *p*-value of 0.216 for the male-female difference indicates that approximately one chance in five exists of observing a response pattern between males and females that is as different or more different than the observed pattern. *P*-values for sex, race, and religion differences are based on Mann-Whitney tests; the *p*-value for socioeconomic status is based on Kendall’s τ . All *p*-values are exact.

together to form a single socioeconomic scale. Jurors with a score of zero to five are labeled “low”; six to eight are labeled “middle”; greater than eight are labeled “high.”

43. Like the population of South Carolina as a whole, Southern Baptists represented the single largest religious denomination among the eight denominations about which our jurors were asked (Baptist, Southern Baptist, Lutheran, Methodist, Presbyterian, other Protestant, Roman Catholic, Jewish). Jurors were also free to indicate another religious preference or no religious preference. Accordingly, we elected to compare Southern Baptists with jurors of all other religious denominations combined.

Table 1's top row shows that 80% of the jurors favored the death penalty for convicted murderers. This level of endorsement comes as no surprise. All capital jurors are subject to "death-qualification," meaning that prosecutors are entitled during voir dire to remove for cause any prospective juror who opposes the death penalty as a matter of principle.⁴⁴ Consequently, the real surprise is that 20% of the jurors said they actually opposed the death penalty. Still, we suspect that jurors who said they were only "somewhat opposed" (16%) to the death penalty would nonetheless remain eligible to serve; only the "strongly opposed" (4%) would probably be ineligible.

With respect to sex and race—the two most salient demographic characteristics in public opinion polls⁴⁵—jurors do divide on race, but not on sex. The difference observed between men and women in the opinion polls all but vanishes among actual jurors. In fact, women voice strong support for the death penalty at a higher rate than men, although the difference between the two groups is statistically insignificant ($p = 0.216$).⁴⁶ In contrast, support does depend on race. White jurors favor the death penalty at noticeably higher rates than do black jurors, and the difference is statistically significant ($p = 0.004$).

Overall levels of support for the death penalty were similar across socioeconomic groups, ranging from 79% among members of the lowest category to 81% among members of the highest. Support among low-status group members nonetheless tends to be stronger than among high-status group members, and the pattern of differences as a whole is

44. See, e.g., *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (a prospective juror whose scruples against the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" can be challenged for cause by the State).

45. Gross, *supra* note 1, at 1451.

46. The p -values reported in Table 1 explore the hypothesis that death penalty support and each of the subcategories (race, sex, socioeconomic status, and religion) vary independently. The hypothesis being tested is conventionally called the "null hypothesis." GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, *STATISTICAL METHODS* 64 (8th ed. 1989). The reported significance levels represent the probability of rejecting the null hypothesis when it is true. That is, the significance levels provide an inverse measure of the likelihood that the relation between a subcategory and death penalty attitudes shows a real relation rather than mere random variation. The smaller the significance level, the more surprised one would be to observe the relation if the tested hypothesis (no relation) were true. See *id.* Results that are significant at or below the .05 level are conventionally described as "statistically significant." E.g., *THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS* 197 (Stephen E. Fienberg ed., 1989).

Because Table 1 contains "sparse cells" (cells with counts of zero or one), the asymptotic p -values derived from traditional tests of significance may be unreliable. We eliminated the problem by computing exact p -values.

statistically significant ($p = 0.039$). As for religious affiliation, Southern Baptists are nearly *twice* as likely as non-Southern Baptists strongly to favor the death penalty, and the pattern of differences is again highly statistically significant ($p = 0.005$). The association between age and support for the death penalty (not shown in Table 1) is also statistically significant ($p = 0.031$), with older jurors tending to voice more support than younger ones.

A second question asked jurors how “acceptable” the death penalty was for convicted murderers. The five possible responses ranged from death as the “only acceptable” punishment to death as an “unacceptable” punishment. This menu of responses is slightly different and slightly more nuanced than the menu available for the first question. Table 2 gives the results, once again in the aggregate and as a function of sex, race, socioeconomic status, and religion.

Table 2

“For convicted murderers, do you now feel that the death penalty is the . . . punishment” (% responding)							
	Only acceptable	Most appropriate	Just one of several	Least appropriate	Un- acceptable	p-value	n
All	14	31	51	1	2		185
Sex							
Male	15	29	54	0	2	0.825	86
Female	12	33	50	3	2		99
Race							
White	15	32	50	1	1	0.038	152
Black	6	25	59	3	6		32
Socioeconomic status							
Low	18	37	40	3	3	0.041	68
Middle	13	31	53	1	1		70
High	9	23	66	0	2		47
Religion							
Southern Baptist	21	41	38	0	0	0.020	34
Other religion	12	29	54	2	3		151

Note—The “p-value” column reports the statistical significance of a test of the hypothesis that no difference exists in the responses across subcategories. For example, the p-value of 0.825 for the male-female difference indicates that approximately four chances in five exist of observing a response pattern between males and females that is as different or more different than the observed pattern. P-values for sex, race, and religion differences are based on Mann-Whitney tests; the p-value for socioeconomic status is based on Kendall’s τ . All p-values are exact.

