DOUBLE DUTY: THE AMPLIFIED ROLE OF SPECIAL CIRCUMSTANCES IN CALIFORNIA'S CAPITAL PUNISHMENT SYSTEM

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ABSTRACT

Legal scholars have argued that relying solely upon the eligibility decision in capital case processing to reduce arbitrary outcomes contravenes the underlying goal articulated in *Gregg v. Georgia*. This Article adds to this line of scholarship by illustrating how eligibility and selection are not easily distinguished as discrete decisions when capital juries are tasked with doing both in the course of their duties. To the extent that most sentencing schemes rely upon capital juries to do both jobs—determine eligibility and make the selection decision—the consideration of aggravating evidence for the purpose of eligibility, and its use as something to be weighed in determining sentencing, is messier in practice. Specifically, the Article focuses on California's death penalty scheme to illustrate how its overbroad eligibility criteria "bite twice," first by failing to narrow the pool of defendants who may face the death penalty (the "eligibility decision"), and then by swamping the selection decision by exerting extraordinary influence on the jury's sentencing decision, relative to mitigating evidence. The Article first details California's death penalty process including its narrowing mechanism. Then the Article presents evidence from empirical research that offers insight into how death-

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eligible Californians understand and consider statutory aggravation ("special circumstances" in California's statutory scheme), especially in relation to mitigating evidence. The Article concludes by outlining next steps for further research on how eligibility and selection determinations work together to produce the twin failures of California's current death penalty machinery: a failure to narrow eligibility and a failure to ensure coherence in sentence outcomes.

TABLE OF CONTENTS

INTRODUCTION

In its 1972 landmark decision on the constitutionality of the death penalty, *Furman v. Georgia*,[1] the U.S. Supreme Court identified a core constitutional problem with how the death penalty operated in the United States and left open the possibility that a solution could be crafted to remediate that failing. Justices Douglas and Stewart emphasized that the death penalty was applied inconsistently and haphazardly;[2] consequently, the death sentences imposed in the *Furman* bundle of cases were "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[3] In their concurring opinions, the Justices highlighted two problems in particular that led to the troubling patterns of death penalty. First, the statutes providing for the death penalty defined eligible offenses too broadly, allowing for unconstitutional application.[4] Second, sentencing bodies—juries and judges—had "untrammeled discretion"[5] in deciding who among those eligible to receive a death sentence would indeed live or die.

In the ensuing years and decades, the Court has constructed an elaborate body of case law that aims to remediate these twin problems. The cornerstone of that body of law, *Gregg v. Georgia*,[6] set the course by introducing two key provisions inherent to a constitutional death penalty: narrowing the class of defendants eligible for the death penalty[7] and "guided discretion" in the sentence-

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1. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

2. In *Furman*, the U.S. Supreme Court ruled that the death penalty, as then administered, violated the Eighth and Fourteenth Amendments of the U.S. Constitution. *Id.* at 239–40. The violation was due in part to both the breadth of death-eligibility and to the unbridled discretion afforded to decision makers to impose a death sentence. *Id.* at 253 (Douglas, J., concurring), 309–10 (Stewart, J., concurring).

3. *Id.* at 309 (Stewart, J., concurring).

4. *Id.* at 256–57 (Douglas, J., concurring).

5. *Id.* at 248 (Douglas, J., concurring).

6. Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). The Court considered five cases together, representing five different state death penalty schemes (Georgia, Texas, Florida, Louisiana, and North Carolina) that were drafted in response to *Furman*. The Court invalidated North Carolina's and Louisiana's schemes and approved the other three.

7. *Gregg*, 428 U.S. at 196–98. *Gregg* required the jury to find, beyond a reasonable doubt, that at least one of ten statutory aggravating factors be present before they can consider the death penalty. This narrowing requirement was further refined in Zant v. Stephens, 462 U.S. 862, 877 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); *see* Chelsea Creo

determination process to ensure some semblance of consistency in who actually receives a death sentence.[8] As reflected in the *Gregg* decision, these provisions were conceptualized as being somewhat interdependent.[9] They were put forth as a package of legal fixes that would function together as a funnel to ensure that only the most culpable, "worst of the worst" defendants would end up facing execution.[10]

Subsequent to *Gregg*, the Court began to bifurcate the bodies of law based on the twin goals of narrowing eligibility and regulating the actual imposition of a death sentence. The narrowing requirement essentially became the jurisprudence of aggravating factors, where, in a series of cases, the Court set out parameters for how narrowing was to be incorporated in law[11] and the content of those statutory provisions.[12] Meanwhile, sentence determination has largely (although

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Sharon, *The Most Deserving of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 224 (2011).

8. *Gregg*, 428 U.S. at 201–06. Georgia's new procedures required jurors to consider particularized aggravating and mitigating factors, *in addition to* finding that at least one of the statutory aggravators was present beyond a reasonable doubt. In the Court's view, guided discretion was further ensured through a new provision requiring automatic review of all death sentences by the Georgia Supreme Court.

9. *See Gregg*, 428 U.S. at 206–07. This interdependent quality was articulated in the joint opinion of Justices Stewart, Powell, and Stevens:

> The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

Id.

10. Sharon, *supra* note 7, at 225.

11. *Zant*, 462 U.S. at 878 (circumscribing the eligible class at the "stage of legislative definition").

12. For instance, while the U.S. Supreme Court has not meaningfully grappled with the question of whether a "system" of aggravators is overly broad, it has found some individual aggravators to be unconstitutionally broad. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420 (1980) (holding that the Georgia Supreme Court had adopted a construction of a statute that was so broad and vague that it violated

not exclusively) been left to the jurisprudence of mitigation. To that end, a robust body of case law ensures the defendant's right to present any evidence that might lead to a sentence less than death.[13] In expanding that right, the Court functionally retreated from regulating the sentence selection decision-point as a mode of ensuring consistency in outcomes, and instead made individualized sentencing the legal ideal.[14]

More than forty years after *Gregg*, the question of whether the narrowing problems in determining eligibility were indeed remedied remains active, while the "selection" issues seem more dormant. Most recently, in *Hidalgo v. Arizona*,[15] petitioner Abel Hidalgo challenged Arizona's capital punishment scheme for failing to narrow eligibility. Mr. Hidalgo presented evidence that nearly all first-degree murder cases in the state qualify for the death penalty due to the number and breadth of Arizona's statutory aggravators. Indeed, Arizona is one of a number of jurisdictions whose statutory eligibility criteria appear to insufficiently narrow the pool of death-eligible defendants, joined by California,[16] Georgia,[17] and Colorado,[18] among others.

