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What One Hand Giveth, The Other Taketh Away: How Future Dangerousness Corrupts Guilt Verdicts and Produces Premature Punishment Decisions in Capital Cases

Elizabeth S. Vartkessian*

I. Introduction

Contemporary death penalty trials are conducted in two parts—the first to determine a defendant's guilt and, if they are found guilty, the second to decide the punishment—in order to ensure that penalty considerations are made separate from guilt decisions. The widespread adoption of bifurcating capital trials into two phases followed the United States Supreme Court's decision in *Furman v. Georgia*,[1] which found the administration of the death penalty unconstitutionally arbitrary and possibly discriminatory under then prevailing statutes. Prior to *Furman*, most states with capital punishment conducted unitary proceedings during which the defendant's guilt and penalty were determined concurrently.[2] However, in addition to placing defendants in the challenging position of arguing against their guilt while also arguing for a sentence less than death, unitary trials risked preventing jurors from

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

2. Prior to the Court's decision in *Furman*, some states, such as New York, Pennsylvania, and California, had changed their capital sentencing statutes to reflect the growing belief that bifurcated trials would provide additional safeguards to capital defendants absent in a unitary proceeding. *See* Gerhard Mueller & Douglas Besharov, *Bifurcation: The Two Phase System of Criminal Procedure in the United States*, 15 WAYNE L. REV. 613 (1968).

being given complete access to the most relevant evidence available with respect to sentencing.[3] Amidst growing concerns that such trials permitted an unlawful amount of arbitrariness in the penalty decision, the Supreme Court delivered their judgment in *Furman*, signaling the end of unitary capital trials and unfettered discretion in capital sentencing.

Yet, it was the Court's decision in *Gregg v. Georgia* and its companion cases that cemented the role of bifurcation in modern capital sentencing.[4] In response to the Court's decision thirty-five states passed new death penalty statutes designed to remedy the arbitrariness found in *Furman*.[5] These newly drafted statutes fell into two broad categories: those that maintained a unitary trial and sought to eliminate arbitrariness in sentencing by automatically making the death penalty mandatory upon conviction of a capital crime[6] and those that provided sentencing guidelines to jurors in a second phase of the trial.[7] *Gregg* and its progeny[8] determined that statutes which did not attempt to provide the

3. The Court acknowledged as much in its reliance on the American Law Institute's justification for a two-phase capital trial: "[If a unitary proceeding is used] the determination of the punishment must be based on less than all the evidence that has a bearing on that issue, such as a previous criminal record of the accused, or evidence must be admitted on the ground that it is relevant to sentence, though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone. Trial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt. . . . The obvious solution is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence." Gregg v. Georgia, 428 U.S. 153, 191 (1976). Although the American Law Institute endorsed the changes brought about by *Furman* to capital sentencing statutes, the Institute revised its position in 2009 withdrawing its support of the death penalty. *See* Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, *available at* http://www.nytimes.com/2010/01/05/us/05bar.html; Carol Steiker and Jordan Steiker, Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty, April 15, 2009, *available at* http://www.deathpenaltyinfo.org/documents/alicoun.pdf.

4. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

5. John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 145 (1986).

6. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

7. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

8. *See* cases cited supra note 4.

sentencer an opportunity to make an individualized assessment of punishment separate from the guilt decision would be unconstitutional, but that "guided-discretion" statutes that attempted to safeguard the punishment decision through bifurcation and by providing jurors with factors to consider at sentencing would pass constitutional muster.[9]

Of the three guided-discretion statutes to pass muster with the Court, the Texas scheme was most unique in its formulation of sentencing factors.[10] Whereas the approved statutes in Georgia[11] and Florida[12] identified statutory aggravating and mitigating factors for jurors to consider and provided instruction as to how they should approach their sentencing decision, the Texas statute restricted the jury's sentencing concerns to three "special issue questions."[13] Although the Texas capital sentencing scheme has been amended by the legislature since the Court initially approved it in 1976,[14] both the first and subsequent iterations of

9. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). These statutes also provided some type of automatic appellate review after conviction.

10. *See* cases cited *supra* note 7.

11. *See generally* Gregg, 428 U.S. at 153. The Georgia statute limited death eligible crimes to six categories, instructed the jury to hear additional evidence in mitigation and aggravation of punishment, including the record of any prior criminal convictions or the absence of any prior conviction and pleas, and required the jury to find at least one statutory aggravating factor beyond a reasonable doubt before electing to impose death.

12. *See generally* Proffitt, 428 U.S. at 242. The Florida statute also limited capital punishment to a smaller classification of crimes and required the jury to consider whether sufficient mitigating circumstances existed which outweighed the aggravating circumstances found to exist. Based on the weighing of factors the jury was to recommend either a death sentence or life sentence to the judge.

13. The originally approved special issue questions were:

> (1) [W]hether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. ANN. art. 37.0711, § 3(b) (West 2009).

14. The change to the Texas capital sentencing statute was prompted by the

the special issue questions have made a determination of the defendant's future dangerousness the centerpiece of the sentencing decision.[15]

Future dangerousness is a statutory aggravating factor in four other states,[16] and a permissible non-statutory aggravating factor in twelve (as well as in the federal capital sentencing statute).[17] However, the Texas

Supreme Court's decision in *Penry v. Lynaugh*, in which concerns were raised about the statute's ability to provide the jury with a mechanism for endorsing some types of evidence as mitigating. In *Penry*, the Court stressed that jurors needed to engage in a reasoned moral decision when determining a capital defendant's sentence. It concluded that the original statute was incapable of facilitating this requirement in certain cases, focusing on the fact that some types of mitigating evidence might be simultaneously viewed as evidence of the defendant's future dangerousness. For instance, Penry's evidence of mental retardation and experiences of victimization might render him less morally blameworthy, but also indicate his inability to learn from mistakes. Thus, without a special issue question addressing mitigating factors, jurors who wished to give mitigating effect to his evidence would not have been able to do so. Although the legislature changed the questions—removing the first special issue question concerning the deliberateness of the capital murder and adding a question addressing mitigating factors—the basic structure of the scheme remained.

15. Previous research has shown that Texas capital jurors believe that the answer to the future dangerousness special issue question is directly linked to the defendant's sentence. Nearly 70 percent of jurors in Texas stated that a death sentence was required if the defendant was shown to be a future danger. *See* William J. Bowers and Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitariness from Capital Sentencing*, 39 CRIMINAL LAW BULLETIN 51 (2003). Texas capital jurors were twice as likely as jurors in other states to hold this mistaken belief. Research conducted approximately fifteen years later posed the same questions to capital jurors in Texas and found a consistent percentage of jurors continued to maintain this false belief. *See* Elizabeth S. Vartkessian, *Dangerously Biased: How the Texas Capital Sentencing Statue Encourages Jurors to be Unreceptive to Mitigating Evidence*, 29 Quinnipiac L. Rev. 237 (2011). Furthermore, a current research project shows that capital jurors who deliberated under the original and amended capital statutes in Texas held nearly identical views regarding whether a death sentence was required if a defendant was shown to be a future danger—69.5 vs. 69.6 percent respectively. *See* Elizabeth S. Vartkessian and Christopher E. Kelly, The More Things Change the More They Stay the Same: An Analysis of Juror Decision-Making in Texas Death Penalty Trials (unpublished manuscript) (on file with the Author).

16. VA. CODE ANN. § 19.2-264.2(1) (2008); WYO. STAT. ANN. § 6-2-102(h)(xi) (2007); IDAHO CODE ANN. § 19-2515(9)(i) (2006); OKLA. STAT. tit. 21, § 701.12(7) (2002).

17. *See* 18 U.S.C. § 3592 (2006) ("The jury . . . may consider whether any other aggravating factor for which notice has been given exists."); Arthur v. State, 575 So. 2d 1165, 1185 (Ala. Crim. App. 1990); People v. Smithey, 978 P.2d 1171, 1217 (Cal. 1999); Walker v. State, 327 S.E.2d 475, 484 (Ga. 1985); State v. Welcome, 458 So. 2d 1235, 1256 (La. 1984); State v. Deck, 303 S.W.3d 527, 543-44 (Mo. 2010); State v. Smith, 705 P.2d 1087, 1103-1105 (Mont. 1985); Redmen v. State, 828 P.2d 395, 400 (Nev. 1992), *overruled on other grounds by* Alford v. State, 906 P.2d 714 (Nev. 1995); State v. Steen,

and Oregon statutes are the only two states which *require* the jury to make such a determination.[18] Though jurors are instructed to determine the defendant's dangerousness beyond a reasonable doubt, they do not receive any additional statutory guidance for determining the defendant's future dangerousness.

Both the unusual sentencing requirement that jurors determine the defendant's dangerousness and the relative lack of statutory guidance provided to the jury in order to reach a decision is especially important in light of the extant literature regarding predictions of future dangerousness. Research indicates that projections of a defendant's dangerousness are poor predictions of whether or not a defendant will actually commit future acts of violence.[19] Research also indicates that mental health professionals who hold themselves out as future dangerousness "experts" are often inaccurate in their assessments.[20] The American Psychological Association (APA) itself recognized that, even under the best circumstances, predictions of future dangerousness by their own colleagues are inaccurate in two out of every three cases.[21] Moreover, research shows that jurors' predictions of future dangerousness are equally mistaken and that jurors tend to automatically err in the direction of finding future dangerousness when faced with answering the special issue question.[22]

536 S.E.2d 1, 30-31 (N.C. 2000); State v. Beuke, 526 N.E.2d 274, 280 (Ohio 1988); Commonwealth v. Trivigno, 750 A.2d 243, 253-54 (Pa. 2000); State v. Young, 459 S.E.2d 84, 87 (S.C. 1995); State v. Arguelles, 63 P.3d 731, 759 (Utah 2003).

