

**“ONLY A RECOMMENDATION”: HOW DELAWARE CAPITAL
SENTENCING LAW SUBVERTS MEANINGFUL
DELIBERATIONS AND JURORS’ FEELINGS OF
RESPONSIBILITY**

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*“A defendant might thus be executed, although no sentencer had ever
made a determination that death was the appropriate sentence.”¹*

INTRODUCTION

In *Caldwell v. Mississippi*,² the United States Supreme Court ruled “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”³ Numerous studies, however, have found that capital jurors do *not* feel responsible for the decisions they make.⁴ This phenomenon is even more pronounced in states that use hybrid sentencing schemes, whereby the jury makes a recommendation, but final sentencing authority is left to the judge.⁵ Nonetheless, the Supreme Court has upheld the constitutionality of these hybrid statutes despite claims that they may allow both the judge and jury to

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1. *Caldwell v. Mississippi*, 472 U.S. 320, 331–32 (1985).

2. 472 U.S. 320 (1985).

3. *Id.* at 328–29.

4. See e.g., William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 413, 445–59 (James R. Acker et al. eds., 2d ed. 2003) [hereinafter Bowers et al., *The Capital Sentencing Decision*]; NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 262 (2007); William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1044 (1995) [hereinafter Bowers, *The Capital Jury Project*]; William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 954–62 (2006) [hereinafter Bowers, et al. *The Decision Maker Matters*]; William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 74–75 (2003) [hereinafter Bowers & Foglia, *Still Singularly Agonizing*]; Joseph L. Hoffmann, *Where’s the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1142–55 (1995) (providing a host of examples of jurors, in post-trial interviews, either unwilling or unable to assume responsibility for the decisions they made).

5. Bowers et al., *The Decision Maker Matters*, *supra* note 4, at 960–61.

point to the other party as responsible, thus leaving neither judge nor jury to assume the burden of sentencing responsibility.⁶

Jeffrey Abramson, University of Texas Professor of Law and Government, has argued that *deliberative* juries are a hallmark of a vibrant democracy because they foster consensus-building and help to protect the populace from the awesome and potentially arbitrary power of the state.⁷ Hybrid capital sentencing statutes seem to subvert this function of juries. At the same time, by making it easier for jurors to avoid confronting feelings of responsibility, such statutes appear to strike at the cornerstone of the death penalty's constitutionality: guided discretion. At the heart of post-*Furman*⁸ capital jurisprudence is the requirement that sentencers give full consideration to aggravating and mitigating factors,⁹ and the Supreme Court's ruling in *Ring v. Arizona*¹⁰ has determined that juries are *essential* fact-finders in this process.¹¹ However, if capital jurors do not believe that the decisions they are making have any real bearing on the outcome of the case, there is a substantial risk that they are not fulfilling these functions. After all, if they do not think their decisions matter, can they be expected to engage in a truly deliberative fact-finding process that considers all relevant penalty-phase evidence?

In this paper, we go beyond the prior examinations of how hybrid statutes affect jurors' perceptions of responsibility. In addition to interviewing former capital jurors in Delaware, we utilize actual penalty trial transcripts to show that not only are capital jurors in one hybrid sentencing state failing to take their sentencing responsibility seriously, but that they are actually engaged in a non-deliberative process. Such an atypical procedure hampers the role of the citizenry in the democratic process,¹² violates the spirit of the *Ring* decision that requires a *jury* to determine when a defendant is death-eligible,¹³ and sacrifices considerations of mitigating evidence that are required by the Supreme Court.¹⁴

6. Michael Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283, 286–87 (1989).

7. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 182–85 (2000).

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

9. *See Johnson v. Texas*, 509 U.S. 350, 359–62 (1993) (discussing post-*Furman* jurisprudence).

10. 536 U.S. 584 (2002).

11. *Id.* at 609.

12. *See ABRAMSON, supra* note 7, at 182–85.

13. *Ring*, 536 U.S. at 609.

14. *See Penry v. Lynaugh*, 492 U.S. 302, 318 (1989); *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978); *Proffitt v. Florida*, 428 U.S. 242, 258 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

THE SUPREME COURT AND SENTENCING RESPONSIBILITY

In *Caldwell*, the Court reasoned that to allow jurors to believe they were not the ones ultimately responsible for the defendant's fate would bias the jurors in favor of a death sentence, and lead to situations where defendants are getting executed even though no one actually determined that they deserved a death sentence.¹⁵ However, the Court has issued conflicting opinions regarding the appropriate role of the jury in capital sentencing trials by upholding the constitutionality of hybrid capital sentencing statutes that divide the sentencing responsibility between the judge and the jury,¹⁶ but without going so far as to dismiss the relevance of juries in capital penalty trials. The Court has ruled that when the prosecution alleges the existence of any fact that increases the possible sentence, the fact amounts to "the functional equivalent of an element of a greater offense" and therefore, must be proven to a jury beyond a reasonable doubt in order to comport with the Sixth Amendment's guarantee of a jury trial.¹⁷ This seems to contradict the Court's acceptance of a scheme that allows a judge to override the jury's sentencing decision in death penalty cases. To address this concern, the Court held in *Ring* that before a defendant can be death eligible, a jury must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.¹⁸ However, the Court did not go so far as to invalidate hybrid sentencing statutes.¹⁹ Instead, as long as a jury finds that a statutory aggravator exists beyond a reasonable doubt, their decision on the actual punishment does not need to be binding.²⁰

Although the *Caldwell* decision focused on a situation in which a prosecutor argued to the jury that they were not responsible for the defendant's death because the sentence would be appealed,²¹ the language of the opinion can clearly be applied to other circumstances in which the capital sentencer feels anything less than full responsibility for the defendant's sentence. Leaving the jury in an advisory role "undermines jurors' feelings of responsibility for the defendant's punishment, contrary to the spirit of *Caldwell*."²² If undermining jurors' sense of responsibility causes them to take their sentencing duty less seriously or not to carefully deliberate the evidence, then defendants may be getting sentenced to death without the benefit of a jury determination that they are, in fact, death-eligible. This would call into question the constitutionality of hybrid capital sentencing systems in the wake of *Ring*, and strike at the very heart of the jury system and its democratic function.

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

16. See *Proffitt*, 428 U.S. at 248–49, 259; see also *Harris v. Alabama*, 513 U.S. 504, 515 (1995); *Spaziano v. Florida*, 468 U.S. 447, 460–65 (1984).

17. *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000).

18. *Ring*, 536 U.S. at 609.

19. See *id.* at 608 n.6 & 609.

20. *Id.* at 607–09.

21. *Caldwell v. Mississippi*, 472 U.S. 320, 336 (1985).

