Instructing on Death

Psychologists, Juries, and Judges

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The American legal system depends on judicial instructions to structure jury death penalty decisions and thus avoid unconstitutional arbitrariness. Some death penalty instructions, however, provide woefully inadequate guidance and ignore schemas that lead jurors to misconstrue instructions. Empirical research has just begun to document sources of misunderstanding and ways to improve communication. Psychological research can assist in reducing arbitrariness in death penalty decisions, but even optimal instructions may not produce constitutionally sufficient consistency. To be constitutional, capital punishment must be imposed according to a consistent set of standards. Simultaneously, juries must be free to consider in mitigation any relevant case or offender characteristic. It is far from clear that this constitutional conflict between standards and discretion can be resolved.

Some of the most difficult of human choices are made by legal decision makers. We may accept that the gods are not fair in distributing health and wealth, but we feel entitled to fairness and accuracy from the legal system we have imposed upon ourselves (Diamond, 1983; Friedman, 1985). A continuous challenge faced by the legal system is how to ensure that decision makers treat like cases alike and treat cases involving relevant distinctions differently. Yet studies of criminal sentencing by legal decision makers from trial court judges (e.g., Diamond & Zeisel, 1975) to lay magistrates (e.g., Diamond, 1990) reveal inconsistencies in discretionary sentencing decisions.

Death penalty decisions pose a unique challenge for the legal system because the sentence of death is singularly severe and because only a death sentence is irrevocable. In giving this decision to a jury, as we do in most states with death penalty statutes, we are turning to a group of legal amateurs to resolve one of our most difficult conflicts. Although empirical studies generally give the jury high marks on its performance (e.g., Diamond & Casper, 1992; for reviews of this literature, see Cecil, Hans, & Wiggins, 1991; Hans & Vidmar, 1986; Hastie, Penrod, & Pennington, 1983), decisions on death raise some special problems for the jury. The question is, do juries provide acceptably consistent decisions about who should and who should not be put to death?

I begin with a brief legal history of the death penalty during the past 20 years, and discuss how jury instructions emerged as the primary vehicle for structuring and controlling jury decisions on death. In embracing the fiction of a passive and docile jury, the legal system has turned to jury instructions but ignored questions of instruction comprehensibility. Using the Illinois death penalty instructions, I examine potential sources of confusion in death penalty instructions and the inability of courts to evaluate those weaknesses in the absence of empirical data. I discuss the case of James Free, a defendant whose death sentence was overturned pending appeal on the basis of allegations that the jury instructions in his case were unconstitutionally incomprehensible. Empirical evidence laid the groundwork for Free's claims and provides a model for such work.

Next, I consider the limits of a focus on comprehensibility, showing how juror reactions to instructions are affected in unexpected ways by juror schemas that are generally ignored when jury instructions are written. After outlining a research agenda designed to assist policymakers in developing optimal jury instructions for death penalty cases, I return to the question of whether juries can produce consistent decisions on death. I conclude that some states provide woefully inadequate guidance, that instructions sometimes in fact *contribute* to confusion, and that psychological research can play an important role in decreasing, if not eliminating, the arbitrariness that permeates the decision making in capital cases. I then consider whether juries—or any other decision

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maker—can produce consistent death penalty judgments under *any* imaginable sentencing scheme acceptable within our legal system.

The Road to Structured Discretion

Legal Overview

Arbitrariness[1] in capital sentencing has been a serious topic on the public agenda for less than 25 years. In the years preceding 1972, juries across the United States[2] generally were given wide discretion and almost no guidance in determining whether a convicted defendant should be sentenced to death (Nakell & Hardy, 1987). During the 1960s, the NAACP (National Association for the Advancement of Colored People) Legal Defense Fund mounted a series of constitutional challenges in death penalty cases, temporarily halting executions across the United States. In *McGautha v. California* (1971), the Fund argued that the lack of standards and guidelines for the imposition of the death penalty denied defendants due process under the Fourteenth Amendment. The Supreme Court rejected this claim, but a year later, responding to a set of challenges to the death penalty based on the way defendants were being selected for execution, the Court in *Furman v. Georgia* (1972) found that death penalty determinations in Georgia were unconstitutional. The Court held "that the imposition and carrying out of the death penalty in these cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments" (pp. 239–240). Although each of the nine justices filed a separate opinion, a majority found an unlawful inconsistency in the way that the few convicted defendants who were sentenced to death were selected from among the many who were legally eligible for capital punishment.

Furman (1972) invalidated the death penalty statutes of 35 states, and legislatures across the country hurried to redesign their capital sentencing provisions in order to gain Court approval. Three fourths of the states now have death penalty statutes modeled on those that the Court approved in 1976 (*Gregg v. Georgia*). Since the states resumed executions in 1977, 190 offenders in 20 states have been put to death, and more than 2,500 offenders sit on death row. Although executions are occurring with increasing frequency, the offenders sentenced to death still represent a small portion of those who have been convicted of homicide, and the issue of arbitrariness in these determinations has been revisited by the Court in numerous cases since 1976 (e.g., *Zant v. Stephens,* 1983; *Mills v. Maryland,* 1988; *McKoy v. North Carolina,* 1990). It has yet to be resolved.

The Emerging Role of Jury Instructions in Death Penalty Cases

At first glance the task of deciding whether a defendant should be sentenced to death appears to be a simple one, and before 1972 trial courts treated it as if it could not have been simpler.[3] The jury, the decision maker in the majority of capital cases, received information about the defendant and offense and then decided whether death was the appropriate sentence. Before the *Furman* decision in 1972, juries generally received no further judicial guidance informing them how to reach a decision.