While the Court denied certiorari in *Hidalgo*, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, issued a statement with the denial that, among other things, made clear how

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the Eighth and Fourteenth Amendments); *see also* Tyler Ash, *Can All Murders be "Aggravated?" A Look at Aggravating Factor Capital-Eligibility Schemes*, 63 ST. LOUIS U. L.J. 641, 641 (2018) (explaining that a capital sentencing scheme may be unconstitutional if one of its aggravating factors is overly broad or vague). Note also that narrowing can be achieved legislatively either by narrowly defining the death-eligible offenses beyond just first-degree murder, or by defining specific aggravators that must be proved to narrow the class of eligible defendants, generally at the sentencing stage. *Id.* at 644, 656.

13. *See* Lockett v. Ohio, 438 U.S. 586 (1978).

14. Sharon, *supra* note 7, at 231.

15. 138 S. Ct. 1054 (2018).

16. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman, 72 N.Y.U. L. REV. 1283, 1288 (1997); *see also* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE FINAL REPORT 138–40 (2008), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs [https://perma.cc/HJ8R-FBPV]).

17. DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY 268 (Ne. Univ. Press 1st ed. 1990).

18. *See* Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1072 (2013); Meg Beardsley, Sam Kamin, Justin Marceau & Scott Phillips, *Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENV. U. L. REV. 431, 433 (2015).

disconnected the "eligibility" and "selection" bodies of law have become, even though in practice the eligibility and selection decisions are deeply intertwined. Like the Georgia statute considered in *Gregg*, in Arizona the jury makes a determination about the presence of a statutory aggravator at the sentencing phase where they are also tasked with considering aggravating and mitigating evidence to determine the sentence. Nonetheless, even though Arizona's scheme commingles the narrowing and selection processes at the sentencing stage, Breyer's statement reinforced the jurisprudential bifurcation, indicating that how the aggravators are understood, deliberated upon, and weighed in relation to mitigation in the actual judgment context was irrelevant for the question of eligibility.[19]

The *Hidalgo* statement also invited further inquiry into the "important Eighth Amendment question" about the effectiveness of capital statutes in narrowing eligibility. Breyer seemed to encourage the development of additional empirical evidence to speak to the claim that the eligibility criteria fail to perform the narrowing function, at least in Arizona.[20] That invitation prompts this symposium and this Article. Legal scholars have previously argued that relying solely upon the eligibility decision to reduce arbitrary outcomes contravenes the underlying goal of regularizing death penalty outcomes, as articulated in *Gregg*.[21] The narrowing challenge begins with the legislative scheme. If it provides for broad eligibility on the books, it has the potential to produce arbitrariness at two critical decision-points in regard to the eligibility assessment: The prosecutor's decision to seek death, and the capital jury's fact-finding decision about the presence of any statutory aggravators.

In many states' statutory schemes, the overbreadth problem also seeps into the selection decision, notwithstanding the Court's efforts to declare these two stages as distinct. To the extent that most sentencing schemes rely upon capital juries to both determine eligibility and make the selection decision, the consideration of aggravating evidence for the purpose of eligibility and its use as

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19. *Hidalgo*, 138 S. Ct. at 1056–57 (rejecting the Arizona Supreme Court's logic that the individualized sentencing determination, which also considered mitigating factors, contributed to the narrowing function because that determination "concerns an entirely different capital punishment requirement—the selection decision—which is not at issue in this case.").

20. *Id.* at 1057 (noting that Hidalgo's evidence "points to a possible constitutional problem" but "the record as it has come to us is limited and largely unexamined" by the lower courts).

21. Sharon, *supra* note 7, at 224; Shatz & Rivkind, *supra* note 16, at 138–40.

something to be weighed in conjunction with mitigating evidence is messier in practice than in legal doctrine. This Article aims to reconnect these two, now-distinct, lines of legal thought—on death penalty eligibility and on death penalty selection—in order to advance a more psychologically-informed understanding of how death penalty judgments are made. It endeavors to show how the eligibility and selection decisions are not easily distinguished when capital juries are tasked with making both decisions in the course of their duties.

To do so, the Article turns to California's death penalty scheme to illustrate how its overbroad eligibility criteria "bite twice": first by failing to narrow the pool of defendants who may face the death penalty during the guilt phase in cases where prosecutors seek death (the "eligibility decision"),[22] and then second by swamping the selection decision[23] by exerting extraordinary influence on the jury's sentencing decision, relative to mitigating evidence. Part I details California's death penalty process including its narrowing mechanism. Part II presents evidence from empirical research that offers insight into how death-eligible potential jurors in California understand and consider statutory aggravation ("special circumstances" in California's statutory scheme),[24] especially in relation to mitigating evidence. The Article concludes by outlining a proposed agenda for further research to examine how eligibility and selection determinations work together to fully model the failures of California's current death penalty machinery, both in narrowing eligibility and in producing incoherence in sentence outcomes.

I. CALIFORNIA'S DEATH PENALTY PROCEDURE

A. Narrowing Scheme

California allows for the death penalty in first-degree murder cases where one or more alleged "special circumstances" is found beyond a reasonable doubt.[25] First-degree murder consists of premeditated homicides and certain homicides that occur in the course of a specified felony.[26] Special circumstances are the statutorily-defined eligibility criteria that purportedly narrow the class of first-

22. Shatz & Rivkind, *supra* note 16, at 1283.
23. *Id*. at 1284.
24. *See* CAL. PENAL CODE § 190.2(a) (West 2019).
25. *Id.* § 190.1.
26. *Id.* § 189(a).

degree murders that can face a death sentence. At present, twenty-two special circumstances are enumerated in section 109.2(a) of the California Penal Code, and two of those enumerated special circumstances include multiple subsections that further expand the breadth of this statute.[27]

As previously noted, in practice, California's narrowing scheme does not do much, if any, narrowing of the pool of first-degree murders committed in the state.[28] In the first major study of the state's scheme, Steven Shatz and Nina Rivkind found that the 1978 death penalty law[29] (including subsequent additions to that law), which ostensibly should have remedied overbroad pre-*Furman* eligibility to comport with the *Gregg* doctrine, actually broadened eligibility.[30] Shatz and Rivkind examined both first and second-degree murder cases that were decided between 1988 and 1992.[31] They found that nearly nine out of ten of the first-degree murder cases in their sample of 253 appealed cases included elements that qualified as special circumstances,[32] and approximately eight out of ten in the sample of 192 appealed second-degree murder cases included elements that qualified as special circumstances.[33]

David Baldus and his colleagues completed an updated and expanded examination of 1900 homicide cases drawn from the universe of convictions in California for first-degree murder, second-degree murder, and voluntary manslaughter between January 1978 and June

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27. For instance, section 190.2(a)(17) lists a dozen felonies that qualify as first-degree when a murder occurs during their commission under the felony-murder provision. These felonies also double as "special circumstances" that elevate that first-degree murder to a death-eligible one. CAL. PENAL CODE § 190.2(a)(17) (West 2019) (listing robbery, kidnapping, rape, sodomy, the performance of a lewd or lascivious act upon the person of a child under the age of 14 years, oral copulation, burglary, arson, train wrecking, mayhem, rape by instrument, carjacking as "special circumstances" making first-degree murder punishable by death).

