
Research on the Death Penalty: Research Note

Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions

William Bowers

Twenty years after the Supreme Court struck down existing death penalty statutes (*Furman v. Georgia* 1972) and a day after Justice Thurgood Marshall's death, the senior Justice of the U.S. Supreme Court, Harry Blackmun, charged the Court with coming "perilously close to murder" in its latest death penalty ruling. He made this charge in an unusual oral dissent from a decision which held that a federal appeals court could not hear newly developed evidence of a death row inmate's possible innocence (*Herrera v. Collins* 1992). The Court, nine months earlier, had barred a lower federal court from hearing new evidence challenging execution by asphyxiation as cruel punishment (*Gomez v. U.S. District Court* 1992) and had then taken the unprecedented step of ordering no further stays of execution (*Vasquez v. Harris* 1992).¹ How did we reach this point when 20 years earlier the Court had declared that the death penalty as applied was too arbitrary to be constitutionally ac-

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¹ The *Herrera*, *Gomez*, and *Vasquez* decisions go well beyond what Weisberg (1983) has described as "deregulating death" and beyond the Court's recent "deregulation" ruling in *Payne v. Tennessee* (1991) that opened the sentencing phase of a capital trial to potentially inflammatory and prejudicial evidence and arguments about the character of the victim and the impact of the crime on the victim's family, associates, and community. In his last death penalty dissent in *Payne*, Justice Marshall declared that "[p]ower, not reason, is the new currency of this Court's decisionmaking," referring to the changing composition of the Court rather than changing constitutional doctrine as the root of this "about face" in the law governing the sentencing of capital defendants (*Payne* 1991:2619, Marshall, J. dissenting). For discussions of the Court's *Gomez* and *Vasquez* decisions in the Robert Alton Harris case, see Reinhardt 1992 and Good 1993.

ceptable, and when virtually all other modern industrialized nations of the free world either had already, or soon would, do away with capital punishment?

The Court's answer is that we got where we now are—191 executions, 2,676 people awaiting execution, and perhaps a million hours of state, federal, and Supreme Court time devoted to capital cases since *Furman*²—because it changed its mind about the arbitrariness of capital punishment.³ In 1976, the Court decided that “on their face,” the new “guided discretion” capital statutes enacted after 1972 would curb the arbitrariness *Furman* declared unconstitutional (*Gregg v. Georgia* 1976, and companion cases, including *Jurek v. Texas* 1976 and *Proffitt v. Florida* 1976). States that had such statutes could go ahead with capital punishment.

A critical reckoning on arbitrariness came after a decade of experience with these guided discretion statutes when the Court was confronted in *McCleskey v. Kemp* (1987) with extensive systematic evidence of gross racial disparities in capital sentencing (Baldus et al. 1990). The question was whether these new statutes approved “on their face” had failed in practice to curb the arbitrariness, specifically racial bias as a form of arbitrariness, condemned in *Furman*. The Court's answer by a single vote was that this evidence of systemwide racial disparities, though assumed valid by the Court, could not sustain McCleskey's challenge⁴ because it did not prove intentional discrimination on anyone's part in this particular case.⁵ The Court's ruling in *McCleskey* meant that the kind of evidence that would suffice to save McCleskey's job could not save his life (Gross & Mauro 1989).⁶

² The execution and death row figures are current as of 15 Jan. 1993; NAACP Legal Defense & Educational Fund 1993.

³ Zimring & Hawkins 1986 argue that *Gregg*, not *Furman*, was the aberrant decision both historically and constitutionally.

⁴ The decision did not categorically rule out a challenge to the death penalty's constitutionality based on systemwide evidence of arbitrariness. This, after all, is precisely what *Furman* was.

⁵ The Court was particularly vehement that such evidence cannot be taken to impeach the behavior of jurors:

Thus, it is the jury that is a criminal defendant's “protection of life and liberty against race or color or prejudice.” . . . Specifically, a sentencing jury representative of a criminal defendant's community “diffused impartiality,” . . . in the jury's task of “express[ing] the conscience of the community on the ultimate question of life or death.” . . . But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgements that defy codification and that “buil[d] discretion, equity, and flexibility into a legal system.” (P. 4545b)

⁶ *Gregg* and *McCleskey* were surely difficult decisions that may have involved bargaining and compromise. In 1976, the Court appears to have struck a bargain that rejected mandatory death sentences in exchange for the acceptance of sentencing under guided discretion statutes. The theory was that the former denied the defendant's constitutionally protected right to individualized treatment based on his or her

Yet, this legalistic account leaves out, I think, an essential ingredient for understanding why the Court acted as it did; namely, the Court's misplaced apprehension about public opinion. That is to say, the Court's 1976 affirmation and 1987 reaffirmation of capital punishment (1) may reflect the Court's belief that the public wants capital punishment and to do away with it would be disastrous for the Court's credibility with the public; when, in fact, (2) the public's expressed support for capital punishment is not a genuine but a spurious function of peoples' desire for harsh but meaningful punishment for convicted murderers. I will review the Court's own opinions for evidence bearing on the first proposition, and then turn to recent citizen survey data and ongoing interviews with capital jurors for evidence concerning the second proposition.