In *Furman* (1972) the Supreme Court concluded that the totally unguided practices of the states were producing death penalty decisions that were arbitrary or unprincipled. Justice Stewart compared the death sentence to a bolt of lightning, finding that the defendants selected for death sentences were a capriciously selected random handful of those whose conduct was equally reprehensible, most of whom did not receive a death sentence (p. 310). One might conclude from this objection that the states, in order to pass constitutional muster, could simply impose mandatory death sentences on all of those defendants convicted of particular offenses (e.g., murder), or of particular offenses committed under specified conditions (e.g., murder for hire). Indeed, North Carolina and Louisiana passed mandatory death statues in their attempt to meet the objections of *Furman.* The Court, however, held that these mandatory statutes ran afoul of the Eighth Amendment. Finding that mandatory sentencing substituted an inflexible decision-making standard and holding that the severity and finality of death make it qualitatively different from all other penalties, the Court concluded that a case-by-case determination was required to ensure that death was the appropriate punishment for that specific case. The mandatory capital sentencing schemes that North Carolina and Louisiana had established in response to *Furman* had the effect of eliminating individualized consideration and substituting automatic death sentences for particular offenses, with no regard to the character or record of the individual defendant or the circumstances of the particular offense. They were consequently rejected

[1] In discussing sentencing in capital cases, it is useful to make a distinction between arbitrariness and discrimination. Discrimination refers to a systematic difference in the likelihood that two individuals will be sentenced to death on the basis of legally irrelevant criteria such as the defendant's or the victim's race; arbitrariness arises when the probability of a death sentence differs across individuals in ways not predicted by case or offender characteristics. Thus, discrimination is statistically analogous to bias, and arbitrariness is statistically analogous to error in a sentencing model that includes all relevant case and defendant characteristics plus any variables that reflect discrimination. Although this distinction is followed throughout this article, the literature sometimes refers to *any* legally unacceptable source of variation in the probability of a death sentence as arbitrariness.

[2] Each state decides whether it will permit capital punishment. If a state permits executions, the sentencer will reach a decision on the death penalty in a particular case only if the prosecutor charges the defendant with a capital offense and requests a death sentence and the defendant is eligible to be sentenced to death under the relevant state statute.

[3] Justice Harlan was an exception. In *McGautha* (1971) he pronounced a system of unguided discretion as acceptable, not because he believed that it achieved substantial consistency because of its simplicity, but because he believed that it was "beyond present human ability" (p. 204) to identify in advance those characteristics of the defendant or the crime that call for the death penalty.

as unconstitutional (*Roberts v. Louisiana,* 1976; *Woodson v. North Carolina,* 1976).

The Court instead endorsed the notion of guided discretion—the establishment of sentencing schemes that would, through legal instructions, tell the decision maker what factors had to be found if a defendant was to be sentenced to death and would leave the decision maker with discretion to consider any relevant case or offender characteristics that might lead to the conclusion that a death sentence was not appropriate (*Gregg v. Georgia,* 1976; *Jurek v. Texas,* 1976; *Proffitt v. Florida,* 1976). Thus, the Court held, states could constitutionally execute offenders if they instructed juries properly about the factors they were to consider and the way those factors were to be weighed, because such instructions would produce rational and consistent death penalty determinations.

The Fiction of the Passive Jury

This reliance on jury instructions reinforced the notion that the death penalty decision is a simple one. It merely required an effective road map for the jury, one that states could tailor to their individual needs. The notion of guided discretion from jury instructions also suggested a simplistic view of the jury as a reactive, almost passive repository of death penalty decisions. The fiction of the passive jury permeates much traditional treatment of the jury by both researchers and the legal system. The jury is expected to absorb information and spew out a decision, much like an empty sponge can be filled with liquid and squeezed to obtain what it has absorbed. One example of this approach is the requirement in some states that the jury not be told what will happen to the defendant if they do not sentence him[4] to death. If the jurors pause in their deliberations to ask, they will be told that such concerns are not relevant to the task at hand, which is to determine whether *death* is the appropriate sentence for this defendant. The expectation is that such an admonition will erase the topic from the jurors' minds, just as deleting a file erases it from a computer's disk. Yet, as much research on the effect of admonitions on juries reveals, juries do not react like computer disks. Bald admonitions to disregard may fail to have their intended purpose (see, e.g., Sue, Smith, & Caldwell, 1973; Casper, Benedict, & Perry, 1989; Kramer, Kerr, & Carroll, 1990) and may even emphasize the information the jury is admonished to disregard (see Tanford, 1990).

A more realistic view of the jury sees its members as active decision makers (Diamond & Casper, 1992; Diamond, Casper, & Ostergren, 1989). From this perspective, it makes sense to consider and address the expectations and concerns that jurors bring to the task of deciding on death, rather than ignoring these signs of activity. Yet although the courts have paid a great deal of attention to jury *selection,* recognizing that all potential jurors are not alike, once selection is concluded they tend to treat the jury as a homogeneous, passive, and compliant decision producer. According to this view, the jury decides the facts on the basis of the testimony presented in court and then applies the law that the judge describes in the jury instructions.

Consistent with the passive model of the jury, the legal system focuses almost exclusively on the legal precision of the instructions given to inform the jurors about the law applicable to the case they are being asked to decide. A primary way to challenge the decision of a jury is to allege that the jury instructions did not accurately reflect the law. In attempting to avoid successful challenges, nearly all states have developed approved pattern jury instructions for commonly used legal instructions (Nieland, 1979). The published pattern jury instructions are readily available to the trial judge, and because of the endorsement they carry,[5] the trial court will assume that the wording of the pattern jury instructions will not be found objectionable if the case is appealed. The implicit assumption of both the trial courts and the appellate courts is that if a legally accurate instruction is given, the jury will (a) understand its meaning, (b) accept its implications, and (c) apply it predictably and appropriately to the facts of the case. The cases are replete with examples of court assumptions about the meaning a reasonable jury will take from a particular jury instruction (for a review, see Steele & Thornburg, 1988). But as we shall see, there is ample reason to believe that problems arise in many capital cases at each of these stages—in comprehension, in acceptance of the instruction, and in application.