18. *See* OR. REV. STAT. § 163.150(1)(b)(A)–(D) (2009); *See* William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 894 (2010). Four additional states—Idaho, Virginia, Oklahoma, and Wyoming—identify the defendant's future dangerousness as a statutory aggravating factor. As one commentator noted, the six states which direct the jury to consider the defendant's future danger accounts for over 50 percent of executions in the post-*Furman* era. *Id.*

19. *See* Mark Douglas Cunningham & Jon R. Sorensen, *Capital Offenders in Texas Prisons: Rates, Correlates, and an Actuarial Analysis of Violent Misconduct*, 31 LAW & HUM. BEHAV. 553 (2007); Mark D. Cunningham & Jon R. Sorensen, *Improbable Predictions at Capital Sentencing: Contrasting Prison Violence Outcomes*, 38 J. AM. ACAD. PSYCHIATRY & L. 61 (2010); Mark D. Cunningham et al, *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 PSYCHOL., PUB. POL'Y & L. 223 (2009).

20. *See* Brief for the American Psychiatric Association as Amicus Curiae Supporting Petitioner at 3, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080), *available at* http://www.psych.org/lib_archives/archives/amicus_1982_barefoot.pdf.

21. *Id.*

22. *See* James W. Marquart et al, *Gazing into the Crystal Ball: Can Jurors*

In addition to the likelihood that trained professionals and juries are often incorrect in determining a defendant's dangerousness, another concern also emerges from the statute's emphasis on future dangerousness. In a capital case, jurors go through the process of "death-qualification" during jury selection or voir dire[23] and are questioned about their ability to impose a sentence of death.[24] Previous research shows that the experience of death-qualification itself will affect jurors' perceptions of the guilt and punishment phase evidence.[25] Moreover, death-qualification necessitates that potential jurors learn about their state's sentencing statute in order to determine whether the juror is able to follow the applicable law in the case. Commentators have noted that the capital trial—especially the punishment decision—is unlike any other.[26] The Supreme Court itself noted that a "capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice."[27] Due to their lack of expertise and limited experience in understanding the legal requirements for determining the defendant's guilt and punishment, jurors will tend to place great value on the explanations they are provided during jury selection.[28]

Thus, in Texas, through the process of death-qualification jurors will learn about the requirement that they decide the defendant's future dangerousness at jury selection and be provided examples of evidence which may assist them in resolving an answer to this special issue question. As shown in this Article, during voir dire jurors are often informed that they may use the evidence presented in the guilt phase as

Accurately Predict Dangerousness in Capital Cases?, 23 LAW & SOC'Y REV. 449 (1989).

23. Voir dire is a phrase commonly used when describing jury selection and refers to an oath to tell the truth. BLACK'S LAW DICTIONARY 1710 (9th ed. 2009).

24. *See* Craig Haney et al, *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 LAW & HUM. BEHAV. 619 (1994).

25. *See* Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984).

26. *See generally* Craig Haney et al, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. SOC. ISSUES, 149 (1994).

27. Caldwell v. Mississippi, 472 U.S. 320, 333 (1985).

28. In Texas, since the special issue questions contain a number of words which are left statutorily undefined, legal actors are able to provide jurors with a wide range of examples which shape their interpretation of the special issue questions. *See* Elizabeth S. Vartkessian, *Dangerously Biased: How the Texas Capital Sentencing Statue Encourages Jurors to be Unreceptive to Mitigating Evidence*, 29 QUINNIPIAC L. REV. 237 (2011).

the sole determining factor in deciding whether the defendant is a future danger. What therefore is the effect of exposing jurors to the future dangerousness special issue question during jury selection? Are there implications for jurors' culpability and punishment decisions which may undermine the Court's requirements that the sentencing decision be made separately after receiving all available evidence about the defendant's background, character, and the crime in order to come to a reasoned moral judgment? By focusing on the statutory requirement that jurors determine the defendant's future dangerousness we may therefore be able to better understand the capital sentencing process within America's busiest death penalty state.

A. *Why Focus on Texas?*

Texas utilizes capital punishment more frequently than most other states. In addition to Texas' unmatched record of executions since capital punishment resumed in 1976[29] it is probable that capital defendants in Texas are also more likely to receive a death sentence if their case proceeds to the punishment phase of trial than defendants in other states. Historically, once convicted, between 75-80 percent of capital defendants in Texas have been sentenced to death.[30] It has been suggested that jurisdictions such as California experience closer to a 50 percent return of death verdicts from capital trials.[31]Although the data are incomplete on this last point with respect to death sentencing rates in Texas and those of other states in more recent times, available data suggests the continuation of this trend.[32]

29. Texas has accounted for 464 of the 1,234 executions carried out since the death penalty was reinstated. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2010: YEAR END REPORT 1 (Dec. 2010), *available at* http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf,

30. Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV.L. & SOC. CHANGE 743, 772 (1990-91) (showing that capital juries returned death sentences in 77 percent of all cases between 1974-1988).

31. *See* Brent Newton, *A Case Study in Systematic Unfairness: The Texas Death Penalty, 1973-1994*, 1 TEX. F. ON C.L. & C.R. 1, 7 n.38 (1993); DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 233 (1990). These authors provide death sentencing rates both prior to, and after, the Supreme Court's decision in *Furman v. Georgia* and indicate death sentencing rates in Georgia after *Furman* to be 55 percent. Other jurisdictions showed similar rates. *Id.*

32. The sample of cases included in the current study was drawn during an eighteen-month period ranging from 2006 to 2008. During that time seventeen capital cases were

Recent developments in other states also signal a greater divide between Texas' enthusiasm for capital punishment and the rest of America. New Jersey, New Mexico, Illinois, and most recently Connecticut have each legislatively abolished the death penalty.[33] Repeal legislation has been introduced in Kansas, Maryland, Colorado, New Hampshire, Nebraska, and Washington.[34] In some instances such measures failed by a single vote.[35] Public opinion appears to be roughly split between those supporting the death penalty and those who prefer life without the opportunity for parole (LWOP) as a punishment for murder.[36] The number of exonerations from death row continues to grow[37] and yet, even with recently discovered evidence in several Texas

tried. One trial ended in a hung jury at the guilt phase, twelve resulted in death sentences, and the remainder resulted in sentences of LWOP which is consistent with an 80 percent rate of receiving a death sentence at trial.

33. Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES, Dec. 17, 2007, http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html; *New Mexico Abolishes Death Penalty*, CBS NEWS (Mar. 18, 2009, 9:05 PM), http://www.cbsnews.com/stories/2009/03/18/national/main4874296.shtml; Ariane de Vogue & Barbara Pinto, *Illinois Abolishes the Death Penalty; 16th State to End Executions*, ABC NEWS (Mar. 9, 2011), http://abcnews.go.com/Politics/illinois-16th-state-abolish-death-penalty/story?id=13095912.; David Ariosto, *Connecticut Becomes the 17th State to Abolish Death Penalty*, CNN JUSTICE (Apr. 25, 2012), *available at* http://articles.cnn.com/2012-04-25/justice/justice_connecticut-death-penalty-law-repealed_1_capital-punishment-death-penalty-information-center-death-sentences?_s=PM:JUSTICE.

34. *See* Alice Popovici, *Maryland Considers Death Penalty Repeal*, NAT'L CATHOLIC REP. (Feb. 27, 2009), http://ncronline.org/news/justice/maryland-considers-death-penalty-repeal ("Bills seeking to repeal the death penalty have been introduced in Nebraska, Colorado, New Hampshire, Washington and Kansas."). For a summary of recent legislative activity regarding capital punishment see the Death Penalty Information Center, http://www.deathpenaltyinfo.org/recent-legislative-activity.

35. Jessica Fender & Lynn Bartels, *Bid to Repeal Death Penalty Fails in Senate*, DENVER POST, May 6, 2009, http://www.denverpost.com/ci_12307296 (noting that the legislation failed to pass in the Colorado Senate by a vote of eighteen to seventeen).

36. *Death Penalty*, GALLUP, http://www.gallup.com/poll/1606/Death-Penalty.aspx (last updated Mar. 9, 2012, 1:00 PM) (polls also indicate similar splits in preference when respondents are asked whether they prefer the death penalty or life without the opportunity for parole for a convicted murderer); Press Release, Death Penalty Info. Ctr., Poll Shows Growing Support for Alternatives to the Death Penalty; Capital Punishment Ranked Lowest Among Budget Priorities (Nov. 16, 2010), http://www.deathpenaltyinfo.org/pollresults (one poll shows that those interviewed preferred life without the opportunity for parole plus restitution for victim survivors more than the death penalty—only thirty-three percent of respondents said that they preferred the death penalty as opposed to other sentencing options).

37. *Innocence and Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-and-death-penalty (last updated Feb. 7, 2012)

cases which strongly suggests that the state has executed an innocent person,[38] the use of capital punishment there continues.

Scholars have offered a number of valid and useful theories for understanding the disproportionate use of capital punishment in Texas. Some have suggested the anomaly is due to historically-rooted cultural values of vigilantism.[39] Others argue that it is a coincidence of legal and political happenstance.[40] Many members of the public perceive the Supreme Court's consistent involvement in death penalty cases as a sign

(140 death row exonerations have occurred since 1973—of those, twelve are from Texas). As regards future dangerousness, the inescapable conclusion from these exonerations is that jurors in these twelve Texas cases found that men who had never killed would nevertheless kill in the future.