Allowing jurors a more flexible range of responses reveals the anticipated effects of death-qualification. The percentage of jurors who

express some support for the death penalty—who consider it the only, the most appropriate, or at least one of several possible punishments for convicted murderers—increases to 96%.⁴⁷

Again, no noticeable difference emerges between men and women, and the difference between blacks and whites diminishes. Whereas the black-white gap in response to the first question was twenty percentage points, the gap between blacks and whites who at least considered the death penalty one of several possible punishments in response to the second question was only seven percentage points (97% for whites compared to 90% for blacks). Still, the difference in the pattern of responses continues to be statistically significant ($p = 0.038$).

Socioeconomic differences display the same general pattern as before, with low-status jurors tending to be somewhat more inclined than members of the other two socioeconomic groups to believe that the only or most appropriate punishment for convicted murderers is death ($p = 0.041$). Likewise, jurors who identify as Southern Baptists are again substantially more likely than non-Southern Baptists to view death as the only or most appropriate punishment ($p = 0.020$). Finally, older jurors continue to be more sure of the death penalty's appropriateness as compared to their younger counterparts ($p = 0.034$) (not shown in Table 2).

2. A Closer Look

Our first look at juror support for the death penalty suggests, among other things, a close association between juror support for the death penalty and race. But race is not necessarily independent of other juror characteristics. For example, socioeconomic status correlates with race,

47. Table 2 reveals a serious problem in the process by which capital jurors are qualified for jury service. The law requires capital jurors, like all jurors, to be impartial. *E.g.*, *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (“[D]ue process . . . has long demanded that, if a jury is to be provided the defendant . . . the jury must stand impartial and indifferent.”). Nonetheless, some 14% of the jurors believed that the *only* acceptable punishment for convicted murderers was death.

The problem may in fact be even worse than Table 2 suggests. Responses to questions not analyzed here show that the jurors are even more apt to believe death is the only acceptable punishment when the question describes the crime in slightly more detail than simply “murder.” For example, while 14% of all jurors thought death was the “only appropriate” punishment for “convicted murderers,” 65% thought death was the “only acceptable” punishment for a “planned, premeditated murder,” 58% for “murders in which more than one victim is killed,” and 48% for “murder by a drug dealer.” Indeed, 17% thought death was the “only acceptable” punishment for a “planned murder, *when the victim survives*,” even though a planned murder in which the victim *survives* is not murder, and so could not constitute a capital offense under existing constitutional doctrine. *Cf. Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“[A] sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment.”).

among jurors and the general public alike. In our data, the mean socioeconomic status score for blacks is 1.64; the mean score for whites is 1.94. The difference is statistically significant ($p = 0.037$). Consequently, what may appear to be racial differences could really be socioeconomic differences.

In order to account for the simultaneous influence of race, socioeconomic status, and other variables, we use a statistical technique known as multiple regression. Regression analysis allows us to explore the influence of each variable while accounting for the simultaneous influence of each of the other variables.⁴⁸

Table 3 presents four regression models, all of which use juror characteristics to explain the extent to which a juror voices support for the death penalty.⁴⁹ Each model thus takes the extent to which a juror favors or opposes the death penalty as the dependent variable, i.e., the variable to be explained, and uses race, socioeconomic status, and age as independent variables,⁵⁰ i.e., the variables that will do the explaining. Prior research suggests an association between each of these variables and death penalty support. The second and fourth models add a variable for the sentencing outcome (life or death), which is intended to control for the possibility that juror support for the death penalty may reflect in part the sentence the juror ultimately voted to impose.

We also include Southern Baptist religious affiliation as an independent variable in each model. Although prior research has generally found no significant link between religious affiliation—e.g., Protestant, Catholic, Jewish—and support for the death penalty,⁵¹ prior research *does* suggest a link between death penalty support and religious fundamentalism,

48. Regression analysis is a statistical technique that quantifies the influence of each of several factors (independent variables) on the phenomenon being studied (dependent variable). *See generally* MICHAEL O. FINKELSTEIN & BRUCE LEVIN, *STATISTICS FOR LAWYERS* 323–464 (1990). For an excellent introduction to multiple regression, see Alan O. Sykes, *An Introduction to Regression Analysis*, in *LAW AND ECONOMICS* 1 (Eric A. Posner ed., 2000).

49. Ordered probit regression models are used because the dependent variable is ordinal and takes on more than two values. *E.g.*, ALAN AGRESTI, *CATEGORICAL DATA ANALYSIS* 103 (1990).

