

## Virginia's Capital Jurors

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# VIRGINIA'S CAPITAL JURORS<sup>©</sup>

STEPHEN P. GARVEY<sup>\*</sup>  
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## INTRODUCTION

Next to Texas, no state has executed more capital defendants than Virginia, eighty-seven as of February 11, 2003.<sup>1</sup> Moreover, once the state obtains a death sentence in Virginia, not only is it likely that the sentence will survive appellate review and the defendant will be executed, but the wait between imposition of sentence and execution is likely to be unusually short.<sup>2</sup> This resolve in carrying out the death sentences it imposes, and carrying them out swiftly, has earned Virginia a reputation as one of the nation's "worst" death penalty states, second only perhaps to Texas.

The fact that Virginia carries out more of the death sentences it imposes than does any other state,<sup>3</sup> and the fact that it does so with such dispatch, tells us something about the conduct of prosecutors and appellate courts. For although Virginia prosecutors do not obtain the death penalty as often as prosecutors in a number of other jurisdictions,<sup>4</sup> they do manage to secure the execution of those sentences they do obtain, due in no small part to the fact that the

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1. Death Penalty Information Center, *Number of Executions By State Since 1976*, at <http://www.deathpenaltyinfo.org/dpicreg.html> (last visited Feb. 11, 2003). As of February 11, 2003, Texas had executed 297 inmates. *Id.*

2. See Stephen J. Spurr, *The Future of Capital Punishment: Determinants of the Time from Death Sentence to Execution* 17 (Aug. 1999) (unpublished manuscript, on file with the authors) ("There is wide variation across states that have the death penalty, with respect to both the likelihood of execution and waiting time. The state that is unquestionably the most severe in both dimensions is Virginia."); see also Brooke A. Masters, *A Rush on Virginia's Death Row*, WASH. POST, Apr. 28, 2000, at A10 ("[T]he average time between sentencing and death in Virginia has dropped 40 percent since 1995, to six years—more than four years faster than the national average.").

3. See James S. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* 73 tbl.6 (Feb. 11, 2002) (unpublished manuscript, on file with the authors).

4. See John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 486 tbl.2 (1999); Liebman et al., *supra* note 3, at 344 tbl.18 (ranking Virginia twenty-ninth out of thirty-four states in terms of the rate per 1000 homicides at which it imposes death sentences). One possible explanation for the comparatively low rate at which Virginia prosecutors secure the death penalty relative to the number of homicides in the state may be Virginia's so-called "triggerman rule," under which "only the actual perpetrator of crime ... [defined as capital murder] may be convicted of capital murder and subjected to the penalty of execution, except in the case of murder for hire." *Frye v. Commonwealth*, 345 S.E.2d 267, 280 (Va. 1986).

Virginia Supreme Court and the United States Court of Appeals for the Fourth Circuit, for all practical purposes the courts of last resort for death-row inmates in Virginia, rarely grant relief in capital cases.<sup>5</sup>

But what happens *before* a case enters the stream of appellate review, when jurors, not prosecutors and appellate judges, are among the critical actors? How do jurors who sit on capital cases in Virginia think and behave? Do they act any differently than capital jurors in other states?

We approach these questions through an analysis of data gathered from interviews with jurors who served on Virginia capital cases. After a brief description of the data, we explore four areas of interest: how Virginia capital jurors feel about the death penalty in general; how well they understand the legal rules designed to guide their sentencing decision; how, if at all, their beliefs about the defendant's future dangerousness influence their deliberations and sentencing decision; and how they allocate responsibility for the defendant's fate, as between themselves and other legal actors, and as between themselves and the defendant.

Our collection of data from capital jurors in Virginia reflects a continuation of the work of the Capital Jury Project (CJP), a nationwide effort to systematically gather and analyze data on the

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5. According to a recent report from the Joint Legislative Audit and Review Commission of the Virginia General Assembly, the Virginia Supreme Court granted relief on direct appeal in only eight percent of the 156 capital cases reviewed between 1977 and 2001, and it granted relief in only one of the fifty-six cases reviewed in state habeas corpus proceedings after 1995. See Joint Legislative Audit & Review Commission of the Virginia General Assembly, *Review of Virginia's System of Capital Punishment* 58 fig.20, 59 fig.21 (Jan. 15, 2002) (unpublished manuscript, on file with the authors) [hereinafter *Assembly Review*].

Similarly, of the 111 Virginia capital cases reviewed in federal district courts between 1977 and 2001, the courts granted a petition for a writ of habeas corpus in only fifteen; moreover, the United States Court of Appeals for the Fourth Circuit affirmed the grant of the petition in only two of those fifteen cases. It reversed in the remaining thirteen. See *Assembly Review*, *supra*, at 60 fig.22. According to Liebman and his colleagues, four federal circuits—the Fourth, Fifth, Eighth, and Eleventh—decided eighty-eight percent of all capital cases between 1973 and 1995. Of those four circuits, the Fourth Circuit had the lowest reversal rates associated with its review of cases from North Carolina, South Carolina, and especially, Virginia. See Liebman et al., *supra* note 3, at 126 fig.15; cf. Roger Parloff, *The Voodoo Court*, 22 AM. LAW. 15 (2000) ("When it comes to death penalty jurisprudence, the Fourth Circuit has quietly seceded from the Union.").

behavior of capital sentencing jurors.<sup>6</sup> The CJP began interviewing jurors in a number of states in 1990, and analyses of CJP data began appearing soon thereafter.<sup>7</sup> Much of the published research

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6. The nationwide CJP database, not yet publically available, contains the results of interviews with 1155 jurors who served on 340 capital cases in fourteen states. See Ursula Bentele & William J. Bowers, *How Jurors Decide on Death; Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011, 1065 n.192 (2001) (reporting the collection of data in Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia); William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1078 nn.190-94 (1995).

7. Quantitative analyses of CJP data appear in John H. Blume, Theodore Eisenberg & Stephen P. Garvey, *Lessons from the Capital Jury Project*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 144 (Stephen P. Garvey ed., 2002) (multistate data); Bentele & Bowers, *supra* note 6, at 1065 (addendum) (multistate data); Bowers, *supra* note 6, at 1085 (multistate data); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (multistate data); William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1998) (multistate data); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) [hereinafter Eisenberg et al., *Remorse*] (South Carolina data); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277 (2001) [hereinafter Eisenberg et al., *Forecasting*] (South Carolina data); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996) [hereinafter Eisenberg et al., *Responsibility*] (South Carolina data); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371 (2001) [hereinafter Eisenberg et al., *Deadly Paradox*] (South Carolina data); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306 (2003) (South Carolina data); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (South Carolina data); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) [hereinafter Garvey, *Aggravation and Mitigation*] (South Carolina data); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000) [hereinafter Garvey, *Emotional Economy*] (South Carolina data); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995) (North Carolina data); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183 (1995) (Kentucky data); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) [hereinafter Sundby, *Absolution*] (California data); Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003) (California data); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (California data).

using CJP data has been based on interviews with jurors from South Carolina, the state with the largest number of interviews among those states included in the CJP. Because we have access to the South Carolina data, and because South Carolina and Virginia are southern states, both of which quickly reinstated the death penalty following the Supreme Court's decision in *Furman v. Georgia*,<sup>8</sup> we present our results from Virginia alongside updated results from South Carolina in order to provide some basis for comparison.

Overall, we find, albeit based on a very limited sample size, that the jurors we were able to interview in Virginia tend to think and act, for both good and bad, in much the same way as do jurors in South Carolina. If Virginia jurors are distinctive in any respect, it's in the attention they devote to considerations relating to the defendant's future dangerousness. South Carolina jurors are preoccupied with the defendant's future dangerousness when they deliberate about his fate, but Virginia jurors are, if anything, even more preoccupied.

