

Commentary: Pursuing Justice in Death Penalty Trials

Clarence Watson, JD, MD, Spencer Eth, MD, and Gregory B. Leong, MD

The capital trial, by its nature, is fraught with emotionally disturbing elements that jurors must face when deciding the ultimate fate of a guilty defendant. A confluence of mitigating and aggravating factors influences a capital jury's decision to impose a sentence of death. The presence or absence of defendant remorse in these cases may make all the difference in whether a capital defendant's life is spared. This commentary examines the onerous emotional toll encountered by capital jurors in light of the findings of Corwin and colleagues regarding defendant remorse and juror's need for affect. The commentary also presents practical and ethics-related considerations that should be kept in mind when reflecting on their study.

J Am Acad Psychiatry Law 40:50–4, 2012

There is no area in the law more controversial than the potential sentence of death for a defendant found guilty at trial of a capital offense. The debate regarding the legitimacy of the death penalty as a just form of punishment has raged on in courtrooms and in the court of public opinion for centuries. Indeed, such debate eventually led to a temporary moratorium on capital punishment in the United States following the U.S. Supreme Court's 1972 decision in *Furman v. Georgia*,¹ which held that the death penalty had been imposed in an arbitrary and capricious manner, and was therefore unconstitutional.

Subsequent legislative efforts to revise the legal procedures governing capital punishment cases influenced the U.S. Supreme Court's 1976 holding in *Gregg v. Georgia*.² In *Gregg*, the Court held that various legislative remedies, including procedures that bifurcated capital trials into guilt and penalty phases, resolved constitutional concerns regarding the arbitrary and capricious administration of the death penalty and cleared the way for its reapplication. Inevitably, the debate regarding the death penalty

continues. Arguments that the death penalty satisfies critical principles of punishment, namely, deterrence and retribution, are quickly countered with skepticism of a deterrent effect and statistics pointing to the more than 130 individuals sentenced to death who have been exonerated in the United States since 1973.^{3,4} Notwithstanding these arguments, most state jurisdictions, the federal government, and the U.S. military permit the execution of defendants found guilty of capital offenses.

The jury in capital cases plays a unique role in the criminal justice system. It is the jury that is charged with determining whether there are aggravating factors that would make a defendant eligible for the death penalty.⁵ In addition, the ultimate burden of deciding whether a guilty capital defendant's punishment should be death falls squarely on the shoulders of the jury. Given the jury's unique role and the mortal stakes involved, it is no wonder that researchers have explored various aspects of the dynamics of jury decision-making in these cases. Various concerns, such as the impact of pretrial publicity,⁶ race and gender,⁷ jury instructions,⁸ the defendant's physical appearance,⁹ and expert psychiatric testimony¹⁰ on jury decision-making in capital cases, have been investigated.

In that vein, Corwin *et al.*¹¹ contribute to the existing research on jury decision-making by examining the relationship between jurors' perceptions of capital defendants' level of remorse, jurors' need for affect, and the ultimate sentence determination. In

Dr. Watson is Clinical Director of Forensic Services, Delaware Psychiatric Center; Clinical Assistant Professor of Psychiatry, Jefferson Medical College, Thomas Jefferson University; and Clinical Associate Professor of Psychiatry, Perelman School of Medicine, University of Pennsylvania, Philadelphia, PA. Dr. Eth is Director of Outpatient Mental Health Programs, Miami VA Medical Center, and Professor of Clinical Psychiatry, Miller School of Medicine, University of Miami, Miami, FL. Dr. Leong is Staff Psychiatrist, Forensic Evaluations Department, Patton State Hospital, San Bernardino, CA. Address correspondence to: Clarence Watson, JD, MD, Two Bala Plaza, Suite 300, Bala Cynwyd, PA 19004. E-mail: cwatson@watsonforensics.com.

Disclosures of financial or other potential conflicts of interest: None.

their study, 184 mock jurors were asked to view five-minute-long courtroom simulation videos of an actor as he awaited sentencing after a conviction of murder during a robbery. Following the videos, mock jurors provided their perception of the mock defendant's level of remorse based on observed verbal and nonverbal behavioral cues. The authors also measured the mock jurors' need for affect (NFA), a desire or ability to approach or avoid emotional situations. After the videos, mock jurors were required to assign a sentence of life in prison without parole or the death penalty.