38. *See* James S. Liebman, Shawn Crowley, Andrew Markquart, Lauren Rosenberg, Lauren Gallo White, & Daniel Zharkovsky, *Los Tocayos Carlos* 43 COLUM. HUMAN RIGHTS L. REV. (2012). Carlos DeLuna was executed by the state of Texas in 1989. The authors present evidence that they uncovered demonstrating that DeLuna, a poor Hispanic man with childlike intellect, was innocent. The book length monograph and multimedia presentation of the evidence can be found at, http://www3.law.columbia.edu/hrlr/ltc/. *See also* David Grann, *Trial By Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Sept. 7, 2009), http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann. Cameron Todd Willingham was executed in 2004 for the deaths of his children in a house fire and maintained his innocence until his death. *Id.* He was convicted with questionable evidence from an arson expert. *Id.* Importantly, other experts versed in the best scientific practices of arson investigation have strenuously argued that the fire was accidental and likely caused by a space heater or faulty electrical wiring. *Id. See also* David Mann, *DNA Tests Undermine Evidence in Texas: New Results Shows that Claude Jones was put to Death on Flawed Evidence*, TEXAS OBSERVER (Nov. 11, 2010), http://www.texasobserver.org/cover-story/texas-observer-exclusive-dna-tests-undermine-evidence-in-texas-execution (illustrating problems with forensic evidence in that new DNA evidence has shown that a strand of hair—the only evidence placing Jones at the murder—has no connection to the executed man). The inescapable conclusion in these numerous Texas cases is that jurors that found that men who had never killed would nevertheless kill in the future.

39. *See* FRANKLIN ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 90 (2003) (Zimring argues that there is a distinct relationship between areas in America which witnessed high numbers of lynchings and those which are leaders in the use of death sentencing and executions). *See also* James W. Marquart, Sheldon Ekland-Olson and Jonathan R. Sorensen, THE ROPE, THE CHAIR AND THE NEEDLE (1994). This is especially true of counties within East Texas which had the highest concentrations of slaves within the state, the most active occurrences of lynchings, and subsequently account for the greatest number of death sentences and executions.

40. *See* David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC'Y 347, 350 (2005) (asserting that the death penalty is a recent development, which resulted from legal and political decisions rather than any deep rooted value-system or culture).

that the system is functioning appropriately, as opposed to an indication that something is fundamentally wrong. Thus, it is the Court's repeated and failed attempts to "fix" the death penalty that may be inhibiting the momentum for abolition. Finally, the death penalty has remained a heavily politicized issue in Texas. In particular, it is likely that Texas' practice of electing partisan judges at both the trial and appellate levels contributes to the inordinate use of the death penalty in that state.[41] The cultural, historical, and political arguments offered by others provide a meta-narrative. However, these arguments fail to recognize the unique dynamic occurring in Texas trial courts, in large part due to the unusual sentencing scheme. In this Article, I advance the theoretical debate about the continued use of capital punishment in Texas by demonstrating that the sentencing scheme's focus on the defendant's future dangerousness and its treatment of this issue during voir dire bear much of the responsibility for the resultant death sentences within Texas.

In order to examine how jurors' early exposure to the concept of the defendant's future dangerousness influences guilty verdicts and early punishment decisions, I present recently collected data from the Capital Jury Project (CJP).[42] The CJP is a consortium of university-based researchers who administer an interviewing instrument with participating capital jurors from around the country. One of the main aims of the CJP's research is to investigate whether capital jurors arrive at their sentencing decision in a manner consistent with the dictates of the Supreme Court and their state's capital sentencing scheme. In the more recent data collection efforts, importance has also been placed on collecting the trial transcripts in the cases in which the interviewed jurors participated.[43] Thus, the data presented in this Article come from two sources: transcripts from eight capital trials conducted in Texas[44] and

41. *See* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 48 (2010) ("Judicial elections take place in thirty-one out of thirty-five death penalty states, and judges have sometimes been deselected because their capital appeals decisions were out of line with the views of their constituents."). *See also* Stephen Bright, *Elected Judges and the Death Penalty in Texas: Why Full Federal Habeas Corpus Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1806, 1808 (2000).

42. *Capital Jury Project*, SCH. CRIM. JUST., U. ALBANY, ST. U. OF N.Y., http://www.albany.edu/scj/capital_jury_project.php (last visited Mar. 9, 2012).

43. *See id*.

44. In 2005 the Texas capital statute changed the alternative to a death sentence from life with parole eligibility in forty years to LWOP. TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2009). In order for the data to be sensitive to that change the

data from semi-structured in-person interviews with forty-six deliberating jurors from those eight trials.[45] The in-person interviews were all conducted with the study-wide survey instrument, which contained a mixture of fixed-choice and open-ended questions that traced jurors' experiences throughout the trial process.[46]

Since jurors are provided a framework understanding of the sentencing statute during jury selection, I first look at how jurors are introduced to the concept of the defendant's dangerousness during that process. In particular, I outline the manner in which jurors are encouraged to think about how the guilt phase evidence relates to the defendant's dangerousness. Section two then provides a general sketch of the evidence presented during the guilt phase in the eight trials included in this study which jurors deemed most significant during guilt deliberations. Sections three and four examine jurors' guilt phase deliberations and evaluate jurors' tendency to use guilt phase evidence to reach a premature punishment decision. Section five discusses the constitutional implications of allowing an assessment of the defendant's future dangerousness to be given such a central role in the sentencing determination. In this Section I suggest that early exposure to the sentencing scheme results in jurors interpreting the guilt phase evidence as evidence of the defendant's dangerousness and therefore undermines their ability to suspend judgment with respect to the defendant's sentence. Thus, I consider some ways in which the operation of bifurcation may be maintained in Texas.

sample was restricted to cases in which the defendant was tried under the most recent statute. Even numbers of trials which resulted in a death sentence and those which resulted in a sentence of LWOP were included in the sample. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2011).

45. The Author interviewed twenty-four jurors who deliberated in cases which resulted in a sentence of death and twenty-two jurors who deliberated in cases which resulted in LWOP.

46. ELIZABETH S. VARTKESSIAN, CAPITAL JURY PROJECT QUESTIONNAIRE (on file with Author). This survey instrument is personally maintained and on file with the Author. The instrument asked jurors about their knowledge of the case prior to trial, jury selection, recollections and responses to the evidence presented at the guilt and penalty phases, accounts of jury deliberations at both guilt and sentencing, their impressions of the legal actors, the defendant and the victims and their families, and finally their views on the criminal justice system generally and capital punishment specifically. The interviews for the forty-six jurors included in the Texas segment of the CJP research lasted between three and eleven hours, averaging just under six hours.

II. Descriptions of the Guilt Phase in Voir Dire

Voir dire plays a critical role in shaping the mindset of capital jurors. It is during this initial stage of the capital trial that potential jurors will experience the process of death-qualification and be made aware of the fact, if they have not been already, that they might be participating in a death penalty case. Death-qualification attempts to ensure that only eligible prospective jurors are selected to deliberate in a capital case. In order to be eligible for jury service in a capital trial a juror must be able to afford the defendant an individual assessment of the punishment he or she deserves based on the evidence presented.[47] Each juror is routinely (and often repeatedly) questioned by the judge and attorneys in order to assess their capacity to suspend judgment regarding a sentencing decision and apply the law in an even-handed manner. Thus, jurors who are death-qualified would have been questioned about their ability to consider and give a sentence of death or of LWOP to convicted capital murderers. Those who are unable or unwilling to sentence someone to death are excluded from jury.

An important outcome of the repeated questioning jurors experience during death-qualification is biasing effects regarding the defendant's guilt and punishment. Research indicates that death-qualified jurors, due to questioning focused on sentencing concerns, enter the trial tending to believe that the defendant is guilty, that he will be convicted of capital murder, and that death is likely to be the appropriate sentence.[48] In fact, studies show that jurors who are death-qualified are less likely to be persuaded by mitigating factors and more likely to be persuaded by aggravating factors.[49] Death-qualified jurors, therefore, are more conviction-oriented and punitive than their excludable counterparts.[50] In addition, extant literature also demonstrates that capital jurors enter the trial primed to view the defendant as less than human through extensive

47. Morgan v. Illinois, 504 U.S. 719, 729 (1992) (ruling that jurors who could not give effect to mitigation evidence could be struck for cause).

48. *See* Haney, *supra* note 22.

49. Ronald C. Dillehay & Marla Sandys, *Life Under* Wainwright v. Witt*: Juror Dispositions and Death Qualification*, 20 LAW & HUM. BEHAV. 152 (1996).

50. Robert Fitzgerald & Phoebe Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46-48 (1984). The authors of this study conducted a phone survey on a sample of 811 participants who were jury-eligible. The study distinguished between excludable jurors unwilling to impose a death sentence in any case and those who were unwilling to impose a death sentence but able to be impartial in determining a defendant's guilt. *See id.*

exposure to a wide range of media which portray criminal defendants as insane and unfeeling madmen.[51] Predisposed to view the defendant suspiciously and having experienced the process of death-qualification, selected jurors will then go on to learn about the centrality of the defendant's future dangerousness in determining their sentence.