28. Shatz & Rivkind, *supra* note 16, at 1283; David Baldus et al., Furman *at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. EMPIRICAL LEGAL STUD. 693, 696 (2019).

29. In 1978, voters approved a ballot proposition that explicitly aimed to broaden death-eligibility, among other provisions. That law remains the basis of California's death penalty statute although it has been expanded even further in subsequent years. Shatz & Rivkind, *supra* note 16, at 1310.

30. Shatz & Rivkind, *supra* note 16, at 1319–1320.

31. *Id*. at 1318–19.

32. *Id*. at 1330.

33. *Id*. at 1333.

2002.[34] Applying current law to that set of cases, the authors estimated that 95% of the cases with first-degree murder convictions would qualify for the death penalty, and 86% of all cases whose facts met first-degree murder criteria (even if that was not the conviction) also qualified for death.[35] The Baldus study also found substantial rates of potential death-eligibility under current law among both second-degree murder cases (38%) and voluntary manslaughter cases (47%).[36]

This body of research confirms what appears on its face to be the case with California's eligibility statute. As written and as applied to actual homicide cases, meaningful narrowing is not possible under California's current death penalty law given that the overwhelming majority of first-degree murders qualify for capital punishment, should a prosecutor seek it. Indeed, it is arguably the least effective narrowing scheme of all the U.S. jurisdictions that authorize capital punishment, both as a function of the sheer number of qualifying circumstances and in the broad reach of several specific circumstances.[37] Consequently, prosecutors in California have immense discretion in selecting cases to pursue capitally because they can opt to seek death or not in most first-degree cases. Variations in those charging decisions, across local jurisdiction and even within local jurisdiction, are demonstrably vast,[38] and can be a product of anything from local politics to prosecutorial prerogatives to plea bargaining strategies.[39] The breadth of any given

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34. Baldus et al., s*upra* note 28, at 707–08.

35. *Id*. at 714 (Table 2 and discussion).

36. *Id*.

37. Shatz & Rivkind, *supra* note 16, 1319–1320. Pointing to two particularly broad special circumstances that considerably expand the eligibility pool: simple felony murder, which at the time of the study was specified in only seven jurisdictions as an eligibility criterion, and "lying in wait", which is even more rarely specified (only three jurisdictions at the time used this as an eligibility criterion). Only two jurisdictions used both, and the other, Montana, had a much more limited felony murder definition. *Id.*

38. *See generally* Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1 (2005) (presenting evidence that the variation in charging decisions is associated with race, including the racial composition of the jurisdiction as well as race of victim); Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and a Single County Case Study*, 34 CARDOZO L. REV. 1227 (2013) (demonstrating vast variation in charging decisions at the within-county level).

39. *See generally* Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227 (2012) (describing variation in current death penalty jurisdictions); Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010) (arguing for a more systemized and centralized capital case selection process

capital statute, coupled with prosecutors' broad discretionary power to determine whether to charge and the content of charges, then, contributes to unpredictability, unevenness, and bias in creating a pool of capital defendants.[40]

B. Capital Case Procedure

Prosecutors in California who seek the death penalty in any given homicide case must file first-degree murder charges and specify alleged special circumstances in the charging document. They must also file a death notice, indicating their intention to seek a death sentence.[41] If they file special circumstance allegations without a death notice, the convicted defendant is subject to a sentence of life without the possibility of parole ("LWOP"), but cannot be sentenced to death. This procedure is the only means by which prosecutors can seek an LWOP sentence for homicide in California, so "special circumstances" ostensibly serve not only to narrow eligibility for death but also to narrow eligibility for LWOP as well.[42] If a prosecutor does seek death, and a death notice is filed, a death-qualified jury makes the eligibility decision (i.e., determines whether the defendant is guilty of first-degree murder and whether at least one special circumstance was proven to be true) during the guilt phase of the capital trial.

Following a first-degree murder conviction and the finding of one or more special circumstances in a death-noticed case, the same

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to mitigate local practices that produce arbitrary outcomes). For a study examining how the death penalty is used as a plea-bargaining chip in homicide cases, *see* Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475 (2013).

40. *See generally* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007) (analyzing how the day-to-day practices and broad discretionary power of prosecutors leads to unequal treatment of defendants and victims within the criminal justice system). For two studies of special circumstances charging in California, *see* Richard A. Berk, Robert Weiss & Jack Boger, *Chance and the Death Penalty,* 27 LAW & SOC'Y REV. 89, 100–106 (1993); Robert E. Weiss, Catherine Y. Lee & Richard A. Berk, *Assessing the Capriciousness of Death Penalty Charging*, 30 LAW & SOC'Y REV. 607, 618 (1996).

41. Nicholas Petersen & Mona Lynch, *Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, 102 J. CRIM. L. & CRIMINOLOGY 1233, 1236–1237 (2012).

42. In Los Angeles County, the largest jurisdiction in the state, the bulk of cases in which special circumstances are filed are not death-noticed. Between 1996 and 2006, only 15% of cases with special circumstances alleged were also pursued as death cases. *Id.* at 1262 (Table 2). Given this, there is also an argument to be made that special circumstances do not uniquely do the narrowing job they are supposed to do, since the majority of cases in which they are filed are not pursued capitally and the narrowing is really to obtain eligibility for LWOP.

jury then proceeds to the sentencing stage.[43] California's death penalty sentencing statute delineates eleven aggravating and mitigating factors that are to be considered in determining the sentence, again either life without parole or death.[44]

California's scheme puts the "narrowing" function to work as a core factor to also be weighed in favor of death. The first of the sentencing factors is an aggravating factor that includes the eligibility criteria: "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true."[45] In doing so, the special circumstances do not simply function as a threshold that opens up the possibility of a death sentence; they also push the jury toward death in the selection stage. This problem, of course, is also present in schemes where the aggravating factors are determined in the penalty phase. Juries are asked to determine their presence to cross the eligibility threshold in the same proceeding that they are considering aggravating and mitigating factors in relation to each other to determine sentence, potentially muddying how evidence is being used and rendering the eligibility decision-making less effectual.[46]

But California's process in particular weaponizes the eligibility criteria in several ways. First, the construction makes the conviction and special circumstances the lead factor in a list of eleven to consider in determining the sentence. Not only is there a primacy effect in listing that factor first,[47] but the procedure calls on jurors to essentially

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43. CAL. PENAL CODE § 190.3 (West 2019). If the case is not death-noticed and special circumstances are found, there is no penalty phase trial and sentencing is done by the judge. Judges must sentence defendants to LWOP if special circumstances are found.