The authors concluded that the more willing mock jurors were to approach emotional events, the more likely they would be to assign a sentence of life in prison without parole. On the other hand, mock jurors' need to avoid emotionally charged situations exerted no significant effect on sentencing. Of note, when comparing verbal and nonverbal behavioral cues of remorse with sentencing outcome, the authors concluded that sentencing was more favorable for the mock defendant who displayed incongruent verbal and nonverbal cues of remorse. In other words, the simulation in which the defendant was perceived as being nonremorseful verbally but exhibiting remorseful nonverbal behaviors received more favorable sentencing, perhaps adding further credence to the old adage, actions speak louder than words.

Curiously, in situations where both verbal and nonverbal behaviors were congruent and perceived as remorseful, the defendant did not receive the same sentencing benefit. The authors postulate that the mock jurors may have perceived the congruency as an indication of faking, insincerity, or, alternatively, sincere remorse demonstrating an awareness of guilt that deserved retribution. One real-life implication that the authors suggest arises from these findings lies in the witness preparation of the defendant in capital trials. In their view, the most effective way of avoiding the death penalty may be for capital defendants to appear remorseful but avoid making verbal apologies. According to the authors, their study's limitations included the mean age of the mock jurors (18.68 years), a university population sample, and the lack of a deliberation phase. These limitations, among others, such as the difficulty in replicating the harrowing experience of actual jurors in capital cases, should call to mind a measure of caution, as well as related practical and ethics-related considerations,

before rolling the dice with these findings in an actual trial in which a defendant is facing death.

The Emotional Toll of Jury Service in Capital Trials

Just as every capital trial carries its own complex array of interacting aggravating and mitigating circumstances, each capital jury is composed of a unique group of individuals who carry their own collection of values, biases, and emotional vulnerabilities. Jurors must resolve in their minds, first individually and then collectively, whether the defendant whom they have observed for weeks or months during the trial should die. For many capital jurors, that is an enormous burden to bear.^{12,13} It is an experience that is entirely different from responding to abstract questions in a research study regarding one's view of the death penalty.¹⁴

Service in capital cases requires jurors to concentrate on the evidence of a crime offered during the guilt phase and on the life circumstances of the convicted defendant during the penalty phase. As a result, jurors are directly exposed to and must contend with heart-wrenching, even emotionally traumatic testimony throughout the trial. Capital trials inevitably involve the most gruesome of crimes and uniquely place the defendant's life in mortal jeopardy. Routinely featured in these trials is detailed eyewitness testimony about the crime, illustrated with color photographs or video images of murder scenes and victims' postmortem appearance. The presentation of aggravating factors during trial is a necessary component of these cases. Such essential factors include evidence that the felony was particularly heinous, atrocious, or cruel. The jury must become immersed in the intimate details of a crime that was wantonly vile, horrible, or inhuman. Such demonstrations of extreme and outrageous depravity include torturing the victim, extreme bodily disfigurement, violent and sexual crimes against children, and crimes committed in a cold, calculated, premeditated fashion. Such images may be eidetic and nearly impossible to forget. Since jurors are prohibited from discussing the details or their impressions of the case with anyone during trial, they are forced to process the evidence in isolation without the social support of family, friends, or even other jurors. Accordingly, capital trial jurors may be profoundly affected by their experience even years after the trial.

The scientific literature confirms that jurors experience stress-related symptoms that are amplified in capital trials. Subjects in two studies who volunteered as mock jurors were shown gruesome crime photographs; in one of the studies actual photographs of a murder victim were used. The jurors viewing the photographs experienced more intense emotional responses than those who were not shown pictures.^{15,16} In a study of 159 jurors drawn from 28 civil and criminal trials, the major sources of stress were the burden of reaching a verdict, understanding the complexities of the trial, and disruption of personal life; each of these factors is substantially greater in a murder trial.¹⁷ The study also found that women reported more overall stress than men. An article described a debriefing intervention for a jury who had heard a murder trial involving multiple victims.¹⁸ These jurors expressed themes of anger, frustration, and guilt. During the counseling session some jurors became “very tearful and distraught.” Legal commentators have questioned the ways that the powerful emotional impact of exposure to heinous murder testimony can influence jury deliberation and adversely affect the administration of justice.¹⁹