22. Bowers et al., *The Decision Maker Matters*, *supra* note 4, at 1004.

Furthermore, if judges are simply deferring to the recommendations of jurors who have been led to believe that their decisions do not really matter, are defendants not being sentenced to death despite the fact that “no sentencer had ever made a determination that death was the appropriate sentence”²³ When the Court struck down automatic death penalty statutes it reasoned that there are “diverse frailties of humankind” that sentencers need to consider.²⁴ For this reason, states are not permitted to limit the types of mitigating factors defendants are permitted to present²⁵ and sentencers are *required* to consider all relevant mitigating circumstances.²⁶ In *Gregg v. Georgia*,²⁷ the Court identified guided discretion as the key ingredient to the constitutionality of capital sentencing statutes.²⁸ At the heart of this guided discretion is a “reasoned *moral* response” that requires full consideration of both aggravating and mitigating factors.²⁹ If the responsibility for the sentence is being divided between a judge and jury, then it remains unresolved who is expected to engage in this deliberative process. Nevertheless, not only do hybrid schemes remain legal, Delaware actually amended its death-sentencing scheme in 1991 with the express purpose of divesting jurors of responsibility for the sentencing decision.³⁰

DELAWARE’S CAPITAL SENTENCING STATUTE

In 1991 four black men from Philadelphia, who robbed and killed two white armored car guards in New Castle, received life sentences after a jury could only muster eleven votes in favor of a death sentence.³¹ In response to this perceived “injustice,” Delaware rewrote its capital sentencing statute to give judges the final say on sentences in capital cases.³² As Fleury-Steiner and his colleagues observed, Delaware’s 1991 law change overrode the “fundamental purpose of unanimity as driving robust jury deliberations” by giving the final “sentencing authority to judicial elites.”³³ The debate over the law change suggested that jurors were “less intelligent” and more arbitrary

23. *Caldwell*, 472 U.S. at 331–32.

24. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

25. *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978).

26. *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982).

27. 428 U.S. 153 (1976).

28. *Id.* at 206–07; *see also* *Proffitt v. Florida*, 428 U.S. 242, 258 (1976).

29. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (emphasis in original) (citation omitted).

30. Benjamin D. Fleury-Steiner et al., *Governing Through Crime as Commonsense Racism: Race, Space, and Death Penalty ‘Reform’ in Delaware*, 11 PUNISHMENT & SOC’Y 5, 17 (2009), available at <http://pun.sagepub.com/content/11/1/5.full.pdf+html>; Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1931 (2012) [hereinafter Johnson et al., *The Delaware Death Penalty*].

31. *Robertson v. State*, 630 A.2d 1084, 1086–87 (Del. 1993).

32. Johnson et al., *The Delaware Death Penalty*, *supra* note 30, at 1930–31.

33. Fleury-Steiner et al., *supra* note 30, at 17.

than judges.³⁴ In 2003, Delaware rewrote its capital sentencing statute again, this time in response to a decision by the Delaware Supreme Court.³⁵ In 2003, the Delaware Supreme Court overturned the death sentence of Sadiki Garden, who was sentenced to death over the jury’s recommendation for a life sentence.³⁶ The Delaware Supreme Court ruled that unless no reasonable person could agree with a life sentence, the judge must give “great weight” to the jury recommendation for life, in effect making life recommendations binding on trial judges.³⁷ However, jury recommendations for death could still be overturned as long as the judge concluded that aggravation did not outweigh mitigation.³⁸ Five months later, a bill was introduced into the Delaware House of Representatives with the express purpose of overturning the Delaware Supreme Court’s decision.³⁹ The bill, which passed in the House the same day it was introduced, and was signed into law less than three weeks later, specified that although the judge must consider a jury’s recommendation, “he or she shall not be bound by the recommendation, but instead shall give it such weight as he or she deems appropriate”⁴⁰ The existing language of Delaware’s capital sentencing statute follows this same logic by stating, “The jury’s recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court. . . . The jury’s recommendation shall not be binding upon the Court.”⁴¹ By giving the judge the ability to give the jury’s recommendation whatever weight he or she wants, the language of the law implicitly allows judges to completely defer their decision-making authority to the jury, to completely ignore the jury’s recommendation, or somewhere in between.

Further divesting Delaware capital jurors of a sense of responsibility for their decisions, they are not actually asked whether or not the defendant should be sentenced to death.⁴² Whereas jurors in Alabama and Florida, the other two hybrid sentencing states, are specifically asked to recommend a life or a death sentence to the judge,⁴³ Delaware jurors are only asked to answer two questions: whether the existence of at least one statutory aggravator has been proven beyond a reasonable doubt and “[w]hether, by a preponderance of the evidence . . . the aggravating circumstances found to exist outweigh the

34. Fleury-Steiner et al., *supra* note 30, at 18.

35. See Act of July 15, 2003, 74 Del. Laws, ch. 174, sec. 1–2 (codified in DEL. CODE ANN. tit. 11, § 4209(d)(1–4) (2003)).

36. Garden v. State, 815 A.2d 327, 345 (Del. 2003), *rev’d and remanded*, Garden v. State, 844 A.2d 311 (Del. 2004), *superseded by statute*, DEL. CODE ANN. tit. 11, § 4209(d) (2003), *as recognized in* Porter v. Turner, 954 A.2d 308 (Del. 2008).

37. Garden v. State, 844 A.2d 311, 314–15 (Del. 2004) (per curiam) (quoting Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987)), *superseded by*, DEL. CODE ANN. tit. 11, § 4209 (2003), *as recognized in* Gattis v. State, 955 A.2d 1276, 1292–93 (Del. 2008).

38. See *id.* at 315.

39. H.B. 287, 142d Gen. Assemb. (Del. 2003).

40. *Id.* (quoted language found in synopsis).

41. DEL. CODE ANN. tit. 11, § 4209(d)(1) (2012).

42. tit. 11, § 4209(c)(3)(a).

43. ALA. CODE § 13A-5-46(e) (1981); FLA. STAT. § 921.141(2) (2010).

mitigating circumstances found to exist.”⁴⁴ The law does not require jurors to be informed that a recommendation that aggravation outweighs mitigation is a recommendation for death,⁴⁵ but even assuming that the judge’s sentencing instructions include this relevant information,⁴⁶ jurors are likely to latch onto the language of the law to disengage themselves from responsibility. This legal language likely serves to buffer Delaware jurors from a feeling of responsibility for the very important and overwhelming decision they have been asked to make in a way that does not occur in other hybrid sentencing states.

It should come as no surprise that after Delaware changed its law in 1991, the proportion of death sentences in the state rose dramatically, giving Delaware the third highest death sentence-to-murder ratio in the country.⁴⁷ While this phenomenon could be caused by a number of other factors, not the least of which is the fact that unanimous recommendations for death are no longer necessary, it appears likely that Delaware’s current capital sentencing scheme may be creating a situation in which defendants are being sentenced to death even though no one decided they should be. Furthermore, effective deliberation on the statutory aggravator(s) is hampered by the sentencing scheme, and sentencers are overlooking the various mitigating circumstances that are pertinent to determining an appropriate sentence. After all, it is highly unlikely that judges will override the recommendation of the jury on a regular basis (the *Garden* case is the only time a Delaware judge has ever overridden a life recommendation),⁴⁸ especially when there is a clear majority. However, if the recommendations of capital jurors are being made in the absence of a sense of responsibility or honest deliberations, then they are not reliable recommendations and the crucial function of the jury to protect individuals from arbitrary treatment by the state is lost. The Delaware Supreme Court has repeatedly upheld Delaware’s post-*Ring* capital sentencing statute, but none of their decisions have grappled with the issue raised in *Caldwell*, namely, “[d]oes giving the judge authority over the jury in making the punishment decision compromise the jury’s sense of responsibility or scrupulousness in their decision-making?”⁴⁹ More importantly, does this restrict the types of evidence jurors consider when making their sentencing recommendations?

44. tit. 11, § 4209(c)(3)(a).