## I. COLLECTING THE DATA

Law students at William and Mary's Marshall-Wythe School of Law conducted all but one of the Virginia juror interviews. Each interview, conducted during the fall and winter of 2001, lasted on average between three and four hours, and used a slightly expanded version of the original CJP interview instrument.<sup>9</sup> The instrument covered both the guilt and penalty phases of the trial and included questions about the crime, the defendant, the victim, the victim's family, the jury's deliberations, and the conduct of the trial by the judge and lawyers. The instrument also collected basic demographic

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

8. 408 U.S. 238 (1972) (per curiam).

9. The modified questionnaire included several additional questions related to future dangerousness and victim impact evidence.

and attitudinal information from each juror. In the end the instrument yielded data on over 750 variables.

In keeping with CJP guidelines, our goal at the outset was to conduct interviews evenly divided between cases ending in a sentence of death and those ending in a sentence of life imprisonment.<sup>10</sup> We limited our pool of cases to those tried before 1997 in an effort to avoid interfering with ongoing litigation. We had hoped to gather enough data to permit the use of regression analysis to isolate those factors that best predict when Virginia jurors vote for life and when they vote for death. Unfortunately, jurors who sat on cases tried before 1997 turned out to be exceptionally difficult to locate and interview. Some jurors had moved from the locale where the trial had originally been conducted and could not be located; others simply refused to be interviewed, or were disinclined to spend the time needed to complete the entire survey.

In the end, we were able to conduct in-depth interviews with sixteen jurors, each of whom served on a case involving one of six defendants. Table 1 presents a profile of each defendant. In the case of defendant number 4, one of the jurors served on the original trial and sentencing, which was held in 1993. The other two jurors served at a resentencing hearing, which was held in 1996 after the defendant's original sentence had been reversed on appeal. All told, twelve jurors sat on cases resulting in a sentence of death, and four sat on cases resulting in a sentence of life imprisonment. Cases resulting in death are therefore over-represented in our sample. Three of the four defendants sentenced to death were executed in 2000, and one in 2002. The defendants in four of the cases were black; those in the remaining two were white.

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10. See Bowers, *supra* note 6, at 1081.

Table 1					
Defendant Number	Year of Trial	Sentence	Year of Execution	Defendant race	Number of jurors interviewed
#1	1995	Death	2000	Black	3
#2	1995	Death	2000	White	3
#3	1995	Death	2000	White	3
#4	1993	Death	2002	Black	1
#4	1996	Death	2002	Black	2
#5	1991	Life	—	Black	2
#6	1996	Life	—	Black	2

At this point we should enter three important caveats about the analysis that follows and any conclusion that may be drawn from the data.

First, our data are based on juror self-reports: our understanding of the facts and circumstances of the cases on which the jurors sat is therefore based entirely on what the jurors told us. We did not undertake any independent substantive review of the case files. Data based on self-reporting are subject to a variety of limitations,<sup>11</sup> not least of which is the risk of memory decay. The jurors we interviewed were asked about an event, albeit one likely to leave a lasting impression,<sup>12</sup> that happened several years ago.

Second, because the number of jurors we were able to interview was limited, our ability to confidently generalize is likewise limited.

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11. For a more detailed discussion of these limitations, see, for example, Garvey, *Aggravation and Mitigation*, *supra* note 7, at 1541-42; Garvey, *Emotional Economy*, *supra* note 7, at 29-30.

12. Keeping in mind the limits of self-reports, twelve of fourteen jurors nonetheless said they remembered hearing evidence about the defendant's punishment "very well" or "fairly well," and thirteen of fourteen said they remembered the jury deliberations about the defendant's punishment "very well" or "fairly well."



Our small sample of Virginia jurors diminishes the power of our statistical tests to detect significant differences.<sup>13</sup> Although most of the differences we report between Virginia and South Carolina jurors are statistically insignificant, we cannot rule out the possibility that our small sample of Virginia jurors has caused us to miss real differences that may nonetheless exist between the two groups. Additional interviews could very well yield different results.

Third, although we will speak throughout about "Virginia" jurors, we hasten to emphasize that with one exception all of the jurors we interviewed were from what is known as the Tidewater region of Virginia. Insofar as Virginia citizens of the Tidewater region hold beliefs and attitudes uncharacteristic of the population of the state as a whole, our ability to generalize from our results is again limited. In this connection, we would note that some observers of Virginia politics maintain that the Tidewater region is generally less "liberal" than Northern Virginia, but more "liberal" than Western Virginia.<sup>14</sup> Whether these differences in basic political orientation, assuming they exist, spill over into the sentencing behavior of capital juries is, of course, another question altogether.

## II. GENERAL ATTITUDES TOWARD THE DEATH PENALTY

We begin with a series of questions the CJP instrument asked of jurors that were designed to probe their general attitudes toward the death penalty: Do you support or oppose it? What are your beliefs about the way in which it is administered? Would you prefer an alternative to it?

First, any prospective capital juror can be challenged and removed for cause during voir dire if she would vote against the death penalty as a matter of conscience in every case in which the state requested it,<sup>15</sup> or if she would vote for the death penalty as a

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13. See generally STANTON A. GLANTZ, PRIMER OF BIOSTATISTICS ch. 6 (5th ed. 2002) (discussing the relationship between sample size and analytical power of statistical tests).

14. This is a common comment one hears from both prosecuting and defense attorneys.

15. See *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968) ("[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."); accord *Wainwright v.*

matter of principle in any case for which it was authorized by law.<sup>16</sup> Capital jurors are therefore both "death-qualified" and "life-qualified." As a result of the latter process, no prospective capital juror should be allowed to serve if he or she believes that death is the only acceptable punishment for a defendant convicted of murder. Keeping this in mind, consider the results in Table 2, which show how our jurors responded when asked how they currently felt regarding the propriety of the death penalty for someone convicted of murder. The responses of capital jurors from South Carolina are given for purposes of comparison.

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Witt, 469 U.S. 412, 424 (1985).

16. See *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.").

Table 2 For convicted murderers, do you now feel that the death penalty is . . .		
	Virginia (n = 12)	South Carolina (n = 212)
The only acceptable punishment	8%	13%
The most appropriate punishment	25%	30%
Just one of several appropriate punishments	58%	54%
The least appropriate punishment	8%	1%
An unacceptable punishment	0%	2%
Note — The significance level for the differences between the Virginia and South Carolina jurors is $p = 0.442$ based on a Mann-Whitney test.		

Ten out of the twelve jurors who responded (eighty-three percent) said that the death penalty was either the most appropriate punishment or just one of several appropriate punishments. One juror said the death penalty was the least appropriate punishment. None of these responses is inconsistent with service on a capital jury. One juror, however, said death was the *only* acceptable punishment. Assuming that this juror held the same belief at the time of trial,<sup>17</sup> the juror should have been disqualified. This pattern of responses is similar to that revealed in the responses of jurors

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17. Although a substantial period of time elapsed between the time the Virginia jurors served and the time they were interviewed, some support exists for the assumption that a juror's general attitude toward the death penalty is unlikely to have changed between the time of trial and the time of interview insofar as attitudes toward the death penalty tend to be "basically emotional." Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 26 (1994). Furthermore, it has been suggested that such attitudes are "an aspect of self-identification." Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1452 (1998). Moreover, four of thirteen Virginia jurors who responded to the question, "Have your personal feelings about the death penalty changed as a result of serving on the [defendant's] case?," indicated that the experience left them more opposed to the death penalty than before. The other nine jurors indicated that the experience did not change their feelings.

from South Carolina,<sup>18</sup> supplements existing data which suggest that a troubling number of jurors whose pro-death attitudes should disqualify them from serving on a capital jury are being allowed to serve nonetheless.