Although there are a number of techniques advanced by the state and the defense during voir dire to orient jurors to a particular view of the capital trial process and the evidence, below I identify three common and especially influential arguments which judges and attorneys for the state use and which appear to conflate the guilt and punishment decisions. This analysis is limited to judicial and prosecutorial comments for several reasons. First, the judicial and prosecutorial remarks given in these eight trials were often very similar to one another.[52] Since jurors are more likely to credit the judge's explanation of the process as valid, any alignment between judicial and state comments is likely to be taken as fact, whereas comments provided by the defense are more often viewed as argument. Likewise, even in trials where the judge did not make any remarks to jurors about the sentencing statute, the interpretation of the sentencing scheme provided by prosecutors was viewed as more legitimate and therefore more persuasive than that given by the defense.[53] Finally, in all trials the defense questioned jurors last. As such, by the time the defense had the opportunity to present jurors with an alternative perspective of the sentencing statute they had already been thoroughly exposed to earlier explanations and were therefore less likely to be receptive.

51. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 549 (1995).

52. Vartkessian, *supra* note 25, at 251-58.

53. In addition, a review of the trial transcripts show that, on average, the defense in the eight trials included in this study engaged in less vigorous questioning than the state during jury selection. Jurors were also asked to rate the performance of the defense and prosecution on a one-to-ten scale. Jurors answered a number of questions concerning the effectiveness of each side's overall performance, whether jurors thought they were prepared for the guilt phase and the penalty phase, whether they thought each side fought hard at the guilt and penalty phase, and whether they viewed the team as competent and professional. Regardless of trial outcome, the defense received lower average scores in every category compared to the prosecution. Defense teams in cases which resulted in a sentence of death received the lowest average scores in all categories.

A. *Punishment Decision Is the Same as Guilt Determination*

The United States Supreme Court has stated that a capital defendant's sentence must be based on an individual determination, one that is not automatic,[54] and one that is the result of an inquiry into to the moral blameworthiness of the defendant.[55] In order to fully safeguard the distinct nature of the punishment decision it is essential that jurors be provided with a clear explanation for how this decision differs from the guilt determination. One way that these issues appear to become confused is through examples that frame the penalty phase as an extension of the guilt phase. For example, the following account was provided by a prosecutor to a juror during voir dire:

> There are two phases in a case that ends up—criminal cases are set up where we call it a bifurcated trial—there are two parts to the trial. The first part of the trial focuses on whether or not the person committed this crime. And so that's the kind of evidence you hear: evidence to prove that he committed this crime when we say he did it, the way we say he did it . . . If they vote guilty, however, then there is a second phase of the trial, and *it looks just like the first phase*. Both sides get to present evidence. You can expect the state to present some evidence. The defense may present some evidence. They are under no obligation to do so, but they may . . . *When you couple those two questions with the guilt or not guilty question, you know, issue at the first part of the trial, you are at three [questions] throughout the entire trial. There are a total of three for the entire trial . . .* The very first question that is answered is guilty or not guilty. That's a threshold question. If that question is answered yes, then you answer the second question when you get it at the end of the punishment phase.[56]

54. Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (holding that death sentences imposed under North Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments).

55. Penry v. Lynaugh, 492 U.S. 302 (1989).

56. TX04D (emphasis added). All cited transcripts, interview recordings, and completed survey instruments are personally maintained in locked files and password-protected formats. In order to ensure the highest degree of confidentiality the Author uses a general citation to the case rather than specifically reference the trial, volume, and page

The prosecution in this case draws the juror's attention to the structural similarity between the guilt and penalty phases. Although it is correct that each phase might look the same structurally in that each side is permitted to present evidence relevant to the question at hand, describing the guilt phase and penalty phase as the same is somewhat misleading in the absence of further explanation. In particular, the prosecutor formulates the guilt decision as the first question the juror will need to answer, thereby positioning the penalty phase questions as a logical extension of the guilt phase inquiry. As noted in the example, jurors are told to think about the entire trial process as a series of factual questions which have a "yes" or "no" answer. Again, by explaining the trial in this way, jurors are encouraged to view the punishment phase as the same as the guilt phase and, therefore, the penalty decision as the same type of decision as the guilt determination. By combining the guilt and penalty phase decisions in this way, the fundamental difference between the types of inquiry involved in the guilt phase (a factual determination) and penalty phase (a moral judgment) is lost.

B. *A Capital Offense Is Enough to Prove Dangerousness*

Jurors may use the evidence presented throughout the entire trial to determine the defendant's sentence. However, during jury selection jurors are regularly told that they can rely solely on the evidence presented during the guilt phase in order to determine an answer to the future dangerousness question:[57]

> So I want everybody to understand what that really means. You have found someone guilty, hypothetically, of intentionally or knowingly causing the death of "A" and in the course of the same criminal transaction intentionally or knowingly causing the death of "B" and that answer is presumed no unless the state proves beyond a reasonable doubt it should be answered yes. Now, does that mean that the jury disregards the evidence at the first phase of the trial? No. No. In fact,

numbers of transcripts.

57. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2009) (the facts of the offense alone may be sufficient to sustain the jury's finding of future dangerousness at the sentencing phase of the capital trial).

> the jury, when it comes time for punishment and answering questions like this, goes back and looks at everything that they heard in the first phase of the trial, the guilt/innocence phase, where they hear about the circumstances of the offense and so forth and any additional evidence that they might hear in the punishment phase. All right? *And the law envisions there may be some situations where the facts of the offense are such that the jury could find beyond a reasonable doubt there's a probability that the defendant would commit criminal acts of violence in the future*.[58]

By referencing the guilt phase of the trial and pointing out that the jurors may hear enough during that segment of the proceeding to determine the defendant's dangerousness, the judge's remarks can have the effect of merging the two stages.

Likewise, attorneys for the state stressed that jurors were able to use the evidence in the guilt phase as the sole determinant of the defendant's dangerousness. For example in one case during voir dire the state explained to a juror how she could use the evidence presented during the guilt phase to decide the defendant's dangerousness:

Q: That the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Now, what kinds of things do you think would be important to know in answering that question?

A: His criminal background.

Q: Okay.

A: Whether he is violent in other areas of his life. If his temper is out of control.

Q: Okay.

A: How he treats his family.

Q: Okay.

A: Things like that.

Q: Okay. Absolutely. *A person's background could be very important. Can you see how the offense itself—might tell you everything about a person?*

58. TX02D (emphasis added).

A: Yeah.

Q: Now, in this part of the trial you're asked to look at the evidence, kind of reevaluate all the evidence you heard at the guilt phase of the trial. Because you know during the first phase of the trial when we present evidence—

A: Right, you're not getting all the other background.

Q: —you're looking at it from, did he do it, did he not do it. Now you're taking everything you heard about the crime itself, plus any additional evidence you heard about the defendant's background and now you're looking at it to determine, you know, what kind of person is he? How did he carry out this crime?

A: Uh-huh.

Q: Why did he commit this crime? Was this a stranger-on-stranger situation? Or was it—what was the relationship of the party?

A: Right.

Q: So those are the kinds of things you would look at, as you pointed out, to determine whether or not the defendant is a continuing threat to society.[59]

In this instance, the juror is reoriented to think about guilt phase evidence as providing evidence of the defendant's character. Similarly, in another trial the prosecutor explained:

Q: And then there's some folks who say, "No, you know, I convicted him of capital murder, but, state, you have to prove to me that he's going to be a future danger." Okay?

A: Uh-huh.

Q: Okay? "You have to prove that to me in whatever way that you can, and I'm going to wait and see what you have to offer before I will answer this question yes." Do you know which of those two camps you might be in?

A: I'd have to wait and see throughout the trial all that I heard enough evidence that this is not just what he's being tried for, but this is a whole pattern—

Q: Okay.

A: —of his behavior.

Q: And let me ask you about that, because the law does say that the

59. TX01D (emphasis added).

state is allowed to rely on just the fact of the instant offense.

A: Right.

Q: And still—still be going for the death penalty. Meaning that someone, for instance, could have nothing but—not even a speeding ticket, but they jump up and commit capital murder, and the state can still say, "Wait. This person may be someone who needs the death penalty just on the facts of this, how brutal it was—the content of the crime itself". Do you agree that there are some crimes that, that you can see that occurring, even if there is not a criminal history?[60]

After answering a question about defense evidence presented in the guilt phase the prosecutor continued:

Q: Okay. So kind of going back to my question of can you imagine—and you don't have to tell me what you're imagining, but can you imagine in your mind a situation with a capital—of a capital murder that falls in any of the categories that we talked about—

A: Uh-huh.

Q: —that in your mind is bad enough, essentially, that you could find future danger based solely on the facts of that particular offense?[61]

The prosecutor in this trial later explained:

> In other words, let's say you're—you're in a trial and the defendant doesn't have a criminal record, per se. I can't show you that they have ever been arrested or not, but I can show you a particularly horrific crime. The law says that if you believe from that crime this possibility—or probability of danger exists, that you can answer that question yes. So let's take it to the next step. They have been found guilty of capital murder. You have determined from the evidence, whatever it is, maybe it's the crime only, that there's this probability of future dangerousness.[62]

These comments are especially significant since the defendant in this

60. TX03D.
61. *Id.*
62. *Id.*

particular case did not have a previous criminal record. This argument—that the evidence of the crime can be used as the sole basis for determining an answer to the first special issue question—was advanced in all eight trials analyzed and served to indicate to jurors the continuity between guilt and penalty decisions. As one juror who determined the defendant's sentence prior to the penalty phase explained:

> And I'd already read the sheet about the sentencing phase it was on the same document that I told you I should have brought [with the special issue questions]. So because you knew what the questions were going to be basically before you had gotten to the sentencing stage you had already seen enough kind of evidence. They gave it to us and that [paper] and said — [the paper] said to the effect: "Is he a threat to society?" And he's already been a threat to society and there's no reason to believe he wouldn't continue to be a threat to society because he'd broken out of prison several times. *To me if you found him guilty there was only way you could go as far as the sentencing.*[63]

This juror described how the judge in his case had provided paper copies of the sentencing statute to jurors to review and keep during jury selection. The juror explained how he had considered the evidence presented in the guilt phase in relation to the sentencing scheme and was therefore able to develop the answers to the special issue questions in advance of the sentencing phase. Thus, emphasizing jurors' ability to apply guilt phase evidence to their determination of the defendant's future dangerousness renders it extremely difficult for them to make an individualized determination of the appropriate sentence.

