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96 Tul. L. Rev. 131 (2021)

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Getting to Know You: An Expanded Approach to Capital Jury Selection

Samuel P. Newton*

The Colorado Method of capital jury selection is a widely embraced strategy defense attorneys use to select jurors during voir dire, in which attorneys rank each juror exclusively on the likelihood that the juror will vote for death. The method could benefit from some expansion. Not all defense lawyers have access to Colorado-Method-based training. In innocence cases, defense lawyers should soften discussions of punishment prior to guilt since this tactic predisposes juries to vote for death. Nor do jurors' views or positions on the death penalty guarantee their eventual votes. While capital juries are already inclined to give death sentences generally, social science researchers have determined that numerous case-specific and juror-specific factors significantly affect jurors' votes. I review these research findings and conclude that capital defense attorneys would be better served, if courts allow them the time and the resources, by questioning and ranking jurors on a broader set of factors. I propose that with more information in hand, defense attorneys would improve their odds of selecting a jury more inclined to impose a life sentence.

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* © 2021 Samuel P. Newton, JD, PhD., Assistant Professor of Law, University of Idaho College of Law. My student, Martin Roes, deserves the thanks for sparking my thinking on this question. While I have litigated capital cases, I had never questioned the Colorado Method before reading Mr. Roes's paper in one of my classes. I wrote this piece with his permission. I am extremely grateful to John H. Blume, whose *An Overview of Significant Findings* from the Capital Jury Project gave me a massive running start on my research. The document is unpublished, but its influence weaves throughout this paper. I sincerely appreciate comments from Jonah Horwitz, Michael Ogul, Jonathan Broun, Gary Beren, Boyd Young, Vikki Liles, and especially Ann England of the National College of Capital Voir Dire who were willing to challenge and critique many of my assertions in this Article's earlier drafts. I also appreciate Jessica Sutton, Aliza Cover, David Pimentel, and other faculty at the University of Idaho College of Law for their thoughtful comments.

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I. INTRODUCTION

On July 20, 2012, in Aurora, Colorado, James Holmes entered a Century 16 theater playing *The Dark Knight Rises* and, using an assault rifle, a shotgun, and a handgun, opened fire on the crowd, killing twelve people and wounding fifty-eight.¹ The victims' families and their community clamored for justice.² Sandy Phillips, mother of one of the victims, said she would never empathize or sympathize with "the person that butchered [her] children."³

But Holmes's defense attorneys had a plan. Using "a carefully calibrated jury selection strategy" known as the Colorado Method, they questioned prospective jurors almost exclusively about their views on the death penalty, and used tactics and techniques to place some of the moral weight of the life and death decision directly on the jurors.⁴

1. Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. TIMES (July 20, 2012), <https://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html> [<https://perma.cc/HH8Q-BTJZ>]; Deandra Tan, *Deconstructing Aurora: How Hollywood Averted Cultural Backlash in the Face of National Tragedy*, 10 YALE J. SOC. 26, 28, 31-32 (2013).

2. See Jack Healy & Serge F. Kovaleski, *Before and After Massacre, Puzzles Line Suspect's Path*, N.Y. TIMES (July 21, 2012), <https://www.nytimes.com/2012/07/22/us/pain-and-puzzles-in-wake-of-deadly-colorado-attack.html>; Richard Corliss, *Bane for Real: How the Aurora Killings Shattered Movie Fantasy*, TIME (July 22, 2012), <https://entertainment.time.com/2012/07/22/bane-for-real-how-the-aurora-killings-shattered-movie-fantasy/> (writing that Holmes "imposed a sick sense of déjà vu on Denver-area citizens, who must cordon off a still larger part of their hearts for perpetual mourning."); *Colorado Theater Shooter James Holmes's Life Spared by Single Juror*, CBC (Aug. 14, 2015, 6:41 PM), <https://www.cbc.ca/news/world/colorado-theatre-shooter-james-holmes-s-life-spared-by-single-juror-1.3192076> (indicating that half the victims wanted Holmes's execution, while others favored life "because they thought they would never actually see Holmes executed").

3. *Aurora Victim's Mother: James Holmes 'Butchered' My Daughter*, NBC NEWS (May 7, 2015, 11:24 AM), <https://www.nbcnews.com/news/us-news/aurora-victims-mother-james-holmes-butchered-my-daughter-n355351> [<https://perma.cc/82GP-ANPN>].

4. John Ingold, *Defense Jury Strategy Could Decide Aurora Theater Shooting Trial*, DENVER POST (Mar. 28, 2015, 12:15 PM), <https://www.denverpost.com/2015/03/28/defense-jury-strategy-could-decide-aurora-theater-shooting-trial/> [<https://perma.cc/HW3Z-XZT8>]; Jordan Steffen, *How the Aurora Theater Shooting Defense Laid the Groundwork for a Life Sentence*, DENVER POST (Aug. 8, 2015, 1:24 PM), <https://www.denverpost.com/2015/08/08/how-the-aurora-theater-shooting-defense-laid-the-groundwork-for-a-life-sentence/>.

Among other strategies, the lawyers explained that the law did not require a death sentence, that their decision was a deeply personal and moral one, and that they did not have to surrender their decision to other jurors.⁵ Their approach paid off. One juror voted for life, two were undecided, and, after only seven hours, the other jurors cordially and respectfully deferred to their fellow jurors' opinions, sentencing Holmes to life.⁶

Experts and others called the life verdict a "titanic" validation of the Colorado Method, which to many "is responsible in part for the precipitous drop in death verdicts happening all over the country."⁷ As the Colorado State Public Defender declares on its website, this method is "the gold standard of effective capital defense."⁸ I will more fully explain the Colorado Method in Part II.

But the Colorado Method should be expanded. Take the case of eighteen-year-old Jeremy Gross, who killed his coworker at a convenience store by shooting him repeatedly.⁹ One juror told lawyers during voir dire that she believed a person who takes a life deserves death. Another juror explained that "the death penalty was not used often enough."¹⁰ But surprisingly, when these two jurors heard about Gross's extremely tragic upbringing, they drew on their own similar life experiences, empathized with Gross, and ultimately persuaded the rest of the jury to vote for life.¹¹ These jurors probably would have been excused under the Colorado Method because of their strong views on capital punishment, but they were *the* jurors who made a difference in the verdict.

5. Ingold, *supra* note 4; Steffen, *supra* note 4.

6. Steffen, *supra* note 4.

7. Ingold, *supra* note 4 (noting that the Colorado Method "is now being used by defense attorneys across the country"); Macradec Aegerter, *Defense Attorneys Use 'Colorado Method' to Save Theater Shooter from Death Penalty*, FOX31 NEWS (Aug. 10, 2015, 5:10 PM), <https://kdvr.com/news/defense-attorneys-use-colorado-method-to-save-theater-shooter-from-death-penalty/> [<https://perma.cc/VR5E-HGHG>]; Jeffrey Toobin, *The Mitigator*, NEW YORKER, May 9, 2011, at 38, <https://www.newyorker.com/magazine/2011/05/09/the-mitigator> ("The Colorado Method is another important factor in the decline of the death penalty nationwide."); Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, THE CHAMPION (Nov. 2010).

8. *Capital Training*, OFF. COLO. ST. PUB. DEFS., <https://www.coloradodefenders.us/training/capital-training/> [<https://perma.cc/2VQ6-ELGL>].

9. Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES (July 6, 2003), <https://www.nytimes.com/2003/07/06/magazine/in-the-face-of-death.html>.

10. *Id.*

11. *See id.*

In Part III, I explain some of the issues with the Colorado Method. One issue is that the method is not fully public. Many capital defense attorneys do not know about it, nor can they afford to learn it. Additionally, prosecutors and even the court might focus the jury selection inquiry on whether jurors could impose the death penalty. If defense attorneys similarly focus their inquiry on the penalty question, they contribute to predisposing jurors not only to vote guilty but to impose a death sentence. Finally, jurors' views, and their eventual votes, are simply more complicated and not necessarily caused by their views on the death penalty in the abstract.

Defense attorneys trying capital cases must familiarize themselves with the research explaining why jurors vote for life or for death. In Part IV, I highlight the factors researchers have found significantly influence jurors' decisions, such as the heinousness of the crime, or a defendant's willingness to express remorse. In Part V, I propose that defense attorneys question, listen to, and rank jurors on these topics, instead of narrowly focusing on a juror's philosophical position on the death penalty. I do not argue that attorneys abandon the Colorado Method entirely. For some, it may remain a simple and yet powerful tool. Instead, I argue that lawyers should insist on getting to know jurors better, especially on the topics we have found carry great weight for them when they make their decisions.

While no jury selection technique is perfect, and defense attorney rankings are bound to be statistically imperfect and flawed, the more expansive method I propose is research-driven and avoids some of the concerns associated with the Colorado Method. These factors matter to jurors, so they should matter to the attorneys charged with saving their clients' lives.

II. THE COLORADO METHOD

David Wymore, a Colorado attorney, developed the method when he was actively litigating capital cases.¹² Wymore thought other public defenders focused too much on litigating the death penalty's constitutionality instead of persuading jurors to impose a life sentence

12. Brief of the Nat'l Ass'n of Crim. Defense Laws., et al. as Amici Curiae in Support of Petitioner at 75a, *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017) (No. 16-5294).

then and there.¹³ He felt he had “to learn who kills and why they kill” and then address their concerns.¹⁴

Wymore’s strategy focused first on isolating and insulating jurors, helping life-prone jurors realize that they could “make their own moral assessment—not capitulate that over to somebody else.”¹⁵ Second, because pro-death jurors often “employ coercive tactics and bullying,” he reminded all jurors to respect “the opinions of life-giving holdouts,” and “not browbeat them” to impose death.¹⁶ As he would tell jurors, no one can perfectly know from their life experience “who ought to live and who ought to die,” so they should not be able to tell someone else that their perspective “is wrong.”¹⁷ Wymore used *voir dire* to remind jurors that the law presumes a life sentence and that a death sentence is “a hard, darned thing to get,” even for someone who “[d]id it, wanted to do it . . . [,and] would do it again!”¹⁸

Using Wymore’s method, a juror’s “attitude toward the death penalty trumps every other factor usually associated with jury selection—race, ethnicity, occupation, education.”¹⁹ Attorneys select jurors “based on their life and death views only” and rank them on a scale from “one” to “seven,” with a “one” being a person who would never vote for death and a “seven” being a person who would always vote for it.²⁰ A “three” or “four” might be someone who believes in the death penalty, but may not be able to articulate why.²¹ One public defender, Terri Brake, called Wymore’s scale “an act of brilliance,” because after interviewing hundreds of potential jurors, all attorneys can compare their notes with a simple and consistent number metric.²²

Attorneys using the Colorado Method pose questions that facilitate “candor and honesty” among jurors, making sure to clarify

13. Roger Parloff, *Too Effective*, 19 AM. LAW., Mar. 1997, at 91.

14. *Id.*

15. *Id.*; Rubenstein, *supra* note 7.