We next explore the attitudes of our Virginia jurors across a range of statements relating to the death penalty, once again placing them in comparison to the attitudes expressed by their South Carolina counterparts. The CJP questionnaire presented jurors with a number of propositions and asked them how strongly they agreed or disagreed with the stated proposition. The results presented here were recoded on a scale ranging from 1 to 3, with 1 expressing strong or moderate agreement, 2 expressing slight agreement or disagreement, and 3 expressing strong or moderate disagreement. The mean responses are presented in Table 3.

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18. Prior CJP research on South Carolina jurors has found that some fourteen percent said they felt the death penalty was the "only acceptable" punishment for "convicted murderers." See Eisenberg et al., *Deadly Paradox*, *supra* note 7, at 382-83 n.47. This percentage increases when the crime or the defendant is described in more detail, as for example, when the crime is described as the killing of a police officer. See Blume et al., *supra* note 7, at 344 tbl.1; Bowers et al., *supra* note 7, at 1505 tbl.6.

<p align="center"><b>Table 3</b>  <b>Do you agree or disagree with the following statements about  punishment for convicted murderers?</b>  1-strongly or moderately agree; 2-slightly agree or disagree;  3-strongly or moderately disagree  (means)</p>			
	Virginia	South Carolina	p-value
You wish we had a better way than the death penalty of stopping murderers	1.31	1.27	0.735
The death penalty is too arbitrary because some people are executed while others serve prison terms for the same crimes	1.46	1.22	0.140
If the death penalty were enforced more often there would be fewer murders in this country	1.55	1.45	0.278
Even convicted murderers should not be denied hope of parole some day, if they make a real effort to pay for their crimes	2.17	1.92	0.302
Murderers owe something more than life in prison to society and especially to their victim's families	1.30	1.30	0.919
Defendants who can afford good lawyers almost never get a death sentence	1.42	1.62	0.461
The death penalty should be required when someone is convicted of a serious intentional murder	1.92	1.46	0.027
You have moral doubts about the death penalty	2.07	1.93	0.466
Persons sentenced to prison for murder in this state are back on the streets far too soon	1.14	1.36	0.409
<p>Note — With the exception of the last item in the list, the number of Virginia jurors ranged from 10 to 13. Only seven Virginia jurors responded to the last item. The number of South Carolina jurors ranged from 183 to 205. Significance levels for the differences between the Virginia and South Carolina jurors are based on a Mann-Whitney test.</p>			

With one exception, none of the results presented in Table 3 rises to the level of statistical significance. If any differences do exist between the attitudes of Virginia and South Carolina jurors, we have been unable to detect them. The exception involves the statement, "The death penalty should be required when someone is convicted of a serious intentional murder." On a scale ranging from 1 to 3, with 1 indicating agreement and 3 indicating disagreement,

the mean response among the South Carolina jurors was 1.46, while that among the Virginia jurors was 1.92. The difference between the two groups is statistically significant at  $p = 0.027$ .<sup>19</sup> This result suggests at least one dimension along which Virginia jurors, or at least those from the Tidewater region, may be slightly more liberal than their South Carolina counterparts. Again, however, our small sample of Virginia jurors counsels caution in drawing any firm conclusions.

Finally, we explore whether the jurors would, if given the choice, prefer a punishment other than death for those convicted of murder. A number of public opinion polls have found that, when respondents are asked about alternatives to the death penalty, and in particular whether they would prefer a specified alternative to the death penalty if that alternative were available, support for the death penalty tends to drop.<sup>20</sup> For example, in a June 2002 Gallup poll, seventy-two percent of the respondents said they favored the death penalty when asked simply, "Are you in favor of the death penalty for a person convicted of murder?"<sup>21</sup> In contrast, when

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19. We also calculated the  $p$ -values for the items listed in Table 3 using survey ordered logit regression in order to account for the fact that not all juror responses are independent of one another insofar as more than one interviewed juror sat on each case. The differences between the Virginia and South Carolina jurors with respect to their reactions to the statement, "The death penalty should be required when someone is convicted of a serious intentional murder" remained significant at  $p = 0.005$ . All other differences remained insignificant, with the exception of the responses to the statement, "The death penalty is too arbitrary because some people are executed while others serve prison terms for the same offense," which reaches significance at  $p = 0.070$ . This statistically significant difference, unlike the previous one, suggests a dimension along which the Virginia jurors we interviewed may be more conservative than their South Carolina counterparts.

20. See, e.g., William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 79-80 (1994) (describing polls); Gross, *supra* note 17, at 1455-56 & tbl.1 (describing Gallup polls).

21. See Jeffrey M. Jones, *Slim Majority of Americans Say Death Penalty Applied Fairly: Support for the Death Penalty Higher Than in Recent Years*, at <http://www.gallup.com/poll/releases/pr020520.asp> (last visited Mar. 24, 2003). Support for the death penalty declined between 1996 and 2000 from record high levels in the immediately preceding years. See, e.g., Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 7, 7 (Stephen P. Garvey ed., 2002). The seventy-two percent figure reported in the text for 2002 reflects a slight increase over the 1996-2000 period low.

asked, "If you could choose between the following two approaches, which do you think is the better penalty for murder—the death penalty or life imprisonment with absolutely no possibility of parole?," only fifty-two percent said the death penalty.<sup>22</sup>

Prior CJP research has found that support for the death penalty tends to drop in a parallel fashion among capital jurors who are asked a similar question.<sup>23</sup> Table 4 gives the responses of our Virginia jurors when asked about three alternatives to the death penalty, comparing them once again to jurors from South Carolina.<sup>24</sup>

The two groups are quite similar. Few jurors from either state are prepared to say they prefer imprisonment *with* parole eligibility after twenty-five years to the death penalty, even if the defendant is also required to earn money to pay restitution to the victims' family. On the other hand, half of the Virginia jurors said they would prefer life imprisonment *without* the possibility of parole, and almost sixty percent say they would prefer life imprisonment without the possibility of parole if it were coupled with a requirement of restitution. Although South Carolina jurors might be somewhat more willing to abandon their support for the death penalty than are Virginia jurors,<sup>25</sup> none of the differences between the two groups is statistically significant.

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22. See Jones, *supra* note 21.

23. See, e.g., Eisenberg et al., *Deadly Paradox*, *supra* note 7, at 391 & tbl6 (reporting similar prior results based on interviews with South Carolina jurors).

24. The results reported in Table 4 for the South Carolina jurors are very similar to those previously reported in Eisenberg, et al., *Deadly Paradox*, *supra* note 391 & tbl.6.

25. Twenty percent of the South Carolina jurors, compared to only 9% of the Virginia jurors, preferred the option of twenty-five years with parole plus restitution, and 70% of the South Carolina jurors, compared to only 58% of the Virginia jurors, preferred the option of no parole plus restitution.

Table 4 Would you prefer the following alternatives?					
	Virginia		South Carolina		<i>p</i> -value
	Yes	No	Yes	No	
If murderers in this state could be sentenced to life in prison with no chance of parole for twenty-five years and even then be eligible for parole only if they earned and paid a required amount of money to the families of their victims, would you prefer this as an alternative to the death penalty?	9%	91%	20%	80%	0.694
If murderers in this state could be sentenced to life in prison without the possibility of ever being released on parole, would you prefer this as an alternative to the death penalty?	50%	50%	50%	50%	0.999
If murderers in this state could be sentenced to life with absolutely no chance of parole and also required to work in prison for money that would go to the victims' families, would you prefer this as an alternative to the death penalty?	58%	42%	70%	30%	0.519
Note — The number of Virginia jurors ranged from 11 to 12; the number of South Carolina jurors ranged from 171 to 186. Significance levels for the differences between the Virginia and South Carolina jurors are based on Fisher's exact.					