44. *Id.* (specifying 11 factors that the jury "shall take into account" if relevant). Section 190.3 then sets out the thresholds for imposing the two possible sentences: jury shall impose a death sentence if "the aggravating circumstances outweigh the mitigating circumstances." If the jury finds that the mitigating circumstances outweigh the aggravating circumstances, the jury shall "impose a sentence of confinement in state prison for a term of life without the possibility of parole." *Id.*

45. As a matter of law, factor (a) can be either an aggravator or mitigator, but as this Article illustrates, it typically functions as the most important aggravating factor for prosecutors seeking death and for jurors. *See* Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411, 422 (1994).

46. This has been deemed constitutional (*see* Lowenfield v. Phelps, 484 U.S. 231 (1988)), but that does not negate its problematic operation in practice.

47. *See generally* E. Allan Lind, Laura Kray, & Leigh Thompson, *Primacy Effects in Justice Judgments: Testing Predictions from Fairness Heuristic Theory*,

validate their prior decision-making that the offense rose to the level of potentially deserving death. Psychological research indicates that people become more committed to their positions post-decision, especially when the initial decision or commitment was made publicly so as to reduce the potential for perceived hypocrisy.[48] To the extent that the jury members outwardly committed to the prior verdict during the guilt phase, including finding special circumstances to be true and elevating the gravity of the conviction, the expectation would also be that those same jurors will experience enhanced confidence in the gravity of these circumstances and commitment to that finding at the sentencing stage.[49]

Empirical research on California capital trials indicates that this commitment is encouraged and reinforced during the penalty phase by the prosecutor's presentation of the case for death, where a central strategy is to graphically and emotionally elaborate upon the "horribles" of the crime of conviction.[50] As will be further detailed in the next section, considerable empirical evidence indicates that the capital sentencing decision comes down to a battle of those vivid facts of the crime, weighed against the more amorphous and harder-to-grasp

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85 ORG. BEHAVIOR & HUM. DECISION PROCESSES 189 (2001) (detailing primacy effects).

48. A subset of scholarship on cognitive dissonance, using the "induced hypocrisy paradigm," shows that when persons are asked to publicly state a position, then are shown that their behavior contradicts that position, they will internalize the position and change their contradictory behavior. *See* Carrie B. Fried & Elliot Aronson, *Hypocrisy, Misattribution, and Dissonance Reduction*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 925, 930 (1995).

49. Psychological research indicates that post-decision confidence is enhanced in group decision-making scenarios, suggesting higher levels of commitment to the position in the jury setting. *See* Andrea L. Patalano & Zachary LeClair, *The Influence of Group Decision Making on Indecisiveness-related Decisional Confidence*, 6 JUDGMENT & DECISION MAKING 163, 171 (2011).

50. Craig Haney & Mona Lynch, Impelling/Impeding the Momentum Toward Death: An Analysis of Attorneys' Final Arguments in California Capital Penalty Phase Trials 17 (unpublished manuscript) (on file with author) (finding that most of prosecutors' arguments focused on the brutality of the crime, but "in this stage, they not only spoke of the violence, they also encouraged the jury to feel the sensations of the crime event."); *see also* PAUL KAPLAN, MURDER STORIES: IDEOLOGICAL NARRATIVES OF CAPITAL PUNISHMENT 160–164 (2012) (producing a similar finding about prosecutor arguments). Prosecutors' elaboration of the crime's brutality in the sentencing stage is not unique to California, however what is different in the California context is that this comes after the eligibility finding, not prior to it, as is done in most capital jurisdictions.

life history mitigating evidence.[51] A predominant prosecution trial strategy is to limit the narrative of the defendant's life to nothing more than those crime "facts" and circumstances, supplemented with details about any prior acts of violence committed by the defendant.[52]

The most dangerous weaponizing, however, results from the immense breadth of California's special circumstances. That is, because nearly all first-degree murders appear to qualify as death-eligible offenses under section 190.2, the facts of even more mundane offenses that end up being tried capitally are elaborated upon and amplified as reasons to impose death by prosecutors under factor (a) of the sentencing statute.[53] A content analysis of twenty sets of closing arguments from California capital cases (ten ending in life and ten ending in death) indicated that factor (a) was the single most discussed sentencing factor in closing arguments.[54] For any given case, prosecutors typically constructed those very factors as evidence that the defendant had earned the death penalty through his violent, evil acts, no matter what those case facts were.[55] In that regard, it is hard to credit the "narrowing" statute with doing its job when it functions as the primary prosecutorial tool to obtain a death sentence.

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51. The bulk of mitigating evidence comes in under factor (k) of § 190: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 LAW & HUM. BEHAV. 575, 581 (1997) (reporting findings from two studies showing only 72% and 64% of layperson samples, respectively, were able to discern that this most important mitigator, factor (k), was in fact a mitigator). For an analysis of how factors (a) and (k) are pitted against each other, *see* Haney & Lynch, *supra* note 50, at 31–32.

52. Haney & Lynch, *supra* note 50, at 10–13.

53. *Id*.

54. *Id*. It was explicitly addressed in 95% of attorneys' arguments. Among prosecutors, 90% argued that the crime and special circumstance should weigh in favor of death, and 40% of defense attorneys also conceded the facts of the crime under factor (a) should count as aggravating evidence. Haney & Lynch, *supra* note 51, at 586–87.

55. Haney & Lynch, *supra* note 50, at 11–13.

II. LAYPERSONS & SPECIAL CIRCUMSTANCES: FURTHER EMPIRICAL EVIDENCE

In this Part, I draw on my past and ongoing research conducted with Craig Haney[56] to further examine how potential capital jurors understand and consider special circumstances, including in conjunction with mitigating evidence at the sentencing stage. As detailed in the previous Part, there is a fundamental and irreconcilable tension in the dual role played by statutory aggravators (i.e., special circumstances). The finding that they are true during the guilt phase functions as the threshold test that moves the defendant into that special, narrowed category of potentially death-deserving defendants. Those same facts then become a potent justification for a death sentence, both by prosecutors and, it appears, for death-qualified potential jurors.