A journalist profiled the jurors in a horrific murder trial who were struggling to return to their normal lives after the defendant was found guilty and sentenced to death.²⁰ Two months following their verdict, the jurors reported persistent symptoms, including rechecking the locks on their doors, spontaneously crying, intrusive images, nightmares, and avoidance behavior, which, taken together, resemble the features of posttraumatic stress disorder (PTSD). The development of significant psychiatric symptoms during and after jury service in criminal trials is supported by the literature. A study of the juries of four criminal trials—two murder cases, one child abuse case, and one obscenity case—found that approximately 67 percent of the jurors experienced one or more discomforting physical or physiological symptoms as a result of the trial.²¹ The reported symptoms included gastrointestinal distress, generalized nervousness, heart palpitation, headaches, sexual inhibitions, depression, anorexia, and posttraumatic stress disorder symptoms. Recognition of the emotional toll of jury service in disturbing trials has led to recommendations for psychological counseling for jurors in need.^{22,23}

As an aside, the psychological stress experienced during capital trials is not limited to jurors. Judges,

attorneys, bailiffs, court reporters, and others in the courtroom may also undergo distressing exposures to evidence presented during capital trials. Semistructured interviews of nine active state court judges noted the presence of PTSD-like symptoms, safety concerns, and occupational burnout in this sample.²⁴ These were judges who complained of being markedly affected by their judicial encounters with cases involving death, paraplegia, burning, and infant trauma. One judge complained that evidence presented in the courtroom was traumatic, especially dealing with people “being horribly hurt or murdered.” Identification with the victims and survivors elicited strong emotional reactions, including one judge who admitted to struggling to keep his emotions in check when feeling like striking out.

Identification with victims and their families is also an important emotional experience faced by jurors in capital trials. The U.S. Supreme Court’s 1991 decision in *Payne v. Tennessee*, upheld the admissibility of victim-impact statements during the penalty phase of a capital punishment trial.²⁵ This evidence is often dramatic and emotionally powerful testimony regarding the effect of the murder on the victim’s surviving family members. The victim’s personal characteristics and the psychological impact of the killing on the victim’s family may be presented to the jury through live testimony, photographs of the deceased throughout their lives and of their grave-stones, and video presentations narrated by the victim’s family. Scholars have challenged the fairness of presenting such emotionally charged evidence in capital cases.^{26,27}

Nonetheless, jurors must contend with such testimony while defense counsel competes to humanize the defendant through mitigating evidence.

The Capital Jury and Defendant Remorse

An important element of defense counsel’s effort to elicit juror empathy can be the defendant’s expression of remorse. Indeed, studies have shown that remorse does matter in these cases.^{28,29} Eisenberg *et al.*³⁰ randomly sampled jurors from 41 South Carolina murder cases with the goal of interviewing 4 jurors per case. Their sample encompassed 22 capital cases resulting in death sentences and 19 cases ending in life sentences. Researchers completed 153 live interviews using a 51-page instrument that covered all phases of both the guilt and the sentencing phases of the trials. Variables included the facts of the crime;

racial, economic, and other defendant and victim characteristics; the juror deliberation process; and the handling of cases by the defense, the prosecution, and the judges. In addition, data about the jurors' demographic characteristics and their views on the death penalty were included. The authors found that other than the viciousness of the crime and the defendant's future dangerousness, no other factor played a greater role in capital sentencing than remorse. They concluded that if jurors believed the defendant was remorseful, they tended to sentence him to life imprisonment instead of death, while jurors who thought the defendant was remorseless were more apt to deliver a death sentence. Interestingly, the study found that jurors were more likely to believe that a defendant was remorseful if he spoke on his behalf than if he said nothing. Accordingly, practical consideration and application of the proposition by Corwin *et al.*¹¹ that capital defendants may benefit from appearing remorseful but not making verbal apologies must first account for the contrary scientific findings of Eisenberg *et al.*,³⁰ who examined the impressions of actual capital trial jurors. In our view, jurors will consider both the defendant's verbal and nonverbal behaviors, including expressions of remorse, within the full context of the bifurcated capital trial. Those behaviors are added to the cauldron of aggravating and mitigating factors that actual jurors are forced to sift through before deciding the ultimate fate of the capital defendant.