50. Tables 1 and 2 suggest no significant difference between male and female jurors, and models (not reported here) that include a dummy variable for sex confirm this result. Consequently, we include no variable for sex in the reported models.

51. *See* Fox et al., *supra* note 1, at 503 (noting that “there appear to be no clear and consistent differences between various religious groups or between those of different degrees of religiousness”).

where fundamentalism means a belief in biblical literalism.⁵² Southern Baptism is a highly fundamentalist religion.⁵³

Each model generates two numbers for each independent variable, a coefficient and a probability (or “*p*-value”). For example, the race variable in Model 1 (“Black”) produces a regression coefficient of -0.505 and beneath it (in parentheses) a probability of 0.012. The sign on the regression coefficient indicates the direction of a variable’s effect. The negative sign on the race variable, for example, indicates that black jurors

52. See, e.g., Marian J. Borg, *Vicarious Homicide Victimization and Support for Capital Punishment: A Test of Black’s Theory of Law*, 36 CRIMINOLOGY 537, 548 (1998) (“Membership in a fundamentalist church and understanding the Bible in the literal sense increases [sic] the likelihood of support for the death penalty, while evangelicalism decreases it.”); Harold G. Grasmick, Robert J. Bursik, Jr. & Brenda Sims Blackwell, *Religious Beliefs and Public Support for the Death Penalty for Juveniles and Adults*, 16 J. CRIME & JUST. 59, 72 (1993) (finding that “particular religious beliefs, considered more characteristic of fundamentalist and evangelical Protestants, do appear to evoke greater support for capital punishment”); Harold G. Grasmick, John K. Cochran, Robert J. Bursik, Jr. & M’Lou Kimpel, *Religion, Punitive Justice, and Support for the Death Penalty*, 10 JUST. Q. 289, 305 (1993) (“Even [controlling for a variety of other variables], liberal/moderate Protestants and those claiming no affiliation are significantly less likely to favor executing adults than are evangelical/fundamentalist Protestants.”). Cf. Harold G. Grasmick, Elizabeth Davenport, Mitchell B. Chamlin & Robert J. Bursik, Jr., *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, 30 CRIMINOLOGY 21, 37 (1992) (“Fundamentalist Protestants appear to be more retributive than other Protestants and than Catholics because they are more inclined to interpret the Bible literally.”). But cf. Chester L. Britt, *Race, Religion, and Support for the Death Penalty: A Research Note*, 15 JUST. Q. 175, 183 (1998) (“In contrast to recent research on fundamentalist Protestants and support for the death penalty, I found no direct effect of affiliation with a fundamentalist Protestant church on the level of support for the death penalty.”); Marla Sandys & Edmund F. McGarrell, *Beyond the Bible Belt: The Influence (or Lack Thereof) of Religion on Attitudes Toward the Death Penalty*, 20 J. CRIME & JUST. 179, 179 (1997) (cautioning based on study of Midwestern respondents that association between fundamentalism and support for the death penalty “may not generalize beyond the Bible Belt”).

The influence of religion also appears to depend on its interaction with race. For example, Young found that the “role of religion in shaping attitudes toward the death penalty” differs significantly between blacks and whites. Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 31 J. SCI. STUD. RELIG. 76, 82–84 (1992). Young explored three main dimensions of religious experience: evangelicalism (commitment to proselytization), fundamentalism (belief in biblical literalism), and devotionism (salience of religion in one’s life). Evangelicalism generally decreased support for the death penalty, but the impact of evangelicalism was strongest among blacks and may exist only for devout evangelicals. Fundamentalism generally increased support for the death penalty, but only for whites. Similarly, devotionism decreased support only among whites. See *id.* See also Britt, *supra*, at 188–89 (“[T]he effect of religious affiliation on support for the death penalty is contingent on the respondent’s race Two groups of fundamentalist Protestants—black and white—hold similar religious beliefs but seem to apply those beliefs in very different ways.”). Cf. Gross, *supra* note 1, at 1451 (reporting that “black respondents were more likely than whites to say that their clergy person spoke out on the issue of capital punishment (39% to 25%), and to report that their religious beliefs had the biggest influence on their thinking on the issue (33% to 17%)”).

53. See Tom W. Smith, *Classifying Protestant Denominations*, 31 REV. RELIG. RES. 225, 238 fig.1 (1990) (indicating sixty-plus percent of Southern Baptists believed in the “inerrancy of the Bible”).

support the death penalty less than white jurors. The magnitude of the regression coefficient makes it possible to compute the size of the effect, and the probability reports the likelihood of observing by chance an effect of that strength or stronger.⁵⁴

The first and second models confirm the strong association between race and support for the death penalty, even when other variables are held constant. In both models, black jurors are significantly more likely to oppose the death penalty than are white jurors. This race effect is sizable and statistically significant. One can quantify the effect by estimating the change in probability of support for the death penalty based on a juror's race.⁵⁵ For example, Model 1 shows that the probability of a black juror supporting the death penalty is approximately 0.18 smaller than that of a white juror doing so (controlling for age, socioeconomic status, and Southern Baptist affiliation). Thus, if the probability of a white juror supporting the death penalty were 0.50, the probability of an otherwise similar black juror supporting it would be 0.32.