I. The Court's Apprehension about Public Opinion

The Court has paid close attention to public opinion polls on the death penalty. In a 1968 decision that said people could not be kept off capital juries simply because they personally opposed the death penalty (*Witherspoon v. Illinois* 1968), Justice Stewart, writing for the Court, declared that the United States was a "nation less than half of whose people believe in the death penalty" (p. 520), citing a 1966 Gallup poll showing 42% in favor, 47% opposed, and 11% undecided. He went on to say that a jury consisting entirely of death penalty supporters would "speak only for a distinct and dwindling minority" (*ibid.*), contrasting the 1966 figures with an earlier 1960 poll showing 51% in favor, 36% opposed, and 13% undecided.

By 1972 when the Court declared the death penalty unconstitutional in *Furman*,⁷ death penalty support was on the rise in the polls. Chief Justice Burger noted that a 1969 poll

blameworthiness while the latter provided a mechanism for individualizing the sentencing process. The Court's failure to reach a decision in the 1975 *Fowler v. North Carolina* case, and the stretch in this theory required to include the Texas "yes" or "no" dangerousness statute under the individualized treatment standard (Black 1981) may also be signs of compromise.

There may have been another kind of trade-off in 1987 when the Court agreed to deny the racial bias challenge in *McCleskey* and to affirm in *Booth v. Maryland* that the "individualized treatment" standard prohibited "victim impact evidence" in sentencing. Both cases were decided by a single vote; eight of the nine justices lined up on the same side (either for or against the petitioner) in both cases; Justice Powell who changed sides authored both opinions. His opinion in *Booth* suggests that his *Booth* vote was colored by the concerns raised in *McCleskey* (p. 506, esp. n.8).

⁷ In addition to the arbitrariness of its application, the Eighth Amendment challenge to the death penalty in *Furman* required the Court to consider the contemporary meaning of the amendment's "cruel and unusual punishment" clause. Its meaning is not static; it "may acquire meaning as public opinion becomes enlightened by a humane justice" (*Weems v. United States* 1910:378). Thus, a previously acceptable punishment such as the death penalty could become unconstitutional, owing to "evolving standards of decency" (*Trop v. Dulles* 1958:101).

showed a 51% majority in favor of the death penalty and 40% opposed, and he contrasted these results with those of the 1966 Gallup poll showing 42% in favor and 47% opposed (dissenting, p. 386).⁸ Justice Marshall responded with serious questions about the adequacy of the polls for judging whether capital punishment comports with contemporary values. He observed that the American people were poorly informed about the ways the death penalty was used and that their expressed support for capital punishment should be given little weight because only a public “fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable” (concurring, p. 361).

By 1976, when the *Gregg* Court changed its mind about arbitrariness, death penalty support had reached about 60% in the polls. A 1972 Gallup poll showed 57% in favor; a 1973 Harris survey showed 59% in favor. Justice Stewart, writing for Stewart, Powell, and Stevens in *Gregg*, reiterated that the Eighth Amendment “‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society’ [citing] (*Trop v. Dulles* [356 U.S. (1958)] at 101).” “The assessment of contemporary values,” he wrote (p. 173), “is not to be decided subjectively, but by ‘objective indicia’”, and he pointed to the enactment of new capital statutes in 35 states and the returning of death sentences by juries under these new statutes as objective indications of public support following *Furman*. He then cited the 1972 Gallup and 1973 Harris polls in support of his conclusion that “a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction” (p. 179).⁹ Justice Stewart’s

⁸ Dissenters also felt that the failure of state legislatures to abolish the death penalty was a sign of continuing public support. Justice Powell (dissenting, p. 437) noted that the “legislative judgments of the people’s chosen representatives” were the “first indicator of the public’s attitudes.” Chief Justice Burger (dissenting, p. 385) said that the Congress and the legislatures of the states provided the most “reliable indicia of contemporary attitude” and pointed out that the legislatures had shown no sign of rejecting death as punishment.

⁹ Research by the time of *Gregg* had raised serious questions about reliance on, or even the meaning of, the standard favor/oppose polling question. Studies showed that people who said they favored the death penalty typically endorsed the idea of capital punishment but not necessarily its implementation (Vidmar & Ellsworth 1974), not if they knew the realities of its administration (Sarat & Vidmar 1976) and not if they themselves would have to be responsible, as jurors, for its imposition (Juror 1971).

Moreover, in its 1976 rejection of statutes that made the death penalty mandatory for certain crimes in *Woodson v. North Carolina* (1976), the Court relied on research that went beyond the standard favor/oppose death penalty polling question. Thus, for the claim of legislative and jury aversion to mandatory statutes, Justice Stewart cited Vidmar & Ellsworth’s 1974 review of research that found “‘despite the increasing approval for the death penalty reflected in opinion polls during the last decade, there is evidence that many people supporting the general idea of capital punishment want its administration to depend on the circumstances of the case, the character of the defendant, or both’” (*Woodson* 1976:298, n.34).

earlier reliance on the polls in *Witherspoon* returned perhaps to haunt him in *Gregg*.