### III. CONFUSION

The CJP interview instrument asked a number of questions designed to test how well jurors understood the law governing their consideration of aggravating and mitigating factors and whether they were required under certain circumstances to impose a death sentence. Many jurors, it turns out, seem confused about the law governing their decision. Indeed, confusion over the law is a central



theme to emerge from much of the work of the CJP.<sup>26</sup> Are Virginia jurors similarly confused?

We begin with a brief review of the law governing a capital jury's consideration of aggravating and mitigating factors. Broadly speaking, a state can make any fact or circumstance an aggravating factor provided the factor "genuinely narrow[s] the class of persons eligible for the death penalty and ... reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder."<sup>27</sup> Moreover, no constitutional bar prevents a state from introducing aggravating facts that do not fall within the scope of a statutory aggravating factor, provided the state can prove beyond a reasonable doubt the existence of at least one such factor.<sup>28</sup> The law governing aggravating factors is thus largely a matter of state law.

Mitigating factors are different. Here the Constitution preempts the field. While each state is free to decide for itself whether to allow capital jurors the freedom to consider nonstatutory aggravating evidence, the Constitution *requires* states to allow each capital juror the freedom to consider any and all evidence in mitigation, statutory or nonstatutory. Known as the *Lockett* doctrine after the name of the case from which it derives,<sup>29</sup> the doctrine prevents the state from erecting any legal barrier to a capital defendant's freedom to present mitigating evidence, or to a capital juror's freedom to consider it. In particular, a capital juror must be free to consider nonstatutory mitigating evidence as well as statutory evidence; a capital juror must be free to consider evidence in mitigation even if the defense has not proven its existence beyond a reasonable doubt; and a capital juror must be

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26. See, e.g., Blume et al., *supra* note 7, at 349-65 tbls.3-6; Eisenberg & Wells, *supra* note 7, at 9-12 tbls.3-4; Luginbuhl & Howe, *supra* note 7, at 1165-66 tbl.1.

27. *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

28. See *id.* at 878; accord *Barclay v. Florida*, 463 U.S. 939, 954 (1983).

29. *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion). The Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (footnotes omitted).

free to consider evidence in mitigation even if the jury as a whole does not unanimously agree on its existence.

In many states a capital defendant enters the penalty phase after being convicted of murder and becomes constitutionally eligible for the death penalty once the jury finds the existence of at least one statutory aggravating circumstance during the penalty phase. In other states, aggravating factors are incorporated into the definition of capital murder, and a defendant's membership in the death-eligible class is determined at the guilt phase, not the penalty phase. Virginia is generally understood to fall into this second group.<sup>30</sup> Virginia law defines capital murder as a "willful, deliberate and premeditated killing" *plus* the existence of an additional factor, such as the killing of a "law-enforcement officer."<sup>31</sup> Although many states would treat this additional factor as an aggravating circumstance to be found at the penalty phase, Virginia treats it as an element of the offense of capital murder to be found at the guilt phase.

Once a Virginia capital defendant enters the penalty phase, the jury's sentencing decision is structured in a way unlike that of almost all other states. In many states, if not most, the jury is instructed to arrive at a sentence, life imprisonment or death, by weighing aggravating factors against mitigating ones.<sup>32</sup> In Virginia, the jury's deliberations are more narrowly focused. The jury is instructed that it may not impose a sentence of death unless, in the language of the applicable statute:

after consideration of the past criminal record of convictions of the defendant, [it] find[s] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense for which he stands charged

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30. See James R. Acker & Charles S. Lanier, *Capital Murder From Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death*, 29 CRIM. L. BULL. 291, 300 & n.35 (1993).

31. VA. CODE ANN. § 18.2-31(6) (Michie 1996 & Supp. 2002).

32. See generally James R. Acker & Charles S. Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes*, 31 CRIM. L. BULL. 19, 33-52 (1995) (discussing this scheme).

was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim ....<sup>33</sup>

The attention of a capital jury in Virginia is therefore directed toward two considerations: the future dangerousness of the defendant and the vileness of the crime.<sup>34</sup> The jury is also free, as *Lockett* requires, to consider all evidence in mitigation.<sup>35</sup> However, the U.S. Supreme Court has recently held that *Lockett* does not go so far as to require Virginia to instruct jurors on the specific mitigating factors relevant to the case, even when those factors are expressly described as mitigating in the state's capital sentencing statute.<sup>36</sup> In fact, Virginia's model jury instructions merely direct the jury to base its decision on "all the evidence." The term "mitigation" is nowhere mentioned.<sup>37</sup>

In light of this legal structure, we next examine how well Virginia jurors understand the rules governing aggravating and mitigating factors.

### A. Aggravating Factors

The CJP interview instrument asked three basic questions regarding the law governing aggravating factors: (1) Could the jury consider only statutory aggravating factors ("Only a specific list of aggravating factors mentioned by the judge"), or could it consider nonstatutory factors or evidence as well ("Any aggravating factor that made the crime worse")?; (2) Did an aggravating factor have to be proven beyond a reasonable doubt in order for the jury to consider it?; and (3) Did the jurors have to agree unanimously that an aggravating factor had been proven before they could consider it?

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33. VA. CODE ANN. § 19.2-264.2 (Michie 2000 & Supp. 2002).

34. See generally Douglass R. Banghart, Note, *Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77 (1999); Jason J. Solomon, Note, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55 (1999).

35. VA. CODE ANN. § 19.2-264.4 (Michie 2000 & Supp. 2002).

36. *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998).

37. See *id.* at 273 n.1.

The answers to these questions depend on the meaning assigned to the terms "factor in favor of death" and "aggravating factor." Jurors could have understood those terms to refer either to the statutory aggravating factors of future dangerousness and vileness, or in addition to nonstatutory aggravating factors not necessarily related to either future dangerousness or vileness. Under Virginia law: (1) A capital jury is free to consider nonstatutory aggravating facts, but only if the state proves the existence of at least one of the two statutory factors;<sup>38</sup> (2) The state must prove at least one of the two statutory factors beyond a reasonable doubt, but it need not bear that burden with respect to nonstatutory aggravating facts;<sup>39</sup> and (3) The members of a capital jury must agree unanimously that the state has proven the existence of at least one of the two aggravating factors,<sup>40</sup> but they need not reach unanimity on non-statutory aggravating factors or evidence.

Table 5 reports the responses of our Virginia jurors. Given the differences between Virginia and South Carolina law with respect to aggravating circumstances, the opportunity to draw meaningful comparisons between the two groups seemed limited. The corresponding responses of South Carolina jurors are accordingly omitted from the results presented in Table 5.

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38. As a matter of Virginia practice, trial courts regularly allow the state to introduce evidence in aggravation unrelated to either the future dangerousness or vileness factors, provided the state has introduced evidence tending to prove the existence of at least one of those factors. Telephone interview by Stephen P. Garvey with Robert E. Lee, Executive Director, Virginia Capital Representation Resource Center (May 22, 2002).

39. See, e.g., *Hoke v. Commonwealth*, 377 S.E.2d 595, 602-03 (Va. 1989).

40. See *id.* Although the jury must unanimously find either future dangerousness or vileness, they need not unanimously agree on the more specific predicates that support either of those unanimous findings. See *Banghart*, *supra* note 34, at 98. For example, with respect to the vileness factor, one juror might believe that a finding of vileness is supported by the fact that the crime involved aggravated battery (but not depravity of mind), while another might believe that such a finding is supported by the fact that the crime involved depravity of mind (but not aggravated battery). Similarly, jurors need not unanimously agree on the specific definition of "probability" underlying a unanimous judgment that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society."