45. *Id.*

46. In all eight cases in this sample, the sentencing instructions did inform the jurors that a recommendation that aggravation outweighed mitigation was a recommendation for death and that a recommendation that aggravation did not outweigh mitigation was a life recommendation.

47. Johnson et al., *The Delaware Death Penalty*, *supra* note 30, at 1928.

48. See *Garden v. State*, 815 A.2d 327, 345 (Del. 2003), *rev'd and remanded*, *Garden v. State*, 844 A.2d 311 (Del. 2004), *superseded by statute*, DEL. CODE ANN. tit. 11, § 4209 (2003), *as recognized in* *Porter v. Turner*, 954 A.2d 308 (Del. 2008).

49. Bowers et al., *The Decision Maker Matters*, *supra* note 4, at 945.

CAPITAL JURORS AND RESPONSIBILITY ATTRIBUTION

In contrast to *Caldwell's* dictate that jurors cannot believe "that the responsibility for any ultimate determination of death will rest with others,"⁵⁰ there is ample evidence that capital jurors seek to avoid feelings of responsibility for the punishment decision.⁵¹ Prior studies of juror responsibility in capital cases have found that, in general, jurors try to distance themselves from responsibility for the sentencing decision in capital cases, and that this reality is especially pronounced in states that have or once had judicial override.⁵² For example, one early Capital Jury Project ("CJP") study conducted in Indiana (which had judicial override at the time) concluded that "most jurors found ways to overcome, or avoid confronting, their sense of personal moral responsibility for the defendant's fate."⁵³ If jurors are not confronting their sentencing responsibility seriously, it is hard to imagine that they are really giving "significance to relevant facets of the character and record of the individual offender" or considering "mitigating factors stemming from the diverse frailties of humankind."⁵⁴ After all, in the original CJP sample, nearly half (48.3%) of all jurors had made up their mind as to the defendant's punishment *prior* to the start of the penalty phase, indicating they were already closed off from considering this type of evidence.⁵⁵

In summarizing some of the CJP's earliest findings, Professor William Bowers noted that nearly all jurors in the sample (which included fourteen states) placed the responsibility for punishment somewhere other than on themselves, with more than 80% placing the responsibility on either the defendant or the law.⁵⁶ On the contrary, only 14.4% of jurors identified the jury or the individual juror as being primarily responsible for the defendant's sentence.⁵⁷ As Austin Sarat, William Nelson Cromwell Professor of

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

51. See VIDMAR & HANS, *supra* note 4, at 262; Bowers, *The Capital Jury Project*, *supra* note 4, at 1093-98; Bowers et al., *The Capital Sentencing Decision*, *supra* note 4, at 446-49; Bowers et al., *The Decision Maker Matters*, *supra* note 4, at 960-63; Bowers & Foglia, *Still Singularly Agonizing*, *supra* note 4, at 74-75; Hoffman, *supra* note 4, at 1142.

52. See, e.g., Hoffman, *supra* note 4, at 1147-48 (providing an example of a juror who "flatly denied having played any role in the defendant's sentencing" on the knowledge that the jury only provided a recommendation to the judge). See generally VIDMAR & HANS, *supra* note 4, at 262; Bowers, *The Capital Jury Project*, *supra* note 4, at 1077-1101 (explaining and analyzing data collected showing jurors tend to distance themselves from sentencing responsibilities); Bowers et al., *The Capital Sentencing Decision*, *supra* note 4, at 446-49; Bowers et al., *The Decision Maker Matters*, *supra* note 4, at 960-63; Bowers & Foglia, *Still Singularly Agonizing*, *supra* note 4, at 74-75.

53. Hoffman, *supra* note 4, at 1156.

54. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

55. William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1488 (1998).

56. Bowers & Foglia, *Still Singularly Agonizing*, *supra* note 4, at 74; see also Bowers, *The Capital Jury Project*, *supra* note 4, at 1093-97; Bowers et al., *The Capital Sentencing Decision*, *supra* note 4, at 446-47.

57. Bowers et al., *The Capital Sentencing Decision*, *supra* note 4, at 447; see also Bowers, *The Capital Jury Project*, *supra* note 4, at 1095 (explaining that 6.4% believed the individual juror was

Jurisprudence and Political Science, noted in Georgia, jurors viewed the decision to sentence a defendant to death as being made elsewhere, using the existence of appellate review to shift the sentencing responsibility to other actors in the system and to avoid feelings of responsibility for the defendant's death, should he or she eventually be executed.⁵⁸ In states where the trial judge has the authority to override the jury's sentencing verdict, nearly all the jurors saw the sentencing responsibility as at least shared with the trial judge.⁵⁹ Jurors who saw the responsibility for the sentencing decision as shared with the judge, were also more likely to vote for death than their counterparts who saw the jury as primarily responsible.⁶⁰ For example, in Indiana, "the most common thread found" in interviews with former capital jurors "is that virtually all of the jurors discussed how difficult it was, initially, to accept responsibility for the defendant's fate"⁶¹ However, this issue went beyond an initial reluctance to accept a responsibility of such magnitude. The jurors had very strong memories of the portion of the sentencing instructions that told them that they were only making a recommendation.⁶² This knowledge allowed the jurors to eliminate "their own personal moral responsibility" for the sentencing decision, and also often became a tool used by jurors to convince holdouts.⁶³ The existence of judicial override appears to have magnified the jurors' attempts to avoid responsibility for their sentencing recommendations. In Indiana, "many death penalty jurors seek, and manage to find, ways to deny their personal moral responsibility for the sentencing decision."⁶⁴

These studies all suggest that capital jurors try to make mental leaps to avoid feelings of personal responsibility for the truly overwhelming decisions they are being asked to make, and that hybrid capital sentencing statutes simply make this leap easier. Perhaps the most damning evidence against the use of hybrid capital sentencing statutes, however, comes from a statistical comparison between binding and non-binding states. Professor Bowers and his colleagues noted that jurors in three hybrid sentencing states (Alabama, Florida, and Indiana) were "especially unlikely to see themselves as responsible for the defendant's punishment."⁶⁵ The jurors from these three hybrid states

responsible, and 8.8% believed the jury as a whole was responsible); Bowers & Foglia, *Still Singularly Agonizing*, *supra* note 4, at 74 (explaining that 5.5% thought the individual juror was most responsible and that 8.9% thought the jury as a whole was responsible).

58. Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 *IND. L.J.* 1103, 1127-33 (1995).

59. William J. Bowers, *The Capital Jury: Is it Tilted Toward Death?*, 79 *JUDICATURE* 220, 223 (1996) [hereinafter Bowers, *The Capital Jury*].

60. *Id.* at 223.

61. Hoffman, *supra* note 4, at 1142.

62. *Id.* at 1146-51.

63. *Id.* at 1151.

64. *Id.* at 1157.

65. Bowers et al., *The Decision Maker Matters*, *supra* note 4, at 954.

were significantly less likely than their counterparts in binding states to view the sentence as strictly the jury's responsibility.⁶⁶ These jurors were also significantly less likely to view the jury as more responsible than the judge.⁶⁷ Considering the finding that jurors in all states were unlikely to view themselves as responsible for the final sentence, this finding is very concerning.⁶⁸ As Bowers and his colleagues observed, "*Caldwell's* prescription is virtually a dead letter in the hybrid states."⁶⁹ Although the jurors in hybrid states were technically correct in their assessment that the judge is not required to accept the jury's sentence, the finding that over 95% of jurors in these states correctly noted this is interesting.⁷⁰ There is ample evidence that capital jurors typically misunderstand the sentencing instructions,⁷¹ so the fact that jurors are correctly picking up on the instruction that the judge has final say, suggests that they search for and latch onto any factor that can help them alleviate their sense of responsibility for their decisions.