Further, how jurors perceive a capital defendant's verbal expression of remorse during the penalty phase may depend on the initial defense strategy during the preceding guilt phase of the trial. Sundby²⁹ studied the posttrial interviews of jurors who served in 37 California capital trials, in which 19 defendants received death sentences, 17 defendants received life without parole, and 1 case ended in a hung jury over the death penalty. The author found that jurors negatively considered defendants' statements of remorse and acceptance of responsibility that first come in the penalty phase. The jurors viewed defense strategies centered on denial of the defendant's involvement as the defendant's failing to accept responsibility for the crime. Sundby suggested that unless the defense had already laid the groundwork for a defendant's statement of remorse during the guilt phase, the jurors would be likely to perceive those statements during the penalty phase as manipulative efforts to avoid the death penalty.

The Capital Jury and Race

Another aspect that is important to consider in a discussion of the death penalty is the impact of race. Based on the scientific literature, it is indisputable that race affects the disposition of death penalty cases.^{31,32} Juror perception of defendant remorse is not immune to the effect of race. Bowers *et al.*³³ examined data from interviews of 1,155 capital jurors from 340 capital trials in 14 states and found that white jurors were more likely than black jurors to perceive a black defendant as not remorseful regardless of the race of the victim. Further, the study found that the defendant's remorse was the strongest rationale for mercy in sentencing among black jurors, but the weakest rationale for white jurors in cases where the defendant was black and the victim was white. The issue of cross-cultural perceptions of remorse appears salient in capital trials. Indeed, the study design used by Corwin *et al.*¹¹ employed a white actor as the defendant and a mock jury drawn from a university population that the authors describe as having a lower representation of minorities than the general population.

Ethics Implications

As a final point for consideration, we offer a comment on the role of psychiatric testimony in capital cases in response to the suggestion by Corwin *et al.* that the most effective way for capital defendants to avoid the death penalty may be to appear remorseful but avoid making verbal apologies. Forensic psychiatrists may be called on to provide expert testimony in the penalty phase of capital trials regarding the presence of mitigating or aggravating factors. Psychiatric experts testifying on behalf of the defense may give an opinion about the presence of a mitigating mental condition. Experts testifying on behalf of the prosecution may instead offer an opinion that the defendant continues to pose a threat to society and carries a high risk for future dangerousness. During their testimony, the expert may be asked whether a defendant's expression of remorse or lack thereof was factored into the expert's opinion. Regardless of whether the expert is retained by the defense or prosecution, forensic psychiatrists are ethically obligated to adhere to the principle of honesty and to strive for objectivity when reaching professional opinions.³⁴ The forensic psychiatrist is cautioned against assuming an advocacy role for either party. Certainly, ex-

perts are expected to advocate for the professional psychiatric opinions reached during their evaluations. However, assisting defense counsel with impression management of the defendant's testimony to best convey to the jury the presence of remorse falls outside ethical practice for the forensic psychiatrist. Such behavior by the expert trespasses into the realm of legal advocacy and may unacceptably facilitate the defendant's presenting misleading or even erroneous testimony to the jury.