Given the expansive breadth of California's eligibility statute, the reliance on special circumstances as aggravating evidence ensures an amplification of the failures of California's narrowing scheme. In any given case, juries are not considering those facts in the context of the universe of potentially capital homicides within which they could scale the egregiousness to other cases in that universe, but rather juries are considering the facts in isolation. For those serving as capital jurors, this is usually their closest contact to the tragedy of murder; therefore, the emotionally charged impact of the details and circumstances of the case at hand are persuasively condemning.[57]

A. Jury Decision-Making Data

In a set of capital jury decision-making experiments, Craig Haney and I examined how death-qualified Californians understood capital penalty instructions, weighed specific evidence, and came to sentencing determinations. In both studies we used the same penalty phase trial presentation,[58] involving a robbery-murder of an employee

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56. Craig Haney is a Distinguished Professor of Psychology at the University of California, Santa Cruz and a foremost expert on the social, psychological, and legal aspects of the American death penalty.

57. Mona Lynch & Craig Haney, *Emotion, Authority, and Death: (Raced) Negotiations in Mock Capital Jury Deliberations*, 40 LAW & SOC. INQUIRY 377, 378–79 (2015); Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1035–36 (2014).

58. The experimental manipulation in both was race of defendant and race of victim. We obtained a significant race of defendant effect such that the black

working behind the counter in a Domino's pizza outlet. Participants were told that two special circumstances were found to be true: the murder occurred during the commission of a robbery,[59] and the defendant had been lying in wait outside the store until the employee-victim was alone.[60] Allegations of prior violence, including a previous robbery, were also presented as aggravating evidence. Mitigating evidence was presented by the defense, indicating that the defendant had suffered a severely abusive childhood that prompted his mental health problems and substance abuse, and that the defendant's family still loved and needed him.

In the first study, 348 death-qualified California adults individually viewed the trial presentation and then were asked to make a sentencing judgment. Subsequent to that, participants completed a large battery of measures, assessing how they weighed and considered individual pieces of evidence and testimony, their perceptions about the defendant and his character, and their comprehension of the jury instructions that were to guide their decision. They also completed a series of attitude and racial bias measures and a set of demographic measures.[61]

The second study replicated the first but added group deliberation to better approximate jury decision-making and to see how the deliberation process mediated some of the findings from the individual-level study.[62] A total of 539 death-qualified Californians were assigned to one of 100 small groups (ranging in size from four to seven participants) in the second study. Each group watched the penalty phase trial presentation, then deliberated to determine a

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defendant was substantially more likely to receive death from our mock jurors. This Article focuses on the aggregated results, rather than the differences between the race conditions.

59. *See* CAL. PENAL CODE § 190.2 (a)(17)(A) (West 2019).

60. *See id.* § 190.2 (a)(15).

61. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 344 (2000).

62. Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481, 484–85 (2009) [hereinafter Lynch & Haney (2009)]; Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide*,*"* 45 LAW & SOC. REV. 69, 79 (2011) [hereinafter Lynch & Haney (2011)].

penalty verdict before individually completing a similar battery of measures about the case perceptions, comprehension, and so on.[63]

In the first study, we found that evidence under factor (a)—the case facts and special circumstances found to be true—was the single most influential factor for those who selected death. A total of 99% of the participants who opted for death indicated that this factor weighed in favor of death for them.[64] Only 11% of the entire participant pool weighed the case facts in favor of life, even though, as a matter of law, it is acceptable to do so. As a point of contrast, 20% of the participants inappropriately weighed the mitigating evidence about the defendant's substance abuse problems—which was *only* supposed to be considered in mitigation—as favoring death.[65]

The second study yielded similar findings. Factor (a) was the single most important factor for participants who voted for death: 92% weighed it in favor of death. Overall, just under 10% of the participants weighed the case facts under factor (a) in favor of a life sentence.[66] For the substance abuse mitigating evidence, on the other hand, nearly one out of four participants (24%) across both life and death voters inappropriately weighed that factor in favor of death, almost the same proportion (28%) who appropriately weighed it in favor of life.[67] Our deliberations data also indicated that those favoring a death sentence frequently pointed to a particularly vivid and gruesome case fact in their persuasive arguments during deliberation, including to dismiss the value of all the mitigating evidence presented by the defense.[68]

B. Survey Research Data

The other data that speak to this issue come from a set of four high-quality telephone surveys conducted over the past five years in three different California counties regarding capital cases that were

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63. Lynch & Haney (2011), *supra* note 62, at 77–78. If they could not come to a unanimous decision within 90 minutes, a "mistrial" was declared, and the individual sentence preference votes were recorded. *Id*. at 81.

64. Lynch & Haney, *supra* note 61, at 349 (Table 2). Our participants were especially likely to inappropriately weigh all of the mitigating evidence in favor of death when they viewed the black defendant. *See id*. at 353 (Table 6).

65. *Id*. at 349 (Table 2).

66. Lynch & Haney (2009), *supra* note 62, at 487 (Table 1).

67. *Id*. In this study we also uncovered a racial bias in the evaluation of evidence disadvantaging the black defendant, especially by the white male participants. *See id.* at 488 (Tables 2 and 3).

68. Lynch & Haney*, supra* note 57, at 389–390 (discussing the "dirty socks" used to gag the victim during the robbery).

pending trial. The surveys sought to examine the impact of death qualification on the jury pool and included a series of questions that assessed how potential jurors in each local jurisdiction felt about various forms of aggravating and mitigating evidence. The first two county-wide surveys of jury-eligible adults were conducted in Solano County, California during the periods of November–December 2014 and April–May 2016 respectively.[69] The next county-wide survey of jury-eligible adults was conducted in Fresno County, California from January–March 2017. The final county-wide survey of jury-eligible adults was conducted in Santa Clara County, California from February–March 2019.

Each survey was administered by a professional market research firm, and the interviews were completed by trained interviewers who used a state-of-the-art computer-assisted telephone interviewing ("CATI") system for administration and data entry. In all of the surveys, we used a probability sampling design to reach both landline users and cell phone users in order to obtain a representative sample of the jury-eligible population in the county. The first Solano survey had a sample of 496 respondents, and the remaining three surveys had 500 respondents each. Respondents were screened for jury eligibility before being invited to participate. To meet the criteria of jury-eligibility, only adults who indicated that they were U.S. citizens between eighteen and seventy-five years of age, who were either registered to vote in the county under study or who possessed a driver's license or a state-issued I.D. card with an address in the county, and who were able to speak and understand English were deemed eligible. Those who were employed as police officers and those who had a felony record without having their rights restored were excluded from participation.