In *Gregg*, then, the Court effectively converted the constitutional question of the death penalty's comportment with the values of a maturing society into a political question of what state legislatures have done about capital punishment. Instead of following Justice Marshall's urging to adopt a standard that looked to informed opinion about the death penalty,¹⁰ the Court rested its judgment above all on the popularity of the death penalty with the public, as reflected in the actions of legislators and the behavior of jurors.

Why was the Court so interested in the polls and so ready to defer to state legislatures? Concerning the polls, the Eighth Amendment's protection against punishments that violate "the evolving standards of decency that mark the progress of a maturing society" would seem to give the Justices the latitude to look beyond majority attitudes to an "informed public," as Justice Marshall did, or to "other enlightened nations," as Justice Brennan did. Yet, the specter of rising majority support for capital punishment in the polls was surely too hard for most Justices to reconcile with claims that the death penalty violates "evolving standards of decency" and undoubtedly had a chilling effect on their readiness to outlaw the death penalty for good, or even to stick with their earlier judgment that its application was too arbitrary.¹¹ Historically, the Court has been reluctant to use the Eighth Amendment so long as it believed that most people approved of a punishment (Hoffmann 1993).

Concerning the Court's deference to state legislatures, perhaps the stormy prior decade of conflict with states over school desegregation and civil rights cases made the Court reluctant to do more than ban the death penalty's mandatory use (see note 6). The Court may not have wanted to risk what it thought would be another unpopular, emotionally charged decision, especially in those states where its reputation and credibility were already tarnished (Bass 1990). Ironically, it was Justice Marshall as Chief Counsel for the NAACP Legal Defense Fund in 1954 who brought the landmark school desegregation cases (*Brown v. Board of Education* 1954) that contributed perhaps most of all to the Court's troubles during this period.

¹⁰ Referring to the new death penalty laws in his *Gregg* dissent, Justice Marshall wrote, "if the constitutionality of the death penalty turns, as I have urged, on the opinion of an *informed* citizenry, then even the enactment of new death statutes cannot be viewed as conclusive" (p. 232). In further support of his claim that the American public knows very little about capital punishment, he cited Sarat & Vidmar's 1976 test of the "Marshall hypothesis."

¹¹ As an Eighth Amendment violation, the death penalty's arbitrariness was a judgment of the Court that extended the notion of "cruel and unusual punishment" beyond the absolute excessiveness of a punishment or its disproportionality relative to a particular crime, to include the fairness or utility of its administration.

By 1987, when the Court rejected McCleskey's challenge that the death penalty was racially biased and hence too arbitrary, public support had risen above 70%. These polling results have been interpreted as solid public support for capital punishment by the pollsters, the news media, and the politicians. Indeed, they prompted pollsters to declare "deep-seated pro-death penalty attitudes" and "continuing strong support for [the] death penalty" (Field Institute 1990), politicians to make capital punishment a campaign issue (Oreskes 1990),¹² and researchers to focus attention on the polling results (Bohm 1991; Fox et al. 1990–91). And haven't we all—opponents, supporters and the public at large—now come to believe that Americans solidly support the death penalty?

II. A Spuriousness Theory of Expressed Death Penalty Support

Consider the possibility that we all, including the Court, have misinterpreted the polls. Perhaps the expressed support they reflect is not a deep-seated or strongly held commitment to capital punishment but actually a reflection of the public's desire for a genuinely harsh but meaningful punishment for convicted murderers.¹³ This spuriousness theory is built on three specific hypotheses. The first, and most important, of these is that (1) people will abandon the death penalty when presented with a genuinely harsh and meaningful alternative. This central claim is substantiated by two subordinate hypotheses, which I also seek to confirm: (2) people see fundamental shortcomings in the death penalty as a punishment, and (3) they accept the death penalty because they believe the currently available alternatives are insufficiently harsh or meaningful.

In support of this theory, I will offer evidence for each of these hypotheses from two sources: (1) surveys of citizens in New York and Nebraska that Margaret Vandiver and I conducted in 1991¹⁴ and (2) interviews with capital jurors in Cali-

¹² What Oreskes 1990 called "the political stampede on executions" was not always successful, as 1990 gubernatorial hopefuls Bob Martinez in Florida, Mark White in Texas, and Diane Feinstein in California learned.

¹³ In this connection, Stinchcombe et al. (1980) found that death penalty support in responses to the favor/oppose question closely tracked other indicators of desire for harsh punishment, particularly agreement with the statement, "we need stiffer sentences to show criminals that crime does not pay." They found further that both the death penalty-specific variable and the general harsh punishment variable moved together over time and responded alike to social disruptions such as the school busing controversy in northern cities, and that they moved independently of trends in crime rates, especially crime for which the death penalty might be imposed.

¹⁴ The initial findings of these two surveys were reported in Bowers and Vandiver 1991a, 1991b. A more detailed analysis of these data will be published shortly in Bowers et al. (in press).

ifornia, Florida, and South Carolina, the first three states in which such interviews have been virtually completed in a 13-state study now underway.¹⁵

Hypothesis 1: People will abandon the death penalty when presented with a harsh but meaningful alternative.