Table 3

Statistical Models of Support for the Death Penalty				
	Model (1) Generally favor death penalty	Model (2) Generally favor death penalty	Model (3) Death penalty as appropriate punishment	Model (4) Death penalty as appropriate punishment
Black	-0.505** (0.012)	-0.517** (0.012)	-0.501** (0.045)	-0.541** (0.032)
Socioeconomic status	-0.216* (0.068)	-0.221* (0.065)	-0.241* (0.051)	-0.266** (0.031)
Age	0.015* (0.062)	0.016* (0.052)	0.013* (0.060)	0.015** (0.029)
Southern Baptist	0.493* (0.057)	0.431 (0.104)	0.365 (0.131)	0.253 (0.314)
Death sentence		0.298 (0.101)		0.600*** (0.000)
<i>n</i>	173	173	184	184
Prob. > F	0.0020	0.0037	0.0060	0.0000

54. See *supra* note 46.

55. For a discussion of estimating the change in probability of an outcome based on changes in explanatory variables, see J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 135–38 (1997).

Note—Ordered probit regression. The dependent variable in Models 1 and 2 is the ordinal response to whether jurors generally favor the death penalty (summarized in Table 1). The dependent variable in Models 3 and 4 is the ordinal response to the degree to which jurors believe the death penalty is an appropriate punishment for murder (summarized in Table 2). *P*-values are in parentheses and account for the fact that multiple jurors per case were interviewed. * $p < .05$, ** $p < .01$, *** $p < .001$.

The first and second models also show the influence of other characteristics. Higher socioeconomic status now correlates significantly with opposition to the death penalty. For example, Model 1 shows that the probability of a juror in the highest socioeconomic category favoring the death penalty is 0.16 smaller than that of a juror in the lowest category. Age and membership in a Southern Baptist church also correlate with death penalty support. As one moves from the youngest to the oldest jurors in the sample, the probability that a juror will favor the death penalty increases by 0.31. Likewise, Southern Baptists are 0.19 more likely to favor the death penalty as compared to white jurors of similar age and socioeconomic status.

The third and fourth models try to explain the extent to which a juror believes the death penalty is an appropriate punishment for defendants convicted of murder. Thus each model takes as the dependent variable the extent to which a juror believes death is the appropriate punishment, and once again uses race, socioeconomic status, age, and Southern Baptist religious affiliation as independent variables.

Models 3 and 4 once again reveal the significant influence of race. In both models the race effect is large and statistically significant. For example, black jurors in Model 3 are 0.11 less likely than white jurors to say the death penalty is the most appropriate punishment for murder; likewise, they are 0.09 less likely to say death is the only appropriate punishment (controlling once again for the other variables).

The effect of socioeconomic status is similar in both models. In the third model, jurors in the highest socioeconomic category are 0.09 less likely to say the death penalty is the most appropriate punishment compared to jurors in the lowest category; they are 0.10 less likely to say death is the only appropriate punishment. Age also continues to influence support. The oldest jurors are 0.12 more likely to say death is the most appropriate punishment compared to the youngest ones; they are 0.16 more likely to say death is the only appropriate punishment. The influence of religious affiliation is less predictable. Although Southern Baptists are

more likely to say death is the most appropriate punishment for murder, the effect is insignificant in Model 4, and barely significant in Model 3.⁵⁶

3. *The Effect of Capital Jury Service*

Finally, we asked the jurors if they thought their “feelings about the death penalty” had changed as a result of their service on a capital jury. The results are presented in Table 4.

56. The loss of significance in Model 4—which controls for sentencing outcome—may be due to the fact that most Southern Baptists vote for death, *see* Eisenberg et al., *Forecasting*, *supra* note 7, at 15 tbl.1, which could in turn have introduced multicollinearity into the relationship between the Southern Baptist variable and the death sentence variable. For an explanation of multicollinearity, *see* Sykes, *supra* note 48, at 23–26.

Table 4

"Have your personal feelings about the death penalty changed as a result of serving on the case?" (% responding)					
	<i>Yes, more in favor</i>	<i>No</i>	<i>Yes, more opposed</i>	<i>p-value</i>	<i>n</i>
All	13	78	9		185
First Vote					
Life	13	68	20	0.108	56
Undecided	14	86	0		22
Death	13	81	6		106
Sentencing Outcome					
Life	9	79	12	0.108	86
Death	16	77	7		99

Note—The "*p*-value" column reports the statistical significance of a test of the hypothesis that no difference exists in the responses across subcategories. For example, the *p*-value of 0.108 for the first vote differences indicates that approximately one chance in ten exists of observing a response pattern across first votes that is as different or more different than the observed pattern. The *p*-value for the sentencing outcome is based on a Mann-Whitney test; the *p*-value for first vote is based on Kendall's τ . Both *p*-values are exact.