All of the surveys were similar in design, content, and length. They began with an array of general criminal justice attitude questions, followed by a measure of death penalty attitudes that assessed respondents' overall level of support for, or opposition to, capital punishment. The next set of questions were designed to assess respondents' potential for disqualification[70] under the *Witherspoon*,[71]

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69. For more details about these two Solano County surveys, *see generally* Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries,* 40 LAW & POL'Y 148 (2018).

70. *See id*. at 149–150.

71. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). This case narrowed prosecutors' discretion in removing jurors who were uncomfortable with the death penalty by prohibiting states from excluding potential jurors "simply because they

Witt,[72] and *Morgan* standards.[73] Respondents were informed about the legal requirements for seating capital juries in California, as well as the basic procedures, and, depending upon whether they supported or opposed the death penalty, they were asked three questions that assessed qualification status.[74] Respondents who answered affirmatively to one or more of the screening questions were deemed "excludable;" the remainder were coded as death-qualified.

Before completing a series of demographic items, respondents answered a series of questions designed to address the way that they understood and evaluated a number of potential aggravating and mitigating factors, including both factors specific to the respective capital cases as well as more general facts or circumstances that are frequently presented in capital penalty trials. These items included

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voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Per *Witherspoon*, potential jurors could only be excluded for cause if they could *never* vote in favor of death, no matter the facts and circumstances of the case.

72. Wainwright v. Witt, 469 U.S. 412, 424 (1985). The Court held exclusionary criteria to also encompass those whose death penalty opinions were so strong as to either prevent or substantially impair their ability to fulfill their duties as capital jurors.

73. Morgan v. Illinois, 504 U.S. 719, 729 (1992). The Court found that a trial court's refusal to exclude those who were such strong supporters of the death penalty that they would automatically sentence someone convicted of a capital crime to death was a due process violation. After *Morgan*, potential jurors can be excluded from serving on capital cases on the basis of either support or opposition.

74. The questions asked were:

> 1) Do you OPPOSE [SUPPORT] the death penalty so much that you could not be fair in deciding whether a defendant is guilty or not guilty? That is, you would NEVER [ALWAYS] vote to CONVICT any defendant in the guilt phase of the trial no matter what the evidence showed, in a case where the death penalty was a possible sentence?
>
> 2) In a case where a defendant was convicted of murder for which the death penalty was a possible punishment, do you OPPOSE [SUPPORT] the death penalty so much that you feel your attitude might interfere with or impair your ability to act fairly in the PENALTY phase—that is, actually deciding that the defendant should get the death penalty instead of life in prison without parole [life in prison without parole instead of the death penalty]?
>
> 3) Do you OPPOSE [SUPPORT] the death penalty so much that you would NEVER [ALWAYS] actually vote to impose THE DEATH PENALTY in ANY case in which the defendant has been convicted of first degree murder and is eligible to receive the death penalty, no matter what the evidence showed?

Lynch & Haney, *supra* note 69, at 154.

some of the statutory special circumstances that also function as eligibility criteria. For this series of questions, respondents were asked to imagine that they had been selected to serve on a capital jury, that they had found the defendant in the case to be guilty and "eligible" for the death penalty, and that they were now deciding on the appropriate penalty—life without parole or death. They were asked to indicate whether the specific fact or circumstance would make them more likely to support a death sentence, less likely to support a death sentence, or would not affect their sentencing decision at all. It is these items that the Article focuses on here.

Each survey included items assessing four special circumstances as defined in section 190.2(a): the killing of a police officer; murders that are especially brutal, involving torture or extreme physical abuse; murders involving multiple victims; and one version of felony murder (in the course of a sexual assault). A range of more general and case-specific aggravating and mitigating factors that would be introduced in accordance with section 190.3 were also included.

Table 1 displays the relative influence of the four statutory special circumstances measured in all the surveys, as well as the non-statutory aggravating factor that typically comes in under factor (a) of section 190.3: a lack of expressed remorse for the crime, among those jurors who are deemed death-qualified. Below those are two non-crime-related mitigators that were measured in all four surveys, plus additional life history mitigating evidence specific to the individual cases. As indicated in Table 1, the only life history-related mitigating factor that a majority of death-qualified respondents weighed toward life is evidence that the defendant suffered from serious documented mental illness, as measured in the second Solano survey and the Fresno County survey, as well as the effect of fetal alcohol syndrome which was measured in the Fresno study. Otherwise, the often-present mitigation that the defendant grew up in hardship and poverty, measured in all four surveys, and evidence that the defendant experienced other severe forms of family dysfunction during childhood, as measured in various ways across the first three surveys, only moved a minority of respondents toward a life sentence.

In the Appendix, the Article presents more detailed data for each individual survey illustrating how the respective samples indicated they would weigh various factors. The italicized items in Tables 2–5 (in the Appendix) are measured in multiple surveys, providing the comparative data across the samples. As illustrated in Tables 2–5, the most persuasive mitigating factor across all four

surveys, lingering doubt about the defendant's guilt, had nothing to do with life history mitigation. This mitigator would move between two-thirds and four-fifths of the death-qualified respondents across the samples toward a life sentence. This stands in stark contrast to the responses to the life history mitigation.

Table 1: Relative Weight Given to Special Circumstances vs. Non-Crime Related Mitigating Evidence

	Solano 1	Solano 2	Fresno	Santa Clara
Special Circumstances (& 1 Non-Statutory Aggravator)	Weigh toward DEATH	Weigh toward DEATH	Weigh toward DEATH	Weigh toward DEATH
Victim was a police officer killed in line of duty	43%	46%	46%	42%
Murder was especially brutal, involving torture or abuse	81%	78%	78%	80%
Two or more victims were murdered	58%	57%	60%	56%
Murder was committed during commission of sexual assault	53%	66%	65%	62%
Defendant expressed no remorse for crime	53%	51%	58%	—
Life History & Circumstances Mitigation	Weigh toward LIFE	Weigh toward LIFE	Weigh toward LIFE	Weigh toward LIFE
Defendant likely to be well-behaved in prison	19%	22%	28%	34%
Defendant grew up in hardship & poverty	17%	21%	20%	11%
Defendant grew up with disabled single mother	13%	—	—-	—-
Defendant loving father & husband	19%	—-	—-	—-

Defendant victim of physical & emotional abuse as child	—-	36%	—-	—-
Defendant raised by adults with drug problems & mental illness	—-	31%	39%	—-
Defendant suffered serious, documented mental illness	—-	56%	59%	—-
Defendant suffered fetal alcohol syndrome	—-		55%	—-
Defendant hardworking immigrant from Mexico	—-	—-	—-	15%
Defendant generous & charitable with others	—-	—-	—-	22%

As illustrated in Table 1 and in the Appendix tables, much of the crime-related aggravating evidence, especially three of the four statutory special circumstances (all but the killing of a police officer), weighed toward death for the majority of respondents. The broad, relatively vague special circumstance that the murder was especially brutal, involving torture or extreme physical abuse, consistently generated the most support for death among the death-qualified respondents.