C. *Mitigation Is an Extension of Dangerousness*

Previous research has shown that capital jurors in Texas often misunderstand the purpose and scope of mitigation evidence.[64] This is in part due to the explanations provided by the judge, prosecution, and defense attorneys in voir dire which fail to make clear the moral decision

63. TX04D (emphasis added).
64. *See generally* Vartkessian, *supra* note 25.

jurors are asked to make when determining the defendant's sentence. In addition, given that each special issue question contains words which are vague, legal actors advance various interpretations of the sentencing scheme. One such interpretation is that for jurors to be able to give consideration to mitigating evidence there must be a link or nexus between the evidence and the crime.[65] For instance, in the following example the prosecutor simply directs the juror to retrace the guilt phase evidence when determining whether there is sufficient mitigating evidence in order to sentence the defendant to LWOP:

> Notice that [special issue question] number two does not have the reasonable doubt standard. It's a little more open-ended. It's just kind of *let's take one look back at the offense*, let's look at what evidence, if any, was presented during the punishment phase and let's see what happened.[66]

Similarly, the prosecutor from another trial explained:

> Is there some reason to spare his life is what we're asking here [with special issue question number two]. And it tells you what to look at in making the determination: *All the evidence, including the circumstances of the offense, which you have already considered in the past*, the defendant's character and background. You've probably looked at that in answering is he going to be dangerous in the future, and his personal moral culpability.[67]

These comments invite jurors to think about the guilt phase evidence in determining the answers to both the future dangerousness and mitigation special issue questions well in advance of the penalty phase. The state also provides explanations of the term "moral blameworthiness" which direct jurors to define this term with respect to consideration of the defendant's role or level of participation in committing the capital crime. The prosecutor in one trial simply explained of mitigating evidence:

65. *Id.* at 268-70.
66. TX02D, *supra* note 59 (emphasis added).
67. TX04D, *supra* note 57 (emphasis added).

> It is evidence that a juror might think reduces the moral blameworthiness of this defendant. It minimizes his role.[68]

Likewise, a prosecutor from another trial commented:

> This question is basically telling the jury to look at the circumstances of the capital murder itself and any other crimes or offenses you may hear about.[69]

In voir dire, the state's questioning appears to predispose jurors to view the defendant as guilty, prepare to sentence him to death, and to consider the guilt phase evidence as providing all the reasons necessary to make such a determination. Since jurors enter the guilt phase believing that the evidence presented is relevant to sentencing, they will begin to view the guilt phase evidence not only as evidence about his factual guilt, but also about the defendant's future dangerousness. It is therefore unsurprising that jurors will frequently decide the defendant's sentence prior to the penalty phase.

III. Guilt Phase Evidence: The State's Case Always Supports The Defendant's Dangerousness

It is the job of the state to offer evidence which persuades the jury that the capital murder occurred and that the defendant is responsible. As such, the evidence presented in the guilt phase regularly includes testimony from law enforcement (e.g., first responders, homicide detectives), testimony from crime scene experts (concerning subjects such as the murder weapon, blood-spatter evidence, ballistics tests), testimony from medical examiners, eye-witness testimony, DNA evidence, fingerprint analysis, testimony of co-defendants, testimony by other inmates in jail to whom the defendant may have confessed, crime scene and autopsy photos, family member testimony concerning the victim, and video or audio taped interrogations of the defendant.[70]

68. TX07L.

69. *Id.*

70. This list comprises the broad categories of evidence presented to the jury in the guilt phases of the eight cases in this study.

Although the state must provide such evidence of the crime in order to establish the defendant's guilt, such evidence is also paramount in persuading the jury to view the defendant as dangerous. Jurors understandably have an immediate emotional response to much of the guilt phase evidence. It is the first time they will hear details of the murder, listen to witnesses and victims, and observe the person allegedly responsible for the commission of the capital crime. Though it is difficult to pinpoint exactly what kind of evidence is especially formative in jurors' overall assessment of the defendant as dangerous, I briefly discuss three areas which appear to create strong emotional reactions with respect to jurors' views of the defendant in the guilt phase: evidence about the victim and his or her family, evidence of the crime, and observations of the defendant.

A. *Victims and Their Families*

In each of the eight cases in this study a victim's family member or loved one identified the victim, provided statements about their last contact, or gave testimony regarding their feelings on learning about the murder.[71] Such testimony often occurred during the first day of trial and immediately stirred jurors' emotions. For instance, one juror described how testimony by the victim's wife on the first day of trial moved several jurors to tears:

> Yes, it was really hard to see the autopsy pictures and to listen to [the victim's family] was torture. There were tears some of them when [the victim's] wife talked about how she was called to the hospital and all that. I mean it was hard. Even some the guys were crying—I mean not like bawling, but tears running down their faces and sniffling. Yeah, it was tough—real hard. We started off that way the very first day.[72]

In another trial, moving evidence was given by the victim's step-father

71. Payne v. Tennessee, 501 U.S. 808 (1991). Victim impact testimony is permitted in the punishment phase, but not in the guilt phase. Nevertheless, testimony given by family members at this stage, while not strictly characterized as such, will frequently illustrate their pain and suffering and thus will have an impact on the jury's punishment decision.

72. TX05L.

about discovering the victim lying in a pool of blood on the kitchen floor. Jurors recalled the emotional impact of his testimony during the guilt phase:

> Most of the girls, we kind of had a hard time with [the step-father's testimony]. I think that there was even a couple of guys that walked out of there a little teary-eyed. We had a bathroom right there and all three of us were sitting in our own stalls, well [another female juror] and I were sitting in our own stall just crying like little two year olds . . . I mean the mom was hard to watch but at least she, you know, was a little put together, but the dad, he was just crazy, it was like "Look what you did to my baby. I was supposed to be able to protect her and I couldn't protect her against this." I think that's when they were asking questions like what did this do to your family and because the father was the one that came in the door and found her they had to put him up there.[73]

Although the relevance of the step-father's testimony in relation to the defendant's guilt was in establishing a time-line of events, jurors recalled little of his testimony beyond the emotional impact of his presentation and his belief that the defendant had committed the crime. As the above juror described, aspects of the step-father's testimony noticeably departed from evidence strictly related to issues regarding the defendant's guilt—specifically his comments about failing to protect his daughter. These types of comments, as well as the physical discomfort displayed by witnesses, are difficult for jurors to separate from what relevance their testimony may have in relation to the question of the defendant's guilt. Such displays of raw emotion reveal the palpable suffering of the victim's family at the outset of the trial and serve to distract jurors from evidence strictly related to an assessment of guilt.

B. *Crime Scene Photos*

In addition to testimony provided by victims' family and friends, each trial included the presentation of color photographs of the crime

73. TX03D, *supra* note 61.

scene as evidence. Jurors recalled the pictures as "vivid."[74] One juror described how such photographic evidence helped the jury to understand the brutality of the crime: "I think [seeing the crime scene photos] was crucial to see how they suffered. It was just brutal."[75] Though such evidence may be necessary to establish that the murder occurred, it also has the effect of inflaming jurors' emotions and shaping their view of the defendant as someone capable of acting in the most horrific ways. For example, in one trial the victims were shot at close range numerous times with an assault weapon which caused a great deal of damage to their bodies. One juror described the lasting impression of the photos:

> Seeing all of that is tough. Those things don't disappear. Neither do the facts and graphics, they don't. They're there. They imprint on your mind. They imprint on you. You know seeing [the victims] . . . or the blood spatter all over the walls—remembering [one victim] crawling away on his forearm and being continually shot as I said, the pictures of [the other victim] with her breasts blown off and the exit wounds, those don't leave you.[76]

Research suggests that jurors respond more punitively in cases in which they have been exposed to violent images.[77] Although it is not clear what impact the introduction of such photographic evidence had on the eventual outcomes in these trials, such emotionally charged evidence does elicit powerful responses from jurors who, in turn, perceive a defendant as unmoved by the same graphic images. The defendant's response to such evidence may confirm, in their eyes, his guilt, remorselessness, and lack of humanity:

> [I was convinced of the defendant's guilt] after I saw—and it was testified to me—the brutality. The gruesome pictures, the smug look on his face afterwards, that told

74. TX02D, *supra* note 59.

75. *Id*.

76. *Id*.

77. David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 LAW & HUM. BEHAV. 183 (2006); Kevin S. Douglas et al, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 LAW & HUM. BEHAV. 485 (1997).

> me he was guilty.[78]

Another juror from the same trial commented:

> [The defendant] seemed to be real cocky. It was like he really thought he was some kind of stud and he was just kind of sitting there like "oh, I'm just going to get away with this" and it really wasn't all the time it was just a couple of times I caught him doing that and he'd get this smile on his face like "yeah, you guys got no clue how bad I really am" you know. It was just an impression, but he didn't seem remorseful.[79]

Jurors appeared to expect the defendant to respond in the same way as they did to the crime scene photos. When the defendant did not react "appropriately" it confirmed his guilt and even, as the juror alluded to in the second quote, his satisfaction at having committed the crime. The jurors' personal responses to the photographs, as well as their observations of the defendant's reactions to the evidence, are therefore significant to the guilt decision. After having viewed the photographs, jurors begin to form an opinion of the defendant as emotionless, inhuman, and dangerous at an early point in the trial.