Most jurors said "No." Seventy-eight percent indicated that their service on a capital jury left them feeling much as they did before. Thirteen percent said the experience left them "more in favor"; only 9% said it left them "more opposed." Nor did responses to this question depend on whether the juror voted initially or finally for a life sentence or a death sentence. Solid majorities across all groups reported no change of heart.

III. JURORS HAVE DOUBTS ABOUT THE DEATH PENALTY AND PREFER AN ALTERNATIVE

Like the general public, most capital jurors are death penalty supporters. But the story does not end there. It gets more complicated, and more mysterious. Jurors in fact have mixed reactions to the death penalty. Many believe the penalty is unfairly administered, and most would prefer an alternative other than death. The net result is a deadly paradox.

A. DOUBTS

The polls show that many people believe the death penalty is unfairly administered. For example, half of the respondents to a 1999 Gallup poll

agreed that “a black person is more likely than a white person to receive the death penalty for the same crime,”⁵⁷ and 65% agreed that poor defendants were more likely to be sentenced to death than rich defendants.⁵⁸ Likewise, another 1999 poll revealed that only 14% believed that innocent people are never wrongly convicted and condemned; almost half said it happens at least occasionally.⁵⁹

Our jurors had reservations too. Table 5 examines how jurors who support the death penalty, i.e., those who said they strongly or moderately favored the death penalty,⁶⁰ reacted to a series of statements about the punishment for convicted murderers.

Table 5

“Do you agree or disagree with the following statements about punishment for convicted murderers?” (% of jurors responding among those jurors who strongly or moderately support the death penalty)				
	<i>Strongly or moderately agree</i>	<i>Slightly agree or disagree</i>	<i>Strongly or moderately disagree</i>	<i>n</i>
You wish we had a better way of stopping murderers than the death penalty.	79	15	6	135
The death penalty is too arbitrary because some people are executed while others serve prison terms for the same crimes.	84	8	8	133
Defendants who can afford good lawyers almost never get a death sentence.	52	32	16	125
You have moral doubts about the death penalty.	27	52	21	138
The death penalty should be required when someone is convicted of a serious intentional murder.	76	13	10	135

Eighty-four percent believe the death penalty “is too arbitrary because some people are executed while others serve prison terms for the same crime,”⁶¹ and over half say that “defendants who can afford good lawyers

57. *Gallup Poll*, at http://www.gallup.com/poll/indicators/inddeath_pen.asp (Feb. 8–9, 1999).

58. *See id.*

59. *New Survey Shows Americans Lack Confidence in Death Penalty System*, at <http://justice.policy.net/proactive/newsroom/release.vtml?id=17480> (June 13, 2000) (1999 poll of 1,003 voters conducted for the Justice Project by Peter D. Hart Associates).

60. *See infra* Part II.B.1 tbl.1.

61. Of course, a juror expressing such reservations might still think guilt is personal: The fact that one offender who deserves death arbitrarily manages to escape it is no reason to spare another

almost never get the death penalty.” In other words, many jurors who support the death penalty believe—as death penalty opponents have long claimed, and as recent press accounts have highlighted⁶²—that the death penalty is unfairly administered. Nonetheless, when asked in the same series of questions if they agree or disagree that the “death penalty should be required when someone is convicted of a serious intentional murder,” 76%—consistent with the results in Tables 1 and 2—say they moderately or strongly agree. Hence, like the general public, jurors believe the death penalty is unfair, but continue to support it anyway.

B. THE PREFERENCE FOR AN ALTERNATIVE

A series of recent public opinion polls only adds to the mystery. The polls asked respondents if they would prefer a specified punishment as an “alternative” to the death penalty. The particular way in which the question was phrased, as well as the particular menu of alternatives presented to the respondent, varied from poll to poll. The list of alternatives typically included twenty-five years’ imprisonment combined with a requirement that the offender make restitution to the victim’s family; life imprisonment without the possibility of parole (LWOP); and life imprisonment without the possibility of parole plus restitution (LWOP+).⁶³ Some polls asked about each of these alternatives seriatim; others asked only about one alternative, usually LWOP.

Despite these variations, a consistent picture emerged. Support for the death penalty dropped substantially.⁶⁴ When the alternative was LWOP, a

offender who likewise deserves it but is not so lucky. *E.g.*, Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1663 (1986) (“Guilt is personal. The only relevant question is: does the person to be executed deserve the punishment? Whether or not others who deserved the same punishment, whatever their economic or racial group, have avoided execution is irrelevant.”).