Examining Jury Comprehension of Death Penalty Instructions

A Statutory Example

To illustrate these sources of discontinuity between legal expectations about jury reactions and actual jury reactions, it is useful to examine some jury instructions. The states of course are free to design their own individual standards, as long as those standards are constitutionally acceptable. Under the Illinois Death Penalty Act, the prosecution may request a capital sentencing hearing after a defendant pleads guilty to or is convicted of murder (Ill. Rev. Sta., 1991). The Illinois statute lists seven aggravating circumstances (e.g., the murdered person was intentionally killed in the course of another felony), at least one of which must be proved beyond a reasonable doubt before the defendant is deemed eligible for a death sentence.[6] If the jury unanimously finds that at least one of these statutory aggravating factors has been proved, the defendant is eligible for the death penalty and the jury must then consider all aggravating and mitigating factors in reaching a decision. The instructions provide a list of

[4] The vast majority of capital defendants have been men (but see Rapaport, 1991).

[5] Indeed, some states require that the pattern instruction be used whenever one is available that is applicable to the case (e.g., Illinois Revised Stat., ch. 110A, sections 239 [civil] and 451 [criminal]).

[6] In addition, the state must prove that the defendant was at least 18 years old when the offense was committed.

several mitigating factors concluding with "any other reason supported by the evidence why the defendant should not be sentenced to death." The jurors are then told that if they unanimously determine that there are no mitigating factors *sufficient to preclude* the imposition of the death sentence, they should sign the verdict form requiring the court to sentence the defendant to death. Otherwise, in an extraordinary sentence with four negatives, they are told "If you do *not* unanimously find from your consideration of all the evidence that there are *no* mitigating factors sufficient to *preclude* imposition of a death sentence, then you should sign the verdict requiring the court to impose a sentence *other than* death [all italics added]."

Understanding the Message

Unfamiliar phrases, such as *sufficient to preclude,* and awkward or complex sentence constructions impose obvious obstacles to juror comprehension. In addition, however, some words that appear familiar may be misunderstood because they have multiple meanings. For example, although *aggravating* is a common word, its common use in informal speech is frequently different from its use in death penalty instructions. The Illinois Pattern Instructions tell the jurors only that "aggravating factors are those facts or circumstances which provide reasons for imposing the death penalty." In everyday speech, the term *aggravating* often refers to annoying or irritating behavior, as in "It is so aggravating when someone tells you the ending of a movie you haven't seen yet." In death penalty instructions, aggravating has the more serious meaning "to make worse or more severe." Confusion between these meanings can affect the standard used by jurors to judge a potential aggravating factor.

Even assuming that the specific words used in these instructions are generally understood by a majority of jurors, the Illinois sentencing scheme is fraught with ambiguity. Suppose that the defendant was a victim of child abuse and a juror thinks that the history of abuse, that is, the defendant's own victimization, should be considered a mitigator. If his or her fellow jurors believe that the defendant's history of being abused as a child deserves no weight, is the lone juror nonetheless permitted to consider the defendant's history? Do all of the jurors have to agree that this factor *is* a mitigator before one of the jurors can go on to decide that it is *sufficient* mitigation to make him or her vote against the death penalty? And does the statute require a *single* mitigator that is sufficient to justify a vote against the death penalty? If a juror thinks that neither the defendant's honorable release from the army nor his history of child abuse is by itself a mitigating factor sufficient to preclude death, can the juror properly find that these two factors are sufficient when considered together? A conscientious juror understandably could be confused.[7]

Even if jurors understand that a mitigating factor is one that mitigates against the imposition of the death penalty, recognizing a mitigating factor may be difficult. Jurors in Illinois are provided with a list of examples of mitigating factors, and one factor on the list is "no significant history of prior criminal activity." What should a juror do if the defendant has a history of burglary but no previous violence? According to death penalty jurisprudence, a juror must be permitted to consider any aspect of a defendant's character or record, or any circumstance surrounding the crime that indicates that the defendant does not deserve to be sentenced to death (*Penry v. Lynaugh,* 1989). Thus, a juror is legally permitted to consider a nonviolent, albeit extensive, criminal history as a mitigating factor. The jury instructions, however, provide only vague guidance. Moreover, in providing jurors with a list of examples of mitigating factors, the instructions may appear to imply that any nonlisted mitigator must be comparable to those listed. That inference would be inconsistent with the constitutional requirement that jurors must be free to consider any potentially mitigating circumstances (*Lockett v. Ohio,* 1978). What on the surface may appear to be a simple road map is actually a complex set of potentially confusing directions.

Improving Comprehension

More than a decade ago at the same time that states were just beginning to design death penalty pattern instructions that would structure jury discretion, some psychologists studying jury behavior focused their attention on jury comprehension of judicial instructions in common criminal and civil cases. In the most elaborate of these efforts, Amiram Elwork, Bruce Sales, and James Alfini (1982) examined juror comprehension of several frequently used pattern jury instructions. They showed not only that comprehension was low, but also that it could be significantly improved when the instructions were rewritten using a combination of psycholinguistic tools and common sense. For example, jurors who responded to the original instructions given in a case of attempted murder averaged 51% correct; after the second rewrite of the instructions, performance averaged 80% correct. In a similar effort, Lawrence Severance and Elizabeth Loftus (1982) examined the questions that jurors asked about judicial instructions during deliberations to identify sources of misunderstanding. They measured jury comprehension for standard instructions concerning topics such as reasonable doubt and intent, showing that juror comprehension was frequently low and that they could significantly improve comprehension by rewriting the instructions—by simplifying language, changing order, and improving sentence construction. Yet despite its promise, the innovative research begun a decade ago has not substantially affected the writing or evaluation of jury instructions. Although a few jurisdictions acknowledged the comprehension problem and rewrote some of their pattern jury instructions (e.g., Pennsylvania, Alaska, Ari-

[7] The legally correct answers to these questions are yes, no, no, and yes.

zona, Florida), on the whole, the legal response has been limited.