<b>Table 5</b> <b>Juror Comprehension of the Legal Rules Governing</b> <b>Aggravating Factors</b>	
	Virginia
Among the factors in favor of a death sentence, could the jury consider . . .	
Any aggravating factor that made the crime worse	42%
Only a specific list of aggravating factors mentioned by the judge	8%
Don't know	50%
	<i>n</i> = 12
For a factor in favor of a death sentence to be considered, did it have to be . . .	
Proved beyond a reasonable doubt	75%
Proved by a preponderance of the evidence	8%
Proved only to a juror's personal satisfaction	8%
Don't know	8%
	<i>n</i> = 12
For a factor in favor of a death sentence to be considered, did . . .	
All jurors have to agree on that factor	50%
Jurors do not have to agree unanimously on that factor	25%
Don't know	25%
	<i>n</i> = 12

The responses appear to reflect the ambiguity created when the CJP questions are applied to Virginia's capital sentencing scheme. Only with respect to the question relating to the burden of proof did any single response command more than a majority of the jurors. Nonetheless, if any pattern can be fairly discerned, it would appear

to be that Virginia capital jurors, like South Carolina capital jurors, generally tend to approach aggravating circumstances as if they were elements of a substantive offense, whose existence the state must therefore prove beyond a reasonable doubt and to the satisfaction of every juror.<sup>41</sup> Moreover, insofar as the beyond-a-reasonable-doubt burden of proof and the demand for jury unanimity have become part of the folk wisdom about how criminal trials over guilt and innocence are conducted, it makes sense that jurors will carry those beliefs with them into the penalty phase, which has the look and feel of a second trial.<sup>42</sup>

### *B. Mitigating Factors*

CJP analyses of jurors in other states, including South Carolina, suggest that capital jurors generally understand that they can consider mitigating circumstances beyond those expressly enumerated in statute.<sup>43</sup> Jurors generally understand that they are free to consider any evidence in mitigation that the defendant wishes to introduce. On the other hand, jurors also tend to believe that they cannot consider a mitigating factor unless its existence is proven beyond a reasonable doubt and to the satisfaction of every juror.<sup>44</sup> Yet, these latter two beliefs are plainly at odds with well-established constitutional doctrine.

Are Virginia jurors any different? The results reported in Table 6 suggest not.

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41. See Blume et al., *supra* note 7, at 355 tbl.3; Luginbuhl & Howe, *supra* note 7, at 1165-66 tbl.1.

42. See Blume et al., *supra* note 7, at 356; Eisenberg & Wells, *supra* note 7, at 11.

43. See Blume et al., *supra* note 7, at 360 tbl.4; Luginbuhl & Howe, *supra* note 7, at 1166 tbl.1.

44. See Blume et al., *supra* note 7, at 360 tbl.4; Luginbuhl & Howe, *supra* note 7, at 1166 tbl.1.

Table 6 Juror Comprehension of the Legal Rules Governing Mitigating Factors			
	Virginia	South Carolina	<i>p</i> -value
Among the factors in favor of a life or lesser sentence, could the jury consider . . .			
Any mitigating factor that made the crime not as bad	44%*	49%*	0.432
Only a specific list of mitigating factors mentioned by the judge	6%	16%	
Don't know	50%	35%	
	<i>n</i> = 16	<i>n</i> = 214	
For a factor in favor of a life or lesser sentence to be considered, did it have to be . . .			
Proved beyond a reasonable doubt	44%	48%	0.143
Proved beyond a preponderance of the evidence	13%	7%	
Proved only to a juror's personal satisfaction	13%*	30%*	
Don't know	31%	15%	
	<i>n</i> = 16	<i>n</i> = 214	
For a factor in favor of a life or lesser sentence to be considered, did . . .			
All jurors have to agree on that factor	44%	62%	0.070
Jurors do not have to agree unanimously on that factor	19%*	24%*	
Don't know	38%	14%	
	<i>n</i> = 16	<i>n</i> = 214	
Note — An asterisk indicates the legally correct response. Significance levels for the differences between the Virginia and South Carolina jurors are based on Fisher's exact.			

Overall, the performance of our Virginia jurors does not inspire great confidence. Only 44 percent understood that their consideration of mitigating factors could extend to any fact or circumstance the defendant proffered as a basis for a sentence less than death. Only 13 percent understood that mitigating factors need only be proven to a juror's personal satisfaction. Forty-four percent wrongly believed that mitigating factors had to be proven beyond a reasonable doubt. Forty-four percent also wrongly believed that mitigating factors could not be considered unless all jurors agreed on that factor. Some of this misunderstanding may reflect problems of recall. Still, Virginia jurors, like their counterparts in South Carolina and elsewhere, appear to misunderstand some of the most basic principles governing their consideration of evidence presented in mitigation.

### *C. Mandatory Death*

The Supreme Court has long held that under no circumstances can a state *mandate* death as the punishment for a crime, no matter how bad the crime or the defendant.<sup>45</sup> Life imprisonment must always remain a legally available option, and in fact, life imprisonment is always an option in Virginia, even if the jury believes that aggravating factors outweigh any mitigating factors, or even if it believes no mitigating factors apply.

Nonetheless, a disturbing number of the jurors we interviewed believed otherwise. We asked jurors two sets of questions with particular relevance to Virginia's scheme of capital sentencing, which focuses the jury's attention on the future dangerousness of the defendant and the vileness of the crime. The first question in each set asked if the juror believed the evidence proved the existence of one or the other of these factors. The second question asked if, after hearing the judge's instructions, the juror believed

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45. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (noting that mandatory death penalty schemes "treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.").



the law *required* him or her to impose a death sentence if the evidence proved the existence of one or the other of these factors.

Answers to the first question should vary depending on the facts of the case on which the juror sat. But answers to the second question should not vary. Only one answer is correct as a matter of law: the law never requires a sentence of death.<sup>46</sup> Table 7 gives the responses.

Table 7 Vileness, Future Dangerousness and Mandatory Capital Sentencing			
	Yes	No	n
Vileness			
After hearing all the evidence, did you believe it proved that the defendant's conduct was heinous, vile, or depraved?	100%	0%	12
After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that the defendant's conduct was heinous, vile, or depraved?	55%	45%	11
Future Dangerousness			
After hearing all the evidence, did you believe it proved that the defendant would be dangerous in the future?	92%	8%	13
After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that the defendant would be dangerous in the future?	46%	53%	13

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46. *See id.*

All of the jurors who responded believed that the evidence proved the defendant's conduct was heinous, vile or depraved, and all but one said the evidence proved the defendant would be dangerous in the future. Given that twelve out of the sixteen jurors we interviewed served on cases in which the jury ultimately voted to return a sentence of death, these results come as little surprise. What does come as a surprise, however, is the number of jurors who, given a finding of future dangerousness or vileness, believed that the law required them to return a death sentence. More than half the jurors in the case of vileness, and just less than half in the case of future dangerousness, reported holding such a belief.

These results are generally consistent with those from South Carolina. They are also consistent with the results of a mock jury study we conducted in the spring of 2000 with more than 150 subjects recruited from Williamsburg and Newport News, Virginia, and instructed using the standard instructions given to Virginia jurors in capital cases.<sup>47</sup> Table 8 compares the responses of our jurors to the second question in each set with those of jurors from these two groups.

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47. See Stephen P. Garvey, Sheri Lynn Johnson & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 638 n.41 (2000).

<b>Table 8</b> <b>Mandatory Capital Sentencing</b> <b>Virginia CJP Jurors, Virginia Mock Jurors,</b> <b>and South Carolina CJP Jurors</b>				
After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that the defendant's conduct was heinous, vile, or depraved?				
	Yes	No	<i>n</i>	<i>p</i> -value
Virginia CJP Jurors	55%	45%	11	
Virginia Mock Jurors	41%	59%	154	0.529
South Carolina CJP Jurors	36%	63%	206	0.337
After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that the defendant would be dangerous in the future?				
	Yes	No	<i>n</i>	<i>p</i> -value
Virginia CJP Jurors	46%	53%	13	
Virginia Mock Jurors	38%	62%	154	0.570
South Carolina CJP Jurors	30%	70%	206	0.224
Note — Significance levels for the differences between the Virginia CJP jurors and the Virginia mock jurors are based on Fisher's exact. The significance levels for the Virginia CJP jurors and the South Carolina CJP jurors are also based on Fisher's exact.				