The specific evidentiary factors that animated the special circumstances, such as child victims in sex-related felony murders (in the second Solano and Santa Clara surveys), the specific details of the death-eligible homicide (in all four surveys), and the specific methods of killing (in the first Solano survey and the Fresno survey) all weighed toward death for the majority of respondents. Wherever measured, prior criminal activity and/or prior convictions did not have nearly as much persuasive pull as did the facts of the crime, including those that are tied to statutory special circumstances.

This survey data, in conjunction with the empirical evidence reviewed in Section II.A, suggest that special circumstances are highly accessible and salient as aggravating evidence at the selection stage for death-qualified laypersons, especially relative to other kinds of

aggravating and mitigating evidence.[75] Under the California scheme, wherein the jury only proceeds to a penalty phase after it has made the threshold determination that one or more special circumstances were true, the prosecutor's formal burden, to cross the threshold to death-eligibility, becomes her most powerful weapon in making a case for death. In that regard, the prosecutor is able to do more than simply elaborate on the crime's circumstances as part of a persuasive argument aimed at both crossing the threshold and in support of a death sentence, as is the case when the two decisions occur at the penalty stage. In the California case, the prosecutor also functionally reinforces the jury's prior-stage decision by using the facts that the jurors themselves found to be true as the central reason to impose death.

CONCLUSION

As detailed in Part I, the empirical evidence that California's narrowing scheme fails to do its job at the front end of the capital process is both compelling and convincing. The statute itself defines a huge range of homicides as death-eligible, and as a result, prosecutors have extraordinary discretionary leeway to pursue death sentences, if they so choose, in almost all first-degree murder cases and even in the majority of second-degree and manslaughter cases.[76] And again, it appears that in this state, prosecutors wield that discretion quite differentially county-by-county.[77] The empirical evidence presented in Part II suggests that the front-end failure to statutorily narrow has consequences for the critical selection stage as well. Special circumstances loom large in the penalty decision-making process, ensuring that the risk of arbitrariness in the eligibility decision-points

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75. These findings are consistent with studies that rely on interview data collected from previous capital jurors and indicate that, even at the penalty phase, jurors are still primarily concerned with guilt and have a difficult time considering mitigating evidence in favor of a sentence less than death. *See* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1019–21 (2001).

76. Shatz & Rivkind, *supra* note 16, at 1327–35; Baldus et al., *supra* note 28, at 713–23.

77. Pierce & Radelet, *supra* note 38, at 25–31. This is not limited to California—geographic disparities by county within state jurisdictions is pervasive. *See* Smith, *supra* note 39, at 230–35.

carries over, ultimately contributing to arbitrariness in ultimate sentence outcomes in the state.[78]

Nonetheless, there is still more to understand about the on-the-ground decision-making that capital juries are tasked with, once prosecutors pursue cases capitally. How well do juries distinguish the gravity of case characteristics and special circumstances once they advance to a penalty phase, including in relation to mitigation? How determinative or influential is that threshold decision at the guilt phase on how special circumstances are weighed and considered during the penalty phase? Is the jury's weighing of this evidence, in conjunction with its consideration of mitigating evidence, systematically shaped by inappropriate features of the case, such as the racial identities defendants and/or victims? Do the characteristics of jurors themselves, including their demographic identities and/or orientations toward capital punishment and the criminal justice system more broadly, impact their ability to rationally and consistently perform their duties both in determining eligibility and in the selection decision?

Data availability has been a huge roadblock in California for researchers who endeavor to answer these questions using actual case processing and outcome data. Being able to track forward from the universe of homicides to the final sentencing decision typically requires merging multiple data sources and omitting key variables (due to access problems) at each stage of process. There is also a wide range of data quality and degree of accessibility as a function of local jurisdiction and as a function of time. Nonetheless, this work is being done in a variety of creative ways in California and other states,[79] as is evidenced by the contributions in this symposium.

But because actual capital jury decision-making as a process largely remains a black box,[80] there is a need to continue to get at the

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78. *See* Smith, *supra* note 39, at 254–57.

79. For examples of this work focusing on California, *see generally* Baldus, et al., *supra* note 28; Catherine M. Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement* Furman*'s Narrowing Requirement*, UCLA L. REV. (forthcoming 2020).

80. The most comprehensive effort to shine a light on this black box was the Capital Jury Project ("CJP"), headed up by the late William Bowers. Over a number of years, CJP researchers interviewed nearly 1200 former jurors from over 350 capital cases in 14 jurisdictions, collecting data on a wide range of jurors' experiences in the trial. Their findings have appeared in dozens of published articles and several books. *See generally* William J. Bowers, *The Capital Jury*

micro-level decision-making that citizens are called upon to do in our capital punishment system. The complexity and emotionally challenging nature of the cognitive tasks they are required to undertake as capital jurors cannot be underestimated. In particular, little research has directly examined how jurors grapple with the dual duties they are tasked with undertaking. Therefore, we would benefit from additional studies designed to triangulate around what we can learn from case outcome data. That includes additional interview-based studies, building on the success of the Capital Jury Project, to further probe former capital jurors' experiences and decision-making processes. It also entails using experimental approaches, including lab experiments and survey experiments, which even if they compromise on external validity, can directly test hypotheses about the socio-cognitive underpinnings of capital decision-making.

Project: Rationale, Design, and Preview of Early Findings, 70 INDIANA L.J. 1043 (1994) (describing CJP and some of its early findings).