If research on standard criminal and civil instructions has been limited, empirical research on death penalty instructions has been almost nonexistent (for an exception, see Luginbuhl, 1992). This lack of attention from researchers has given legislatures and courts evaluating judicial instructions in death penalty cases no choice; they have been forced to make assumptions or to speculate about what jurors do and do not understand the judicial instructions to mean. And yet there is an interesting trail of implicit invitations to empirical research running through the court opinions. The Supreme Court has framed the question of judicial instruction in capital cases in much the way that another area of the law has invited and regularly accepts empirical research. In cases of alleged trademark infringement and deceptive advertising, the courts have said that literal or judicial interpretations of a message are "at best not determinative and at worst irrelevant. The question in such cases is—what does the person to whom the advertisement is addressed find to be the message?" (*American Brands, Inc. v. R. J. Reynolds,* 1976, p. 1357). Empirical studies testing what messages consumers take away from an advertisement are regularly presented in court and often form the primary evidence used to determine whether an advertisement will be prohibited. In cases dealing with death penalty instructions, the Court has posed much the same audience-grounded question, "The question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning" (*Francis v. Franklin,* 1985, pp. 315–316).

In the absence of empirical evidence on juror comprehension, the U.S. Supreme Court in case after case has simply looked at the language of the instructions given to the jury and decided what jurors would have understood. Thus, the judge in a California death penalty case told the jurors that they were not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" (*California v. Brown,* 1987, p. 542). One of the questions on appeal was, what meaning did jurors take from the inclusion of *sympathy* on this list? Jurors are generally cautioned not to allow sympathy to affect their judgments on guilt or innocence, or their decisions on liability and damages in civil cases. Death penalty cases, however, are different. Prior cases suggested that sympathy for the defendant might be a permissible basis for a vote against the death penalty, because in deciding on death, jurors must be able to consider any relevant mitigating evidence regarding the defendant's character or background and the circumstances of the particular offense. As a result, the California Supreme Court found that the trial court judge had violated the federal constitution when he instructed the jury not to be swayed by sympathy.

The case was then appealed to the U.S. Supreme Court, and the Supreme Court found that the instruction given by the trial judge did not violate the federal constitution. The Supreme Court distinguished between *sympathy* and *mere sympathy,* deciding that although the sympathy rooted in the evidence presented during the penalty hearing could be part of a jury determination, sympathy not based on the evidence would be impermissible. The Court then decided that the phrase *mere sympathy* meant sympathy not based on the evidence. Therefore, a judge could properly instruct a jury not to be swayed by *mere* sympathy.

The Court then analyzed how jurors would have understood the instruction on sympathy in *California v. Brown* (1987). According to the Court, a reasonable juror would have applied the *mere* at the beginning of the instruction (mere sentiment, conjecture, sympathy, etc.) to *sympathy* and not simply to *sentiment,* so that the jurors must have understood the instruction (properly) to warn against the use of sympathy alone. If a legal system seriously entertains a criterion of juror understanding as a basis for endorsing a particular jury instruction, it should not be forced to apply these uncertain mental gymnastics to analyzing possible meanings of a potentially ambiguous sentence. Empirical research in this, as in many other instances, could easily have replaced speculation.

This case is not unique in the history of death penalty decisions. Courts rarely have been presented with empirical evidence to show how jurors do indeed understand the instructions they receive in death penalty cases. One likely reason why the necessary data have not been produced is that states individually determine the instructions they will give in capital cases and the instructions differ substantially across states.[8] For example, California provides jurors with a single list of factors they may consider and does not distinguish between aggravating and mitigating factors (CALJIC, 1988).[9] Although general principles might be extracted that would apply across jurisdictions, any serious court challenge probably would require evidence on the level of miscomprehension associated with the particular instruction at issue.

The end result is that miscomprehension in death penalty cases may be a crucial policy issue, but the scant scholarly attention to comprehension of death penalty

[8] States also differ in the basic structure they use to guide juror discretion. States such as Georgia, which uses a "threshold" statute, list specific aggravating circumstances and tell the jury that any one of them is sufficient for a death sentence; the jury has complete discretion to impose the death penalty once it finds a single aggravating circumstance. States such as Florida, which uses a "balancing" statute, direct jurors to weigh aggravating and mitigating circumstances against one another. The jury's decision on life or death under Texas's "directed" statute is strictly determined by its answer to three questions on intent, absence of provocation, and likely future dangerousness of the defendant (Bowers & Vandiver, 1991).

[9] At the end of its list of possible factors, California adds "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." Note that "extenuates the gravity of the crime" means "makes the crime *less* serious."

instructions has left courts to guess at juror meanings or to assume juror comprehension. Empirical research on death penalty instructions has not been carried out, although research on other jury instructions has demonstrated that low comprehension rates occur and that comprehension can substantially be improved.

In the absence of independent scholarly interest in death penalty instructions, the cost of the required tailored research has posed a significant obstacle. The cost of conducting research in the trademark and deceptive advertising areas is borne by the litigants who have the resources to make that kind of investment. Death penalty defendants on the other hand are often indigents whose cases are handled by public defenders with limited litigation coffers or on a pro bono basis by private attorneys who are already donating their time. In the absence of scholarly initiative and donated services to conduct special purpose studies of juror comprehension coupled with court cooperation to facilitate juror participation in the research, such studies simply are not done.

An Application of Social Science Evidence

An exception to this deafening silence occurred last year. Hans Zeisel, whose pathbreaking research on the jury (Kalven & Zeisel, 1966) became the model for empirical scholarship on law, worked with the McArthur Justice Center to produce a study of juror comprehension involving death penalty instructions in Illinois. The Zeisel survey became the basis for a hearing on the constitutionality of the jury instructions used in the death penalty hearing of James Free. Free alleged that the incomprehensibility of his jury instructions violated his constitutional rights, and the survey research provided the primary evidence supporting his claim.