16. Parloff, *supra* note 13, at 91; Rubenstein, *supra* note 7, at 18-19, 23-24.

17. Parloff, *supra* note 13, at 91; Rubenstein, *supra* note 7, at 24-27.

18. Parloff, *supra* note 13, at 92.

19. Toobin, *supra* note 7, at 38.

20. Rubenstein, *supra* note 7, at 18; Parloff, *supra* note 13, at 93. Rubenstein defines the juror rating which I have included as an Appendix. Some scholars have referenced a “three-category death-penalty-opinion framework” that includes those who will always vote for death, those who would never vote for death, and those who are undecided. John H. Blume et al., *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1234 (2001).

21. Parloff, *supra* note 13, at 93.

22. *Id.*

for jurors that “there are no ‘right’ or ‘wrong’ answers.”²³ They use a combination of jury questionnaires and open-ended, conversational, “strip,” and leading questions, and carefully listen to jurors in order to discover their views on the death penalty; from there, they assign a number to each juror.²⁴ For example, Wymore indicated he might question a juror on a serial killer case about how many people it would take for the person to give a death sentence.²⁵ If the juror gave a number, say two people, Wymore would try to get the juror to say that they would not listen to mitigation evidence if the defendant killed two people, which would support a challenge for cause.²⁶ If the juror said they would consider evidence that mitigated a death sentence but would want to wait to hear from the defense, Wymore might still challenge the juror as a burden shifter.²⁷

From 1976 to 2004, Wymore litigated approximately eighty capital cases, *none* of which resulted in a death sentence, a clearly astonishing result.²⁸ Wymore’s success made him a sought-after trainer.²⁹ His strategy found criticism from prosecutors and others who felt Wymore indoctrinated jurors “to thwart the collective decision-making process.”³⁰ Colorado Attorney General Gale Norton believed Wymore simply intimidated jurors by convincing them that “every juror was putting the defendant to death.”³¹ Wymore had no problem with these assertions. He said he “personalize[d] the kill question,” by telling jurors they “have the power to *not* kill my guy.”³² He querulously wondered how it amounted to intimidation to tell jurors they have the power to give life, and that the court, the prosecutor, and other jurors were required to respect each juror’s personal and common sense moral judgment: “*Now how in the hell is that intimidating?*”³³

23. Rubenstein, *supra* note 7, at 20.

24. *Id.* at 18, 20-23; Blume et al., *supra* note 20, at 1248; Janae M. Lepir, *Hypothetically Speaking: The Constitutional Parameters of Capital Voir Dire in the Military After Morgan v. Illinois*, 225 MILWAUKEE L. REV. 375 (2017).

25. Parloff, *supra* note 13, at 92-93.

26. *Id.*

27. *Id.* at 93.

28. Brief of the National Ass’n of Criminal Defense Lawyers, *supra* note 12, at 24 n.15.

29. Parloff, *supra* note 13, at 90-92.

30. *Id.* at 92.

31. *Id.*

32. *Id.*

33. *Id.*

III. ISSUES WITH THE COLORADO METHOD AND A PROPOSAL FOR EXPANSION

A capital case is often won or lost in voir dire.³⁴ Even though the capital defense bar has developed specialized methods like the Colorado Method to address these concerns, defense attorneys have often proven to be ineffective at doing voir dire right.³⁵ The Colorado Method does a lot of things well: it is simple, and as Wymore has shown, demonstrably effective in many situations. However, there are some issues with the method that deserve expansion.

A. *The Method Is Not Fully Public*

The Colorado Method is proprietary.³⁶ To learn it, ninety participants must attend a two and a half day seminar at the National College of Capital Voir Dire in Boulder, Colorado and pay tuition of

34. Blume et al., *supra* note 20, at 1209 (“[M]ost trials are won or lost in jury selection.”); *id.* at 1264 (“Voir dire is short and then you die.”); Chris F. Denove & Edward J. Imwinkelried, Commentaries, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 AM. J. TRIAL ADVOC. 285, 285 (1995) (“[J]ury selection can be the most important phase of a trial. Pick the right jury, and the battle is half won. But select the wrong jury, and the case is lost before evidence is even heard.”); Harvey Weitz, *Voir Dire in Conservative Times*, 22 LITIG. 15, 15 (1996) (“Voir dire is the most important, yet least understood portion of a jury trial.”); Herald Price Fahringer, “*Mirror, Mirror on the Wall . . .*”: *Body Language, Intuition, and the Art of Jury Selection*, 17 AM. J. TRIAL ADVOC. 197, 197 (1993) (noting that, according to experts, 85% of the cases “are won or lost when the jury is selected,” requiring counsel to approach voir dire with care); Jeffrey R. Boyll, *Psychological, Cognitive, Personality and Interpersonal Factors in Jury Verdicts*, 15 L. & PSYCH. REV. 163, 176 (1991) (“[J]ury selection is one of the most vital components of the trial proceedings. The case may be [won] or lost at voir dire.”); Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY’S L.J. 575, 575-76 (1984) (“Experienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings. In fact, once the last person on the jury is seated, the trial is essentially won or lost.”); Leslie Snyder, *Attorney Conducted Voir Dire in a Criminal Case*, in JURY TECH. TRIAL LAW. 246 (Handbook Series, volume 274, 1984) (“Voir Dire is one of the most critical phases of the trial: all can be lost [if not necessarily won] at this point.”).

35. Blume et al., *supra* note 20, at 1211; *id.* at 1239, 1243 (explaining that judges restrict the necessary exploration and “many defense lawyers are not very adept in the precise, yet fluid, inquiry that is required”); *id.* at 1248-64 (describing best practices for voir dire); Rubenstein, *supra* note 7, at 18; Lepir, *supra* note 24, at 395; Neal Bush, *The Case for Expansive Voir Dire*, 2 L. & PSYCH. REV. 9, 9 (1976); see Ronald C. Dillehay & Marla R. Sandys, *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification*, 20 L. & HUM. BEHAV. 147, 149 (1996).

36. Lepir, *supra* note 24, at 397.

\$500.³⁷ Out of concerns for prosecutorial steps to counter the methodology, it can be difficult to access the materials.³⁸ Consequently, “public information” about the Colorado Method “is limited.”³⁹ The National College of Capital Voir Dire is a nonprofit; its trainers volunteer their time, and the organization tries to make the program as widely available to defense attorneys as possible, even at no or limited cost. Despite these laudatory attempts to make resources available, many capital defenders have miniscule budgets and they often lack basic training or even knowledge of the Colorado Method.⁴⁰

We know that convincing jurors to give life is “a very specialized, complex undertaking,” but as Danalynn Recer, the executive director of the Gulf Region Advocacy Center told the *New Yorker*, it “is not some unknowable thing. This is not curing cancer. We know how to do this. It is possible to persuade a jury to value someone’s life.”⁴¹ Importantly, we have valuable, publicly available research explaining how and why capital jurors exercise particular votes. Capital defense attorneys need to be aware of it and effectively use it.

I do not undervalue or want to negate the experiential training defense attorneys receive at the National College’s training. I would commend it to any capital defense lawyer. But given that too few attorneys attend these conferences because of the lack of time, money, or other resources, the defense community needs at a minimum an awareness of this body of research. Additionally, the research findings in this Article justify expanding the method or altering aspects of it by asking jurors about subjects beyond the life and death question.

37. *National Capital Voir Dire Training Program*, NAT’L COLL. CAP. VOIR DIRE, <https://www.nccvd.org> [<https://perma.cc/U24E-LPQZ>].

38. *See Application for May Boulder Program*, NAT’L COLL. CAP. VOIR DIRE, <https://www.nccvd.org/application> [<https://perma.cc/WJP3-BMGX>] (last visited Nov. 18, 2021).

39. Lepar, *supra* note 24, at 397 (calling Rubenstein’s Article “the most in-depth, publicly available discussion of the methodology”); Rubenstein, *supra* note 7.

40. Laura Dara Sudeall, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1731-32 (2005). According to the *Colorado Independent*, “indignation and rage power [Wymore’s] work,” and in retirement he teaches younger lawyers the Colorado Method, which “[h]e plans to continue,” even if Colorado were to abandon the death penalty. Susan Greene, *Inside the Small Legal Community Defending Colorado Death Penalty Clients, a Wary Hope for Appeal*, COLO. INDEP. (Feb. 21, 2020), <https://www.coloradoindependent.com/2020/02/21/death-penalty-abolition-capital-defenses/> [<https://perma.cc/QZ8T-Z3AH>].

41. Toobin, *supra* note 7, at 32, 34.

B. *Discussing Punishment Prior to Trial Predisposes Jurors to Find the Defendant Guilty and to Impose a Death Sentence*

The Colorado Method prioritizes “jurors’ perspective on the death penalty . . . over any other consideration.”⁴² This runs the risk of devastating an innocence case. When jurors are questioned about punishment prior to trial, they are more likely not only to convict but also to sentence the defendant to death.⁴³ While the method’s proponents suggest admonishing jurors not to hold questions of punishment against a defendant,⁴⁴ the research has shown this strategy is not very effective.⁴⁵ It mistakenly assumes that jurors’ openly expressed commitments (“I won’t consider that evidence”) are more significant than their deeply held and often unconscious biases.⁴⁶ As Judge Learned Hand wrote, similar instructions ask for “a mental gymnastic” that jurors simply cannot make.⁴⁷ It amounts to a “judicial

42. Parloff, *supra* note 13, at 93.

43. Rubenstein, *supra* note 7, at 20; John H. Blume et al., *Future Dangerousness in Capital Cases: Always “at Issue,”* 86 CORNELL L. REV. 397, 404 (2001); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 65 (2003) (“The CJP indicates further that the jury qualification process itself creates a bias toward death.”). Some jurors interpret the judge’s instructions to “follow the law” as a comment that the law requires a death sentence. Blume et al., *supra* note 20, at 1231, 1238, 1238 n.100. They think, “[o]h, I get it. They’re asking me if I can kill this guy. Yeah, I’ll do that if that’s what I’m supposed to do.” *Id.* at 1231.

44. Rubenstein, *supra* note 7, at 20.

45. Adam Trahan, *In Their Own Words: Capital Jurors’ Reactions to Mitigation Strategies*, 7 INT’L J. PUNISHMENT & SENT’G 1, 2 (2011); Brooke Butler, *The Role of Death Qualification in Jurors’ Susceptibility to Pretrial Publicity*, 37 J. APPLIED SOC. PSYCH. 115, 115 (2007) (explaining that death-qualified juries were more likely to “think that the defendant was guilty, and recommend the death penalty”); *id.* at 121 (arguing death qualification is constitutionally suspect); Blume et al., *supra* note 20, at 1231-32; Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors’ Predisposition to Convict and on the Quality of Deliberation*, 8 L. & HUM. BEHAV. 53, 55-75 (1984); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 L. & HUM. BEHAV. 121, 121-22, 128-32 (1984) [hereinafter Haney, *On the Selection of Capital Juries*]; Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 L. & HUM. BEHAV. 133, 133-34, 137 (1984); see Craig Haney et al., “Modern” Death Qualification: New Data on its Biasing Effects, 18 L. & HUM. BEHAV. 619, 627-28, 631 (1994).