APPENDIX

Table 2: Assessments of Aggravation & Mitigation: Solano 1 Death-Qualified Sample (N = 284)[81]

	Weigh toward DEATH	Weigh toward LIFE	Would NOT Weigh in Decision
190.2 (a) ITEMS (Special Circumstances)			
Victim was a police officer in line of duty	43% (118)	12% (33)	45% (121)
Murder was esp. brutal, involving torture or abuse	81% (224)	7% (19)	12% (33)
Two or more victims were murdered	53% (143)	10% (26)	37% (100)
Murder was committed during commission of sexual assault	58% (156)	15% (40)	28% (75)
190.3 ITEMS (Aggravating Factors)			
The victim was elderly	35% (92)	14% (38)	51% (137)
Defendant expressed no remorse for crime	53% (145)	13% (34)	34% (94)
The victim was a child	62% (171)	11% (30)	27% (74)
The victim was police officer shot multiple times in back	62% (172)	9% (24)	29% (80)
Defendant committed other gun-related crimes	41% (113)	19% (53)	40% (109)
190.3 ITEMS (Mitigating Factors)			
Defendant likely to be well-behaved in prison	7% (18)	19% (53)	74% (204)

81. The actual reported data in each of these tables exclude all who were deemed excludable, and those who responded "do not know" or refused to respond to a given item. The italicized items in these tables are measured in multiple surveys, providing the comparative data across the samples.

You have lingering doubts about defendant's guilt	5% (13)	64% (153)	31% (74)
Defendant grew up in hardship & poverty	8% (21)	17% (46)	75% (207)
Defendant grew up with disabled single mother	7% (20)	13% (37)	79% (220)
Defendant loving father & husband	12% (31)	19% (51)	69% (179)
Murder was not premeditated, but victim tried to resist	22% (57)	41% (106)	38% (98)
Defendant lost job & was trying to support his family	8% (21)	19% (52)	73% (198)

Table 3: Assessments of Aggravation & Mitigation: Solano 2 Death-Qualified Sample (N = 283)

	Weigh toward DEATH	Weigh toward LIFE	Would NOT Weigh in Decision
190.2 (a) ITEMS (Special Circumstances)			
Victim was a police officer in line of duty	46% (121)	12% (32)	42% (109)
Murder was esp. brutal, involving torture or abuse	78% (215)	8% (21)	14% (39)
Two or more victims were murdered	57% (151)	9% (25)	34% (91)
Murder was committed during commission of sexual assault	66% (177)	10% (26)	24% (66)
190.3 ITEMS (Aggravating Factors)			
Victim was elderly	31% (82)	14% (38)	54% (143)
Defendant expressed no remorse for crime	51% (137)	11% (30)	38% (103)
Defendant had a prior criminal record	27% (70)	19% (48)	54% (140)
Victim was a 13-year-old girl who was kidnapped & sexually assaulted	75% (207)	9% (24)	16% (44)
The cause of death was strangulation	29% (80)	10% (26)	61% (167)
190.3 ITEMS (Mitigating Factors)			
Defendant likely to be well-behaved in prison	9% (23)	22% (56)	69% (176)
You have lingering doubts about defendant's guilt	6% (14)	67% (164)	27% (66)
Defendant grew up in hardship & poverty	10% (26)	21% (55)	69% (185)

Defendant had long, documented history of mental illness since youth	7% (19)	56% (150)	37% (97)
Defendant raised by adults with drug problems & mental illness	7% (20)	31% (84)	61% (165)
Defendant was rejected by his parents at a young age & experienced instability	7% (19)	31% (84)	62% (168)
Defendant victim of physical & emotional abuse as child	8% (21)	36% (93)	56% (145)

Table 4: Assessments of Aggravation & Mitigation: Fresno Death-Qualified Sample (N = 288)

	Weigh toward DEATH	Weigh toward LIFE	Would NOT Weigh in Decision
190.2 (a) ITEMS (Special Circumstances)			
Victim was a police officer in line of duty	46% (128)	14% (39)	40% (109)
Murder was esp. brutal, involving torture or abuse	78% (220)	7% (19)	15% (43)
Two or more victims were murdered	60% (165)	9% (25)	31% (87)
Murder was committed during commission of sexual assault	65% (179)	12% (33)	23% (65)
190.3 ITEMS (Aggravating Factors)			
Victim was elderly	33% (91)	18% (49)	49% (133)
Defendant expressed no remorse for crime	58% (162)	14% (39)	28% (77)
Defendant had a long criminal record & spent much of adult life in prison	47% (126)	20% (53)	34% (91)
Victims' throats were slashed	58% (162)	11% (30)	31% (86)
Defendant suspect in attempted murder in another case	46% (126)	18% (48)	36% (99)
190.3 ITEMS (Mitigating Factors)			
Defendant likely to be well-behaved in prison	13% (33)	28% (72)	59% (150)
You have lingering doubts about defendant's guilt	4% (9)	67% (166)	28% (67)

Defendant grew up in hardship & poverty	12% (33)	20% (55)	67% (182)
Defendant had long, documented history of mental illness	9% (25)	59% (155)	32% (85)
Defendant raised by adults with drug problems & mental illness	11% (31)	39% (107)	50% (138)
In the past, defendant has behaved and worked well in prison	14% (37)	33% (91)	53% (144)
Defendant suffered from fetal alcohol syndrome	9% (23)	55% (147)	37% (98)

Table 5: Assessments of Aggravation & Mitigation: Santa Clara Death-Qualified Sample (N = 296)

	Weigh toward DEATH	Weigh toward LIFE	Would NOT Weigh in Decision
190.2 (a) ITEMS (Special Circumstances)			
Victim was a police officer in line of duty	42% (117)	13% (38)	45% (126)
Murder was esp. brutal, involving torture or abuse	80% (227)	8% (24)	12% (33)
Two or more victims were murdered	56% (155)	12% (33)	32% (88)
Murder was committed during commission of sexual assault	62% (177)	14% (41)	24% (67)
190.3 ITEMS (Aggravating Factors)			
Victim was a 17-month-old boy	56% (156)	13% (35)	31% (87)
The murdered child was sexually assaulted	72% (203)	11% (31)	17% (48)
Victim's genitals were injured	65% (182)	12% (32)	23% (63)
Defendant was living in the U.S. illegally	23% (66)	9% (26)	68% (194)
Defendant's semen was found on murdered child's clothing & body	64% (179)	12% (33)	24% (67)
190.3 ITEMS (Mitigating Factors)			
Defendant likely to be well-behaved in prison	6% (17)	34% (94)	60% (164)
You have lingering doubts about defendant's guilt	1% (3)	81% (218)	18% (47)

Defendant grew up in hardship & poverty (in Mexico)	17% (49)	11% (32)	72% (203)
Defendant has no prior criminal history	14% (40)	37% (104)	49% (138)
Defendant hardworking immigrant from Mexico	17% (48)	15% (42)	69% (197)
Defendant generous and charitable to others	12% (35)	22% (61)	66% (183)
Evidence exists that child victim had older injuries inflicted by someone else	15% (41)	22% (60)	63% (170)