In January of 1992, I, along with several other social scientists (Hans Zeisel and Valerie Hans), a statistician (Peter Rossi), and a linguist (Judith Levi), testified in an unusual fact-finding hearing devoted entirely to the issue of jury comprehension in the Free death penalty case. Free's attorneys had presented Zeisel's survey evidence to the federal judge hearing Free's petition for habeas corpus relief, and the judge ordered a hearing before a federal magistrate to evaluate the reliability and validity of the evidence of jury miscomprehension produced in the survey. The question before the magistrate was whether the jury instructions used to structure the death penalty decision of the Free jury were so confusing as to provide constitutionally inadequate guidance to the capital sentencing jurors. Zeisel had concluded, on the basis of his survey of Illinois jurors, that the instructions provided misleading or ambiguous guidance to the jurors. The judge, in ordering the hearing to evaluate the Zeisel findings, accepted the petitioner's argument that empirical evidence should where possible replace judicial speculation about what jurors comprehend. The potential significance of the case went beyond the petitioner, James Free: The instructions he objected to were substantially comparable to the standard instructions that had been given to jurors making death penalty determinations throughout Illinois over the past decade.

The survey presented to the court was conducted in a Chicago courthouse and involved a sample of jurors waiting to be called to courtrooms. The respondents heard and read a description of the evidence and the jury instructions from a sentencing hearing. They then read a series of juror decisions, each of which described what a hypothetical juror believed about the facts in the case and whether the juror voted in favor of putting the defendant to death. The respondents were asked in each instance whether the hypothetical juror correctly followed the judge's instructions. For example, one question was as follows:

> A juror decides that the fact that Mr. Woods did not actually rape either of the women is a mitigating factor sufficient to preclude the death penalty. She votes against the death penalty.
>
> Did this juror follow the judge's instructions?

The survey included several questions designed to assess the same general issue: Did jurors understand that the instructions allow jurors to consider as a possible mitigator *any* reason supported by the evidence why the defendant should not be sentenced to death, or did they assume that a mitigator had to be comparable to the ones enumerated by the judge in his instructions? Between 40% and 68% of the respondents answered each of the relevant questions incorrectly, suggesting that a substantial number did not understand that jurors must be given the opportunity to consider any mitigating factors, even those not specifically mentioned by the judge. In addition to the seven questions relating to the issue of comparable mitigators, questions were included on the survey that assessed juror comprehension in four additional areas.

Several of us testified that the survey was methodologically sound and that the results were consistent with related findings. In addition, quite serendipitously, some research Jonathan Casper and I had been conducting on a hearing involving the death penalty had also used instructions based on the Illinois Pattern Jury Instructions.[10] In our research we used a videotaped death penalty hearing and jurors currently at court for jury service. We asked jurors a number of questions concerning their comprehension of the instructions, and the study showed that jurors could do very well on questions that did not concern the use of aggravating and mitigating factors. As in Zeisel's survey, however, jurors' performance on questions involving aggravating and mitigating factors showed relatively high rates of error. Moreover, because a randomly selected subset of the jurors in our study had deliberated, we could provide evidence on the issue of whether deliberation could be depended upon to cure those misunderstandings. It could not.

[10] We studied a death penalty case as part of a larger investigation evaluating juror responses to decision consequences and to experts. The first case we examined in this research was a civil antitrust suit (Diamond & Casper, 1992).

In July 1992, sadly four months after Hans Zeisel died, the magistrate issued his recommendations. Relying heavily on the empirical evidence and testimony, he concluded that neither the Illinois Pattern Jury Instructions in Death Penalty Cases nor the instructions given to James Free's jury are intelligible or clear enough to provide even a majority of jurors hearing them with an adequate understanding of how they are to go about deciding whether the defendant lives or dies. Thus, the jury instructions permit the arbitrary and unguided imposition of the death penalty . . . in violation of the Eighth and Fourteenth Amendments (*Free v. McGinnis,* July 7, 1992). Two months later, the federal judge accepted the magistrate's recommendation and ordered a new death penalty hearing for Mr. Free (September 24, 1992). The case is currently on appeal before the Federal Court of Appeals for the Seventh Circuit. Whatever the ultimate outcome, these opinions indicate at least some members of the judiciary are open to scientific evidence that particular jury instructions allow unacceptable arbitrariness in death penalty decision making.

Beyond Comprehension

To this point the focus has been on communication problems posed by the language of current death penalty jury instructions. But even if the language and structure of jury instructions are clarified, even if psycholinguists and social and cognitive psychologists contribute their skills, and even if courts and judicial committees are receptive to these efforts, instructions that simply use more user-friendly language are unlikely to dispel some major sources of lawlessness in capital sentencing. Unless social scientists studying juror reactions to instructions go beyond the passive sponge-like model of the jury and attend to juror expectations and beliefs about courts and the legal system, juror responses cannot achieve the predictability properly demanded of death penalty determinations. Jurors may resist even the most clearly worded directions.

One example of the limits of a focus on instructions comes from the jury study I referred to earlier (see Footnote 10). We have been looking at the way jurors react to judicial instructions when the instructions do or do not tell them about the consequences of their decisions. In one version of the death penalty hearing we have studied, the judge informs the jurors that the defendant will be sentenced to life in prison without the possibility of parole if the jury decides not to sentence him to death. In another version of the case, the judge gives the jurors the traditional message—that the defendant will be sentenced to a term in prison if he is not sentenced to death. We anticipated that jurors would be strongly influenced by this difference. Interviews with jurors in capital cases by William Bowers and his colleagues suggest that jurors are troubled about the prospect of a capital defendant's future release, fearing that if they do not sentence him to death he will eventually be set free to kill again (Bowers & Vandiver, 1992). Future dangerousness is often a crucial issue and the subject of expert testimony at death penalty hearings (Marquart, Ekland-Olson, & Sorensen, 1989). Yet in our research, information on what the defendant's alternative sentence will be if he does not receive the death penalty has had an insignificant effect on the rate at which the jurors favor a death sentence (see Footnote 10).