In a series of surveys beginning with one conducted by Amnesty International USA in Florida in 1985 and followed up by surveys in other states, the following question, or one very much like it, was asked: "Suppose convicted first-degree murderers in this state could be sentenced to life in prison without parole and also be required to work in prison for money that would go to the families of their victims. Would you prefer this as an alternative to the death penalty?"

This question was asked in surveys in Florida, Georgia, New York, and California 1985–89 and replicated in our 1991 New York and Nebraska surveys. Our New York survey included both a New York City sample¹⁶ and a representative statewide sample. Panel B of Table 1 shows the responses to this question in the four earlier surveys and in our three samples (the New York State and City samples are shown separately). Panel A of the table shows the responses to the standard "favor/oppose" death penalty polling question.

In all instances where this alternative of life without parole combined with a restitution requirement (LWOP+R) was posed, expressed death penalty support plummeted. Among the earlier surveys, it dropped 62 percentage points in Florida; 32 points in Georgia; 40 points in New York; and 54 points in California. Among our own samples, it dropped 52, 49, and 56 points, respectively, in New York State, in New York City, and in Nebraska.

What is more, this obviously harsh but meaningful punishment, which puts the offender to work to pay restitution for the loss and suffering his crime has caused, is preferred to the death penalty by a majority in every state where it was posed as an alternative.¹⁷ Even among respondents who said they

¹⁵ The co-investigators for these states are Scott Sundby, Gordon Waldo, and Ted Eisenberg, respectively. The target sample in each state is 120 interviews; 4 each in 30 capital cases since 1988, 15 cases in which the jury's sentence was death and 15 in which it was not. The target sample of 60 jurors in death cases has been met in all three states, although a few interviews remain to be completed with people who served on juries that did not impose a death sentence.

¹⁶ The New York City sample was drawn to represent state senatorial districts 16, 19, and 21 in the Queens and Brooklyn burroughs of New York City, so it is not representative of the city as a whole. We include this grouping of respondents because it constitutes an urban sample distinctively different from the statewide samples used in other studies.

¹⁷ There is some indication in the available studies (mostly unpublished) that people would be willing to accept parole for convicted first-degree murderers after a fixed period of at least 25 years if by then the offender had also met the restitution requirements in full. Bowers et al. (in press).

Table 1. Responses to Death Penalty Polling Questions in States Where Respondents Were Asked about Alternatives to Capital Punishment (Percent)**A. Favoring or Opposing Capital Punishment**

	Favor	Oppose	Not Sure ^a	Poll Date
Florida	84.0	13.0	3.0	5/86
Georgia	75.0	25.0	—	6/86
New York	72	—	—	5/89
California	79.5	19.0	—	12/89
New York State	70.6	21.8	8.0	3/91
New York City	68.1	21.9	10.0	3/91
Nebraska	80.4	13.4	6.1	4/91

B. Preferring the Death Penalty or Sentence of Life without Parole plus Restitution (LWOPR) as Alternative to Death Penalty

	Prefer Alternative	Prefer Death Penalty	Undecided/No Opinion	Poll Date
Florida	70	24	6	5/86
Georgia	51	43	5	12/86
New York	62	32	6	5/89
California	67	26	7	12/89
New York State	73	19	8	3/91
New York City	73	19	8	3/91
Nebraska	64	26	10	4/91

SOURCE: *Florida*: Cambridge Survey Research 1986; *Georgia*: Thomas & Hutcheson 1986; *California*: Haney & Murtado 1989; *New York* (1989): Cambridge Survey Research 1989; *New York & Nebraska* (1991): Bowers & Vandiver 1991a, 1991b.

^a Includes "don't know," "depends," "not sure," "no opinion," and "undecided."

"strongly" favored the death penalty on the standard favor/oppose question, majorities of 56%, 66%, and 57% abandoned it in favor of the LWOP+R alternative, respectively, in our New York State, New York City, and Nebraska samples.¹⁸ Public preference for this alternative is unmistakable.

Does the experience of serving on a capital jury reinforce peoples' commitment to the death penalty, or sour them on capital punishment? And does it matter whether or not the jury on which they served condemned the defendant to death? We asked the capital jurors the same question we used in the New York and Nebraska surveys. Table 2 shows their responses.

Again, in all instances majorities prefer LWOP+R over the death penalty. This is so for jurors who imposed the death sentence and those who did not in all three states. The experience of serving on a capital jury obviously did not make jurors into advocates for the death penalty. Like their counterparts who have not been capital jurors, they prefer the LWOP+R alternative.¹⁹

¹⁸ These data are presented in Bowers et al. (in press).

¹⁹ Obviously, the citizen samples in Table 1 and the juror samples in Table 2 are not directly comparable since they come from different states. Even for California and Florida where earlier citizen survey results might be compared with our juror interview responses, direct comparisons are confounded because the process of jury selection for

Table 2. California, Florida, and South Carolina Capital Jurors' Responses to Questions about Alternatives to Capital Punishment

	California		Florida		South Carolina	
	Death	Prison	Death	Prison	Death	Prison
Yes	50.8	53.1	50.8	56.9	61.4	56.8
No	35.4	39.1	32.8	27.5	21.4	27.3
Not sure	13.8	7.8	14.8	13.7	17.1	13.6
No answer	0.0	0.0	0.0	1.9	0.0	2.3
No.	65	64	61	51	70	44

Note that if the polls had asked this question at the time of *Gregg*—when considerably fewer would have had to abandon the death penalty to produce an overwhelming preference for LWOP+R—politicians might have been persuaded to convert these preferences into law or have been replaced by those who would. In terms of legislative enactments and jury decisions, the death penalty would then have failed the Court's test of contemporary values.