References

1. Furman v. Georgia, 408 U.S. 238 (1972)
2. Gregg v. Georgia, 428 U.S. 153 (1976)
3. Radelet ML, Lacock TL: Do executions lower homicide rates?: the views of leading criminologists. *J Crim L Criminol* 99:489–508, 2009
4. Death Penalty Information Center. Available at <http://www.deathpenaltyinfo.org>. Accessed November 23, 2011
5. Ring v. Arizona, 536 U.S. 584 (2002)
6. Ruva C, McEvoy C, Bryant JB: Effects of pre-trial publicity and jury deliberation on juror bias and source memory errors. *Appl Cognit Psychol* 21:45–67, 2007
7. Brewer TW: Race and jurors' receptivity to mitigation in capital cases: the effect of jurors', defendants', and victims' race in combination. *Law Hum Behav* 28:529–45, 2004
8. Frank J, Applegate BK: Assessing juror understanding of capital sentencing instructions. *Crime Delinquen* 44:412–33, 1998
9. Eberhardt JL, Davies PG, Johnson SL, Purdise-Vaughns VJ: Looking deathworthy: perceived stereotypicality of black defendant predicts capital-sentencing outcomes. *Psychol Sci* 17:383–6, 2006
10. Montgomery JH, Ciccone JR, Garvey SP, *et al*: Expert testimony in capital sentencing: juror responses. *J Am Acad Psychiatry Law* 33:509–18, 2005
11. Corwin EF, Cramer RJ, Griffin DA, *et al*: Defendant remorse, need for affect, and juror sentencing decisions. *J Am Acad Psychiatry Law* 40:41–9, 2012
12. Antonio ME: "I Didn't Know It'd Be So Hard": jurors' emotional reactions to serving on a capital trial. *Judicature* 89:282–8, 2006
13. Saewitz M: Many jurors scarred by trial: experiences from death penalty cases can stay with those deciding the outcome for a long time. *Sarasota Herald Tribune*. December 4, 2005. p BCE1
14. Bienen LB: Helping jurors out: post-verdict debriefing for jurors in emotionally disturbing trials. *Ind L J* 68:1333–55, 1993
15. Douglas KS, Lyon DR, Ogloff JR: The impact of graphic photographic evidence on mock jurors' decisions in a murder trial: probative or prejudicial? *Law Hum Behav* 21:485–501, 1997
16. Bright DA, Goodman-Delahunty J: Gruesome evidence and emotion: anger, blame, and jury decision-making. *Law Hum Behav* 30:183–202, 2006
17. Bornstein BH, Miller MK, Nemeth RJ, *et al*: Juror reactions to jury duty: perceptions of the system and potential stressors. *Behav Sci Law* 23:321–46, 2005
18. Feldmann TB, Bell RA: Crisis debriefing of a jury after a murder trial. *Hosp Commun Psychiatry* 42:79–81, 1991
19. Bandes SA: Repellent crimes and rational deliberation: emotion and the death penalty. *Vt L Rev* 33:489–513, 2009
20. Glaberson W: Harrowing Cheshire case still haunts jurors. *New York Times*. January 2, 2011. p MB1
21. Kaplan SM, Winget C: The occupational hazards of jury duty. *Bull Am Acad Psychiatry Law* 20:325–33, 1992
22. Feldmann TB, Bell RA: Juror stress: identification and intervention. *Bull Am Acad Psychiatry Law* 21:409–17, 1993
23. Miller MK, Flores DM, Dolezilek AN: Addressing the problem of courtroom stress. *Judicature* 91:60–9, 2007
24. Chamberlain J, Miller MK: Evidence of secondary traumatic stress, safety concerns, and burnout among a homogeneous group of judges in a single jurisdiction. *J Am Acad Psychiatry Law* 37: 214–24, 2009
25. Payne v. Tennessee, 501 U.S. 808 (1991)
26. Myers B, Greene E: The prejudicial nature of victim impact statements, implications for capital sentencing policy. *Psychol Publ Pol L* 10:492–515, 2004
27. Cassell PG: In defense of victim impact statements. *Ohio St J Crim L* 6:611–48, 2009
28. Garvey SP: The emotional economy of capital sentencing. *N Y U L Rev* 75:26–73, 2000
29. Sundby SE: The capital jury and absolution: the intersection of trial strategy, remorse, and the death penalty. *Cornell L Rev* 83: 1557–98, 1998
30. Eisenberg T, Garvey SP, Wells MT: But was he sorry?—the role of remorse in capital sentencing. *Cornell L Rev* 83:1599–637, 1998
31. Unah I: Choosing those who will die: the effect of race, gender, and law in prosecutorial decision to seek the death penalty in Durham County, North Carolina. *Mich J Race L* 15:135–79, 2009
32. Phillips S: Racial disparities in the capital of capital punishment. *Hous L Rev* 45:807–40, 2008
33. Bowers WJ, Steiner BD, Sandys M: Death sentencing in black and white: an empirical analysis of the role of juror's race and jury racial composition. *U Pa J Const L* 3:171–274, 2001
34. American Academy of Psychiatry and the Law: Ethics Guidelines for the Practice of Forensic Psychiatry. Adopted May 1987; revised October 1989, 1991, 1995, and 2005. Available at <http://www.aapl.org/ethics.htm>. Accessed November 23, 2011