46. *People v. Williams*, 628 P.2d 869, 873 (Cal. 1981) (quoting Jay M. Spears, Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1495 (1975)); see also Blume et al., *supra* note 20, at 1236-37 (noting the importance of the distinction between conscious and unconscious biases).

47. *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932); *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956), *aff’d*, 352 U.S. 232 (1957); *United States v. Grunewald*, 233 F.2d 556, 573-74 (2d Cir. 1956) (Frank, J., dissenting), *rev’d*, 353 U.S. 391

lie” and promotes the “unmitigated fiction” that jurors can merely put punishment “out of their minds” once they have been extensively questioned about it.⁴⁸

One Colorado Method proponent advocates front-loading a vigorous defense theory so life-prone jurors can concede guilt in trade for “extract[ing]” a life sentence concession from death-prone jurors.⁴⁹ While this might be an effective strategy for a guilty defendant, which is often the case, this does not work for the innocent. The number of capital cases involving innocent defendants is somewhat opaque, but one study observed that 15% of death-sentenced cases involved a subsequent exoneration.⁵⁰ This is not an insignificant number. Lawyers should not define “victory” as a life sentence for an innocent—or potentially innocent—defendant. That defendant wants an acquittal. If that defendant’s lawyers focus jury selection entirely on the penalty question, they unintendedly, even if partially, can cause the jury to think, *that defendant must be guilty if their lawyers are asking if we could sentence them to life. It sounds like their lawyers are not even questioning that they did it.*

While there are stronger proposals to remedy these problems, such as providing a separate jury for each phase of the capital trial,⁵¹ lawyers should nonetheless carefully limit overt discussions about the death penalty. As I propose, they can question jurors about issues that outwardly seem unrelated to punishment, but demonstrably affect jurors’ verdicts, such as the viciousness of a murder or a juror’s life experience. That way, in a more indirect manner, lawyers can still discover the juror’s views that would have an impact on their vote for life or for death and still maintain some distance, especially in the innocence case, from the government’s emphasis on death.

(1957); *see also* *Bruton v. United States*, 391 U.S. 123, 132 n.8 (1968) (emphasizing Judge Hand’s statement in *Nash*).

48. *Grunewald*, 233 F.2d at 574; *Krulwitch v. United States*, 336 U.S. 440, 453, (1949) (Jackson, J., concurring); *Delli Paoli v. United States*, 352 U.S. 232, 248 (1957) (Frankfurter, J., dissenting).

49. Rubenstein, *supra* note 7, at 20.

50. Karcin Vick et al., *Lethal Leverage: False Confessions, False Pleas, and Wrongful Homicide Convictions in Death-eligible Cases*, 24 CONTEMP. JUST. REV. 24, 26 (2021).

51. Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 52 (1989).

C. *Jurors Do Not Always Vote Consistent with Their Views on the Death Penalty*

Finally, jurors' sentencing votes do not always coincide with their positions on the death penalty.⁵² While this undoubtedly is a substantial factor, it is unclear if it is statistically significant. I have not found a study experimentally validating the Colorado Method. However, the research has some contrary findings. One study found that 24% of apparent death penalty supporters "were actually opponents" and 42% of predicted opponents "were in fact proponents."⁵³ Among jurors, it is more common to find a pro-death person "in opponent's clothing" than the other way around.⁵⁴ By solely focusing on the life and death question, defense lawyers risk misidentifying these jurors, who outwardly appear to hold a position they may not actually conform to when they exercise their vote. A broader inquiry can help discover and identify these jurors.

D. *Expanding the Colorado Method*

The concerns above do not invalidate the Colorado Method—they illustrate why I believe the research findings this Article will lay out are particularly important to consider when one goes to select a capital jury.

As I have experienced in my own capital litigation, and as many of my fellow capital defense attorneys have explained to me, courts will not allow them to conduct the expansive voir dire that I propose here. I recognize that my proposal may work well in theory, but would be difficult, if not sometimes impossible, to implement in practice. That does not mean that attorneys should not *try* to expand their questioning during voir dire. They can point the court to this research and advocate for more options.

That said, many attorneys are not comfortable with the complex inquiry I propose here. For them, the Colorado Method remains simple, achievable, workable, and successful and they see no need to deviate. That is not an untenable position.

52. James Alan Fox et al., *Death Penalty Opinion in the Post-Furman Years Challenging the Death Penalty*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 508 (1990).

53. *Id.*

54. *Id.*

Nonetheless, we cannot escape the reality that “the unbiased juror does not exist.”⁵⁵ Since jurors, like all people, relate to the world through the experiences and preconceptions they have accumulated over a lifetime,⁵⁶ I believe it is more beneficial to broadly question jurors, to get to know them better, and to select “the most favorably biased jury” one can find.⁵⁷ As one lawyer who read an early draft of this Article told me, he remained committed to the Colorado Method, but found that the evidence-based information detailed here led him to ask additional questions during voir dire at his next trial. That is entirely my intent. Once defense lawyers start asking jurors about research-driven subjects, not only will they have broader and more rounded pictures of jurors, but they will better understand their likelihood to vote for life or for death.

IV. FINDINGS FROM THE CAPITAL JURY PROJECT AND OTHER RESEARCH

Defense attorneys can know what affects jurors’ votes. The Capital Jury Project (CJP) was a National Science Foundation-funded study in which 1,198 former capital jurors, who collectively served on 353 capital trials, took a fifty-one-page survey and were interviewed for approximately three to four hours each.⁵⁸ “It represents a landmark research initiative and one of the most comprehensive and systematic efforts ever made to study death-penalty decision making by juries.”⁵⁹

The CJP helps us understand capital jurors’ decision making. While jurors are constitutionally required to objectively restrict the death penalty to the most heinous of murders and murderers, weighing both aggravating and mitigating circumstances of the offense and of

55. Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 492 (1987).

56. *Id.*

57. *Id.*

58. Adam Trahan, *Identifying Factors that Shape Capital Jurors’ Impressions of Attorneys*, 32 JUST. SYS. J. 169, 172 (2011); Lepir, *supra* note 24, at 394; Eric R. Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, 2011 ARMY LAW. 6, 7 (2011); William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 220 (1996).

59. Dennis J. Devine & Christopher E. Kelly, *Life or Death: An Examination of Jury Sentencing with the Capital Jury Project Database*, 21 PSYCH. PUB. POL’Y & L. 393, 393 (2015).

the offender,⁶⁰ the reality is that capital juror sentencing is more like falling in love, as Scott Sundby has explained.⁶¹ Clive Stafford Smith put it a little differently: to vote for life, “the jury has to feel both sympathy and empathy” for the defendant.⁶²

These are admittedly loose determinations. However, the research has shown “distinctive patterns,” or what I call factors, that can influence jurors’ decisions.⁶³ The first factors involve the case and the defendant, which I explain in Part IV.A. Other factors relate to a juror’s unique personal characteristics, which I cover in Part IV.B. I style these factors as questions attorneys ask about their case or their juror. Attorneys would then numerically rank each juror on each factor using the Colorado Method’s one to seven scale. Once they have this broad picture of the juror in hand, defense attorneys can then assign the juror an overall ranking, which they can use to select a jury more sympathetic to the defendant, to a not guilty verdict, and to a life sentence.

Effective lawyering is key. The CJP findings demonstrate that if jurors feel emotional distance from the defendant, they will vote for death.⁶⁴ The line between a life or a death verdict is “razor-thin,” and juries vote for life only when attorneys present their client’s story in a compelling and sympathetic way.⁶⁵ Through the more expansive process this Article proposes, defense counsel can better discover and remove unsympathetic jurors and also support and select jurors who are more likely to connect with their clients, empathize with them, and spare them their lives.

60. *Tuilaepa v. California*, 512 U.S. 967, 971-75 (1994); *Arave v. Creech*, 507 U.S. 463, 474 (1993); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988); *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *id.* at 879 (outlining that there must be “an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (noting that an individualized sentence requires “consideration of the ‘character and record of the individual offender and the circumstances of the particular offense’”) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

61. SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* 134 (2005).

62. Toobin, *supra* note 7, at 36.

63. SUNDBY, *supra* note 61, at 134-35.

64. See Craig Haney, *Taking Capital Jurors Seriously*, 70 *IND. L. J.* 1223, 1224 (1995).

65. SUNDBY, *supra* note 61, at 137.

A. *Lawyers Must Query Jurors About Case-Specific Issues that Influence Their Verdict*

Several case-specific factors can influence a juror's sentence. Some factors, such as a defendant's willingness to express remorse, may exist in every case, but other factors, like the number of victims, may not be at issue. Some factors may be highly important in one case, less important in another, and not important at all in some. But if they exist, jurors find they affect their decision.

1. Did the Defendant Kill More Than One Person or Commit the Crime in a Particularly Heinous or Cruel Manner?

As one capital juror explained, "there was no way" they could find that the victim provoked an attack because the "heinousness of the crime was so great."⁶⁶ This played a significant role in the jury's sentencing decision. Another capital juror said that no evidence would have led jurors to sympathize with the defendant "because the crime itself was so awful."⁶⁷

The more seriously violent the offense, the more likely a death sentence, especially if the victim was tortured or suffered before death.⁶⁸ In one Florida study, 64% of death-voting jurors indicated the manner of death was the basis for their vote.⁶⁹ If jurors perceive the

66. Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 L. & HUM. BEHAV. 151, 161 (1994).

67. *Id.*

68. Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 278 (2001); John M. Scheb II & Kristin A. Wagers, *Racial Discrimination in the Death Penalty in Tennessee: An Empirical Assessment*, 5 TENN. J.L. & POL'Y 9, 17 (2008); John H. Blume et al., *Lessons from the Capital Jury Project*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 163-65 (Stephen P. Garvey ed., 2003); Michael E. Antonio, *Arbitrariness and the Death Penalty: How the Defendant's Appearance During Trial Influences Capital Jurors' Punishment Decision*, 24 BEHAV. SCI. & L. 215, 224-26 (2006); Blume et al., *supra* note 20, at 1224; Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539 (1998); Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and a Research Agenda*, 16 L. & HUM. BEHAV. 185, 188-89 (1992). One Tennessee study found that homicides committed for sexual pleasure or to silence a witness, or by methods such as drowning, throat slashing, strangulation or suffocation were more likely to result in death sentences over homicides committed because of jealousy, hatred, or racial or religious motivations. Scheb II & Wagers, *supra*, at 19, 21.

69. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life Or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 47 (1988).

homicide as heinous, they are much less likely to consider evidence in mitigation and even will think that they must vote for death.⁷⁰

A defendant who kills more than one person is much more likely to be sentenced to death, as much as three times more likely.⁷¹ One multivariate logistic regression analysis of 918 jurors from 244 trials found that of five significant predictors of a death sentence, the most significant was the number of victims killed.⁷² A different multivariate analysis of CJP data found that “each additional victim killed increased the likelihood of a death sentence by 78%.”⁷³

Capital defense attorneys must especially avoid downplaying a heinous offense, such as comparing a multiple homicide to a mass murder or torture, which greatly offends jurors.⁷⁴ In one case, jurors felt a defense attorney “blew his case” with this tactic.⁷⁵

2. Does the Defendant Have a Lengthy History of Violence, Particularly a Prior Murder?

One CJP multivariate regression analysis concluded that “[t]he individual aggravator most strongly related to” a death sentence was the defendant’s history of violence.⁷⁶ Defendants with long criminal histories, especially violent crime or three or more felonies, are much more likely to receive a death sentence.⁷⁷ A survey of capital jurors in

70. Thomas W. Brewer, *Race and Jurors’ Receptivity to Mitigation in Capital Cases: The Effect of Jurors’, Defendants’, and Victims’ Race in Combination*, 28 L. & HUM. BEHAV. 529, 539 (2004); Blume et al., *supra* note 68, at 160 (finding that 41% of capital jurors believed they must impose a death sentence if the crime was heinous, vile, or depraved); Garvey, *supra* note 68, at 1542; Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 360 (1996); William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1091 n.32 (1995); Geimer & Amsterdam, *supra* note 69, at 41.

71. Nadine M. Connell, *Death by Jury: Group Dynamics and Capital Sentencing in CRIMINAL JUSTICE: RECENT SCHOLARSHIP* 167 (Marilyn McShane & Frank P. Williams III eds., 1st ed. 2009); Scheb II & Wagers, *supra* note 68, at 23; Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 764 (1990).

72. Connell, *supra* note 71; Devine & Kelly, *supra* note 59, at 395.

73. Devine & Kelly, *supra* note 59, at 401.

74. Trahan, *supra* note 45, at 5-6.

75. *Id.* at 6.

76. Devine & Kelly, *supra* note 59, at 399.

77. Sorensen & Marquart, *supra* note 71, at 771; Scheb II & Wagers, *supra* note 68, at 24. See also Sorensen & Marquart, *supra* note 71, at 771 (noting that offenders with arrest or prison records of violent offenses are more likely to receive death sentences); *id.* at 774 (“A prior conviction increased an offender’s odds of receiving a death sentence by 7.7%.”).

eleven states found that 70% believed that death was the only acceptable punishment if the person had previously committed another murder.⁷⁸

3. Does the Defendant Pose a Risk of Future Violence, Especially of Committing Another Murder?

“Jurors mainly kill out of fear” that the defendant is “going to get loose and kill somebody, or . . . kill somebody else in prison.”⁷⁹ The CJP findings confirm this.⁸⁰ Virtually every social science researcher has “been struck” with jurors’ “tendency to recast their sentencing decision” as a need to protect society from a future act of violence.⁸¹ It is often *the* reason jurors impose the death penalty.⁸² Jurors often latch onto this belief early in the trial and it becomes “extremely difficult to

78. Blume et al., *supra* note 68, at 151-52; Blume et al., *supra* note 20, at 1224.

79. Parloff, *supra* note 13, at 93.

80. Bowers, *supra* note 58, at 221-22; Devine & Kelly, *supra* note 59, at 395; Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 7-8 (1993); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1177 (1995); Eisenberg et al., *supra* note 68, at 302 n.87; Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 67 (2000); Blume et al., *supra* note 68, at 165-67. At least one study has found that jurors’ fears of future dangerousness had only marginal significance in their decision to give the death penalty. Devine & Kelly, *supra* note 59, at 403.

81. Haney, *supra* note 64, at 1231; Garvey, *supra* note 68, at 1542. Future dangerousness is “at issue” in “virtually all capital trials.” Blume et al., *supra* note 43, at 398-99.

82. William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 893 (2010) (finding that future dangerousness is “the strongest determinant” of a death sentence); Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 412 (2003) (explaining that it is the “major means” of persuading jurors to vote for death); Elizabeth S. Vartkessian, *Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to Be Unreceptive to Mitigation Evidence*, 29 QUINNIPIAC L. REV. 237, 280 (2011) (noting that jurors believe future dangerousness mandates a death sentence); Garvey, *supra* note 68, at 1539; Blume et al., *supra* note 43, at 404 (finding that future dangerousness is “second only to the crime itself” in importance to capital jurors); Costanzo & Costanzo, *supra* note 66, at 160 (finding “that nearly all jurors” have said their “penalty decision hinged on” whether defendant would be a continual threat); Mark D. Cunningham et al., *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 PSYCH. PUB. POL’Y & L. 223, 225 (2009) (explaining that jurors found future dangerousness in all 436 Texas executions, 65 of Oklahoma’s 89, and 74 of Virginia’s 103); see also Eisenberg & Wells, *supra* note 80, at 7 (showing that over three-fourths of capital jurors believe the defendant will be a future danger).

displace” even with a compelling case in mitigation.⁸³ Upwards of three-quarters of CJP jurors indicate it was the major factor that they discussed and that affected their decision.⁸⁴

Even the best experts find they cannot accurately predict future dangerousness.⁸⁵ Jurors do much worse, grossly overestimating a

83. SUNDBY, *supra* note 61, at 145; Vartkessian, *supra* note 82, at 271-72, 281 (citing Blume et al., *supra* note 43, at 398-99); Wanda D. Foglia, Research Note, *They Know Not What They Do: Unguided and Misguided Discretion in Pennsylvania Capital Cases*, 20 JUST. Q. 187, 206 (2003) (noting that future dangerousness was an “overriding consideration” that concerned “most jurors” throughout the trial and deliberations).

84. Foglia, *supra* note 83, at 197; Vartkessian, *supra* note 82, at 281; Blume et al., *supra* note 43, at 404; Stephen P. Garvey & Paul Marcus, *Virginia’s Capital Jurors*, 44 WM. & MARY L. REV. 2063, 2089-91 (2003); Berry III, *supra* note 82, at 901.

85. Carla Edmondson, *Nothing Is Certain but Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, 20 LEWIS & CLARK L. REV. 857, 861-62 (2016); Mark D. Cunningham et al., *Assertions of “Future Dangerousness” at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 32 L. & HUM. BEHAV. 46, 61 (2008); Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 L. & PSYCH. REV. 63, 85-86 (2005); Berry III, *supra* note 82, at 907 (noting that the research findings “demonstrate the extreme inaccuracy in predicting future dangerousness”); Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCH. PUB. POL’Y & L. 267, 280-81 (2001); Meghan Shapiro, *An Overdose of Dangerousness: How “Future Dangerousness” Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 161-62 (2008) (“Mental health professionals themselves are entirely skeptical of their own predictions, academics appear to have unanimously accepted that such professionals are unreliable, and studies of capital jurors show a high misperception of general risks of violence.”) (footnotes omitted); *see also* *Furman v. Georgia*, 408 U.S. 238, 355 (1972) (Marshall, J., concurring) (“[M]urderers are extremely unlikely to commit other crimes either in prison or upon their release. For the most part, they are first offenders, and when released from prison they are known to become model citizens.”); Brief Amicus Curiae for the American Psychiatric Ass’n for Petitioner at 9, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080) (finding that experts are wrong two out of three times); *see also id.* at 8-9 (“[M]edical knowledge has simply not advanced to the point where long-term predictions . . . may be made with even reasonable accuracy.”). As Justice Marshall explained, the Supreme Court has “not decide[d] the *substantive* question of whether a prediction of future dangerousness is a proper criterion for determining whether a defendant is to live or die.” *California v. Ramos*, 463 U.S. 992, 1023 n.9 (1983) (Marshall, J., dissenting).

defendant's likelihood of future violence,⁸⁶ when convicted murders actually have low recidivism rates.⁸⁷

Jurors similarly will sentence someone to death if they think there is a *possibility* that the defendant will get out of prison.⁸⁸ An Oregon juror explained that the jury felt that the defendant was "going to get out if you give him life imprisonment" and that "[t]he only way I can guarantee that" he will not get out is to impose a death sentence.⁸⁹

86. Thomas J. Reidy et al., *Probability of Criminal Acts of Violence: A Test of Jury Predictive Accuracy*, 31 BEHAV. SCI. & L. 286, 297 (2013); Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1269 (2000) (noting that jurors "severely overestimate the likelihood of violence being committed by a life-sentenced capital murderer" at 85% for a new violent crime and 50% for a new homicide, when the actual rate is "approximately 0.2% over a forty-year term, while the risk of assaultive behavior in general is about 16%"); James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & SOC'Y REV. 449, 463 (1989) (finding that in 85% of Texas capital cases, "the jury failed to predict that the defendant would pose a continuing threat to society"); *id.* at 466 ("[J]urors err in the direction of false positives when it comes to predicting future dangerousness.").

87. Edmondson, *supra* note 85, at 906; Cunningham et al., *supra* note 82, at 227; Shapiro, *supra* note 85, at 162; Sorensen & Pilgrim, *supra* note 86, at 1256 (explaining that convicted murderers are "among the most docile and trustworthy inmates in the institution"); James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 8, 28 (1989) ("Studies of commuted capital offenders suggest that these inmates are not unusual threats to institutional order and security"; "these prisoners did not represent a significant threat to society."); THORSTEN SELLIN, *THE PENALTY OF DEATH* 120 (1980) (concluding that capital murderers "whether in prison or on parole, pose no special threat to the safety of their fellowmen"); Sorensen & Pilgrim, *supra* note 86, at 1269 (referring to a 0.2% re-offense rate for a future homicide); Hugo Adam Bedau, *Recidivism, Parole, and Deterrence*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 173, 175-80 (1982) ("[N]o other class of offender has such a low rate of recidivism.").

88. SUNDBY, *supra* note 61, at 147-48; Foglia, *supra* note 83, at 190-91; Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 373 (2001) ("Where LWOP is the alternative, jurors either do not know about it, or do not believe it really means the defendant will, in fact, never be released on parole."); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 636 (1999) (finding that almost two-thirds of jurors would vote for life if they knew the defendant would not be paroled); *id.* at 648 (finding that jurors "grossly underestimate" how long life-sentenced prisoners will stay in prison); Bowers, *supra* note 58, at 222; Luginbuhl & Howe, *supra* note 80, at 1179 (explaining that jurors' belief that a life-sentenced defendant "would spend relatively little time in prison" and be released was a "strong motivation" to vote for death).