The level of misunderstanding is higher among both sets of Virginia jurors than among South Carolina jurors. As between the two sets of Virginia jurors the level of misunderstanding is higher among the CJP jurors than among the mock jurors. The differences between the Virginia CJP jurors and the mock Virginia jurors may of course be due to recall problems attributable to the lag between the time the CJP jurors were instructed on the law and the

time they were interviewed. These differences are, in any event, statistically insignificant. But even if the level of misunderstanding among the mock jurors is closer to the true level of misunderstanding among Virginia jurors, that figure alone suggests that far too many believe they are required to impose a death when in fact they are not.

What's worse, this misunderstanding appears due at least in part to confusion generated by the standard jury instructions used in Virginia capital cases. In the previously mentioned mock jury study, we found that 49% of the jurors who received the standard instruction believed they were required to impose a death sentence if they thought the defendant's crime was heinous, and 45% believed they were required to impose a death sentence if they thought the defendant would be dangerous in the future. In contrast, the corresponding figures for jurors who received a clarifying instruction were only 29% and 24% respectively.<sup>48</sup> The confusion about mandatory death among Virginia jurors is thus needless confusion. Simple changes to Virginia's standard jury instructions could significantly reduce the problem.

#### IV. FUTURE DANGEROUSNESS

Prior CJP research has shown that worries about a capital defendant's future dangerousness influence the dynamics of the penalty phase of a capital trial in at least three ways.

##### *A. Discussion Among Jurors*

First, the discussion among jurors during the penalty phase tends to focus heavily on the risk that the defendant, if not sentenced to death, will be released back into society to do more harm.<sup>49</sup> Virginia jurors likewise tend to focus heavily on the defendant's future dangerousness. Indeed, Virginia jurors seem to

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48. See *id.* at 640 tbl.3.

49. See Eisenberg & Wells, *supra* note 7, at 5-6 tbl.1.

focus *more* on future dangerousness, at least when compared to South Carolina jurors.

The CJP interview instrument presented jurors with a lengthy list of topics on which their penalty-phase deliberations might have focused. Jurors were asked how much the jury's discussion focused on each topic. Responses ranged from a "great deal" (coded 1) to "not at all" (coded 4). Table 9 presents the mean responses for both Virginia jurors and South Carolina jurors. Topics related to future dangerousness are listed first. The remaining topics follow, arranged from those most discussed among Virginia jurors to those least discussed.

<p>Table 9</p> <p>How much did the discussion among the jurors focus on the following topics?</p> <p>1-great deal 2-fair amount 3-not much 4-not at all (mean responses)</p>			
	Virginia	South Carolina	p- values
Topics relating to future dangerousness			
<i>Defendant's dangerousness if ever back in society</i>	1.33	1.98	0.020*
<i>How long before he would get a parole or pardon</i>	1.42	2.28	0.076*
<i>Need to prevent him from ever killing again</i>	1.46	1.83	0.222
<i>How likely he would be to get a parole or pardon</i>	1.67	2.13	0.004*
<i>Defendant's dangerousness to others in prison</i>	3.42	3.38	0.576

Topics relating to other considerations			
Death penalty as what the defendant deserved	1.33	1.63	0.228
Defendant's role or responsibility in the crime	1.38	1.27	0.553
The way in which the victim was killed	1.46	1.40	0.746
How weak or strong the evidence of guilt was	1.54	1.50	0.928
Defendant's motive for the crime	1.62	1.60	0.902
Juror's own attitude toward capital punishment	1.67	2.05	0.255
Defendant's sorrow, remorse, or lack of it	1.77	2.01	0.335
Innocence or helplessness of the victim	1.77	1.75	0.708
How well the attorneys presented their cases	1.77	1.92	0.518
Defendant's planning or premeditation	1.85	1.63	0.495
What the law requires	1.85	1.77	0.749
Defendant's history of crime or violence	1.92	2.15	0.392
Pain or suffering of the victim before death	2.00	1.80	0.386
Defendant's background or upbringing	2.17	2.29	0.781
Defendant's appearance or manner in court	2.23	2.53	0.292
Loss or grief of victim's family	2.46	2.05	0.208
Jurors' feelings toward the defendant	2.58	2.38	0.387
Reputation or character of the victim	2.62	2.41	0.475
Death penalty as a deterrent to killings by others	2.67	2.83	0.676
Jurors' feelings for the family of the victim	2.67	2.42	0.381
The victim's role or responsibility in the crime	3.00	2.74	0.419
<i>What moral values require</i>	3.00	2.48	0.086*
Drugs as a factor in the crime	3.18	3.00	0.512
<i>Defendant's IQ or intelligence</i>	3.23	2.48	0.011*
What religious beliefs require	3.25	2.91	0.258
Alcohol as a factor in the crime	3.27	3.17	0.657
What community feelings require	3.31	3.10	0.376
Insanity as a factor in the crime	3.33	3.38	0.881
<i>Jurors' feelings toward the defendant's family</i>	3.33	2.73	0.029*
Punishment wanted by victim's family	3.42	3.00	0.176
Mental illness as a factor in the crime	3.50	3.05	0.106
Similarity to other crimes and other murders	3.62	3.42	0.574

Note — The number of Virginia jurors ranged from 11 to 13; the number of South Carolina jurors ranged from 205 to 209. Significance levels for the differences between the Virginia and South Carolina jurors are based on a Mann-Whitney test. Italics and an asterisk indicate a *p*-value less than 0.10.

The topic labeled “defendant’s dangerousness if ever back in society” is the topic most discussed among Virginia jurors at the penalty phase, matched only by “death penalty as what the defendant deserved.” Other topics related to future dangerousness, such as how long it might be before the defendant is either paroled

or pardoned, were also among the topics most discussed. Jurors are less concerned with the defendant's dangerousness when those at peril are the defendant's fellow prison inmates.

Comparing the responses of Virginia jurors to those of South Carolina jurors, the average Virginia juror tended to discuss topics related to future dangerousness more than did the average South Carolina juror (with the exception of defendant's dangerousness to others in prison).<sup>50</sup> Moreover, the differences between the responses of the Virginia and South Carolina jurors to three out of the five topics related to future dangerousness were statistically significant. One immediate explanation for these differences is the law. In South Carolina, jurors are free to consider a defendant's future dangerousness as a nonstatutory aggravating circumstance, but future dangerousness is not among the aggravating factors expressly enumerated in the state's capital sentencing statute. In contrast, future dangerousness *is* expressly enumerated in Virginia law. To be sure, future dangerousness is one of only two possible predicates for a capital sentence in Virginia, and in some cases it will constitute the only aggravating factor on which the prosecution relies. Thus, Virginia jurors would tend to focus on future dangerousness because the law requires them to focus on it.<sup>51</sup>

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50. Virginia jurors also differed from South Carolina jurors with respect to a handful of other items. For example, compared to the deliberations among South Carolina jurors, the deliberations among Virginia jurors tended to concentrate less on "what moral values require," "defendant's IQ or intelligence," and "jurors' feelings toward the defendant's family." Assuming these differences are real, any explanation we could offer for them would be speculation.

51. We also calculated *p*-values for the items listed in Table 9 using survey ordered logit regression. *See supra* note 19. The differences between the responses of the Virginia jurors and the South Carolina jurors were statistically significant for the following items: "defendant's dangerousness if ever back in society" ( $p = 0.029$ ); "how long before he would get a pardon or parole" ( $p = 0.002$ ); "death penalty as what the defendant deserved" ( $p = 0.093$ ); "defendant's IQ or intelligence" ( $p = 0.023$ ); "juror's feelings toward the defendant's family" ( $p = 0.004$ ); and "punishment wanted by the victim's family" ( $p = 0.020$ ). Two out of the three topics related to future dangerousness and identified as statistically significant in Table 9 therefore retain their significance in the regression models.