These findings have implications for the very democratic role of juries as the conscience of the community. Abramson has argued that a deliberative jury is critical to American democracy.⁷² The Founders viewed juries as so fundamental to the democratic experiment that the right to a jury in criminal trials is the only right expressly included *twice* in the Constitution (in Article III, Section 2 and in the Sixth Amendment).⁷³ The unanimous verdict requirement of most juries fosters a consensus-building, deliberative process that is at the heart of a vibrant democracy.⁷⁴ Permitting non-unanimous jury verdicts and judge override in death penalty cases, where the stakes are so high, seems to run counter to democratic functioning and increases the possibility of arbitrariness. As Michael Mello has observed, if judges are also denying responsibility by simply accepting the jury's recommendation, then we are in a situation in which defendants are being sentenced to death and executed, but *no one* bears responsibility for the decision, which is in direct contrast to the ruling in *Caldwell*.⁷⁵ If jurors are not taking their sentencing responsibility seriously, they may not be truly engaged in determining if a statutory aggravator exists beyond a reasonable doubt, as the *Ring* decision

66. Bowers et al., *The Decision Maker Matters*, *supra* note 4, at 954.

67. *Id.*

68. *Id.*

69. *Id.* at 957.

70. *Id.* at 956–57.

71. See Craig Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. SOC. ISSUES 149, 162 (1994); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 LAW & HUM. BEHAV. 575, 576 (1997); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411, 414–16 (1994); Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 338–39 (2000).

72. ABRAMSON, *supra* note 7, at 201–05.

73. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

74. See U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI; ABRAMSON, *supra* note 7, at 201–05.

75. Mello, *supra* note 6, at 286.

mandates,⁷⁶ nor are they likely to be giving true consideration to mitigating circumstances, which is a cornerstone of the death penalty's constitutionality in the wake of *Gregg v. Georgia* and its companion cases.⁷⁷ If this is the case, jurors are likely providing erroneous recommendations to judges, and judge override simply becomes "an instrument of arbitrary death sentencing in its own right."⁷⁸ These fears raise questions about the legal status of hybrid sentencing statutes.

METHODOLOGY

The data for this study come from thirty-five interviews with former Delaware capital jurors that were conducted as part of the Capital Jury Project.⁷⁹ Interviewees were selected from eight capital trials that were tried in Delaware from 2001-2005, in which court transcripts and judges' sentencing opinions⁸⁰ were both available.⁸¹ Jurors had to have served on both the guilt and sentencing phases of the trial, and were selected systematically from the jury list, only being replaced by another juror if efforts to interview them failed.⁸² There were eleven defendants sentenced to death in Delaware during this time period.⁸³ Three subsequently had their sentences overturned, and one refused to allow his attorneys to present any mitigation.⁸⁴ Of the remaining seven cases, four had their appeals being handled by the Philadelphia Federal Defenders, who provided electronic copies of the transcripts for no cost.⁸⁵ Since the penalty phases of most cases that ended with a life sentence were not transcribed (because the sentence was not being appealed), they were harder to track down. Only four could be located from either the defendants' current appellate attorneys or from the court file. Since we desired an equal number of life and death cases, this limited our sample size to four life and four death cases.⁸⁶

76. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

77. *Gregg v. Georgia*, 428 U.S. 153 (1976). See also *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

78. Bowers et al., *The Decision Maker Matters*, *supra* note 4, at 1003.

79. Ross Kleinstuber, "Everyone Has Choices": Constructing Individualism in the Cultural and Institutional Life of Capital Mitigation (Spring 2011) (unpublished Ph.D. dissertation, University of Delaware) (manuscript at 7), available at <http://udel.edu/~rdk/dissertation%20final.html>.

80. See Superior Court Opinions and Orders, DEL. STATE COURTS, <http://courts.delaware.gov/opinions/list.aspx?ag=superior%20court> (last visited Apr. 9, 2013).

81. Kleinstuber, *supra* note 79, at 69.

82. *Id.* at 68-78.

83. *Id.* at 18-35. Citation to the specific cases has been omitted in an effort to ensure juror/respondent privacy.

84. *Id.* at 68-78.

85. *Id.*

86. *Id.*

Interviews lasted between two-and-a-half and four-and-a-half hours, with a median time of just over three hours, and included both open and close-ended questions in order to obtain both a depth and breadth of responses.⁸⁷ Thirty-one interviews were conducted in person, three were conducted over the phone, and one was conducted half on the phone and half in person.⁸⁸ Although most interviews were completed in one session, six were conducted over multiple meetings.⁸⁹ The goal of the interviews was to understand the decision-making process of capital jurors and juries, the dynamics of jury interaction, the experiences of capital jurors, and their use of discretion. Jurors were compensated for their time and assured confidentiality.⁹⁰ In order to ensure juror confidentiality, pseudonyms will be used to refer to all defendants, and all jurors will be referenced solely by the masculine pronoun, regardless of their actual gender.

FINDINGS

The interviews conducted with thirty-five former capital jurors suggest that they do *not* feel responsible for the sentences that they recommend, and that penalty phase deliberations are often exceedingly brief with very little discussion of the evidence.⁹¹ The vast majority of the jurors who were interviewed indicated that either the defendant or the law was most responsible for the defendant's punishment, and the jurors' stories of the juries' (lack of) sentencing deliberations reflect this feeling of irresponsibility.⁹² While prior studies of capital jurors have also discovered that jurors try to distance themselves from responsibility for their sentencing decisions, especially in states with a judge override,⁹³ the findings of this study reveal that many of the jurors in Delaware focus solely on the portion of the judge's sentencing instructions that tells them they are only making a recommendation in order to absolve themselves of responsibility.

This causes jurors to have a misconception as to their actual role in the sentencing process. In the process of denying responsibility for a recommendation that few judges are apt to take lightly, Delaware capital jurors also sacrifice the deliberative process, giving very little consideration to the evidence presented in the penalty phase. Although seven of the eight cases involved statutory aggravating circumstances that were found as a matter of

87. Kleinstuber, *supra* note 79, at 70–71.

88. *Id.*

89. *Id.* at 71.

90. *Id.*

91. *Id.* at 124–26.

92. *See generally id.* (finding jurors did not feel responsible for the punishment, and that their feeling of irresponsibility was based upon their misconceptions of the law, their instructions, or their belief about the defendant).