Hypothesis 2: People see fundamental shortcomings in the death penalty as a punishment.

Our citizen surveys included a battery of statements about people's punishment attitudes and priorities. Seven of these in our New York and nine in our Nebraska surveys referred specifically to the death penalty. The statement with which most people agreed in each of our three samples read, "The death penalty is too arbitrary because some people are executed and others are sent to prison for the very same crimes."

This is, of course, a classic definition of unfairness, and it is precisely the kind of unfairness that caused the *Furman* Court to declare the death penalty unconstitutional under existing statutes in 1972.

Four out of five people in each of our three citizen samples agreed that the death penalty was "too arbitrary," and virtually half in each sample agreed "strongly" with this statement, as shown in Table 3. Even more people agreed with this statement than with one that read "If we used the death penalty more often there would be fewer murders across the country," or indeed, said they favored the death penalty in response to the standard polling question (see Table 1, panel A).

Does actually having to decide whether a convicted capital defendant should live or die relieve peoples' misgivings about the arbitrariness of capital punishment? After all, people who make such a life-or-death decision may develop a commitment to believing that what they are doing is not arbitrary, especially

capital cases disproportionately eliminates death penalty opponents. Also for California the citizen sample is statewide, but the juror sample was drawn from northern California.

Table 3. 1991 New York and Nebraska Respondents' Agreement with Statement: "The death penalty is too arbitrary because some people are executed and others go to prison for the very same crimes"

	New York State	New York City	Nebraska
Strongly agree	46.0	50.0	46.4
Moderately agree	29.2	22.8	29.2
Probably agree	7.4	5.4	8.1
Probably disagree	2.2	2.8	1.4
Moderately disagree	5.6	7.2	5.3
Strongly disagree	5.8	8.6	2.4
Don't know/refused/NA	3.8	4.3	7.1

Table 4. California, Florida, and South Carolina Capital Jurors' Agreement with Statement: "The death penalty is too arbitrary because some people are executed and others go to prison for the very same crimes"

	California		Florida		South Carolina	
	Death	Prison	Death	Prison	Death	Prison
Agree strongly	35.4	46.9	45.9	47.1	54.3	54.5
Agree moderately	30.8	21.9	32.8	19.6	27.1	25.0
Agree slightly	7.7	9.4	8.2	11.8	5.7	4.5
Disagree slightly	7.7	7.8	3.3	1.9	1.4	0.0
Disagree moderately	7.7	4.7	8.2	7.8	4.3	4.5
Disagree strongly	1.5	1.6	0.0	3.9	1.4	2.3
Don't know/not sure	7.7	6.3	1.6	1.9	5.7	9.1
No answer	1.5	0.0	0.0	1.9	0.0	0.0
No.	65	64	61	51	70	44

perhaps those who impose a death sentence. The answers appear in Table 4.

Serving on a capital jury makes no apparent difference. Like the public at large, 80% of the capital jurors said the death penalty is too arbitrary, and nearly half agreed strongly with this judgment. There is no consistent difference across states between jurors who did and did not choose death, although the death jurors in California are a bit more reluctant than others to endorse this judgment "strongly." There is no telling what the level of agreement might have been among these people before serving as capital jurors or in these states as compared with people in New York and Nebraska. But it is unmistakably clear that capital jurors, like other citizens, see the death penalty as too arbitrary in overwhelming numbers.

If the polls had included this question and had obtained results in 1976 and perhaps earlier, could the *Gregg* Court in good conscience have said the death penalty was not too arbitrary or did not violate contemporary values? Arbitrariness is, after all, a value judgment about the fundamental unfairness of the application of the punishment in question. It was the value judgment the Court itself used under Eighth Amendment au-

thority to invalidate existing capital statutes in *Furman*. Politicians might have ignored such value judgments in favor of expressions of support for capital punishment in which fear of crime, desire for harsh punishment, and dissatisfaction with available alternatives could override such value judgments. But doesn't the Eighth Amendment require the Supreme Court to consider contemporary values as reflected in such judgments instead of broad endorsements in which value judgments may play only a minor role?

Hypothesis 3: People accept the death penalty because they believe the currently available alternatives are insufficiently harsh or meaningful.

If people feel the death penalty is too arbitrary (and they will abandon it for LWOP+R), why do so many of them say they favor it in response to the favor/oppose question? Hypothesis 3 suggests that the death penalty is accepted because it is viewed as better than the presently available alternative in their states. We asked: "How many years do you think a convicted first degree murderer in [this state] will usually spend in prison before being paroled or released back into society?"