Why should this be? The answer appears to lie in the expectations that jurors have about the criminal justice system. Although the jurors in our study accurately recalled the judge's instruction and were able to play back the message that the judge would sentence the defendant to life in prison without the possibility of parole, only half of the jurors said they believed that the defendant would die in prison if he received such a sentence. Moreover, this belief appeared to have crucial repercussions. Jurors who believed that the defendant eventually would be released were twice as likely to sentence him to death as those who believed he would die in prison.

If we recognize that jurors are concerned about parole possibilities, simply telling them that the defendant will receive a natural life sentence is not enough, because the communication conflicts with their beliefs about the criminal justice system. And indeed these beliefs are not the mad ravings of irrational jurors. A life sentence traditionally has *not* meant life imprisonment, but generally a substantially shorter period, more like 8 to 12 years with good behavior. Jurors may not know how long defendants who are sentenced to life in their state generally serve, but they have been exposed often enough to stories in the media about defendants who received life sentences and were later released to have well-founded doubts about the meaning of a life sentence. If the words "natural life without the possibility of parole" are to mean what they clearly say, jury instructions are needed that will confront the jurors' prior but erroneous knowledge about this category. Thus, during their deliberations our jurors used the periodic parole hearings of Charles Manson as an example of evidence that someday the defendant in the case they were deciding would in fact be eligible for parole, despite what the judge had told them. Illinois instituted the sentence of life in prison without the possibility of parole in 1979, and no defendant sentenced under that statute has been paroled.

The traditional approach to jury instructions is to tell the jury only what it is supposed to do, and to avoid directing attention down any false paths the jury might consider, in the interest of economy and avoiding diversion. But failing to address the erroneous beliefs that jurors *do* have does not make those beliefs go away, and it does not neutralize them. The schemas jurors bring with them about crime and punishment can have powerful effects on perception, attention, and recall (Fiske & Taylor, 1991). Therefore, by failing to take account of jurors' constructions of the legal world, even psycholinguistically purified instructions may fail to achieve high levels of comprehension.

To take another example, in most jurisdictions the state must prove the existence of aggravating factors be-

yond a reasonable doubt, a standard expected by jurors familiar with Perry Mason or "L.A. Law," or those who have just sat through a criminal trial. In contrast, to reach a decision on the death penalty, the juror is given a standard for judging the existence of mitigating factors, and this standard may only require proof by a preponderance of the evidence or "to the juror's satisfaction," a standard meant to be lower than beyond a reasonable doubt. Unless the judge points out the difference and makes it clear that the standard is quite different, jurors may easily miss the importance of the shift and rely on an ill-fitting schema that their prior experience has constructed (Luginbuhl, 1992).

The potential that jurors will be confused or misunderstand instructions because they have schemas that conflict with the applicable law extends throughout legal decision making and is not confined simply to death penalty cases. Vicki Smith (1991), for example, has shown how lay images of typical burglary and kidnapping cases influence the ability of laypersons accurately to categorize cases that do and do not meet the legal criteria. The active juror who can be misled by instructions that do not directly confront his or her beliefs and expectations deserves more attention from the legal system. In death penalty cases, ignoring the distortions that arise when jury instructions are misunderstood may have particularly dire consequences.

Policy Implications and a Research Agenda

Research on the interplay among juror expectations, comprehension, and judgments can enrich our understanding of how naive decision makers deal with complex tasks; this research also has policy implications. The response of the U.S. Supreme Court to some earlier work by psychologists on the death penalty does not inspire confidence that the U.S. Supreme Court will be a receptive audience (e.g., *Lockhart v. McCree,* 1986; *McCleskey v. Kemp,* 1987). It may be, however, that courts will be more interested in empirical evidence on the subject of jury instructions in capital cases. Courts have already demonstrated concern over signs of misunderstanding of instructions by jurors in capital cases. The ultimate fate of the evidence presented in Mr. Free's case may provide a clearer indication of the level of court interest in instructions that realistically communicate with jurors.

Courts are not the only potential policy audience for this research, and they may not be the most receptive one. State legislative committees and judicial commissions are responsible for drafting and proposing changes in pattern instructions and capital punishment statutes. Tanford (1991) found that when it came to adopting changes in procedures concerning jury instructions based on social science evidence (e.g., providing written instructions), legislative committees and judicial commissions were more likely to use the available social science research findings than were courts that dealt with the same issues. This pattern may be particularly pronounced for questions about the content of death penalty instructions. An appellate court that overturns a death sentence based on the incomprehensibility of the pattern jury instructions logically opens the door to challenge by other defendants who were sentenced under similar instructions. In contrast, when a drafting committee revises a set of death penalty instructions, it is simply engaged in the normal progressive work that attempts to facilitate effective decision making. A revised set of instructions does not necessarily imply unconstitutional flaws in the set of instructions being replaced.

If we assume that a progressive legislative drafting committee is preparing to revise the pattern jury instructions in death penalty cases, how might we create an optimal information base on which revisions might be constructed? The research agenda that would produce the most comprehensive guidance to such a committee would involve a three-pronged cross-disciplinary approach designed to evaluate the extent and sources of inconsistency in capital sentencing and an experimental program to test the revisions expected to reduce that inconsistency.

Research to Evaluate the Extent of Inconsistency

Archival research on sentencing patterns. One way to document arbitrariness in an existing system of capital sentencing is to examine the decisions that the system has already made in capital cases. In a number of jurisdictions, researchers have assessed arbitrariness in capital sentencing indirectly in the course of studies aimed primarily at detecting racial discrimination in capital sentencing. Early archival studies consisted of relatively gross assessments of the case characteristics that could predict whether or not a defendant had been sentenced to death. More recently, researchers have collected and analyzed the potential influence of hundreds of case characteristics on death penalty decisions. Moreover, they have conducted longitudinal analyses to assess the influence of these various case characteristics on the entire sentencing process, from the charging decision through the ultimate sentencing decision (e.g., Nakell & Hardy, 1987, in North Carolina; Baldus, Woodworth, & Pulaski, 1990, in Georgia). In each of these studies, the sentencing models based on the myriad of measured case characteristics were unable to explain a large portion of the variation in the decision whether to impose the death penalty.