89. Costanzo & Costanzo, *supra* note 66, at 163. Only 12% of Pennsylvania capital jurors thought a life-sentenced defendant would actually serve a life sentence; the rest estimated the defendant would serve fifteen to nineteen years. Foglia, *supra* note 83, at 196.

Many jurors also wrongly believe that a death-sentenced person will not get executed.⁹⁰ As one capital juror said, “[n]inety-nine percent of the time they don’t put you to death. You sit on death row and get old.”⁹¹ If jurors think the defendant will serve less than twenty years (and especially less than ten years), they are more likely to vote for death.⁹²

Jurors feel life sentences are overly lenient,⁹³ that prisoners have free meals and TVs, and that they do not have to work. David Wymore responded to these concerns by showing jurors that life “really *means* life.”⁹⁴ He has had prison officials testify and he has shown jurors videos about twenty-three-hour lockdowns, total isolation, and being “fed through a slot.”⁹⁵ This strategy has often proven successful.⁹⁶

4. Will the Defendant Express Sincere Remorse for the Killing or Show It Visually?

A defendant’s willingness to express remorse—to genuinely say they are sorry—may be the single greatest factor that will persuade

90. Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1131-33 (1995); In one study, three-fourths of jurors who sentenced someone to death believed the defendant would serve less than twenty years in prison, while life-sentencing jurors estimated the defendant would twenty to thirty years. Luginbuhl & Howe, *supra* note 80, at 1178. Two-thirds of jurors indicated they would have voted for life had they known the defendant would be incarcerated for the period of time the law requires. Foglia, *supra* note 83, at 190. An Oregon capital juror similarly tried to convince other jurors to vote for death because “[they] know he’s not going to get it” and their vote “doesn’t mean that [they’re] going to kill him.” Costanzo & Costanzo, *supra* note 66, at 163.

91. Sarat, *supra* note 90, at 1133.

92. Bowers & Steiner, *supra* note 88, at 664; Bowers, *supra* note 58, at 222; Eisenberg & Wells, *supra* note 80, at 7-9; Luginbuhl & Howe, *supra* note 80, at 1178 (noting that jurors who sentenced to death strongly believed life-sentenced defendants served a “relatively short time in prison”); see SUNDBY, *supra* note 61, at 147.

93. See Blume et al., *supra* note 20, at 1248. In general, jurors often perceive the criminal justice system as lenient. Benjamin D. Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 L. & SOC’Y REV. 461, 464-66 (1999).

94. Parloff, *supra* note 13, at 93; Foglia, *supra* note 83, at 207; Bowers & Steiner, *supra* note 88, at 712-13.

95. Parloff, *supra* note 13, at 93.

96. See SUNDBY, *supra* note 61, at 146. In one case, jurors noticed a prisoner-witness’s “clear dread” when a prosecutor warned a witness he could be sent back to supermax; this powerfully led jurors to see the seriousness of a life sentence. *Id.* at 147.

jurors to vote for life.⁹⁷ Conversely, jurors “show little mercy to defendants who show no remorse.”⁹⁸ One multivariate study of thirty-nine aggravators and mitigators from the entire CJP database found a defendant’s lack of remorse was the strongest predictor of a juror’s vote for death.⁹⁹

Even if a defendant does not testify, jurors scrutinize them looking for outward signs of remorse, such as crying, or signs that they lack remorse, such as wandering stares, boredom, smiling at the wrong moment, or remaining expressionless.¹⁰⁰ They also look for “positive personality characteristics,” which works for the defendant if jurors think they are attractive.¹⁰¹

If the defendant claimed innocence and lost, CJP jurors strongly resent what they see as expressions of remorse that come too late and, to them, seem quite insincere.¹⁰² One juror said the defendant was “[g]rasping at straws” at that point.¹⁰³ Bare pleas for mercy from defense attorneys rarely resonate with jurors if they have not seen it from the defendant, which is why some recommend the defendant personally express regret “as early as possible.”¹⁰⁴

97. Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1633-37 (1998); Devine & Kelly, *supra* note 59, at 403; Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1558, 1560 (1998); Vartkessian, *supra* note 82, at 270; Costanzo & Costanzo, *supra* note 68, at 198 (noting that jurors view “confession and repentance” as prerequisites for mercy); Garvey, *supra* note 80, at 58-59.

98. Garvey, *supra* note 68, at 1539.

99. Devine & Kelly, *supra* note 59, at 395; *see also* Garvey, *supra* note 68, at 1538 (finding a lack of remorse to be a significant aggravator). According to another scholar, lack of remorse is behind only a violent criminal history and future dangerousness. *Id.* at 1560-61.

100. Geimer & Amsterdam, *supra* note 69, at 51-52; Sundby, *supra* note 97, at 1561-65; Costanzo & Costanzo, *supra* note 66, at 161; Costanzo & Costanzo, *supra* note 68, at 198 (explaining that jurors take the lack of expression “as a lack of concern and remorse”); Antonio, *supra* note 68, at 219, 227-34 (finding that, when jurors believed the defendant appeared emotionally involved, sorry, and sincere, they tended to favor a life sentence, but when the defendant appeared bored, frightening, or self-confident, “they sought the death penalty instead”); *see* Connell, *supra* note 71, at 167.

101. Connell, *supra* note 71, at 167; Antonio, *supra* note 68, at 218-19. Jurors are more likely to give death to someone they see as a prototypical violent criminal. Costanzo & Costanzo, *supra* note 68, at 198.

102. Trahan, *supra* note 45, at 5-6.

103. *Id.* at 6.

104. *Id.* at 11. Jurors perceive the defendant’s expression of remorse at the end of the case as a “last-ditch” effort to save their life. *Id.*

5. Would Jurors Empathize and Sympathize with the Victim?

Jurors are more likely to impose a death sentence if they empathize or identify with the victim, which is especially the case in a rape-homicide or stranger-homicide case.¹⁰⁵ Just hearing testimony from the victim's family influences jurors to vote for death.¹⁰⁶ Consequently, jurors are less sympathetic to victims who engaged in high-risk or anti-social activity, like prostitutes or drug dealers.¹⁰⁷

6. Will the Defendant and/or the Victim's Race Introduce Racial Dynamics into the Trial?

If the defendant is a person of color and especially if the victim is white, racial dynamics will come into play.¹⁰⁸ Communities of color are the criminal justice system's most common targets.¹⁰⁹ Henry

105. Sorensen & Marquart, *supra* note 71, at 767; Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 345 (2003).

106. Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 436 (2003); *see also* Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCH. PUB. POL'Y & L. 492, 508 (2004) (highlighting difficulties with using victim impact evidence).

107. Sundby, *supra* note 105, at 356; Edith Greene et al., *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 28 J. APPLIED SOC. PSYCH. 145, 147-48, 154-55 (1998); *see* Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, 5 PSYCH. CRIME & L. 331, 345 (1999).

108. Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587, 618 (1985) (finding that bias regarding "the defendant's and victim's races are major determinants of who is selected for execution"); *id.* at 601 ("[C]ases with white victims are more likely to be upgraded than cases with black victims . . ."); Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 125 (1973) (noting that Black men were eighteen times more likely to receive a death sentence than white defendants).

109. William Quigley, *Racism: The Crime in Criminal Justice*, 13 LOY. J. PUB. INT. L. 417, 417 (2012); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1025 (2010) (noting that there are "shocking racial disparities at every level" in the American criminal justice system); Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1000 (2013) (noting the "obvious" fact that the criminal justice system has a "disparate impact on people of color"); MARK COSTANZO, *JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY* 79-84 (1997); *id.* at 80 (noting that, of over 16,000 executions since 1608, only thirty-one have been for a white person killing a Black person); *id.* (finding that between 1930 and 1967, 89% of defendants executed for rape were Black); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 175 (2001).

Schwarzschild, then President of the American Bar Association, testified to the Senate Judiciary Committee in 1978 that we select not the most heinous murderers for death, but instead Black people and poor people “for reasons having nothing to do whatever with their crime.”¹¹⁰ Whether explicitly or implicitly, prosecutors have sought the death penalty more often for people of color and have openly invoked racial bias at trial.¹¹¹ Prosecutors have also been trained to exclude people of color from serving as jurors and to hide their motivations, making the continuing phenomenon of all-white juries a twenty-first century disgrace.¹¹²

110. *To Establish Rational Criteria for the Imposition of Capital Punishment: Hearings Before the Committee on the Judiciary, United States Senate*, 95th Cong. 90 (1978); see also Corinna Barrett Lain, *Madison and the Mentally Ill: The Death Penalty for the Weak, Not the Worst*, 31 REGENT U. L. REV. 209, 232 (2019) (explaining that the death penalty “is not for the worst of the worst. It is for the weak among the worst.”).

111. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012) (“[I]mplicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways.”); *id.* at 819 (noting that even “egalitarian-minded prosecutors nonetheless disproportionately strike black jurors”); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309-10 (2010) (explaining that “even the simplest of racial cues . . . might automatically and unintentionally evoke racial stereotypes” that affect jurors); COSTANZO, *supra* note 109, at 81-82; DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 110-11 (1990); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1659-60, 1692-94, 1713-15 (1998); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 433-34 (1995); see *Flowers v. State*, 947 So. 2d 910, 937 (Miss. 2007) (finding that twenty years after the Supreme Court prohibited it “racially-motivated jury selection is still prevalent”); Bowers et al., *supra* note 109, at 175; see also Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test Commentaries*, 8 OHIO ST. J. CRIM. L. 187, 207-08 (2010) (discussing the impact of implicit attitudes on trials).

112. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4-6 (2010); Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1164 (2014) (noting that prosecutors continue to strike Black jurors and try Black and Brown defendants by all-white juries); Bowers et al., *supra* note 109, at 176-77, 263; Radelet & Pierce, *supra* note 108, at 618-19 (finding that prosecutors often seek the death penalty based on the crime’s racial configuration and “do so in a way that greatly reduces the possibilities” to discover their discriminatory motivations). For two recent examples, see *Flowers v. Mississippi*, 139 S. Ct. 2228, 2233, 2246 (2019) (concluding that the State engaged in a “relentless, determined effort to rid the jury” of Black jurors so it could try the defendant “before an all-white jury”); *Foster v. Chatman*, 136 S. Ct. 1737, 1742, 1755 (2016) (finding that prosecutors struck all five potential Black jurors and the

Defense lawyers must be aware that many jurors hold explicit and implicit biases against people of color and will employ them in jury deliberations.¹¹³ For example, the United States Supreme Court reversed Keith Tharpe's conviction where a juror signed an affidavit concluding Tharpe was a "n*****" and was not in the "'good' black folks category."¹¹⁴ In another case, a Black female juror—who earnestly supported a life sentence for a Black defendant—endured seven hours of racial threats and slurs from eleven white jurors who called her a "n***** woman," drew "demeaning pictures" of her, and threatened to victimize her if she did not vote for death.¹¹⁵ An all-white Utah jury on a case with two Black defendants had a note that depicted a hanging with the words, "Hang the N*****s" on it.¹¹⁶

With these serious concerns in mind, jurors are much more likely to sentence a person of color to death, especially if they murder a white person.¹¹⁷ Researchers have found that jurors can consciously and even

record "plainly demonstrates a concerted effort to keep black prospective jurors off the jury"); see also *Batson v. Kentucky*, 476 U.S. 79, 104 & n.3 (1986) (Marshall, J., concurring) (noting that Dallas County prosecution manual expressly advised district attorneys to strike racial minorities).

113. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice against Black Defendants in the American Courtroom*, 7 PSYCH. PUB. POL'Y & L. 201, 202 (2001) ("The pervasive and deleterious effects of White juror bias . . . led to the present focus on White jurors.").

114. *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam). In Tharpe's case some "jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks." *Id.* Tharpe lost his case on remand. *Tharpe v. Warden*, 898 F.3d 1342, 1347 (11th Cir. 2018), cert. denied, *Tharpe v. Ford*, 139 S. Ct. 911 (2019). Justice Sotomayor noted that Tharpe had presented "truly striking evidence of juror bias" and that he showed "racism can and does seep into the jury system." *Id.* at 913 (Sotomayor, J., statement respecting the denial of certiorari).

115. Bryan Stevenson, *Keynote Address by Mr. Bryan Stevenson*, 53 DEPAUL L. REV. 1699, 1711 (2004).

116. *Andrews v. Shulsen*, 600 F. Supp. 408, 419 (D. Utah 1984); *State v. Andrews*, 576 P.2d 857, 859 (Utah 1978). No court even held a hearing on the note. Stephen B. Bright, *The Electric Chair and the Chain Gang: Choices and Challenges for America's Future*, 71 NOTRE DAME L. REV. 845, 855 (1996). See *Andrews*, 576 P.2d at 859 (praising "the professional manner" jurors, the bailiff, and the court handled "this unfortunate incident"); *Andrews*, 600 F. Supp. at 419; *Andrews v. Shulsen*, 802 F.2d 1256, 1266 (10th Cir. 1986); *Andrews v. Shulsen*, 485 U.S. 919, 920-21 (1988) (Marshall, J., dissenting from denial of certiorari) (citing courts' failure to inquire into the racial animus in the community and the jury).

117. David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 199-214 (2003); Catherine M. Grosso et al., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*,

unconsciously apply dangerous, race-based stereotypes to those of different races.¹¹⁸

Because, as Justice Blackmun once wrote, “race continues to play a major role in determining who shall live and who shall die,” defendants of color and their attorneys can lose hope of obtaining a fair trial.¹¹⁹ However, they cannot choose inaction because they are afraid of being accused of “playing the race card” and must, instead, attempt to uncover juror biases.¹²⁰

in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION (James R. Acker et al. eds., 3d ed. 2014); Brewer, *supra* note 70, at 531; *id.* at 540 (noting that jurors are more receptive to defendants of their own race in opposite-race killings); Devine & Kelly, *supra* note 59, at 394; William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 458-59 (James R. Acker et al. eds., 2d ed. 2003); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California’s Capital Penalty Instruction*, 18 L. & HUM. BEHAV. 411, 415 (1994); Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCH. 1953, 1954 (2009) (summarizing that researchers’ “overwhelming consensus” is that jurors are more likely to find Black defendants guilty); Wolfgang & Riedel, *supra* note 108, at 123-33 (finding that, compared to white defendants, Black defendants have received death sentences at a rate “that exceeds any statistical notion of chance or fortuity”); see Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & HUM. BEHAV. 337, 349 (2000).

118. Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCH. 292, 304 (2008); Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama’s Election*, 37 N. KY. L. REV. 243, 252 (2010) (finding that, despite the assertions of most people, they apply racial stereotypes of Black criminality); Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 632 (2009) (noting that jury “death qualification primes racial stereotypes” with jurors); see BRYAN C. EDELMAN, RACIAL PREJUDICE, JUROR EMPATHY, AND SENTENCING IN DEATH PENALTY CASES 3-4 (2006). One researcher concluded that a defendant’s race “does *not* have a consistent impact” on a jury’s vote, while the victim’s race “*does* have a consistent and robust influence” on their sentence. Berry III, *supra* note 82, at 902-03 (observing also that jurors are more likely to vote for death against a person of color based on a fear “that the defendant poses a personal danger”).

119. *Callins v. Collins*, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting). Ibram X. Kendi powerfully lamented that the nightmare for a person of color “is knowing that racist Americans will never end it. Anti-racism is on you, and only you.” Ibram X. Kendi, *The American Nightmare*, ATLANTIC (June 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/american-nightmare/612457/>.

120. Andrea D. Lyon, *Naming the Dragon: Litigating Race Issues During a Death Penalty Trial*, 53 DEPAUL L. REV. 1647, 1661 (2004); Tabak, *supra* note 118, at 249 (noting that, while jurors rarely make explicitly racist statements, sometimes they will reveal their

Attorneys must learn to have hard conversations with jurors and simultaneously make them feel comfortable expressing their racial views.¹²¹ This is clearly challenging and requires training.¹²² Merely alerting jurors that discrepancies between their conscious and unconscious responses may impact their decision making often prompts some jurors to check their racial biases and to try to be fair.¹²³ As Suzanne Plihcik recently described to the *New Yorker*, one can convey to jurors that racism is not always intentional, that they can be “a beneficiary of a system set up hundreds of years ago,” and that while white culture is acceptable, they should take steps to ensure it does not impose itself on others.¹²⁴

Instead of lecturing jurors, lawyers should try to open a conversation so that those who hold intractable race-based viewpoints but know how to provide a “socially acceptable response” feel

biases “if they feel comfortable or if they respond quickly and automatically”); RENI EDDO-LODGE, *WHY I’M NO LONGER TALKING TO WHITE PEOPLE ABOUT RACE* xvii (2017) (“Every voice raised against racism chips away at its power. We can’t afford to stay silent.”); see Sommers & Ellsworth, *supra* note 113, at 221; Smith, *supra* note 112, at 1183-85; see also Jeffrey Abramson, *Anger at Angry Jurors*, 82 CHI.-KENT L. REV. 591, 595, 603-07 (2007) (commenting on the impact of juror on jury nullification). While “race-relevant *voir dire*” can positively affect the verdict, some jurors will be “annoyed by questions about racism.” Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 601 (2006); Tabak, *supra* note 118, at 265. Even if courts are reluctant to allow this type of questioning, some have argued that by litigating race issues pretrial, the judge and prosecutor are more likely to grant more flexibility in *voir dire*. Tabak, *supra* note 118, at 269; see Blume et al., *supra* note 20, at 1239-43.

121. Smith, *supra* note 112, at 1175; Tabak, *supra* note 118, at 264 (emphasizing that defense lawyers need jurors “who talk honestly” about their racial views “rather than denying that they have any racial attitudes”).

122. Reni Eddo-Lodge expressed exasperation with these conversations because of the “denials, awkward cartwheels and mental acrobatics” from white people who do not even see a problem and troublingly, feel silenced by race, but glaringly fail to empathize with people who have “been visibly marked out as different for our entire lives, and live the consequences.” EDDO-LODGE, *supra* note 120, at xi-xii; *id.* at 215 (discussing racism is about a “white anxiety” that defines itself against bogey monsters for its own security).

123. Rapping, *supra* note 109, at 1021-22; Tabak, *supra* note 118, at 260; see John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCH. 510, 535 (1997). Tabak explains that attorneys might prefer a juror who acknowledges racial attitudes and commits to work on it over one who denies racism but appears to hold implicit attitudes. Tabak, *supra* note 118, at 259.

124. The New Yorker Radio Hour, *Getting White People to Talk About Racism*, NEW YORKER, at 06:40 (June 12, 2020), <https://www.newyorker.com/podcast/the-new-yorker-radio-hour/getting-white-people-to-talk-about-racism>.

comfortable opening up more deeply.¹²⁵ This strategy requires careful attention to the juror's discomfort, to their attitudes, and even to their facial expressions.¹²⁶ Attorneys must normalize unpopular responses, which they can do in the abstract, such as asking jurors about the negative experiences their friends, family, or others have had with those of other races.¹²⁷ A simple question could be, "What have you heard others say about Black men in America today?" The point is for attorneys to be nonjudgmental, to get jurors talking, and to listen.

B. *Juror-specific Factors*

Lawyers also need to assess how jurors' personality characteristics or experiences might affect their sentencing decision.

1. How Susceptible is This Juror to Peer Pressure?

Defense lawyers must rate a juror's susceptibility to peer pressure.¹²⁸ We know that as jurors deliberate, their sentences get more severe.¹²⁹ That is because, as Saby Ghoshray has written, their deliberations are not objective, do not involve a search for human dignity, or do not encourage individual free-thinking.¹³⁰ We need to recognize that jury deliberations are not the sort of civil debates where

125. Bidish J. Sarma, *Challenges and Opportunities in Bringing the Lessons of Cultural Competence to Bear on Capital Jury Selection*, 42 U. MEM. L. REV. 907, 930-31 (2012); Rapping, *supra* note 109, at 1028-29. John McWhorter has argued it is extremely counterproductive to muzzle, straightjacket, and chloroform white Americans so "that pretty much anything they say or think is racist and thus antithetical to the good." John McWhorter, *The Dehumanizing Condescension of White Fragility*, ATLANTIC (July 15, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/dehumanizing-condescension-white-fragility/614146/>.

126. Tabak, *supra* note 118, at 264.

127. See Rapping, *supra* note 109, at 1031-35; Sarma, *supra* note 125, at 931.

128. See Connell, *supra* note 71, at 167. Indeed, one multivariate analysis found it highly significant that the more positively jurors view the jury deliberation climate, the more likely they are to vote for death. *Id.* at 167, 169-70.

129. Yvonne Hardaway Osborne et al., *An Investigation of Persuasion and Sentencing Severity with Mock Juries*, 4 BEHAV. SCI. & L. 339, 346-47 (1986).