Roughly half the people surveyed said that the usual punishment for murderers not sentenced to death will be 15 years or less in prison. Slightly more than half the people in the New York samples thought this, and slightly less than half in Nebraska (Table 5). If we exclude those who did not venture an estimate, a clear majority in all three samples said 15 years or less. One in four said less than 10 years in the two New York samples, and one in five gave this response in Nebraska.²⁰

In New York the mandatory minimum for murder is not less than 15 years, and in Nebraska it is life without parole (LWOP) for death-eligible murder. In both states, at least half the citizens' estimates are well below the mandatory minimum sentences on the statute books and the terms actually served by convicted murderers not sentenced to death.²¹ No doubt, the

²⁰ The greater number of "no answers" and "don't knows" in the New York samples is due to the fact that the question was open ended; respondents had to volunteer an answer rather than simply choose a five-year interval response category as in the Nebraska survey. One other difference that keeps the two surveys from being strictly comparable is a problem of overlapping response categories in the Nebraska survey. Thus, for example, Nebraskans could choose categories such as "10 to 15 years" or "15 to 20 years." Strictly speaking, the percentages in the 10–15-year category is a more conservative estimate for Nebraska than for New York since we have no way of identifying Nebraskans in the 15–20-year category whose estimate would have been 15 years if asked to make a point rather than an interval estimate.

²¹ The mandatory minimum sentence before parole eligibility in New York state is no less than 15 or more than 25 years at the judge's discretion for categories of murder that might be capital offenses if the state had the death penalty. Thus only murderers whose convictions or sentences were reversed or reduced on appeal or commuted by the governor would get out of prison in less than 15 years. The New York State Division of Parole indicates that the average time served was 202.1 months (16

Table 5. 1991 New York and Nebraska Respondents' Estimate of Number of Years Convicted Murderers Usually Serve before Parole or Release

	New York State	New York City	Nebraska
Less than 10 years	25.6	31.0	20.4
10–15 years	29.6	29.0	27.9
16 or more years	24.0	17.8	38.7
Don't know/NA	20.8	22.2	13.0

public's exaggerated sense that convicted murderers will be back on the streets so soon is the product of selective media reporting of crime by previously incarcerated inmates and the absence of statistics that distinguish persons convicted of the kinds of murder that might be punishable by death from other lesser forms of criminal homicide.

The point here is not that people underestimate the current punishment for convicted murderers but that the term of years they imagine imprisoned murderers will serve is short enough to make the incapacitative aspect of capital punishment attractive to them, however arbitrary they believe it is. Of course, the LWOP+R alternative they prefer to the death penalty also eliminates the possibility of recidivism. Notably, there is evidence that a majority of the public would also be willing to accept parole after a fixed term of at least 25 years in preference to the death penalty on the condition that it was coupled with a restitution requirement and that the defendant had fully met the restitution requirement (Bowers et al. in press).

Does serving as a capital juror enlighten people about what the punishment will be if the death penalty is not imposed? Not surprisingly, a 1991 South Carolina survey indicated that three out of four people said that if they were jurors in a capital case, it would be "extremely" or "very" important for them to know what the punishment would be if they did not vote for death.²² Moreover, recent research indicates that one in four capital ju-

years and 10 months) for all prisoners initially convicted of murder and released on parole in 1991. This is a conservative estimate since it includes prisoners whose convictions or sentences were reversed or reduced on appeal and excludes prisoners who served lengthy sentences and died in prison without ever being granted parole (information from personal communication with New York State Division of Parole, Feb. 1993).

The mandatory sentence for convicted murderers not sentenced to death in Nebraska is life without parole (LWOP). Although prisoners serving a life sentence cannot be paroled, they can have their sentences reduced by a clemency or pardons board composed of the governor, the attorney general, and the secretary of state. Requests for such actions are sometimes initiated by the Department of Corrections, but such pardons or grants of clemency are infrequent.

²² The 1991 statewide South Carolina survey of 500 residents 18 years of age and older was conducted by the Survey Research Laboratory of the University of South Carolina's Institute for Public Affairs and submitted in the form of an affidavit for the petitioner in *State v. Simmons* (1993). The question read, "If you were a juror . . . how important would it be for you to know how much time the person would serve . . . ?" Some 45.3% replied "extremely important"; 31.5% "very important"; 9.3% "somewhat

ries in Georgia interrupted their deliberations to ask the trial judge for further information or instructions, and that nine out of ten times the question they asked was what the punishment would be if they did not impose a death sentence (Lane 1993). In Georgia and most other states, the law prevents the judge from answering this question.

So first of all, we might expect jurors not to be much more enlightened than the public at large and, hence, subject to the same misperceptions about the leniency of current options. Second, if people are more likely to favor the death penalty when they think the alternative option is too lenient, our theory suggests that as jurors they might be more willing to impose a death sentence. The answers to both of these suppositions are evident in Table 6.