C. *Observations of Witnesses and the Defendant*

A number of jurors reported watching the defendant closely throughout the trial and were mindful of his non-verbal cues. Jurors often perceived a lack of response from the defendant, which they considered as evidence of both his guilt and dangerousness. For example, in one trial jurors perceived "fear" in the two eye-witnesses to the murder when they testified. This became a pivotal factor for determining the defendant's guilt:

> The preponderance of the evidence, combined with the circumstance, combined with the real and honest fear, particularly of [one witness]. [The two eye-witnesses] were both very fearful, very afraid, not a little afraid,

78. TX02D, *supra* note 59.
79. *Id.*

> they were maximum afraid that this guy was going to kill them.[80]

The juror above credited the eye-witnesses' testimony because she believed each witness was fearful of the defendant. In fact, the juror expressly stated that she found the defendant guilty for two reasons—the brutality of the crime and the look on the defendant's face[81]—in particular, his ability to provoke fear in each witness by simply being present in the courtroom.

Jurors reported scrutinizing the defendant's body language and facial expressions closely throughout the trial, looking for any reaction. Despite such attentiveness, significant numbers of jurors believed that the defendant exhibited no emotion whatsoever during the course of the proceedings (76 percent), indicating him to be cold (57 percent), remorseless (78 percent), without a conscience (71 percent),[82] and ultimately dangerousness to other people (91 percent).[83]

Previous research suggests that jurors are more likely to sentence a defendant to death if they think him to be emotionally uninvolved in the trial.[84] Jurors in this study who decided that the defendant was emotionally distant during the trial were easily able to relate such a conclusion to the defendant's dangerousness. The use of evidence which provokes an emotional reaction from jurors but is unlikely to produce the same from a defendant allows the state to influence the jury's consideration of the special issue questions in the guilt phase long before the punishment phase has commenced, and often absent any counter argument from the defense.[85]

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80. *Id.*

81. *Id.*

82. This question has one missing case (n=45). Percentages listed are valid percentages.

83. Jurors were asked to identify how well the terms described the defendant. The percentages listed reflect jurors who responded that the phrase described the defendant very well and fairly well. Jurors who selected the option choice of not so well were not included in the reported percentages.

84. Michael E. Antonio, *Arbitrariness and the Death Penalty: How the Defendant's Appearance During Trial Influences Capital Juror's Punishment Decision*, 24 BEHAV. SCI. & L. 215 (2006).

85. *See, e.g.* TEX. CODE CRIM. PROC. ANN. art. 38.36 (West 2003). Due to the bifurcation of capital trials into two phases the defense is legally unable to present evidence regarding the defendant's background unless it is related to the question of guilt. In practice, this means that the defense will often not present a single witness during the guilt phase, leaving the jury to focus entirely on the state's case. With the special issue

IV. Guilt Deliberations

An overwhelming majority (85 percent) of jurors entered the guilt deliberations having already decided the defendant was guilty. Moreover, 80 percent of jurors had concluded that he was guilty of capital murder. Thus, very few jurors entered deliberations undecided (11 percent) or believing the defendant to be not guilty of capital murder (4 percent).[86]

One jury began deliberations by discussing the evidence presented during the guilt phase, eventually reaching a consensus about the final verdict. However, in the seven remaining trials juries began deliberations with an initial vote[87] in order to gauge individual opinions about the defendant's guilt. As one juror described:

> I think we first of all went around the table and everybody talked about how they felt about [the defendant's guilt] and whether or not they had made a decision, if you were still unsure. If you were sure what you were leaning towards. Each person made a comment and they discussed it while it was their turn. They discussed any and everything they wanted to.[88]

Jurors in each case reported that at least one member of the jury was either "undecided" or not quite convinced of the defendant's guilt at the

questions immediately framing the evidence presented in terms of the defendant's dangerousness, this structural limitation serves to disadvantage the defense. The defense called witnesses to give evidence in the guilt phase in three of the eight cases included in this study. Two of those three trials ended in sentences of LWOP.

86. Jurors were asked about their guilt decision after hearing the judge's instructions to the jury, but before they began deliberating with the other jurors.

87. Juries who conducted initial votes did so in one of three ways. Some juries conducted formal votes—either by secret ballot or a show of hands. Other juries went around the room, allowing each person to explain their position on guilt. While the second, less formal method did not ask jurors to take a firm position on the defendant's guilt immediately, jurors inevitably expressed their opinion providing a de facto vote. The single case which did not take a vote began deliberation with a review of evidence and discussion of the standards of proof for guilt. Each method is consistent with previous research which has classified deliberations in two categories—verdict-driven or evidence-driven. *See* REID HASTIE ET AL, INSIDE THE JURY 163-65 (1983) (verdict-driven deliberations begin with a public ballot, are guided by verdict positions of individual jurors, and engage in frequent polling. Evidence-driven deliberations are categorized by public balloting late in deliberations. Jurors in evidence-driven deliberations are not closely associated to a specific verdict).

88. TX02D, *supra* note 59.

beginning of deliberations. The data indicate that jurors who were in the majority helped focus the discussion on factors which would persuade those who were undecided. Since each trial involved a majority of jurors who believed the defendant to be guilty, this always included an extended review of the crime scene photos. As one juror explained:

> We actually put [the crime scene photos] up on a board, first of all we started a list of things we had questions about and tried to eliminate them and or go through them . . . We looked at [the male victim] and how he fell and moved forward and I think that is when I discovered his hand prints in blood where he actually tried to crawl away and we don't know that he ever said anything but it appeared he was begging . . . .[89]

The guilt deliberations therefore often involved juries retracing the state's case in some detail and focusing on aggravating factors. Jurors regularly inferred specifics from the evidence about what the victim may have experienced in their final moments, as the quotation above illustrates. Although it is expected that jurors will and should discuss issues such as the defendant's motive, responsibility for the killing, the role of an accomplice, the strength of witness testimony, the judge's instructions to the jury, and whether jurors agree on the meaning of the standard of proof, much of jurors' deliberations also focused on topics outside of the defendant's guilt. For instance, jurors reported rampant discussions of topics more relevant to the punishment decision than to a determination of the defendant' guilt. For instance, 65 percent of jurors reported some discussion during guilt deliberations regarding the defendant's dangerousness if ever allowed back in society. Likewise, 85 percent of jurors reported some discussion of the defendant's history of crime and violence, 91 percent discussed the pain and suffering of the victim, 83 percent discussed the loss and grief of the victim's family, and nearly two-thirds of jurors (65 percent) discussed their feelings about the right punishment.

The emphasis placed by other jurors on the defendant's dangerousness when deliberating on his guilt proved to be especially moving to jurors who were undecided. As one initially undecided juror described:

89. *Id.*

Q: You said that there were roughly eight people who felt like he was guilty and they really didn't have any questions. So, I want to know how they explained to you and the other folks who were still needing a little bit of clarification on stuff – what did they say? What were their arguments to you?

A: They were saying, o.k., look at the pictures. Look at the brutality of the pictures. The gruesomeness down the line. The fact that he had an assault weapon and one [victim] did not have a weapon—one did have a weapon. His demeanor. Gosh—there were so many questions—but they were proving them—proving them by what they were bringing up.[90]

Another juror from the same trial commented:

> The crime scene photos were asked for to kind of reinforce the fact that it wasn't about this one person [the defendant]. It was about these two other people. That in my mind was the reason that we asked for those pictures to be brought back in. They were horrible and nobody wanted to look at them, but it's like, we've got to look to remember that these people had lives. They were moving on and becoming good members of society. They weren't perfect—like none of us are, but they didn't deserve this bloodbath and it was a bloodbath.[91]

This juror's observations are evocative of comments more often made by jurors when describing the penalty phase—not the guilt phase. The juror seems to ignore the intention of the guilt phase, which concerns the defendant's actions and whether he is legally responsible for the crime. Instead, she is so moved by the graphic pictures that she focuses on holding someone responsible for the terrible crime, rather than making an individual determination regarding this particular defendant's guilt. Thus, discussions of the defendant's dangerousness during guilt deliberations can enable jurors to side-step the question of the defendant's guilt.

Given the tenor of guilt deliberations high numbers of jurors reported discussing whether the defendant would be dangerous and what

90. *Id.*
91. *Id.*

punishment they thought he deserved. Although the jury is directed by the judge not to discuss the potential punishment during the guilt phase, nearly two-thirds of jurors (65 percent) reported some premature discussion of the defendant's punishment, while the same percentage also reported discussing the defendant's dangerousness. As one juror explained:

> Well, we knew though that those questions, if we made a decision, how we had to answer those or what we would have to think about so it did kind of come into part of our decision.[92]

Indeed, half of the jurors (50 percent) indicated that during the guilt deliberations they even discussed whether the defendant would ever be executed. Finally, almost a quarter of jurors (22 percent) reported some discussion about how soon the defendant would get out of prison if he was not given a sentence of death. This final topic is especially interesting given that all cases included in this study were tried after LWOP became the sentencing alternative to death.