130. Saby Ghoshray, *Capital Jury Decision Making: Looking Through the Prism of Social Conformity and Seduction to Symmetry*, 67 U. MIA. L. REV. 477, 483-84 (2013); see *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972) (Brennan, J., concurring) (noting that the death penalty "treat[s] members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the [Cruel and Unusual Punishments] Clause that even the vilest criminal remains a human being possessed of common human dignity."):

people hear each other out and move toward a middle position.¹³¹ They are bully fests. Cramped in tiny rooms, rife with passion, life-prone jurors frequently end up surrendering under the extraordinary pressure they endure from death-voting jurors.¹³²

For example, in a case in the United States Court of Appeals for the Eleventh Circuit,¹³³ eleven jurors who felt the one holdout was “uncooperative” and would not deliberate told the court the juror was at a “breaking point” and wanted to be excused.¹³⁴ The juror later testified that he was not ill, but was severely affected by the intense pressure from jurors, who, once they got him off, found the defendant guilty and voted for death.¹³⁵ On a different case, one juror said, “I was not able to stand up to the other bullies on the jury.”¹³⁶ Jurors called a holdout on a different case “spineless” and “gutless,” and leveled vicious tirades against the holdout, prompting a separate juror to change their vote to life “just to take the pressure off” the holdout.¹³⁷

In the Georgia case of William Henry Hance, a Black defendant, although the jury was initially more split, death-favoring jurors eventually persuaded all but two of the life-voters, a Black woman and a white woman, to change their votes.¹³⁸ The white woman switched because jurors inaccurately told her that if they hung, there would have to be a new trial.¹³⁹ The Black juror refused to concede, so the foreperson took the extraordinary step of telling the judge that the jury had unanimously agreed on a death sentence.¹⁴⁰ When the court polled the jury, the holdout was too frightened to state otherwise.¹⁴¹ Despite raising this issue in post-conviction proceedings, Hance’s claims were

131. Carpenter, *supra* note 58, at 8-9; see SUNDBY, *supra* note 61, at 51 (giving an example).

132. Carpenter, *supra* note 58, at 8; Ghoshray, *supra* note 130, at 484; see also Osborne et al., *supra* note 129, at 346 (finding group sentencing more severe than individual sentencing).

133. Peek v. Kemp, 746 F.2d 672 (11th Cir. 1984).

134. *Id.* at 675, 677; Peek v. Kemp, 784 F.2d 1479, 1482, 1506-07 (11th Cir. 1986) (en banc) (Johnson, J., dissenting), *cert. denied*, 107 S. Ct. 421 (1986).

135. Peek, 746 F.2d at 676-77; Peek, 784 F.2d at 1482, 1484; *id.* at 1504 (Johnson, J., dissenting).

136. Ghoshray, *supra* note 130, at 478 n.4 (quoting Michael Landauer, *Does It Matter If a Juror Has Regrets?*, July 19, 2011).

137. Joseph L. Hoffmann, *Where’s the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1144-45 (1995).

138. Bob Herbert, *Jury Room Injustice*, N.Y. TIMES, Mar. 30, 1994, at A15.

139. *Id.*

140. *Id.*

141. *Id.*

denied and he was executed.¹⁴² The juror “was so heartbroken and guilt-ridden that she said she would never forgive herself for having kept silent until” it was “too late to save Hance’s life.”¹⁴³ Life-prone jurors rarely change their minds about the punishment; instead, they later regret that they surrendered to the others’ pressure.¹⁴⁴

As the Colorado Method encourages, attorneys should strengthen life-prone jurors’ resolve and remind other jurors to respect each juror’s opinion.¹⁴⁵ But the research has also shown that life jurors simply need more support; they need more allies.¹⁴⁶ It takes at least a quarter to a third of jurors to vote for life, typically, to “act[] as a counterweight” to death-prone jurors’ pressures, since most jurors will eventually capitulate to whatever sentence two-thirds of the jurors support on their first vote.¹⁴⁷ While there are cases where lone holdouts managed to flip the jury,¹⁴⁸ attorneys are better served by assessing jurors’ susceptibility to group pressure and trying to get the most committed and as many life-sympathizers as they can on the jury.

2. Is This Juror Predisposed to Impose a Particular Sentence?

Jurors who favor the death penalty are more likely to prejudge the case and are also more likely to impose a death sentence.¹⁴⁹ Because

142. Bob Herbert, *Judicial Coin Toss*, N.Y. TIMES, Apr. 3, 1994, at E11; David Dow, Panel Discussion, *The Death of Fairness: Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1190 (1994).

143. Herbert, *supra* note 142, at E11; Dow, *supra* note 142, at 1190.

144. Hoffmann, *supra* note 137, at 1145; Carpenter, *supra* note 58, at 8; SOLOMON E. ASCH, SOCIAL PSYCHOLOGY 450 (1952) (noting that people often are pressured “to act contrary to their beliefs and values”).

145. Parloff, *supra* note 13, at 91; Steffen, *supra* note 4.

146. Devine & Kelly, *supra* note 59, at 395; Eisenberg et al., *supra* note 68, at 278; REID HASTIE ET AL., INSIDE THE JURY 27 (1983) (“A result obtained in virtually all research on small decision-making groups is that larger factions, within a group, exert more influence on the group’s decision than do smaller factions.”); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 488 (1966) (“[I]n the instances where there is an initial majority . . . the jury in roughly nine out of ten cases decides in the direction of the initial majority.”).

147. Devine & Kelly, *supra* note 59, at 395, 400, 402-03; SUNDBY, *supra* note 61, at 158; Carpenter, *supra* note 58, at 8; Norbert L. Kerr et al., *Bias in Jurors vs Bias in Juries: New Evidence from the SDS Perspective*, 80 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 70, 73 (1999); Eisenberg et al., *supra* note 68, at 278. Devine and Kelly opine that if a “critical threshold” of eight or nine jurors vote for death on the first vote, this strongly predicts a death sentence. Devine & Kelly, *supra* note 59, at 402.

148. Hoffmann, *supra* note 137, at 1149; see Costanzo & Costanzo, *supra* note 66, at 159 (noting that jurors frustratingly ended deliberations when life holdouts refused to yield).

149. Devine & Kelly, *supra* note 59, at 394; Blume et al., *supra* note 68, at 169.

people ideologically self-identify with their position on the death penalty, they are “relatively immune to evidence and argument” and remain committed to death from the outset.¹⁵⁰ Troublingly, as many as 30% of jurors hold such strong dispositions toward death sentences that they would automatically be disqualified from service.¹⁵¹ These early death adopters manage to pass jury qualification and “push the final verdict heavily toward death.”¹⁵² Those who change their votes to life usually only do so to avoid a hung jury, not because they were persuaded by the evidence or the deliberations.¹⁵³ Life-committed absolutists similarly can serve, and, in one study, 65% of them voted for life because of their personal scruples about the death penalty.¹⁵⁴

Multiple studies have shown that as many as half to two-thirds of CJP jurors had decided, before the sentencing proceeding even started, that death was the appropriate sentence and they never wavered from that decision.¹⁵⁵ As one Oregon juror recalled, “everyone had their mind made up before the penalty phase started.”¹⁵⁶ Even worse, many of these jurors think they are *required* to impose a death sentence if they

150. Eisenberg et al., *supra* note 68, at 307; Eisenberg et al., *supra* note 88, at 377-78; Bowers et al., *supra* note 117, at 428. As many as 75% of CJP jurors who chose death before the penalty phase never changed their verdict. Foglia, *supra* note 83, at 198.

151. Eisenberg et al., *supra* note 68, at 279; William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1504 (1998); Dillehay & Sandys, *supra* note 35, at 149, 156-59; Geimer & Amsterdam, *supra* note 69, at 39.

152. Eisenberg et al., *supra* note 68, at 279.

153. Bowers & Foglia, *supra* note 43, at 57-58.

154. Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1472 (1998); Geimer & Amsterdam, *supra* note 69, at 27.

155. Bowers et al., *supra* note 151, at 1504-07; Bowers, *supra* note 58, at 221; Bowers, *supra* note 70, at 1093; Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1192-95 (1995); Vartkessian, *supra* note 82, at 278; Foglia, *supra* note 83, at 192 (noting that most early death supporters were “absolutely convinced, never wavered from that position,” and discussed punishment during the guilt phase); *id.* at 197-98 (finding that 54% of jurors “had already decided what the sentence should be”); Thomas W. Brewer, *The Attorney-Client Relationship in Capital Cases and Its Impact on Juror Receptivity to Mitigation Evidence*, 22 JUST. Q. 340, 359 (2005) (remarking that premature death-voters “were 53 percent less likely to show increased receptivity to mitigation”); Brewer, *supra* note 70, at 539; Luginbuhl & Howe, *supra* note 80, at 1177.

156. Costanzo & Costanzo, *supra* note 66, at 161.

believe the defendant is guilty.¹⁵⁷ This phenomenon has been called a “presumption of death.”¹⁵⁸ As one Florida juror put it, “[w]e were all ready to hang him, but we went over the list so we would be within the law . . . to get it right.”¹⁵⁹

The jury selection process itself can give this impression.¹⁶⁰ When jurors see the court excuse those with doubts about the death penalty, it communicates that the court appears to prefer a death sentence.¹⁶¹ Jurors need only follow the “obedience drill.”¹⁶² As one Indiana juror thought, the verdict was predetermined, and the jury had “a responsibility to come back with a death sentence.”¹⁶³ Another juror in a different case said, “the State of Florida called for the death penalty. There didn’t seem to be any choice.”¹⁶⁴

Attorneys must dialogue with jurors about the consequences of prejudging the case and evaluate and rank jurors on how likely they are to remain intractable or open and evaluative.

157. Geimer & Amsterdam, *supra* note 69, at 43-47; Garvey, *supra* note 80, at 38; Eisenberg et al., *supra* note 70, at 359-60 (finding that nearly one-third of jurors mistakenly thought a death sentence was required if they found heinousness); Blume et al., *supra* note 20, at 1223-24; Bowers et al., *supra* note 151, at 1497-98; Dillehay & Sandys, *supra* note 35, at 158-59; Blume et al., *supra* note 68, at 151-52; Susan D. Rozelle, *The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 789 (2006) (noting that anywhere from two to eight jurors are likely to mistakenly believe they must impose a death sentence).

158. Eisenberg & Wells, *supra* note 80, at 12, 38 n.12 (explaining that the sentencing phase begins “with a substantial bias in favor of death,” leading jurors to give death “by default” without considering legal standards); Luginbuhl & Howe, *supra* note 80, at 1177; Geimer & Amsterdam, *supra* note 69, at 41-46.

159. Geimer & Amsterdam, *supra* note 69, at 25.

160. Bowers & Foglia, *supra* note 43, at 66; Haney, *On the Selection of Capital Juries*, *supra* note 45, at 128-29; Bowers & Foglia, *supra* note 43, at 62-65 (“[T]here also is evidence that the questioning during voir dire itself prejudices jurors toward finding the defendant guilty and imposing a death sentence.”).

161. Bowers & Foglia, *supra* note 43, at 61-64; Haney, *On the Selection of Capital Juries*, *supra* note 45, at 128-29; see Mike Allen et al., *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 L. & HUM. BEHAV. 715, 716-19, 725-26 (1998).

162. Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1482 (1997).