Although inconsistent decision making probably accounts for a significant portion of the unexplained variation, it is hypothetically possible that sentencing models that included unmeasured or more sensitively measured case characteristics would show higher levels of consistency. In view of the substantial unexplained variation despite the carefully constructed and numerous measures included in these studies, however, it is unlikely that unmeasured variables are the primary reason for the substantial inconsistency revealed in these studies. This possibility, nonetheless, offers a convenient rationale for

discounting the results of such an archival analysis to an audience that may not be inclined to acknowledge the existence of undependable decision making in capital cases. Moreover, even if policymakers accept that some portion of the unexplained variance is attributable to arbitrariness, these studies provide no significant guidance as to what it is about the jury instructions that permitted or facilitated the inconsistency and how the instructions might be modified to reduce that inconsistency.

Posttrial interviews with jurors in capital cases. Interviews with jurors who have decided death penalty cases potentially offer a more direct source for assessing the determinants of juror decisions and in particular for detecting inconsistent understandings and misconceptions jurors have about the law they were called upon to apply in these cases. For example, Geimer and Amsterdam (1988) conducted an exploratory interview study with 54 jurors in 10 Florida capital cases. In 5 of these cases the jury recommended death, and in 5 the jury did not recommend death.[11] The jurors' responses suggested that a number of them had used legally impermissible criteria in deciding whether to impose a death sentence.

Currently, a more extensive and systematic national interview study is being conducted by a consortium of researchers (Bowers & Vandiver, 1991). Using a structured interview format, investigators are attempting to interview 4 randomly selected jurors from 30 capital trials in each of eight states. The project is not focusing specifically on juror comprehension of instructions, but in the course of collecting juror reports on the factors that influenced their decisions to vote for life or death, the researchers are compiling extensive data on the extent to which instructions left jurors with misconceptions about the law. For example, in a preliminary report on 30 Kentucky jurors, Marla Sandys (1991) found that 75% of them believed, incorrectly, that all jurors had to agree on a mitigating factor in order for it to be considered in the sentencing decision.

The interview studies have two important strengths. First, because they involve jurors in actual capital cases talking about their decisions in those cases, they may detect juror reactions that otherwise would be missed and may identify relevant or influential case characteristics that researchers have not thought of or that cannot be measured from a paper record of the hearing. In addition, these studies cannot be charged with the lack of realism Chief Justice Rehnquist used to dismiss some of the simulation research presented in *Lockhart v. McCree* (1986; Ellsworth, 1988).

The limitation of posttrial interviews (or questionnaires) is that they generally cannot be conducted or distributed immediately after trial. As a result, failure to recall instructions accurately at the time of the interview may be attributed in part to memory loss as opposed to miscomprehension at the time of the trial.

Hypothetical cases and instructions. The research approach offering the greatest control for directly assessing juror comprehension of judicial instructions involves the presentation of a set of instructions and an immediate assessment of juror comprehension. It is the method used in the survey presented in the *Free* (1992) case and the general approach that researchers studying jury instructions in noncapital cases have used. Some researchers have simply read portions of instructions to the jurors and then asked the jurors to paraphrase the instruction (e.g., Charrow & Charrow, 1979) or answer questions about the meaning of the instruction (e.g., Strawn & Buchanan, 1976). Others have shown jurors an abbreviated trial along with instructions before testing juror comprehension (e.g., Elwork, Sales, & Alfini, 1977; Severance, Greene, & Loftus, 1984). Some have tested individual juror responses (e.g., Charrow & Charrow, 1979), and others have had groups discuss the instructions before answering questions in an attempt to create an analog for deliberation (e.g., Elwork et al., 1982; Severance et al., 1984). Some have asked only abstract questions, and others have tested jurors' ability to apply the instructions to particular fact situations or in response to a complete trial.

The methodological approach used to assess juror comprehension can have a substantial effect on the performance level of the jurors. For example, giving jurors a copy of the instructions to refer to as they answer questions about the meaning of the instructions should increase performance levels by minimizing the effects of memory and focusing exclusively on comprehension. Testing procedures that require the jurors to articulate rather than simply recognize correct interpretations are likely to result in lower performance levels. Thus, in assessing jury comprehension levels for current jury instructions, a committee considering the need for change must take into consideration the difficulty of the test as well as the level of jury performance. For example, moderately high error rates on simple recognition tasks when jurors have a copy of the instructions in front of them suggest that the instructions pose a serious problem of miscomprehension.[12] Low error rates, however, may be only partially reassuring. If they are obtained from tests of comprehension that do not assess jurors' ability to apply the instructions to the facts of a case, the test may fail to reveal obstacles to optimal juror use of instructions.

Research to Test the Influence of Innovative Instructions on Comprehensibility

Experimentation is the final stage in a research program designed to help draft death penalty jury instructions to maximize comprehension. Because death penalty in-

[11] In Florida the jury's role is advisory; the judge may accept or reject the jury's recommendation on the death penalty.

[12] Note that policymakers must also decide what level of miscomprehension is tolerable. It is unrealistic to expect 100% comprehension by every juror (Perlman, 1986); the comprehension level that is realistically attainable probably will vary according to the complexity of the ideas being conveyed and the conceptual clarity of the applicable law (Elwork & Sales, 1985).

structions have received little attention from psychologists, experimental studies that test the effect of various approaches to the instructions used in capital cases are almost nonexistent (Hans, 1988). Yet experimental research offers the most direct strategy for evaluating the extent to which changes in instructions can improve juror comprehension and accurate application of the instructions. Good advice on strategies to use that will improve the clarity of instructions is available (Elwork et al., 1982), but without an empirical test of a suggested change, the alteration may produce unexpected results. Thus, when Charrow and Charrow (1979) found that the phrase *proximate cause* was unclear to many jurors,[13] they decided to test the phrase *legal cause* as a substitute. Their research unexpectedly revealed that some respondents assumed that legal cause meant the opposite of illegal cause. The crucial point is that armchair speculation on improved language goes only so far.