To begin with, the data show that jurors, like the public at large, imagine that murderers not sentenced to death will be paroled or released relatively soon—not quite as soon as the public thinks but sooner than the laws of their states actually permit. Overall, roughly a third of the jurors as compared to about half of the public thought that murderers not sentenced to death would be back on the streets in 15 years or less. Jurors' longer estimates may be due, in part, to the fact that the mandatory minimum sentences in Florida and South Carolina are longer than in New York (which accounts for two of the three citizen samples). Thus, South Carolina requires that convicted murderers not sentenced to death serve a mandatory minimum of 30 years in prison, and Florida keeps convicted murderers not sentenced to death in prison 25 years before they become eligible for parole. California, like Nebraska, automatically imposes life without parole when the death sentence is not handed down.²³

Using the mandatory minimum as the basis for comparison, we can say that most jurors in each of these three states imagine that convicted murderers not sentenced to death will serve less than the mandatory minimum sentence. Thus, both citizen and juror grossly underestimate the time that will usually be served by murderers not sentenced to death.

Moreover, there is a consistent difference between jurors who did and did not impose death as punishment. In each of these three states, believing that convicted first-degree murderers not sentenced to death would get out sooner is associated

important"; 2.4% "not too important"; 4.6% "not at all important"; and 6.3% "don't know."

²³ In Florida for a prisoner to be released in less than 25 years would require that the governor recommend clemency and at least half of the state's six-person elected cabinet must accept the recommendation. In South Carolina and California, gubernatorial clemency is the only source of relief from, respectively, the mandatory 30 years in prison and life without parole alternatives to the death penalty. The exercise of such clemency is virtually unheard of in recent years in these states.

Table 6. California, Florida, and South Carolina Capital Jurors' Estimate of Number of Years Convicted Murderers Usually Serve before Parole or Release

	California		Florida		South Carolina	
	Death	Prison	Death	Prison	Death	Prison
< 10 years	13.8	15.6	14.8	15.7	18.6	4.5
10 years	9.2	6.3	6.6	3.9	11.4	6.8
11–14 years	6.2	4.7	4.9	1.9	12.9	2.3
15 years	4.6	4.7	13.1	1.9	4.3	6.8
16–19 years	3.1	1.6	4.9	3.9	10.0	4.5
20 years	9.2	4.7	8.2	13.7	8.6	15.9
21–24 years	0.0	1.6	6.6	1.9	5.7	9.1
25 years	0.0	0.0	29.5	33.3	5.7	11.4
26–29 years	0.0	0.0	3.3	5.8	0.0	2.3
30 years	1.5	0.0	1.6	0.0	7.1	22.7
31+ years	0.0	3.2	0.0	0.0	1.4	4.5
LWOP	36.9	31.3	3.3	3.9	1.4	2.3
Don't know/NA	15.3	21.9	3.3	11.8	12.9	6.8
No.	65	64	61	51	70	44

with voting for death. Notably, the relationship between belief in early release and voting for death is more pronounced as fewer jurors in the state appear to know what the mandatory minimum sentence is. Thus the difference is least evident in California where a third of the jurors appear to know that life without parole is the sentence that will be imposed in lieu of death, and most pronounced in South Carolina where fewer than 15% appear to know the mandatory minimum.

The results are consistent with the hypothesis that *jurors who underestimate the currently available alternative are more apt to impose the death penalty*. It is possible, of course, that jurors who did not impose a death sentence were more motivated to learn what the sentence would actually be after not recommending death. But if so, they should appear more often in the mandatory minimum categories and less often among the “don’t knows–NAs.” In fact, this happens only for South Carolina and is by no means strong enough there to account for the greater tendency of jurors who underestimate the current option to impose a death sentence in that state.

This pattern in the data raises the specter of arbitrariness in the sentencing behavior of capital jurors owing quite specifically to laws prohibiting them from being told what the sentence would be if they do not impose the death penalty. It may be argued in theory that a jury’s decision should be based strictly on whether the defendant’s blameworthiness merits execution, and that having judges describe or explain what the sentence would otherwise be introduces the possibility of bias. But whatever the arguments, the empirical evidence indicates that not informing the jury about the sentence that would otherwise be imposed is biasing the jury’s sentencing decision

and that the bias is in favor of death as punishment since most jurors underestimate the sentence that would otherwise be served.

From the standpoint of the spuriousness theory, the data in Tables 5 and 6 are doubly confirming. The fact that citizens and jurors underestimate the severity of the punishment alternatives to death for convicted first-degree murderers is consistent with them favoring the death penalty in the polls and, consequently, with legislators enacting capital statutes. Further, the fact that jurors who see the available alternative to death as relatively lenient are more apt to impose a death sentence means that death sentences are much more common than they would be if jurors did not underestimate the severity of current alternatives. The theory thus explains how the Court's allegedly "objective" indicia of contemporary values in terms of legislative enactments and jury decisions are corrupted first by the public's ignorance of the current options and second by the absence of severe but meaningful alternative forms of punishment. Hence, the Court's indicia do not reflect genuine death penalty support.

III. Conclusion

The Supreme Court had all it needed to make good on doing away with the death penalty in 1976. The rest of the world was moving away from capital punishment, the Court itself had taken one bold step toward ending executions in *Furman*, there was ample historical evidence of its arbitrary and discriminatory use, there was no credible evidence of its alleged deterrent advantage, and the Court itself in 1971 had said that capital sentencing decisions cannot be guided (*McGautha v. California* 1971). Instead, the court broke with the worldwide trend, ignored the legacy of racism in the application of the death penalty, declared that the death penalty must be a superior deterrent (contrary to its own evaluation in *Gregg* that the evidence was "inconclusive"), and went on to affirm guided discretion capital statutes "on their face" without waiting to see whether "in practice" they actually curbed the arbitrariness that rendered earlier statutes, if not the thousands of executions they authorized, unconstitutional.