62. *See, e.g.*, Jonathan Alter, *The Death Penalty on Trial*, NEWSWEEK, June 12, 2000, at 24 (describing recent controversy surrounding death penalty).

63. *See, e.g.*, Bowers et al., *supra* note 2, at 79–80 n.8 (describing polls); Gross, *supra* note 1, at 1455–56 & tbl.1 (describing Gallup polls).

64. A series of public opinion polls conducted between 1991 and 1999 asked a more neutrally worded version of the question, *e.g.*, “What do you think should be the penalty for murder—the death penalty or life imprisonment with absolutely no possibility of parole?” Responses to this question showed a smaller but still sizeable (15–20%) drop in support for the death penalty. *See* Gillespie, *supra* note 1 (reporting results of 1999 poll); Gross, *supra* note 1, at 1455–56 tbl.1 (reporting results of 1991–98 polls). These polls did not ask about LWOP+ as an alternative. Similarly, a Gallup poll conducted in August–September 2000 asked, “If you could choose between the following two approaches, which do you think is the better penalty for murder—the death penalty or life imprisonment, with absolutely

low of 36% to a high of 61% of the respondents continued to support the death penalty, with the rest preferring the alternative, expressing no opinion, or saying “it depends.”⁶⁵ When the alternative was LWOP+, a low of 23% and a high of 43% continued to support the death penalty.⁶⁶ The rest once again preferred the alternative, expressed no opinion, or said “it depends.”

One caveat: Respondents in these polls were asked if they would prefer the specified punishment as an “alternative” to the death penalty. Some respondents may have understood this question to be asking them if they would prefer the alternative *in addition* to the death penalty, not *in place of* it.⁶⁷ A more recent poll—in which the alternative (LWOP) was unambiguously presented as a replacement for the death penalty—found that death-penalty support dropped to 60%, a relatively smaller but still significant fall.⁶⁸ At the very least, these polls suggest that most respondents want LWOP to be among the choices available to jurors during the penalty phase of a capital trial.

Our jurors were also asked about alternatives. The results, reported in Table 6, mirror the polls. As one moves from the low-end alternative (i.e., 25 years imprisonment plus restitution) to the high-end alternative (i.e., LWOP+), the percentage of jurors preferring the alternative steadily increases, rising from 22% to 73%. Again, the results suggest, at the very least, that the choice available to jurors during the penalty phase of a capital trial should include the choice between death and LWOP.

Table 6

“Would you prefer the following alternatives?” (% responding)			
	Yes	No	n
If murderers in this state could be sentenced to life in prison with no chance of parole for 25 years and even then be eligible for parole only if they earned and paid a required amount of money to the families of their victims, would you prefer this as an alternative to the death penalty?	22	78	162
If murderers in this state could be sentenced to life without the possibility of ever being released on parole, would you prefer this as an alternative to the death penalty?	52	48	149

no possibility of parole?” Forty-nine percent of the respondents said they would choose the death penalty; 47% said they would choose life imprisonment. *See Gallup Poll, supra* note 18.

65. *See* Bowers et al., *supra* note 2, at 90–91 tbl.1; Gross, *supra* note 1, at 1456 tbl.1.

66. *See* Bowers et al., *supra* note 2, at 91 tbl.1.

67. Gross, *supra* note 1, at 1456 (identifying this ambiguity).

68. *See id.* at 1456–57 (citing a 1996 poll conducted by the Public Policy Research Institute).

If murderers in this state could be sentenced to life with absolutely no chance of parole and also required to work in prison for money that would go to the victims' families, would you prefer this as an alternative to the death penalty? 73 27 153

We next take a closer look at which jurors are most likely to shift their support away from the death penalty and toward an alternative. Our analysis focuses on LWOP+, which is the death penalty's strongest competitor.

Table 7 summarizes the shifting behavior among all jurors and among members of each group we have examined.⁶⁹ We find the most dramatic shift among black jurors and Southern Baptists.⁷⁰ Although black jurors as a group generally support the death penalty less than do Southern Baptists, a large percentage of both groups is willing to abandon that support if the alternative to death is LWOP+. The shift among Southern Baptists is not statistically significantly compared to the shift among jurors who are not Southern Baptists, but the magnitude of the shift (81%) is nonetheless striking, especially in light of the fact that Southern Baptists are among the death penalty's staunchest supporters.⁷¹

69. We treat a juror as a member of the "shifting" group if he or she strongly or moderately favors the death penalty and also prefers LWOP+ over the death penalty. Consequently, the number of observations available for analyzing shifting behavior is smaller than the number otherwise available.

70. Socioeconomic status does not strongly correlate with the choice to shift support away from the death penalty and toward LWOP+. In results not reported in Table 7, the association between a juror's increasing age and his or her shift towards LWOP+ is only marginally statistically significant ($p = 0.070$).