*B. Estimates of Release Time*

Second, the odds of a defendant causing future harm to others outside of prison obviously depends on whether and when, if not sentenced to death, he will be released from prison, usually on parole. Prior CJP research has shown that capital jurors consistently tend to underestimate the time a defendant would be required to remain in prison before becoming parole-eligible.<sup>52</sup> Is the same true of Virginia jurors?

At the time the CJP began its interviews, many capital defendants not sentenced to death would in fact have been eligible for parole.<sup>53</sup> The only real question was how long they would remain in prison before reaching eligibility. Today, in contrast, almost all states, including Virginia, provide that a capital defendant sentenced to life imprisonment will remain in prison for the rest of his life.<sup>54</sup> Parole is no longer an option; life imprisonment means imprisonment for life. In addition, a capital defendant is now entitled, under *Simmons v. South Carolina*,<sup>55</sup> to inform the jury that he is ineligible for parole for life, provided he is in fact ineligible for parole for life under state law and his future dangerousness is "at issue" at sentencing.<sup>56</sup> Virginia law on this point actually goes further than federal law. As of 1999, Virginia law entitles all capital defendants to an instruction *upon request* that "the words 'imprisonment for life'—the only alternative to death under Virginia law today—"mean 'imprisonment for life without possibility of parole.'"<sup>57</sup>

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52. See, e.g., Bowers & Steiner, *supra* note 7, at 647 tbl.1.

53. See *id.*

54. Death Penalty Information Center, *Life Without Parole*, at <http://www.deathpenaltyinfo.org/lwop.html> (last visited Mar. 24, 2003).

55. 512 U.S. 154 (1994) (plurality opinion).

56. See *id.* at 156. For *Simmons*' progeny, see *Kelly v. South Carolina*, 534 U.S. 246 (2002); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Ramdass v. Angelone*, 530 U.S. 156 (2000); *O'Dell v. Netherland*, 521 U.S. 151 (1997). For a critique of *Simmons*' "at issue" requirement, see John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397 (2001).

57. *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 616 (Va. 1999).



Under Virginia law the parole eligibility of a capital defendant not sentenced to death depends on when he committed the crime for which he was convicted. Defendants whose crimes were committed on or after January 1, 1995 are ineligible for parole.<sup>58</sup> Defendants whose crimes were committed before that date were and are eligible for parole after twenty-five years,<sup>59</sup> with two limited exceptions. First, if the defendant had been previously sentenced to life imprisonment, then the mandatory minimum term under the life sentence imposed for the capital conviction would be thirty years.<sup>60</sup> Second, if the capital murder conviction was the defendant's third conviction—his third “strike”—for either murder, rape or robbery with a deadly weapon, then the defendant would be ineligible for parole for life.<sup>61</sup>

Based on a review of newspaper accounts and reported judicial opinions, it appears that all but one of the defendants in our study were eligible for parole under Virginia law. Four out of the six defendants were eligible for parole after twenty-five years, and one after thirty years. Moreover, because these defendants were eligible for parole they would have been unable to secure an instruction on parole ineligibility under *Simmons*. The remaining defendant (Defendant 4) was ineligible for parole at the time of his original trial and sentencing in 1993. However, the members of that jury were not, given the law at the time, informed of that fact. Defendant 4's sentence was reversed on appeal, and he was resentenced in 1996. Due to intervening changes in the law, the members of the resentencing jury, unlike those of the original jury, were told that he would be ineligible for parole for life. Juror 1 for Defendant 4 served on the original jury. Jurors 2 and 3 served on the resentencing jury.

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58. VA. CODE ANN. § 53.1-165.1 (Michie 2002).

59. VA. CODE ANN. § 53.1-151(C) (Michie 2002). *But cf.* William C. Hood III, Note, *The Meaning of “Life” for Virginia Jurors and its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1605 & n.13 (1989) (noting that credit for good time could reduce this period by three years and three months).

60. VA. CODE ANN. § 53.1-151(D) (Michie 2002).

61. *Id.* § 53.1-151(B1). In some cases a defendant might accumulate all three strikes at once based on the same course of conduct.

With this background in place, Table 10 presents the responses of each of our jurors to the question: "How long did you think someone not given the death penalty for capital murder in this state usually spends in prison?"

Table 10 Estimates of Release Time if Not Sentenced to Death (in years)				
	Juror Number			
Defendant Number	#1	#2	#3	Years in prison before being eligible for parole
#1	10	15	50	30
#2	10	20	20-25	25
#3	13 "no parole"	25	life; "wasn't sure if meant life"	25
#4	20	—	—	life
#4	—	life	"not a factor; thought no parole unless law changed"	life
#5	25	"no idea"	—	25
#6	12-14	20	—	25

The results are generally consistent with prior CJP findings.<sup>62</sup> Of the fifteen jurors who responded, eight estimated that capital

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62. See, e.g., Bowers & Steiner, *supra* note 7, at 647 & tbl.1 (reporting that thirty-six Virginia jurors who served on capital cases tried between March 1989 and November 1991, during which time capital defendants not sentenced to death were eligible for parole after twenty-five years in prison, gave a median estimate release time of only sixteen years).

defendants not sentenced to death are usually released from prison well before the time the defendant in the case on which they sat would even become eligible for release on parole. The estimations of six jurors corresponded to, or exceeded, the actual time the defendant in the case would remain in prison before becoming eligible for parole. The remaining juror offered a range in response to the question, with the low end underestimating the number of years the defendant would be required to serve, and the top end corresponding to it. The responses in the case of Defendant 4 also display the potential influence of *Simmons*. The juror who did not receive the instruction on parole ineligibility estimated that the defendant would be released in twenty years, while the two jurors who did receive the instruction correctly responded that the defendant would remain in prison for life.

### C. Sentencing Decisions

Third, prior CJP research strongly suggests that concerns among jurors about a defendant's future dangerousness often translate into a death sentence.<sup>63</sup> For example, researchers using data based on interviews with South Carolina jurors found that the less time a juror believed the defendant would remain in prison unless sentenced to death, the more likely the juror was to cast his or her first vote for death.<sup>64</sup> This association between a juror's estimated release time and the juror's first vote at the penalty phase remained statistically significant in regression models that controlled for the most salient factors influencing a juror's sentencing decision.<sup>65</sup>

Although the small number of interviews we were able to conduct prevents us from constructing similar regression models for our Virginia jurors, we can at least report the responses jurors

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63. See *id.* at 663-64; Eisenberg et al., *Forecasting*, *supra* note 7, at 300-03 tbl.6; Eisenberg & Wells, *supra* note 7, at 7.

64. See Eisenberg et al., *Forecasting*, *supra* note 7, at 300-01 tbl.6.

65. See *id.* (estimate of release time variable statistically significant at 0.01 level in model controlling for other salient variables).

gave when asked: "When you were considering punishment, were you concerned that the defendant might get back into society someday, if not given the death penalty?" Table 11 gives the results.

<b>Table 11</b> <b>When you were considering punishment, were you concerned that the defendant might get back into society someday, if not given the death penalty?</b>		
	Virginia ( <i>n</i> = 14)	South Carolina ( <i>n</i> = 211)
Yes, greatly concerned	64%	37%
Yes, somewhat concerned	29%	31%
Yes, but only slightly concerned	0%	13%
No, not at all concerned	7%	19%
Note — The significance level of the differences between the Virginia and South Carolina jurors is $p = 0.028$ based on a Mann-Whitney test.		