Regardless of whether jurors openly discussed the appropriate punishment for the defendant, their accounts indicate that much of the guilt-phase deliberations were spent discussing evidence and testimony which stirred their emotions. These discussions tended to center on the jurors' feelings about the victim, the victim's family, their observations of the defendant, and their feelings towards him. Nearly all of the jurors (94 percent) reported discussing the brutal or vile manner of the killing, while 91 percent reported some discussion about the suffering of the victim. An overwhelming majority of jurors (78 percent) discussed their feelings for the family of the victim, while 74 percent discussed their feelings toward the defendant. Finally, 87 percent of jurors reported some discussion of the defendant's appearance or manner in court during the guilt deliberations. For instance, one juror commented, "We discussed that he never blinked. He never showed any sign of remorse."[93]

These conversations appeared to shape jurors' views about the defendant's character, helping to create a picture of the defendant as dangerous and, in some cases, as evil. Thus, even juries who did not discuss the defendant's sentence explicitly were in essence deliberating

92. *Id.*
93. TX03D, *supra* note 61.

upon the answer to the first special issue question regarding the defendant's dangerousness before any punishment phase evidence had been presented. In fact, many jurors did not recall a difference between the future dangerousness question and the mitigation question, indicating that discussions which implied that the defendant was dangerous in turn served to shape jurors' understanding of the defendant's character and background. Jurors who both believed the defendant to be dangerous, and did not distinguish between the dangerousness and mitigation issues were therefore able to determine an answer to both questions prior to the presentation of any penalty phase evidence.

Of particular importance were those occasions when jurors were uncertain about the defendant's guilt. In those instances candid jury discussions focused not on delivering a not-guilty verdict, but on the appropriate punishment.[94] Fifteen percent of the jurors in this study reported at least one member of their jury as having said they would join the majority's vote to convict the defendant of capital murder, but would refuse to impose a sentence of death due to doubts about his guilt.[95] Uncertainties about the defendant's guilt should not result in a lesser sentence, but rather in the acquittal of the defendant for the capital offense. When jurors decide to convict a defendant of a capital crime despite misgivings, it necessarily calls into question the validity of the conviction.

Jurors who negotiated a life sentence for a defendant during guilt deliberations used either the special issue question related to the

94. Jurors in this situation did not necessarily believe that the defendant was factually innocent, but rather some jurors did not think the offense should have been eligible for capital punishment. For instance, in one case the jury believed the defendant was present during a burglary-homicide. However, no evidence was presented to confirm the defendant was the triggerman. While the jury was convinced the defendant had participated in the burglary they were not sure he was responsible for the murder and thus did not want to find him guilty of the capital crime. In only one trial was the issue of the defendant's factual innocence raised during guilt deliberations. One member of the jury was not convinced the defendant had committed the double murder. That jury eventually sentenced the defendant to death.

95. Jurors were asked whether any member of their jury said they would vote guilty of capital murder, but would not vote for a death sentence during guilt deliberations. The seven jurors who reported a member of the jury saying that they would vote guilty of capital murder but would not vote for the death penalty originated from five trials. Three of those trials resulted in a sentence of LWOP while two resulted in sentences of death. *See* Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L REV. 1557 (1998) (noting that residual doubt is a strong mitigating factor in cases with multiple defendants and circumstantial evidence).

defendant's participation as a party to the capital murder[96] or the mitigation special issue question as the statutory mechanism for expressing residual doubt about the defendant's responsibility.[97] In three of the four cases which resulted in sentences of LWOP members of the jury used evidence related to the crime (e.g., the defendant was not necessarily the person who shot the victim, the victim's actions were partly to blame for the capital crime, or the defendant didn't necessarily mean to kill the victim) as the reason to spare the defendant's life. Jurors who were leaning towards a life sentence often cited such guilt related issues as the reason they believed that the defendant should be given a life sentence.

V. Premature Punishment Decisions

After going through guilt deliberations that often focus on the defendant's dangerousness, nearly a quarter of jurors (24 percent) reported having determined that the defendant should be sentenced to death prior to the commencement of the punishment phase. Though legally required not to determine the defendant's penalty before the punishment phase starts, with 15 percent having decided he deserved LWOP, only 61 percent of jurors reported being undecided at the beginning of the penalty phase.

Perceptions about the defendant's dangerousness were central to jurors' premature determination of a death sentence. The following juror explained why she felt the defendant should be sentenced to death before hearing any punishment phase evidence:

> Because he was just brutal. He didn't show any remorse. He just seemed like he didn't value anyone else's life and I just felt that if he were to be let out he'd kill again, he'd kill someone else. He just point blank shot, you

96. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(2) (West 2009) (explaining that "in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under sections 7.01 and 7.02 of the [Texas] Penal Code," the jury will be instructed to answer "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." This special issue question follows the dangerousness issue and precedes the mitigation issue).

97. *See Sundby*, *supra* note 96, at 1577. *See also* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998).

> know, several times and you could see where [the male victim] was dragging himself to get away from [the defendant] and [the defendant] just kept shooting him and the girl too in the car. I mean he just point blank at close range just shot her and it wasn't like he just shot them once or twice and ran. He shot them, what, twenty—seventeen times? I can't see anybody just doing something like that.[98]

Jurors who decided that the defendant should receive a death sentence were thus unable to understand how the defendant could do what they believed he did. Given that during jury selection jurors were told that they could use the evidence of the crime as the sole factor in answering the dangerousness special issue question, jurors did not need to suspend their judgment. The nature of the crime and the evidence presented during the guilt phase was enough for jurors to determine the defendant's sentence.

Jurors who made a premature decision to sentence the defendant to LWOP also engaged in discussions about the defendant's dangerousness, but made an early determination to sentence him to life due to factors related to the commission of the crime. Specifically, a number of such jurors had reached the decision to sentence the defendant to LWOP in order to go along with the majority verdict at guilt. As the following juror expressed:

> I gave in that he was guilty because of the way the law's written, but I will not give in that he will have the death penalty. Even if he's dead in there. I'm not going to be responsible for actually knowing that he got the death penalty.[99]

Other jurors who self-identified as premature deciders for a sentence of LWOP did not actually determine the sentence early, but rather maintained a clearer understanding of the standard of proof required for a defendant to be sentenced to death:

> I went into [the penalty phase] expecting a life sentence.

98. TX02D, *supra* note 59.
99. TX06L.

> [The state] had to prove beyond a reasonable [doubt]—you had to answer all those other questions so you err on the side of life until you answer those questions—so to me a reasonable person you feel like life is expected basically and then you seek the death penalty or imagine the death penalty.[100]

Jurors like the one quoted above did not actually determine the defendant's sentence in advance of the punishment phase, but rather entered the next part of the trial prepared to hold the state to the correct standard of proof before deciding whether a death sentence was appropriate.

Jurors therefore determine the defendant's sentence prior to the penalty phase for several reasons. For one, jurors are induced into viewing the trial as a unitary rather than bifurcated proceeding. This blurs the distinction between the guilt and punishment decisions. Juror experiences during voir dire also often result in a misunderstanding of the difference between the future dangerousness special issue question and the mitigation special issue question. Since the evidence presented during the guilt phase provides jurors with the evidence they often rely on to determine the answer to the dangerousness question, jurors who do not grasp the distinction between the special issue questions determine an answer to both well before the penalty phase. Finally, some jurors determined the defendant's sentence early because they decided to convict the defendant of the capital crime despite their misgivings about his guilt in return for ensuring he received a life sentence.

VI. Discussion

Early exposure to the future dangerousness special issue question distorts the psychological barriers between culpability and punishment decisions thereby encouraging premature sentencing verdicts. It can also have biasing effects on jurors' views of the defendant's guilt. The early exposure to the concept of the defendant's future dangerousness at jury selection followed by evidence of the crime presented in the guilt phase will frequently foster fearful responses in jurors. As others have noted, the concept of dangerousness cannot be easily divorced from feelings of fear because:

100. TX05L *supra* note 73.

> Being afraid implies that the situation at hand is perceived as dangerous, regardless of how vague this perception may be. It is logically impossible to be afraid but not to judge the situation as threatening.[101]

Thus, capital jurors in Texas are told they will need to think about the defendant as a potentially dangerous person and are presented evidence that engenders fear. This makes it easier to view the defendant as guilty and easier to vote for his death. Early exposure to the future dangerousness special issue question widens the chasm between the defendant and the juror, which is significant hurdle for the defense to overcome. This chasm or "empathic divide" as Haney refers to it, can be understood as:

> [T]he cognitive and emotional distance between [jurors and the defendant] that makes genuine understanding and insight into the role of social history and context in shaping a capital defendant's life course so difficult to acquire. The recognition of basic human commonality – an opportunity for capital jurors to connect themselves to the defendant through familiar experiences, common moral dilemmas, and recognizable human tragedies – is the starting point for compassionate justice. But the empathic divide stands in the way of that kind of understanding. Its roots are deep but not difficult to trace. Precisely because the harm for which the defendant has been held responsible is so great, and the typical capital defendant is perceived by jurors as truly different from themselves (made so by his behavior if nothing else), there is always a gap in understanding that must be overcome.[102]

Thus, by channeling the sentencing decision through a determination of the defendant's future dangerousness jurors are less likely to engage in a

101. Ute Gabriel & Werner Greve, *The Psychology of Fear of Crime: Conceptual and Methodological Perspectives*, 43 Brit. J. CRIMINOLOGY 600, 602 (2003).

102. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1582 (2004).

reasoned moral decision because they are placed in a situation in which they cannot assess the defendant's penalty neutrally.

The Supreme Court has held that the dangerousness special issue question is constitutional, because it asks the jury to make a routine consideration when determining the defendant's sentence.[103] But, as the data presented in this Article indicate, jurors often base their decision regarding dangerousness on emotionally-charged evidence presented during the guilt phase, in violation of the constitutional mandate that they suspend their penalty decision until after they have found the defendant guilty. Therefore, the issue to be addressed is not necessarily whether jurors are making a routine decision often formulated by other actors within the criminal justice system.[104] Instead it is this: how are jurors determining an answer to the dangerousness special issue question and at what point in the trial?