71. The statistical significance of the shift among Southern Baptists may be more pronounced than the results reported in Table 7 suggest. Southern Baptists are overwhelmingly white, and nearly 63% of whites who were not Southern Baptists shifted away from the death penalty. The difference between Southern Baptists and other whites is nonetheless significant at $p = 0.141$.

Table 7

Jurors Who Shift From Favoring the Death Penalty to Preferring Life Without Parole Plus Restitution (% responding)				
	<i>Shift</i>	<i>Do not shift</i>	<i>p-value</i>	<i>n</i>
All	71	29		116
Race				
White	67	33	0.090	97
Black	89	11		18
Socioeconomic status				
Low	71	29	0.584	42
Middle	75	25		44
High	63	37		30
Religion				
Southern Baptist	81	19	0.231	26
Other religion	68	32		90

Note—The “*p*-value” column reports the statistical significance of a test of the hypothesis that no difference exists in the responses across subcategories. For example, the *p*-value of 0.090 for the white-black difference indicates that approximately one chance in ten exists of observing a response pattern between blacks and whites as different or more different than the observed pattern. *P*-values for race and religion differences are based on Fisher’s exact test; the *p*-value for socioeconomic status is based on a Mann-Whitney test. All *p*-values are exact.

Table 8 uses multiple regression to explore the results presented in Tables 6 and 7 in greater detail. Models 1 and 2 analyze the relationship between juror characteristics and the preference for LWOP+ over the death penalty. Models 3 and 4 analyze the relationship between juror characteristics and the decision among jurors who generally favor the death penalty to shift their support away from death toward LWOP+.

The sample in the first two models includes all jurors who said they either would or would not prefer LWOP+ over the death penalty ($n = 152$). In contrast, the sample in the second two models includes only those jurors who strongly or moderately favored the death penalty and who also preferred LWOP+ as an alternative to the death penalty ($n = 115$). Models 2 and 4 include the sentencing outcome as an independent variable in an effort to control for the risk of hindsight bias, i.e., the risk that a juror’s preference for LWOP+ or decision to shift to LWOP+ depended on the sentence he or she finally voted to impose.

Table 8

Statistical Models of Jurors Who Prefer
Life Without Parole Plus Restitution (LWOP+) and of Jurors
Who Shift from Preferring Death to Preferring LWOP+

	Model (1) Prefer LWOP+	Model (2) Prefer LWOP+	Model (3) Shift to LWOP+	Model (4) Shift to LWOP+
Black	0.606** (0.046)	0.611** (0.045)	1.005** (0.022)	1.013** (0.022)
Socioeconomic status	-0.046 (0.753)	-0.042 (0.776)	0.016 (0.929)	0.018 (0.920)
Age	0.016 (0.136)	0.016 (0.137)	0.023 (0.108)	0.023 (0.107)
Southern Baptist	0.341 (0.149)	0.378 (0.116)	0.543** (0.043)	0.555** (0.043)
Death sentence		-0.139 (0.587)		-0.060 (0.841)
Constant	-0.223 (0.700)	-0.147 (0.800)	-0.775 (0.333)	-0.744 (0.339)
<i>n</i>	152	152	115	115
Prob. > F	0.1089	0.1664	0.0411	0.0786

Note—Probit regression. The dependent variable in Models 1 and 2 is whether or not the juror prefers LWOP+ over the death penalty (summarized in Table 6). The dependent variable in Models 3 and 4 is whether or not the juror shifts from favoring the death penalty to favoring LWOP+ (summarized in Table 7). *P*-values are in parentheses and account for the fact that multiple jurors per case were interviewed. * $p < .05$, ** $p < .01$, *** $p < .001$.

Models 1 and 2 use demographic characteristics to try to explain why jurors prefer LWOP+ over the death penalty, but neither model is statistically significant overall. Indeed, the only variable within each model that achieves statistical significance is race. The limited explanatory power of these models may at least in part be due to the fact that so many jurors overall prefer LWOP+ over the death penalty. Statistical models have difficulty explaining variation when little variation exists to explain.

In contrast, Models 3 and 4, both of which use demographic characteristics to try to explain why jurors shift from supporting the death penalty to supporting LWOP+, are statistically significant (at least marginally). Once again, black jurors and Southern Baptists are eager to abandon the death penalty in favor of LWOP+. Indeed, the rate of defection is quite large. Southern Baptists are 0.16 more likely to abandon the death penalty compared to jurors who are not Southern Baptists.⁷² Similarly, black jurors are 0.27 more likely to abandon the death penalty than are white jurors. Black jurors are thus more apt than white jurors to

72. See *supra* note 56 and accompanying text.

disfavor the death penalty, and black jurors who *do* favor the death penalty are more willing than white jurors to abandon their support when the alternative is LWOP+.