The factors underlying the Court's decision to permit capital punishment in 1976 are uncertain. The Court paid close attention to the polls showing a persistent rise in the percentage who said they favored capital punishment for a decade prior to its 1976 decision. The Court may have been leery about the consequences of doing away with the death penalty after most states returned to it following *Furman* and after a protracted period of conflict with the states over school desegregation and

civil rights rulings. The Court's choice of legislative enactments as its foremost indicator of the death penalty's comportment with contemporary values was clearly a sign of deference to state law and perhaps an indication that the Court wanted to avoid another decision it thought would be unpopular with the states.

Now, 20 years after *Furman*, the current Court is adamant in its commitment to the operative laws and their application by juries as the indicia of contemporary values.²⁴ Justice Scalia has disparaged empirical research including polls challenging the execution of juveniles as "ethicoscience" (*Stanford v. Kentucky* 1989:323), and the Court has dismissed 66–73% opposition in the polls of several states to the execution of the mentally retarded (*Penry v. Lynaugh* 1989:334–35).²⁵ For now, the Court appears to be as unimpressed with polls showing opposition to the death penalty for certain defendants as it was impressed in *Furman* and *Gregg* with those showing support on the favor/oppose death penalty polling question.

But this could change if the Court became persuaded that it is mistaken about the public's view of capital punishment. The tide could turn because Supreme Court Justices don't like to be wrong and because the Eighth Amendment requires the Court to act on its most enlightened interpretation of contemporary values. The evidence sketched out here, if replicated and confirmed in other studies, could have the critical effect of changing the perspectives of legislators, judges, the media, and the public on how people think about capital punishment. The obvious political implication of a clear public preference for an alternative to the death penalty is that it will prompt lawmakers

²⁴ Twenty years ago Chief Justice Burger conceded in *Furman* (dissenting, pp. 385, 386) that public opinion polls could indicate that legislatures had lost touch with community values. For evidence of a vast discrepancy between the death penalty attitudes and preferences of voters and their legislators, see Bowers & Vandiver 1991a; Bowers et al. in press.

²⁵ The Court in *Penry v. Lynaugh* (1989:288–89, O'Connor, J., for the Court) explained:

Penry does not offer any evidence of the general behavior of juries with respect to sentencing mentally retarded defendants, nor of decisions of prosecutors. He points instead to several public opinion surveys that indicate strong public opposition to execution of the retarded. For example, a poll taken in Texas found that 86% of those polled supported the death penalty, but 73% opposed its application to the mentally retarded. . . . A Florida poll found 71% of those surveyed were opposed to the execution of mentally retarded capital defendants, while only 12% were in favor. . . . A Georgia poll found 66% of those polled opposed to the death penalty for the retarded, 17% in favor, with 16% responding that it depends how retarded the person is. . . . The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.

to convert the public's punishment preference into laws or they will be replaced by those who will. The apparently exorbitant costs of maintaining a system of capital punishment (Death Penalty Information Center 1992), as well as the public's interest in restitution requirements as a component of punishment and in seeing prisoners work during their incarceration (Bowers et al. in press), will add to the political attractiveness of an alternative that puts prisoners to work for money that would go to their victims' families.

The recognition that we have been wrong about how the public thinks about the death penalty will take time to sink in, but if and when it becomes the new wisdom on this matter, it will surely affect the Supreme Court, perhaps not directly or immediately in a shift of the Court's interpretation of contemporary values, but perhaps indirectly by fostering a renewed receptivity to death penalty challenges. This is a situation in which a "face-saving" decision could compensate for many past mistakes. Maybe the study of how jurors make their sentencing decisions will provide the kind of evidence the court will find compelling.²⁶ For instance, if jurors make it clear in their own words (as suggested in Table 6 above) that they are more apt to impose death when they are unsure about what the alternative would be, the Court's presuppositions about how such decisions are made cannot stand. And, likewise, other presuppositions about how capital jurors make their sentencing decisions may also fall.

My purpose has been more to raise than to resolve questions with a few choice findings from research now underway. Concerning the public generally, there is more to be said about peoples' punishment preferences and particularly about the appeal of an alternative to the death penalty that incorporates the principle of restitution to murder victims' families (Bowers et al. in press). This is just the first glimpse of capital jurors' thinking and at what the implication may be for capital punishment in the United States.

²⁶ The Court has signaled in *Lockhart v. McCree* (1986) that to understand how capital jurors exercise their discretion, it is not enough to examine the behavior and thinking of persons who "were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant. We have serious doubts about the value of these studies in predicting the behavior of actual jurors."

Perhaps, then, the Court will be interested in evidence about real jurors in actual cases (as, indeed, its complaining in *Penry v. Lynaugh* about not having evidence on the reactions of capital jurors to mentally retarded capital defendants suggests (see passage quoted in note 25).

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