93. VIDMAR & HANS, *supra* note 4, at 262; Bowers, *The Capital Jury Project*, *supra* note 4, at 1093–95; Bowers et al., *The Capital Sentencing Decision*, *supra* note 4, at 445–49; Bowers et al., *The Decision Maker Matters*, *supra* note 4, at 962–63; Bowers & Foglia, *Still Singularly Agonizing*, *supra* note 4, at 74–75; Hoffman, *supra* note 4, at 1146–48.

law in the guilt phase, and thus do not specifically raise *Ring* issues, the findings suggest that statutory aggravators presented during the penalty phase in Delaware are not being deliberated and considered in the manner envisioned by the *Ring* majority.⁹⁴ Furthermore, the interviews suggest that most jurors are giving very little, if any, consideration to the mitigating circumstances proffered by the defense in the penalty phase. Twenty-one of the jurors (60%) stated they had made up their mind on punishment before the penalty phase even began, and even those who had not yet made up their minds, suggested that their decisions were based on guilt phase evidence.⁹⁵ Many of the jurors could not recall the mitigating evidence that was presented in the penalty phase, even when prompted, and those who could recall it, dismissed it as irrelevant.⁹⁶

The results displayed in Table 1 reveal that when jurors were asked whether they thought the determination of the defendant's fate was: (1) strictly the jury's responsibility; (2) partly the jury's responsibility and partly the judge's and appeals court's decision, or; (3) mostly the responsibility of the judge and the appeals court, a majority answered mostly the judge and appeals court. In contrast, only three jurors saw the jury as primarily responsible. Of even greater concern, the results in Table 2 reveal that when jurors were asked to rank the law, the judge, the jury, the individual juror, and the defendant from "most" to "least" responsible for the defendant's punishment, *none* of the jurors identified the individual juror as the most responsible, and only *one* said the jury was most responsible. Further, the lone juror who identified the jury as the most responsible had no recall of serving on the penalty phase and insisted that he did not, despite court records to the contrary (which suggests that he may have been so convinced that the jury was not responsible that he came to believe he did not even serve on the penalty trial). On the other hand, thirty-one of the thirty-five jurors (91.4%) placed the burden of the decision on the law or the defendant, essentially suggesting that if certain conditions are met, the law mandates a death sentence. This is not guided discretion. Such thinking deprives the jurors of *any* discretion, which the Supreme Court has said cannot be done.⁹⁷ Jurors saw themselves as so irresponsible for the decision that the modal response category for the jury was fourth most responsible (fifteen of thirty-five or 42.9%) and for the individual juror, the modal response was the least responsible (seventeen of thirty-five or 48.6%).

94. Kleinstuber, *supra* note 79, at 160.

95. *Id.* at 124–26.

96. *Id.* at 144–77.

97. *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976).

TABLE 1⁹⁸

Did you think that whether the defendant lived or died was . . .

	N	%
Strictly the jury's responsibility and no one else's	3	8.6
Partly the jury's responsibility and partly the responsibility of the judge and appeals courts	12	34.3
Mostly the responsibility of the judge and appeals courts	18	51.4
Missing	2	5.7

TABLE 2⁹⁹

Rank the following from "most" through "least" responsible for defendant's punishment

1 = most responsible; 5 = least responsible

	1 (most responsible)	2	3	4	5 (least responsible)
The law that states what punishment applies	16 (45.7%)	11 (31.4%)	3 (8.6%)	2 (5.7%)	3 (8.6%)
The judge who imposes the sentences	2 (5.7%)	9 (25.7%)	16 (45.7%)	6 (17.1%)	2 (5.7%)
The jury that votes for the sentence	1 (2.9%)	7 (20.0%)	9 (25.7%)	15 (42.9%)	3 (8.6%)
The individual juror since the jury's	0	4 (11.4%)	4 (11.4%)	10 (28.6%)	17 (48.6%)

98. See Kleinstuber, *supra* note 79, at 247–319 (responses are the aggregated result of jurors' responses to the questionnaire) (responses on file with author).

99. *Id.*

decision depends on the vote of each juror					
The defendant because his conduct is what actually determined the punishment	16 (45.7%)	4 (11.4%)	3 (8.6%)	2 (5.7%)	10 (28.6%)

Modal response in each category is in bold.

“Typical” progression: Defendant, law, judge, jury, juror.

The qualitative results are even more revealing. Jurors from six of the eight trials specifically stated that their jury found no need to deliberate at the penalty phase, and twenty of the interviewed jurors (57.1%) expressly mentioned either how the law took responsibility away from them, how they were not the ones really sentencing the defendant, or that the jury did not spend much time deliberating the defendant’s sentence.¹⁰⁰ For example, a juror from Jerry’s trial (the only trial that did not involve a statutory aggravator being found in the guilt phase), where the jury unanimously recommended a death sentence, told the interviewer:

[W]e all knew when we went in there for that sentencing phase that *it didn’t matter really* if we said yes to the judge or no to the judge. It’s the judge’s final decision. We can all go back and say yes that we agree he meets the criteria for the death penalty, but if the judge doesn’t agree with us, he still doesn’t have to give the death penalty, and we realized that he could have given life imprisonment. All we did was go in there and see if it met the criteria for him to make that decision.¹⁰¹

Earlier in the interview, this juror explained, “*we weren’t the ones that were imposing the death penalty*. We were just telling the judge whether the criteria for the death sentence was [sic] met, and he was the one to make the decision on the death sentence.”¹⁰² He said that this understanding of the law helped to resolve the reluctance of jurors to vote for the death penalty, indicating, “we had a hard time getting that through to [a holdout], ‘You are not giving this man the death penalty. You are telling the judge that the criteria is [sic] met to give the man the death penalty.’”¹⁰³ This juror was clearly not considering mitigation; his interview reveals that his sole focus was on the *Ring* question of

100. Kleinstuber, *supra* note 79, at 247–319 (the box shown is the aggregate result of jurors’ responses to the questionnaire found in Appendix A of the dissertation) (responses on file with author).

101. Interview with Anonymous Juror A from Jerry’s Trial, in Del. (Oct. 13, 2009) (on file with Widener Law Review) (emphasis added).

102. *Id.* (emphasis added).

103. *Id.*

death-eligibility. He gave no consideration to the proffered mitigating evidence or to the all-important second question of whether the aggravating circumstances outweighed the mitigating ones. According to the juror, the only decision the jury had to make was whether it “met the criteria” to allow the judge to make a final determination; that is, if a statutory aggravator was present. One of the other jurors from Jerry’s case made similar remarks, indicating that during punishment deliberations:

We kept bringing up that the Judge was going to make his decision regardless [sic]. He has the same evidence we do, and he’s going to make the decision he believes is best regardless [sic]. Whether we have a twelve-zero vote—even if it’s twelve-zero—if he sees stuff differently, that’s what he’s gonna [sic] do.¹⁰⁴

Another juror from Jerry’s trial illustrates the way the jurors hide behind the law to absolve themselves of responsibility:

I found the death phase of it much easier because they explained mitigating versus aggravating circumstances, and you actually went in and listed the mitigating circumstances versus the aggravating, and it gave you instructions that one had to outweigh the other. That was almost mathematical to me[,] so . . . [t]hat to me took the decision out of my hands. We were following the instructions we were given, and everybody contributed to that, and then it was just like, ‘Well here it is. We don’t really have a choice here.’ That was probably one of the easier things for me and took some of the personal burden of making that decision off of me. And it did not have to be unanimous, and we knew it was only a recommendation and the judge could overrule it if he didn’t feel it was right.¹⁰⁵

Illustrating the complete lack of discretion this juror felt, he told the interviewer that the instructions “took off a lot of the pressure” because “if this equaled this then this equaled this.”¹⁰⁶ These responses from the jurors on Jerry’s trial reflect the exact fear Mello identified as inherent in hybrid statutes: the jury will “believe that its determination is . . . of little relevance to the defendant’s fate.”¹⁰⁷ They also express Justice Marshall’s concern in the *Caldwell* decision: jurors who do not feel responsible for a sentence are more likely to err on the side of death (since life sentences cannot be reviewed) and are less inclined to give full consideration to the evidence, which calls into question the reliability of the death-eligibility decisions and their final sentencing recommendations.¹⁰⁸