Nine of the jurors who responded (64%) said they were "greatly concerned," and another four (29%) said they were "somewhat concerned." Only one juror said he or she was not at all concerned. Moreover, the differences between the Virginia jurors and South Carolina jurors are quite striking. They are also statistically significant ( $p = 0.028$ ).<sup>66</sup> While an analysis that held constant other relevant variables would provide better evidence of a relationship between a juror's worries about a defendant's future dangerousness and the juror's decision to vote for death, the results presented in Table 11 are at least consistent with such a relationship. Indeed, because future dangerousness is one of the two predicates for a capital sentence expressly set forth in Virginia law, we would guess

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66. These differences remain statistically significant at  $p = 0.091$  when the  $p$ -value is calculated using survey ordered logit regression. See *supra* note 19.

that, if anything, the relationship is even stronger in Virginia than in South Carolina.

In sum, capital jurors are generally worried about a defendant's future dangerousness. Virginia jurors are no different. Indeed, compared to South Carolina jurors, our Virginia jurors, are, if anything, even more concerned. This difference may reflect the fact that under Virginia law, both at the time our jurors served and today, future dangerousness is often the focal point of the jury's penalty phase deliberations. On the other hand, our jurors' concerns might also reflect the fact that all but one of the defendants in our study were eligible for parole if not sentenced to death. Moreover, with only two exceptions, none of the jurors received any instruction regarding the defendant's parole ineligibility. In contrast, under Virginia law today, no defendant convicted of capital murder is eligible for parole, and all capital jurors are informed of that fact. Whether these changes offset the Virginia statute's continued focus on future dangerousness, and thereby diminish the grip of future dangerousness on the minds of Virginia capital jurors, remains an open question.

## V. RESPONSIBILITY

A capital jury is responsible for the sentence it imposes, at least insofar as the law gives its members the freedom to choose either life or death. Moreover, under *Caldwell v. Mississippi*,<sup>67</sup> capital jurors cannot be misled into thinking that responsibility for the defendant's sentence rests in anyone's hands but their own.<sup>68</sup> So, for example, if a prosecutor implies during closing arguments that the jury should impose a death sentence because that sentence will, if erroneous, be corrected on appeal, the defendant's sentence is constitutionally invalid and must be reversed.<sup>69</sup> Prior CJP research

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67. 472 U.S. 320 (1985).

68. See *id.* at 328-29; see also Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 111-12 (2002) (discussing *Caldwell* and its progeny).

69. See *Caldwell*, 472 U.S. at 323.

examining the allocation of responsibility in capital sentencing has in general reached two conclusions worth discussing here.

First, when asked who, as between the jury, the judge, and the appeals courts, bore responsibility for whether the defendant lived or died, most jurors said they believed, as they should, that such responsibility rests strictly or mostly with the jury.<sup>70</sup> Nonetheless, a substantial minority said they believed such responsibility was only partly the jury's, and partly that of the judge and appeals courts, or else mostly that of the judge and the appeals courts.<sup>71</sup> These latter two responses are, we believe, inconsistent with the spirit, if not the letter, of *Caldwell*.

How do our Virginia jurors compare? Table 12 reports their responses, along with those of South Carolina jurors.

Table 12 When you were considering the punishment, did you think that whether the defendant lived or died was . . .		
	Virginia (n = 14)	South Carolina (n = 208)
Strictly the jury's responsibility and no one else's	29%	31%
Mostly the jury's responsibility, but the judge or appeals courts take over responsibility whenever they overrule or change the jury's decision	36%	31%
Partly the jury's responsibility and partly the responsibility of the judge and appeals courts who review the jury's sentence	29%	23%
Mostly the responsibility of the judge and appeals courts; we make the first decision but they make the final decision	7%	15%
Note — The significance level of the differences between the Virginia and South Carolina jurors is $p = 0.870$ based on a Mann-Whitney test.		

70. See Bowers, *supra* note 7, at 1096 tbl.11; Eisenberg et al., *Responsibility*, *supra* note 7, at 353 tbl.1.

71. See Bowers, *supra* note 7, at 1096 tbl.11; Eisenberg et al., *Responsibility*, *supra* note 7, at 353 tbl.1.

Consistent with prior CJP findings, most of the Virginia jurors (65%) assigned responsibility to the jury, either strictly or mostly, as did a similar majority of the South Carolina jurors (62%). Still, a substantial minority (36%) assigned responsibility for the defendant's fate partly or mostly to the judge and appeals courts. The same held true for the South Carolina jurors (38%). These results suggest that more should be done to ensure that jurors do not enter the penalty phase believing that responsibility for the defendant's fate rests with anyone else but them. Simply preventing prosecutors from encouraging jurors to abdicate responsibility appears not to be enough. Instead, jurors should clearly and unequivocally be instructed that they and they alone are responsible for deciding what the defendant's punishment will be.<sup>72</sup>

Second, prior CJP research also suggests that jurors tend to believe that the defendant himself bears the greatest responsibility for the punishment he ultimately receives. This result emerges when the range of actors to whom responsibility can be assigned is expanded to include the defendant himself, in addition to the jurors, the judge, and the law. Table 13 gives the results for our Virginia jurors, compared once again to South Carolina jurors.

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72. See Hoffman, *supra* note 7, at 1157; see also Eisenberg et al., *Responsibility*, *supra* note 7, at 379.





The results for the Virginia jurors display the familiar pattern. When asked to rank on a scale of one to five who or what is most to least responsible for the defendant's punishment, most Virginia jurors (55%) say the defendant ranks first, as do most South Carolina jurors (51%). Capital jurors thus appear disinclined to see the defendant as a victim of social circumstance. They tend to see him instead as a responsible actor who chose to commit the crime for which he has been convicted, and consequently, the lion's share of responsibility for his ultimate punishment rests with him.<sup>73</sup>

None of the differences between the responses of the Virginia jurors and the South Carolina jurors is statistically significant, with one exception. Although jurors from both states agreed that the defendant himself bears the greatest responsibility for his punishment, they disagree on who bore the least responsibility. South Carolina jurors tended to believe that the judge is least responsible, whereas Virginia jurors tended to believe that they as individuals were least responsible. Assuming that this difference is real, it may be due in part to the fact that a majority or near majority of the Virginia jurors believed that the law required them to impose a death sentence if they believed the evidence proved the crime's vileness or the defendant's future dangerousness.<sup>74</sup> If jurors believe the law requires a death sentence when these facts exist, then the law really decides the defendant's punishment,<sup>75</sup> not the jurors.

### CONCLUSION

A defendant sentenced to death in Virginia, more so than a defendant sentenced to death in another state, is likely to be executed, and he is likely to be executed with exceptional dispatch. According to conventional wisdom, the state and federal courts hearing appeals from Virginia's death row are exceptionally unsym-

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73. Cf. Garvey, *Aggravation and Mitigation*, *supra* note 7, at 1567.

74. See *supra* tbls. 7-8.

75. Forty-five percent of the Virginia jurors said that, after the defendant, the law was most responsible for the defendant's punishment.

pathetic to those appeals. The result is an appellate process that affirms death sentences, and affirms them quickly.

Yet in contrast to its courts, Virginia's capital jurors appear, based on our results, to behave much like their counterparts in South Carolina and, we suspect, in most other states. Of course, saying Virginia capital jurors behave like other capital jurors is not to say they always behave as they should. On the contrary, Virginia jurors, like jurors in South Carolina and elsewhere, often fail to behave as the law expects them to behave, and considerable room exists in Virginia, as it does in South Carolina and elsewhere, for improvement in the process by which capital jurors are selected and instructed.

In at least one respect, however, Virginia jurors may be different. That difference relates to future dangerousness. Prior research finds that worries about a defendant's future dangerousness play a critical role in a capital juror's decision to vote for life or death. The limited evidence presented here suggests that future dangerousness, at least among the jurors we interviewed, may play an even greater role in the life and death decisions of Virginia's capital jurors.