The Court has yet to decide whether the inclusion of the future dangerousness special issue question and its presentation to the jury during voir dire undermines both the presumption of innocence during the culpability phase and the requirement that jurors determine the defendant's penalty in a separate hearing after the guilt phase. The Court's decision in *Deck v. Missouri*[105] however provides a line of reasoning which could apply to this issue. In *Deck*, the Court discussed how observing a shackled capital defendant can prematurely persuade the jury to view the defendant as dangerous. The Court explained:

> It also almost inevitably adversely affects the jury's perception of the character of the defendant. And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations — considerations

103. Jurek v. Texas, 428 U.S. 262, 275 (1976) ("Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities.")

104. Indeed, commentators have likened determinations of future dangerousness in Texas capital cases to modern fortune telling: "[P]sychiatric predictions based on hypothetical situations sometimes bear more resemblance to medieval fortune-telling than to modern scientific techniques." TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 45 (2000), *available at* http://02f2fd4.netsolhost.com/tds/images/publications/Chap3.pdf.

105. Deck v. Missouri, 544 U.S. 622 (2005).

> that are often unquantifiable and elusive—when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale."[106]

The Court concluded that a defendant's due process rights were violated when such security measures were taken without adequate cause. As with the shackles at issue in *Deck*, emphasizing the future dangerousness issue during jury selection prejudices the jury and undermines the capital defendant's right to a fair trial. Moreover, because jurors are told that they can rely solely on the culpability evidence to make a future dangerousness determination, the bifurcation of the trial fails to perform the function envisioned by the Supreme Court in *Gregg* and its progeny. When the United States Supreme Court sanctioned guided-discretion models as a constitutional form of capital punishment, it acted on the assumption that structural changes to the capital trial could counteract the inherent randomness thought to exist in discretionary capital sentencing.[107] The Court placed great weight on the premise that bifurcation of the trial into two distinct phases would help sentencers separate their guilt and punishment decisions. As the Court observed in *Gregg v. Georgia*:

> As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is appraised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.[108]

Any system which invites and encourages jurors to focus prematurely on sentencing issues undermines this constitutional requirement. Thus, the Texas capital punishment system appears to fail the most fundamental tests of constitutionality.

Moreover, we have also observed that jurors tend to base their belief

106. *Id.* at 633 (alteration in original) (citations omitted) (quoting Sochor v. Florida, 504 U.S. 527, 532 (1992)).

107. Gregg v. Georgia, 428 U.S. 153, 188 (1976); Proffitt v. Florida, 428 U.S. 242, 248-51 (1976) (laying out the mitigating and aggravating factors to be weighed in a jury determination); Jurek v. Texas, 428 U.S. 262, 271-73 (1976).

108. *Gregg*, 428 U.S. at 196.

about the defendant's dangerousness on evidence which is extremely unlikely to result in accurate future predictions of dangerousness. Although not fully developed here, it appears that the inclusion of the future dangerousness special issue question further undermines the morally principled decision jurors are asked to make by introducing a fundamentally subjective standard as a factual determination. Jurors are led to believe there can be a "right answer" to the dangerousness special issue question, when in fact the vast majority of dangerousness predictions have been and will continue to be incorrect.

Research regarding the functioning of the modern death penalty in America has identified inherent failures within the system that no amount of restructuring or tinkering is likely to eliminate.[109] Although America's experiment with the death penalty has largely failed, a minority of jurisdictions—including a handful of counties in Texas—continue to frequently use capital punishment.[110] Given that Texas is responsible for most of the executions and high numbers of death sentences in America, the following further suggestions are offered in an effort to bring the practices within the state into accord with constitutional requirements.

The inclusion of the future dangerousness special issue question appears to damage the integrity of the bifurcated capital trial and therefore ought to be legislatively removed. Although not conclusive, it is interesting that during the two-year period from which the sample of cases included in this study was drawn, not a single juror answered "no" to the future dangerousness special issue question.[111] Given that there is likely to be little variation in jurors' beliefs about capital defendant's dangerousness it appears that the future dangerousness special issue question fails to significantly further narrow death eligibility for the vast majority of capital defendants.[112] Since the Texas statute already narrows

109. *See generally* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION, (James R. Acker et al. 2d ed. 1998).

110. GARLAND, *supra* note 42, at 40-42; James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, OHIO ST. J. CRIM. L. (forthcoming) (on file with Author).

111. The sample was drawn between 2006 and 2008. During that time, seventeen capital trials were conducted. One resulted in a hung jury at the guilt phase, four resulted in sentences of LWOP, and the remaining twelve cases resulted in death sentences. Of the four cases to result in LWOP three did on the mitigation special issue question, while one did on the criminal liability question related to the defendant's participation in the capital murder. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West 2011).

112. Although rare, there have been cases in which the jury has returned a life

the class of defendants eligible to receive the death penalty by identifying particular types of aggravated murder which render a defendant death-eligible, no further narrowing is required.[113] In other words, the removal of the future dangerousness issue would not strip the Texas statute of the constitutional requirement to limit the application of the death penalty.[114]

However, the removal of the future dangerousness special issue question can only be recommended if other modifications to the Texas statute were undertaken. The mitigation special issue question, even if it were to stand alone, is fraught with ambiguity making it difficult for jurors to understand. For instance, if the future dangerousness special issue question was removed and the mitigation special issue question remained, jurors would continue to be confused by the concept of the defendant's moral blameworthiness. Absent a clearer articulation about how the guilt and penalty phase determinations differ, the lower standard of proof for finding mitigation, that jurors need not be unanimous about the mitigation question or in fact even in agreement about what factors they consider to be mitigating, and that LWOP will result if the jury cannot reach a decision, jurors will continue to fail in their attempts to follow the law.

Yet, the problem identified throughout this Article extends beyond the future dangerousness issue. Because capital jurors go through the process of death-qualification and are told in advance of the penalty phase to think of a time when they might have to decide if the defendant should be sentenced to death, evidence presented in the guilt phase will always be relevant to sentencing, regardless of whether it is channeled through the future dangerousness special issue question. In some ways then, the analysis undertaken here serves to underscore how the future dangerousness special issue question expands the malevolent effects of death-qualification. Experts have offered a couple of solutions to the problems created by bifurcation. One suggestion is to empanel a jury that

verdict after determining the defendant not to be a future danger. *See* Jury Instructions, Texas v. Estrada, No. 2008-CR-5290 (Dist. Ct. Mar. 3, 2010); Jury Instructions, Texas v. Segura, No. 07-10058, (Dist. Ct. Oct. 1, 2009); Jury Instructions, Texas v. Garcia, No. 04-9000606 (Dist. Ct. Sept. 4, 2008).

113. *See* TEX. PENAL CODE ANN. § 19.03 (West 2011).

114. *See Gregg*, 428 U.S. at 188 (1976) (death penalty cannot be imposed in an arbitrary and capricious manner). *Cf.* Proffitt v. Florida, 428 U.S. 242, 251 (1976) (Florida examines eight different aggravating factors in their determination of death penalty applicability). *See also* Jurek v. Texas, 428 U.S. 262, 271 (1976) (individualized sentencing requires the evaluation of mitigating factors).

is not death-qualified to determine guilt, then, if the defendant is found guilty, empanel a second separate death-qualified jury to determine punishment. Although this might appear to alleviate some of the shortcomings of bifurcation this method would prevent the defendant from benefiting from highly persuasive mitigating evidence related to the crime such as residual doubt. A second suggestion is to impanel a non-death-qualified jury with the maximum number of alternates. If the jury finds the defendant guilty they will be death-qualified after the guilt phase but before the presentation of penalty phase evidence. Although this second method allows for the jury to hear potentially relevant mitigating evidence related to the crime, it risks empaneling jurors who are committed to sentencing the defendant to death in the particular trial, as opposed to death-qualifying a juror generally.[115]

At a minimum, steps should also be taken to limit the amount of repeated exposure the jury receives to the future dangerousness special issue question during voir dire. Although death-qualification permits the questioning of jurors about their ability to determine answers to the special issue questions, arguments that emphasize the ability of the guilt phase evidence to determine an answer to the future dangerousness special issue question do little to clarify the distinct nature of the jury's sentencing decision. Rather, such arguments compel jurors to contemplate punishment during the guilt phase. If the dangerousness special issue question remains, judges should limit attorney arguments regarding the applicability of guilt phase evidence to the determination of the defendant's future dangerousness to the penalty phase.

VII. Conclusion

By providing jurors with the concept of dangerousness as the central focus for their sentencing decision, dangerousness permeates how jurors perceive the defendant. These data indicate that an overwhelming number of jurors make their decision concerning the defendant's punishment before any penalty phase evidence is presented. Thus, the statutory emphasis on the defendant's dangerousness, which has been exhaustively discussed during jury selection and reinforced by the evidence presented in the guilt phase, facilitates premature decision-

115. Richard Salgado, Note, *Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in* United States v. Green, 2005 B.Y.U. L. REV. 519 (2005).

making.

The Court has repeatedly emphasized the constitutional significance of providing a capital defendant an individualized sentence determination. However, the experiences of jurors during voir dire appear to confuse the purpose of bifurcation and frustrate efforts to limit arbitrariness in sentencing. Yet as the law stands, death-qualification will remain part of any capital trial, meaning that every juror will know the precise scope of the sentencing scheme prior to the start of the guilt phase. Courts must recognize that the inclusion of the future dangerousness question in the Texas statute has particularly deleterious effects on jurors' ability to distinguish between the two phases of the trial.