The two jurors who were interviewed from Charlie’s trial also reflect this lack of discretion as well as a sense of irresponsibility. Charlie’s jury

104. Interview with Anonymous Juror B from Jerry’s Trial, in Del. (Sept. 9, 2010) (on file with Widener Law Review).

105. Interview with Anonymous Juror C from Jerry’s Trial (Nov. 17, 2009) (on file with Widener Law Review).

106. *Id.*

107. Mello, *supra* note 6, at 303.

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

recommended death unanimously, but as one of them stated, “Again, it’s a recommendation, we knew, and the judge made it very clear to us. We knew that we’re not sentencing him to death. We are merely recommending a death sentence.”¹⁰⁹ This knowledge, according to the juror:

[T]akes some pressure off because you don’t have to worry about being unanimous, and I think at that point, having already gone through the heat of that trial—and not that we didn’t take our time doing it, I think we did—but after that three hour period we felt strongly in [our recommendation].¹¹⁰

The other juror interviewed from Charlie’s trial echoed these sentiments, explaining that his understanding of the law mandated that the jury recommend death: “[W]e determined that all of the aspects of the crime that Delaware says are criteria for capital punishment apply, so regardless of what your deepest inner feelings are, the law has to apply. Do your job.”¹¹¹ As with Jerry’s jurors, this belief that all they needed to do was determine the existence of a statutory aggravator (the *Ring* question)¹¹² indicates the jury’s reluctance to even factor mitigating evidence into their decision. Neither of these jurors could recall any details of the defense’s mitigation case even when the interviewer reminded the jurors of the evidence and the witnesses.

Even in cases with life recommendations, the impact of the jurors’ knowledge that their decision was not the final one is evident. Ted’s jury recommended he be spared by a nine-to-three vote,¹¹³ but the responses of the jurors who were interviewed suggest that this vote was not the product of any careful deliberation or consideration of Ted’s horrific childhood, which the defense presented over two days through the testimonies of a psychologist, a forensic nurse, and Ted’s mother and sister. The jurors believed that their vote had little meaning so they spent little time discussing or considering the penalty phase evidence.¹¹⁴ As one of the jurors told the interviewer, during the penalty deliberations, there was “no real debate, no real substantive discussion as it was in the guilt phase . . . [t]hat wasn’t the case in the penalty phase.”¹¹⁵ This juror recalled that there was “really just one vote [on punishment] [T]hen it was pretty much concluded there was no point in going further because (a) people believed what they believed and (b) *it was just a*

109. Interview with Anonymous Juror A from Charlie’s Trial (May 13, 2009) (on file with Widener Law Review).

110. *Id.*

111. Interview with Anonymous Juror B from Charlie’s Trial, in Del. (Mar. 11, 2009) (on file with Widener Law Review).

112. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002).

113. Kleinstuber, *supra* note 79, at 128–29.

114. *See id.* at 130.

115. Telephone Interview with Anonymous Juror A from Ted’s Trial (Sept. 8, 2010) (on file with Widener Law Review).

recommendation anyway."¹¹⁶ He later reiterated this point, explaining, "[a]fter we had the vote on the recommendation, that was basically it. *There was no point in going any further* because I think it was clear to everybody that no one at that point was going to change their mind, and secondly, *it wasn't really relevant.*"¹¹⁷ This juror explained that the jury believed that "in the end [the punishment recommendation] *wasn't anything that bore any weight in reality.* What's in the discussion about that is, 'Why do we even go through this if at the end of the day the judge makes the decision?'"¹¹⁸ He said they told the jurors who were reluctant to vote for a death sentence that "if you're concerned at the end of the death [penalty], it's going to be the judge's final decision. *We [are] just making a recommendation.*"¹¹⁹ Unsurprisingly, only one of the six jurors interviewed from Ted's case could recall even one of the defense's two experts, and he gave the expert's testimony no credibility and refused to consider it: "whatever testimony [the defendant's forensic nurse] gave . . . was not credible."¹²⁰

Eleven of the jurors on Alan's trial voted to recommend a life sentence.¹²¹ In this situation, it might not come as a surprise that the jury spent little time on the deliberations, but it might be surprising that one juror said the deliberations lasted "less than half an hour."¹²² He explained that there was little attempt by any of the jurors to sway any of the others. According to him:

It wasn't our objective to get to a unanimous decision. It was more whatever—whoever had the greater votes for either death penalty or life in prison. So once we did the first run, it came back eleven to one, we did a second vote. It came back eleven to one, and the one person in favor of the death penalty conceded that he didn't want to do it anymore. That's when we just said, "O.K., that's the vote."¹²³

Steve's jury recommended a death sentence by a nine-to-three margin, and, like in Alan's case, jurors suggested that this vote was not the product of any deliberations.¹²⁴ Rather, the jurors just voted their own feelings and left it at that. As one juror stated, "[w]e didn't have to be one hundred percent [meaning unanimous]. [The] jury's reaction was good, so everybody voted on their opinion and we went with that."¹²⁵ Another juror from this trial

116. Interview with Anonymous Juror A from Ted's Trial, *supra* note 115 (emphasis added).

117. *Id.* (emphasis added).

118. *Id.* (emphasis added).

119. *Id.* (emphasis added).

120. Interview with Anonymous Juror B from Ted's Trial, in Del. (Aug. 25, 2010) (on file with Widener Law Review).

121. Kleinstuber, *supra* note 79, at 186.

122. Telephone Interview with Anonymous Juror A from Alan's Trial (Nov. 23 & 30, 2010) (on file with Widener Law Review).

123. *Id.*

124. *See* Kleinstuber, *supra* note 79, at 175 and *supra* note 122 and accompanying text.

125. Interview by Ross Flockerzie with Anonymous Juror A from Steve's Trial (Mar. 16, 2009) (on file with Widener Law Review).

indicated, “I like the way Delaware was: ‘What’s your vote?’ [We] take it. ‘You guys sure?’ Yes, we are, and this is what we say. And go from there.”¹²⁶

What is especially surprising is that even when the jury vote was close, there still appears to have been very little time or energy devoted by the jurors to their punishment deliberations. Donald’s jury recommended a life sentence by a narrow seven-to-five margin, but as a juror from his trial explained, “there was really no discussion [about punishment].”¹²⁷ When asked what the jury did to reach its punishment decision, this juror described a superficial process that did not grapple with any of the evidence presented in the penalty phase:

[W]hen we got in the room to do the penalty [deliberations], the lead juror kind of took the lead and said, “We do not have to vote unanimously. Is everyone ready to vote or does anyone need to talk about it?” And we said, “Let’s vote.” Honestly, everybody just wanted to get out, so everybody just put in their vote and we told the bailiff we were ready, so there was really no discussion.¹²⁸

Other jurors from Donald’s case verified this account. When asked how the jurors decided to end their deliberations, one juror said: “We voted, and we were done. We asked if anybody wanted to make any other arguments or reasons why we should do something, then we were done.”¹²⁹ A third juror explained:

[I]t was pretty simple. I think people were kind of worn down. We had been there for a while, and you’re either one way or another, and we didn’t have to be unanimous on it. You either feel one way or you feel the other way, so we did a little bit of discussion on if the punishment fits the crime.¹³⁰

This juror went on to say, “I think we only took two votes on that. It was a pretty quick thing. It was like we took one vote, then kind of everybody got to say their piece and what they thought, and we took another vote. It was not a long ordeal.”¹³¹ He explained that this sentencing scheme meant that none of the jurors were reluctant to go along with the final recommendation “because I think you get your vote and that’s your vote, and then that’s it, and ultimately it’s up to the judge.”¹³²

126. Interview by Ross Flockert with Anonymous Juror B from Steve’s Trial (Apr. 29, 2009) (on file with Widener Law Review).