CONCLUSION—DEADLY PARADOX

Most jurors, like most members of the general public, prefer LWOP or LWOP+ as an alternative to the death penalty. Most jurors, like most members of the general public, harbor serious doubts about the way the death penalty is administered. But most jurors, like most members of the general public, continue to express support for the death penalty all the same.

The result is a paradox. Why do people—the public and jurors alike—support the death penalty even though they doubt its fairness, and even though they would prefer something else?

One hypothesis is this: The death penalty is simply the lesser of two evils. Most people believe the death penalty is unfairly administered, but continue to support it because they see no real alternative. Compared to the punishment they believe the defendant will get if not sentenced to death, people regard death as the only real choice; anything short of death means the defendant will someday be released from prison. Most people are unwilling to entertain this possibility, either because they think a defendant convicted of capital murder deserves at least life imprisonment, or because they are unwilling to risk the chance that a released offender will cause future harm.⁷³

If this hypothesis is correct, then continuing high levels of support for the death penalty among capital jurors and members of the general public reflect collective failure, in one or both of two ways. The first is a *failure of democratic politics*. According to this account, jurors and the public would prefer an alternative to the death penalty, but lawmakers—unwittingly,⁷⁴ or perhaps by design⁷⁵—refuse or neglect to honor this

73. See Gross, *supra* note 1, at 1457 (“The attraction of life without parole may reflect retributive impulses as well as a desire to prevent future killings.”).

74. See Bowers & Steiner, *supra* note 7, at 708–09 (“The failure of states to make LWOP available for capital murder appears to be due, in part, to legislators’ lack of appreciation of the public’s desire for the LWOP alternative”); Bowers et al., *supra* note 2, at 140 tbl.XIV (reporting results of survey of New York lawmakers regarding perceived support for the death penalty among their constituents); McGarrel & Sandys, *supra* note 2, at 508 tbl.3 (reporting results of similar survey among Indiana lawmakers).

75. One commentator suggests:

preference. Instead, they set the alternative to death at a term of imprisonment whose duration is less than life without parole. Consequently, although jurors and the public would prefer something else, they will continue to support the death penalty until something better comes along.

The second is a *failure of democratic education*. According to this account, even when the law does in fact provide for LWOP or LWOP+, jurors and members of the general public are unaware of it, or, if they are aware of it, they do not believe it. Instead, they wrongly think the alternative to death is some term of imprisonment short of LWOP. Reality is one thing; perception is another. Consequently, jurors and the public continue to express high levels of support for the death penalty despite their preference for an alternative, but only because they do not realize, or do not believe, that the alternative they prefer is already the one the law provides.

Both dynamics are probably at work to different degrees in different states. No state now provides LWOP+ as the alternative to death. In a number of states the alternative is a sentence of life imprisonment with the possibility of parole after a specified term.⁷⁶ In these states—where LWOP is not the alternative—democratic politics has clearly failed. Lawmakers have not given the people what they say they want. Indeed, if the popular preference is for LWOP or LWOP+ *instead of*—and not only *in addition to*—the death penalty, then democratic politics has failed in every state in which the death penalty remains on the books.

In many states LWOP *is* the alternative to death.⁷⁷ A capital defendant not sentenced to death will spend the rest of his natural life in prison. Nonetheless, many capital jurors, like many members of the general public,⁷⁸ wrongly believe the defendant will eventually find his

[I]t is irresponsible for public officials . . . first to exacerbate and channel legitimate public concern about crime into public support for capital punishment by advertising unsupportable claims that capital punishment is an answer to the crime problem, and then to turn around and cite public support for capital punishment as a justification when all other justifications are shown to be unsupportable.

Anthony G. Amsterdam, *Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 346, 353 (Hugo Adam Bedau ed., 1982).

76. See *Simmons v. South Carolina*, 512 U.S. 154, 167 n.7 (1994) (plurality opinion).

77. See *id.*

78. Cf. RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY 8 (Apr. 1993) (reporting results of a March 1993 poll of 1,000 registered voters nationwide in which “[w]hen asked how long someone with a sentence of *life without parole* would serve, only 11% believed that such a person would never be released”).

way out.⁷⁹ Moreover, even where the alternative to death is life imprisonment *with* the possibility of parole somewhere down the line, jurors nonetheless wrongly—but consistently—predict that the defendant will be eligible for release well before he actually will be.⁸⁰ In these states, the failure goes to democratic education. Jurors are either not being told what the actual alternative to death is, or if they are being told, they do not really believe it.

79. See Bowers & Steiner, *supra* note 7, at 647 tbl.1 (reporting median estimates among jurors in eleven CJP states of the number of years a capital defendant not sentenced to death will spend in prison before release).

80. See *id.*