Note that although there is substantial practical advice to guide the writing of clearer instructions, the more recent evidence on the importance of schemas and their effect on comprehension suggests the need to go further. Exploratory studies that use open-ended interviews and focus groups to get jurors to discuss their assumptions and expectations offer the best way to learn which ones are mistaken and need to be addressed in order to facilitate rational and consistent jury decisions.

Ultimately, although the hope of policy influence no doubt encourages a great deal of good research, if researchers are interested in affecting policy and in particular in influencing the courts, they must at the least be prepared to engage in sustained research efforts and to be highly tolerant of long gaps in partial reinforcement intervals. In December 1991, the California Supreme Court struck down the pattern jury instruction on proximate cause, in part because an empirical study revealed that the instruction caused juror confusion (*Mitchell v. Gonzalez,* 1991). The empirical study by Charrow and Charrow (1979) had been published 12 years earlier.

Is it Possible to Achieve Constitutional Consistency in Death Penalty Decision Making?

Although psychological research can contribute to *reducing* arbitrariness in capital sentencing, a fundamental question remains: Can lay juries—however carefully instructed—or even professional judges schooled in the relevant legal principles, make acceptably rational and consistent decisions selecting the few defendants to execute from the many homicide defendants who are legally eligible for death sentences?

In the end, the task may simply be impossible to accomplish. First of all, there is no agreed-upon standard to use as a guide for assessing jury (or judicial) decisions on death. Thus, we can intelligently ask whether a defendant was properly convicted in light of the evidence. But, in contrast, asking whether a particular defendant was properly sentenced to death only makes sense if the question refers to the procedures used, and not to the result. There is no fact or correctness referent. In any sentencing decision, competing goals may point in different directions. When the goal is solely to punish in proportion to the culpability of the defendant, the sentencer rationally will focus on the egregiousness of the act, and in fact many jurors do cite the adage "an eye for an eye" in explaining why they favor a death sentence. When the primary goal is incapacitation, the decision maker may consider the likely future dangerousness of the defendant. But consider a defendant convicted of a capital offense who has a long history of violence and who happens to be mentally retarded. The U.S. Supreme Court has said that the sentencing decision maker may be permitted to consider mental retardation as a mitigating factor in deciding whether a defendant should receive the death penalty (*Penry v. Lynaugh,* 1989). Yet, that very characteristic coupled with a violent history could convince a reasonable decision maker concerned less with desert or retribution and more with the defendant's potential for future violence that this defendant should receive a death sentence. How should desert and incapacitation be weighed? Moreover, how can any balancing of aggravating and mitigating factors be done with consistency without some scoring sheet that assigns weights in advance to specified attributes?

In the 1970s, addressing concern about inconsistency in criminal sentencing, a number of states developed sentencing guideline schemes to provide more direction to judges in sentencing defendants. These guideline systems generally use point systems to arrive at presumptive sentences for particular combinations of offense and offender characteristics. Judges may choose not to give the presumptive sentence, but if they do so, they generally must explain the reason for their deviation. There is a good deal of disagreement about the fairness and even about the effect of sentencing guidelines in producing consistency in sentencing (see, e.g., Tonry, 1989, discussing the federal sentencing guidelines). But even assuming that guidelines do channel the decisions of the judges they are meant to guide, can similar guidelines be constructed that will lead to consistent choices on whom to sentence to death? The U.S. Supreme Court has repeatedly ruled that, consistent with the Eighth and Fourteenth Amendments, the decision maker in a capital case must be able to consider and give effect to all evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty (e.g., *Penry v. Lynaugh,* 1989). The death penalty may be unimaginable without that safety valve, but the valve invites inconsistency.

Thus, death penalty decisions may simply face a *consistency ceiling* that cannot be penetrated. As in many

[13] A proximate cause is one that contributes substantially to a particular outcome. If a person proximately causes another's injury by acting negligently, the injured party can sue and recover damages for that injury. A proximate cause is thus sometimes called a *legal cause.*

other complex tasks, we are limited in our ability to structure and control decision making while preserving sensitivity to the demands of the task. An inherent and unavoidable conflict may exist between the twin legitimate legal demands of death penalty jurisprudence when it comes to decisions on death. Because death is constitutionality different from all other criminal sentences, arbitrariness in decisions on death is not to be tolerated; the margin for permissible inconsistency must be minimal. At the same time, the decision maker in a capital case must be free to consider any possible factor in mitigation. It may simply be impossible to meet both of these requirements.[14]

In most of this discussion I have urged research that aims at identifying ways to reduce arbitrariness, because there is ample evidence that arbitrariness can be reduced significantly. This does not mean, however, that any remaining arbitrariness will be insubstantial. In the end, arbitrariness may be a symptom of an incurable congenital defect in death penalty decision making. The structural factors described earlier suggest limits on our ability to design a system for selecting defendants for death that preserves flexibility and at the same time avoids substantial inconsistency. If further research demonstrates that clearer instruction is unable to produce a level of predictability compatible with public policy and moral considerations, then we may have to acknowledge that a consistency ceiling exists. If it turns out that arbitrariness or crude inflexible standards are the inevitable price of capital punishment, we may ultimately decide that the price is too high.

[14] Justice Scalia acknowledged in *Walton v. Arizona* (1990) that there is an inherent conflict between demanding a high level of consistency in capital sentencing and requiring an unfettered opportunity for the decision maker to consider any relevant mitigator. Because he finds that the Constitution does not demand that the decision maker be permitted to consider every possible mitigator, he would simply remove that requirement in order to resolve the conflict. No other member of the Court has endorsed this position.

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