127. Interview with Anonymous Juror A from Donald’s Trial (Aug. 18, 2010) (on file with Widener Law Review).

128. *Id.*

129. Interview with Anonymous Juror B from Donald’s Trial, in Del. (Aug. 27, 2010) (on file with Widener Law Review).

130. Interview with Anonymous Juror C from Donald’s Trial (Aug. 26, 2010) (on file with Widener Law Review).

131. *Id.*

132. *Id.*

Roger's jury had an identical seven-to-five life recommendation, but like the juries in other trials, there were indications that the jury spent little time actually deliberating the penalty phase evidence.¹³³ One juror explicitly stated, "I don't think there was a whole lot of deliberation because we didn't need to all agree."¹³⁴ A fellow juror from Roger's trial reiterated this point, explaining:

[N]obody that I remember tried a whole lot to convince anybody of their decision [W]hen we were done with discussion we took a vote and that was it. There wasn't any arguing during that portion. I think everybody just kind of wanted to make their decision known and whatever happened, happened. Plus the fact, I guess, the judge had the final decision¹³⁵

A third juror from this case corroborated this account, saying there was only one vote on punishment since "it didn't have to be unanimous. We talked about it, and it was a personal thing."¹³⁶ These findings become especially troubling in Roger's case because, in his sentencing decision, the judge completely deferred to the jury's decision. Rather than engaging in a detailed analysis of the aggravating and mitigating factors, the entirety of the judge's sentencing rationale was: "The Court agrees with the jury that the mitigating evidence clearly and substantially outweighs the aggravating evidence that has been presented and that a life sentence is therefore appropriate under the law."¹³⁷ Considering the closeness of the vote, it is hard to see how the mitigating evidence so overwhelmingly outweighed the aggravating evidence, and one wonders what the judge would have done if the vote had been reversed.

In Michael's case, the vote was reversed. The jury voted seven-to-five in favor of death, and the judge on the case obliged, sentencing Michael to death.¹³⁸ However, there are indications that this jury, too, did not take its responsibility seriously. When asked what the jury did to reach their sentencing decision, one juror explained:

It really only took a couple hours. We pretty much went in [to the jury room], took another vote fairly quickly. We discussed it a little bit. The ones that were against the death penalty, we talked a little bit with them about it, but it didn't seem like we were gonna [sic] change too many of those people if we stayed there for another week [s]o knowing that this was basically just a

133. Kleinstuber, *supra* note 79, at 136–37.

134. Interview with Anonymous Juror A from Roger's Trial, in Del. (Sept. 30, 2010) (on file with Widener Law Review).

135. Interview with Anonymous Juror B from Roger's Trial (Sept. 26, 2010) (on file with Widener Law Review).

136. Interview with Anonymous Juror C from Roger's Trial (Sept. 28, 2010) (on file with Widener Law Review).

137. Kleinstuber, *supra* note 79, at 190.

138. *Id.* at 136–37.

recommendation to the judge, we pretty much went with the vote when we first took it. We did take another one later, but it came out the same.¹³⁹

This juror later explained that there were not deliberations in the penalty phase “like in the guilt phase.”¹⁴⁰ Rather, no one “really argued one way or the other. We just kind of all presented our view of what we had heard in the penalty phase, but we really didn’t do a lot of trying to change other people’s minds.”¹⁴¹

CONCLUSIONS

Overall, these findings suggest that capital jurors in Delaware are not taking their sentencing responsibilities seriously. Not only do they not view themselves as responsible, but they take mental strides to effectively distance themselves as much as possible from the sentencing decision. This tactic appears to lead them to an abridged deliberation process that does not grapple with, or even evaluate, the evidence being presented in the penalty trial. Other portions of the interviews suggest that the jurors appear to have made up their minds regarding punishment either during the guilt phase or based almost entirely on guilt phase evidence.¹⁴² The portions summarized here show that they fail to discuss anything else they may have heard. The jurors either do not pay attention to, or give very little consideration to mitigation. Those who do recall the presented mitigating circumstances overwhelmingly fail to see its relevance. Once the penalty phase ends, they retire to the jury room, cast a ballot, and pass the buck onto the judge. They spend little time deliberating, do not feel as if their sentencing recommendations matter, and do not evaluate or weigh the additional evidence presented to them in the penalty trial. This is *not* what the Supreme Court had in mind when they authorized bifurcated capital trials.¹⁴³ In fact, the importance of robust jury deliberations is illustrated by recent research, which has found that life holdouts are sometimes able to educate the other jurors about the important role a defendant’s troubled childhood and past experiences of victimization can have on a defendant’s development and subsequent life choices.¹⁴⁴ This critical

139. Interview with Anonymous Juror A from Michael’s Trial, in Del. (June 28 & July 2, 2010) (on file with Widener Law Review).

140. *Id.*

141. *Id.*

142. See also Ross Kleinstuber, “We’re All Born with Equal Opportunities”: *Hegemonic Individualism and Contextual Mitigation Among Delaware Capital Jurors*, 1 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 152 (2013).

143. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 191–92, 195 (1976) (determining that, although bifurcated trials adequately appeased earlier concerns, mandatory sentencing was constitutionally archaic).

144. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of Jurors’ Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 258 (2001); BENJAMIN

function is lost when juries vote without deliberating. This reality has real consequences for defendants and for the robustness of American democracy.

This is not to blame the jurors for a very understandable psychological reaction to a very stressful situation. Rather, their reactions are *facilitated by the law*. The law in Delaware practically invites jurors to see others as more responsible for the defendant’s punishment. The law incites jurors to feel as if their sentencing decisions do not matter, and to spend little time or energy evaluating, analyzing, or deliberating the evidence they receive in the punishment phase. The jurors cannot be blamed for taking this morally disengaging step. Capital trials are already fraught with what Haney calls “structural aggravation”—factors that help to disengage the jurors from the very real decision they are called upon to make.¹⁴⁵ Since aggravating evidence is intimately related to the factors of the crime and is able to be presented in the guilt phase,¹⁴⁶ this ultimately means that mitigating circumstances are getting short shrift. The judge override is simply another mechanism of disengagement that Delaware has built into its capital sentencing structure. Its very existence encourages jurors to distance themselves from responsibility for the defendant’s fate. In addition to removing the obvious burden of acquiring a unanimous jury verdict, the current system also biases jurors in favor of a death sentence and leads to arbitrary sentencing decisions. While the legislative record in Delaware suggests that judicial override was created, at least partially, to reduce arbitrariness in death sentences,¹⁴⁷ the findings here reveal the same thing Bowers and his colleagues discovered in Florida, Alabama, and Indiana: “Ironically, judge override . . . is, itself, a source of further arbitrariness in capital sentencing.”¹⁴⁸

This discovery has important implications for Delaware death penalty law in light of the current status of constitutional law. Put succinctly, it is hard to reconcile the current practice of capital sentencing in Delaware with the Supreme Court’s dictates that capital sentencing be a “reasoned moral response” of aggravating and mitigating factors in which *all* relevant mitigators are considered,¹⁴⁹ *Caldwell’s* insistence that sentencers must think of themselves as completely responsible for the defendant’s punishment,¹⁵⁰ and *Ring’s* requirement that a statutory aggravator be found beyond a reasonable doubt by a deliberative jury.¹⁵¹ On the other hand, it appears that those responsible

FLEURY-STEINER, JURORS’ STORIES OF DEATH: HOW AMERICA’S DEATH PENALTY INVESTS IN INEQUALITY 69, 75–76 (2004).

145. CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 143, 160 (2005).

146. *Id.* at 148–49; Jesse Cheng, *Frontloading Mitigation: The “Legal” and the “Human” in Death Penalty Defense*, 35 LAW & SOC. INQUIRY 39, 41 (2010).

147. Fleury-Steiner et al., *supra* note 30, at 17.

148. Bowers et al., *The Decision Maker Matters*, *supra* note 4, at 1005.

149. *See Penry v. Lynaugh*, 492 U.S. 302 (1989) *abrogated by Atkins v. Virginia*, 122 S. Ct. 2242 (2002).

150. *Caldwell v. Mississippi*, 472 U.S. 320, 333–36 (1985).

151. *Ring v. Arizona*, 536 U.S. 584, 612 (2002) (Scalia, J., concurring).

for Delaware's abrupt law change in 1991 got exactly what they wanted. As Fleury-Steiner and his colleagues stated:

The conscience of the community must be dramatically limited to a simple majority. The fundamental purpose of unanimity as driving robust jury deliberations is overridden by a new mapping of the death penalty state that gives ultimate sentencing authority to judicial elites. In this way, the normative order is constituted by further limiting the voice of the citizenry and ensuring the appearance of justice by those who know what they are doing.¹⁵²

Capital jurors in Delaware no longer engage in a deliberative process, a fact which compromises the very democratic essence of the jury system,¹⁵³ a system about which the Founders felt so strongly that they safeguarded it *twice* in the Constitution.¹⁵⁴ While cynics might chirp that having an educated and trained judge make the ultimate sentencing decision is preferable to twelve people picked from a jury pool, the evidence seems clear that defendants are more likely to be sentenced to death under Delaware's new scheme and the system is tinged with more racial bias.¹⁵⁵ Furthermore, the use of twelve jurors increases the chance that somebody might actually relate to what Haney calls the defendant's "structural mitigation."¹⁵⁶ Lastly, the entire rationale for the jury system was to allow the citizenry to exert one final check on the nearly limitless and potentially arbitrary power of the state.¹⁵⁷ The state has no greater power, and can perform no greater intrusion into the lives of its citizens than to kill them. The existence of a truly deliberative jury system would help to check this unimaginable power by saying that the state cannot kill anyone without first convincing twelve ordinary citizens that the person has done something so unthinkable that he or she truly deserves to die. In Delaware, the legislature deliberately circumvented this check on state power by reducing the jury to an advisory role and creating a system in which the state has the power to kill its citizens without anyone actually deciding that death is an appropriate penalty.

Delaware's efforts to undermine the democratic process of the jury system are most starkly illustrated in the legislature's reaction to the Delaware

152. Fleury-Steiner et al., *supra* note 30, at 17. (internal quotation marks omitted).

153. ABRAMSON, *supra* note 7, at 204–05.

154. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

155. See Johnson et al., *The Delaware Death Penalty*, *supra* note 30, at 1938–41.

156. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathetic Divide*, 53 DEPAUL L. REV. 1557, 1577 (2004). Structural mitigation is defined as "mitigation that is structured into the lives of African-American defendants by the various forms of life-altering racism that remain in American society." *Id.*

157. See JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 253 (Charles C. Little and James Brown eds., 1850); THE FEDERALIST NO. 83, at 485 (Alexander Hamilton) (Am. Bar Ass'n ed., 2009) ("The strongest argument in its favor is that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion . . .").

Supreme Court's decision in *Garden v. State*.¹⁵⁸ Sadiki Garden was sentenced to death despite a jury's nine-three recommendation that he should be allowed to live.¹⁵⁹ Delaware's high court overturned Garden's death sentence, and insisted life recommendations should be afforded great weight and are binding on the trial judge if "supported by the record and it is not irrational".¹⁶⁰ Within six months, a new capital sentencing law was passed in Delaware with the express intent of overturning the Delaware Supreme Court's decision in *Garden*, and allowing judges to completely disregard the recommendations of capital juries.¹⁶¹ This legislative maneuvering further distances Delaware capital juries from their role as the conscience of the community, essentially telling them that they are too stupid to be involved in the democratic process, which should be left to elites who know better.

Of course, the findings of this study are not conclusive. They only come from thirty-five jurors who served on eight cases. However, they are quite illustrative. Obviously, further studies still need to be done. Of critical importance to fully understanding the operation of Delaware's death penalty is knowledge of how often judges actually follow the recommendations of a jury. In all eight cases included in this research, the judge concurred with the jury, including the seven-five juror recommendations,¹⁶² which seems to suggest that judges might just be deferring their sentencing authority to the simple majority decision of the jury. However, this suggestion needs to be investigated with a larger and more systematic study. In line with this inquiry is the question of whether or not there is a "tipping point," beyond which judges are significantly more likely to agree with the jury (e.g., how much more likely is the judge to agree with the jury when the vote is ten-to-two compared to nine-to-three or eight-to-four). The distinct possibility that judges just go along with the jury's recommendation in the vast majority of cases would, of course, be highly troubling in light of the findings of this study, which discovered that jurors are not giving truly considerate recommendations, assuming the judge will make whatever decision he or she deems appropriate anyway. However, the opposite conclusion would have equally troubling implications. It would suggest that capital juries in Delaware really have been reduced to a symbolic function, that their recommendations carry no real weight, and that the voice of the citizenry has been silenced.

In either event, we should be troubled by the implications for capital defendants and democracy—because we now know that citizens thrust into what they perceive to be "mock" capital juries are taking their incredible responsibility less seriously and giving less credence to the evidence. The citizenry has already been silenced, capital defendants are being denied their

158. *Garden v. State*, 815 A.2d 327 (Del. 2003), *rev'd and remanded*, *Garden v. State*, 844 A.2d 311 (Del. 2004), *superseded by statute*, DEL. CODE ANN. tit. 11 § 4209 (2003), *as recognized in* *Porter v. Turner*, 954 A.2d 308 (Del. 2008).

159. *Id.* at 332–33.

160. *State v. Garden*, 844 A.2d 311, 318 (Del. 2004) (per curiam).

161. H.B. 287, 142d Gen. Assemb. (Del. 2003).

162. *See* Kleinstuber, *supra* note 79.

right to a jury trial, and they are being denied the benefit of having their peers evaluate mitigating circumstances that might marshal support for a sentence other than death. This leads to an increase in death sentences and a more arbitrary death sentencing procedure that is, ironically, *less* open to appeal. Since it is perceived that a judge, who knows the law and the relevant information, is really making the final decision, any legal error is likely to be considered “harmless.” This reality should be troubling to anyone who claims to respect the rule of law and the democratic process.