163. Hoffmann, *supra* note 137, at 1152.

164. Geimer & Amsterdam, *supra* note 69, at 25.

3. How Well Will This Juror Understand and Apply Jury Instructions Regarding the Consideration of Mitigating Evidence?

One capital jury foreperson explained the jury's frustration with the lack of guidance they received from the court: "[w]e were drowning and we wanted some kind of help. And when it's that serious, for God sake [sic] when you're pleading for help, you have to give us something. We were reasonable people, intelligent people, making a very difficult decision, asking for help."¹⁶⁵ While the Supreme Court has mandated that jurors' have guidance so that they limit the imposition of the death penalty to the "worst of the worst,"¹⁶⁶ CJP research has demonstrated that jurors do not grasp these legal burdens.¹⁶⁷ Lawyers and judges rarely if ever gauge jurors' comprehension, and the few times jurors have explained their understanding, "the appellate courts have run away in horror."¹⁶⁸

Part of the problem is that jury instructions are written in what Robert Weisberg has called the "mystifying language of legal formality," or as one juror said, "gobbly gook, mumbo jumbo."¹⁶⁹

165. Alan Berlow, *A Jury of Your Peers? Only If You're Clueless*, WASH. POST, Aug. 11, 2002, at B1; Alan Berlow, American Radioworks, *Deadly Decisions: Juror Confusion*, AMERICAN RADIOWORKS (Aug. 2002), http://americanradioworks.publicradio.org/features/deadlydecisions/confusion_print.html.

166. *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).

167. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976); *McCleskey v. Kemp*, 481 U.S. 279, 363 (Blackmun, J., dissenting) ("There perhaps is an inherent tension between the discretion accorded capital sentencing juries and the guidance for use of that discretion that is constitutionally required.").

168. *Dow*, *supra* note 142, at 1170 (citing *United States ex rel. Free v. Peters*, 806 F. Supp. 705 (N.D. Ill. 1992); *Free v. Peters*, 12 F.3d 700, 705-06 (7th Cir. 1993); *SUNDBY*, *supra* note 61, at 161; *Luginbuhl & Howe*, *supra* note 80, at 1181; *see also Foglia*, *supra* note 83, at 190-91 (explaining that "jurors need accurate information" since they ask questions about sentencing and judges refuse to answer directly).

169. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 392 (1983); *SUNDBY*, *supra* note 61, at 166; *Vartkessian*, *supra* note 82, at 250; *Luginbuhl & Howe*, *supra* note 80, at 1169; Steven J. Sherman, *The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law*, 70 IND. L.J. 1241, 1241 (1994); David Barron, *I Did Not Want to Kill Him but Thought I Had To: In Light of Penry II's Interpretation of Blystone, Why the Constitution Requires Jury Instructions on How to Give Effect to Relevant Mitigation Evidence in Capital Cases*, 11 J.L. & POL'Y 207, 246 (2002); James Frank & Brandon K. Applegate, *Assessing Juror Understanding of Capital-Sentencing Instructions*, 44 CRIME & DELINQ. 412, 419-26 (1998); *Sandys*, *supra* note 155, at 1203-04, 1210-11, 1212-13 n.55; *Costanzo & Costanzo*, *supra* note 68, at 188; Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No*

Capital jurors face a gut-wrenching and emotionally difficult decision, but paradoxically, the instructions courts give them are unfeeling, highly legal, technical, opaque, and incomprehensible.¹⁷⁰

The “overwhelming evidence” from the CJP research demonstrates that jurors do not understand or properly apply” the standards of aggravation and mitigation that the law requires them to consider.¹⁷¹ Operating under cognitive “biases and misunderstandings, they construe the instructions in substantially prejudicial ways against defendants.¹⁷² In every aspect of the instructions, CJP researchers have discovered a “tilt toward death” in jurors’ understandings.¹⁷³ And because the instructions actually promote ignorance on the death penalty’s actual operation, they create “chaos and confusion” in

Excuse, 66 BROOK. L. REV. 1011, 1044 (2001); Peter A. Barta, Note, *Between Death and a Hard Place: Hopkins v. Reeves and the “Stark Choice” Between Capital Conviction and Outright Acquittal*, 37 AM. CRIM. L. REV. 1429, 1458 n.213 (2000); Richard L. Wiener et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, 10 PSYCH. PUB. POL’Y & L. 516, 570-74 (2004); Haney & Lynch, *supra* note 117, at 414; *see also* Devine & Kelly, *supra* note 59, at 395 (commenting on juror confusion with jury instructions).

170. Costanzo & Costanzo, *supra* note 66, at 166-67; Valerie P. Hans, *Death by Jury*, in 24 CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 171 (Kenneth C. Haas & James A. Inciardi eds., 1988). Commentators have suggested at a minimum, courts improve instructions using “psycholinguistic principles of clear speech” and simpler sentence structure and definitions that “take into account jurors’ prior assumptions about law.” Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 IND. L.J. 1233, 1239 (1995) [hereinafter Hans, *How Juries Decide Death*]; Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 702-03 (2000).

171. Bowers & Foglia, *supra* note 43, at 66-84 (summarizing numerous research findings on capital jurors’ inability to understand jury instructions); Barron, *supra* note 169, at 241; Foglia, *supra* note 83, at 192, 199; Bowers, *supra* note 58, at 221; Bentele & Bowers, *supra* note 169, at 1043-44; Devine & Kelly, *supra* note 59, at 395; Blume et al., *supra* note 20, at 1228-30 (noting that CJP findings indicate that large numbers of jurors are “mitigation impaired—unable or unwilling” to consider mitigation factors); Vartkessian, *supra* note 82, at 265; Craig Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. SOC. ISSUES 149, 167-74 (1994); Haney & Lynch, *supra* note 117, at 420 (discussing serious confusion related to the term mitigation); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 230 (1996) (finding that 45% of jurors misunderstood meaning of mitigation).

172. Foglia, *supra* note 83, at 201, 204.

173. Bowers, *supra* note 58, at 222.

deliberations, which pro-death jurors exploit to convince pro-life jurors to switch their votes.¹⁷⁴

One Pennsylvania study found that nearly every capital juror (98.6%) “failed to understand at least some of the instructions” and disturbingly, only 9.5% of those jurors did not have “at least one of the problems to a prejudicial or extreme extent.”¹⁷⁵ In another study, only 8% of jurors could offer legally correct definitions of aggravation and mitigation, even after they had heard the instructions read three times.¹⁷⁶ Studies have shown that large percentages of capital jurors think the death penalty is mandatory in certain situations, such as if they find the existence of certain aggravators, when it is not.¹⁷⁷ They also tend to misapply the burdens, such as a beyond a reasonable doubt standard for mitigation evidence or a preponderance standard to aggravating factors, opposite of what the law requires.¹⁷⁸ Many jurors likewise think they must unanimously agree on the existence of mitigating factors.¹⁷⁹

One significant problem is the relative precision of aggravators and the relative imprecision of mitigators.¹⁸⁰ Aggravating factors tend

174. See Haney, *supra* note 64, at 1225-26; Haney, *supra* note 162, at 1479. As Haney argues, we ask capital juries “to do the moral dirty work of a system that is not even honest enough with them” to give jurors the “full story” of the “purposes, ambiguities, complexities, and consequences” of the punishment the state wants them to impose. Haney, *supra* note 64, at 1232.

175. Foglia, *supra* note 83, at 199, 201.

176. Haney & Lynch, *supra* note 117, at 420-21.

177. Luginbuhl & Howe, *supra* note 80, at 1173-74; Bowers, *supra* note 58, at 221-22 (“Four out of [ten] capital jurors wrongly believed they were ‘required’ to impose the death penalty if they found that the crime was heinous, vile, or depraved, and nearly as many mistakenly thought the death penalty was ‘required’ if they found that the defendant would be dangerous in the future.”); Bentele & Bowers, *supra* note 169, at 1031; Barron, *supra* note 169, at 244-45; Bowers, *supra* note 70, at 1091. The death penalty cannot be mandatorily imposed. *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976); see *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994).

178. Connell, *supra* note 71, at 170; Blume et al., *supra* note 68, at 158; Blume et al., *supra* note 20, at 1230; Bowers et al., *supra* note 117, at 437; Luginbuhl & Howe, *supra* note 80, at 1169-70; Eisenberg & Wells, *supra* note 80, at 11; Barron, *supra* note 169, at 241-42. “Deciding death is not something that is easily reduced to an algebraic exercise of weighing aggravating and mitigating circumstances.” Hans, *How Juries Decide Death*, *supra* note 170, at 1236. Jurors often misunderstand the reasonable doubt standard itself. See Leonard B. Sand & Danielle L. Rose, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?*, 78 CHI.-KENT L. REV. 1359, 1366 (2003).

179. Blume et al., *supra* note 68, at 158; Luginbuhl & Howe, *supra* note 80, at 1167; Eisenberg & Wells, *supra* note 80, at 11; Foglia, *supra* note 83, at 193.

180. Haney & Lynch, *supra* note 117, at 430; Haney, *supra* note 64, at 1228 n.22.

to be easy to understand and to prove: they are often answers to simple yes or no questions, including something like a prior conviction or if there were multiple victims.¹⁸¹ On the other hand, the instructions elusively describe mitigating factors as subjective judgment calls, which not only confuses jurors, but causes them to reject mitigating factors when faced with “more vivid and tangible arguments about aggravation.”¹⁸²

The instructions may even dangerously intimate that jurors entirely ignore what they are legally required to evaluate: the defendant’s background, character, or person.¹⁸³ An astonishing 94.6% of capital jurors in Pennsylvania felt “the punishment should be determined by what the defendant did, not what kind of person he or she was.”¹⁸⁴ Jurors somehow come to believe that legally relevant mitigating character evidence, such as mental illness or childhood abuse, only matters if it justifiably excuses the murder.¹⁸⁵ Consequently, capital jurors entirely dismiss legally relevant character-based mitigation and focus instead on crime-related mitigation, such as a defendant’s reduced culpability.¹⁸⁶

181. Luginbuhl & Howe, *supra* note 80, at 1179-80; *see* Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (“The use of ‘aggravating circumstances’ is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury’s discretion.”).

182. Haney, *supra* note 64, at 1229-30; Blume et al., *supra* note 20, at 1228-31; Garvey, *supra* note 68, at 1559; Luginbuhl & Howe, *supra* note 80, at 1179-80; Bowers et al., *supra* note 117, at 439; *see* Watkins v. Murray, 493 U.S. 907, 910 (1989) (Marshall, J., dissenting from denial of certiorari) (“‘Mitigating evidence’ is a term of art, with a constitutional meaning that is unlikely to be apparent to a lay jury.”); Blystone v. Pennsylvania, 494 U.S. 299, 312 n.3 (1990) (Brennan, J., dissenting) (giving examples of jurors’ confusion about mitigation and trial courts’ failures to adequately explain it to them). As one defense attorney told a jury, “[t]he law doesn’t tell you what a sufficient mitigating circumstance is either . . . [Instead,] the law turns you loose in a certain way there to use your personal moral judgement. . . .” Vartkessian, *supra* note 82, at 273.

183. Haney, *supra* note 64, at 1227-28.

184. Foglia, *supra* note 83, at 198.

185. *See* Bentele & Bowers, *supra* note 169, at 1042, 1052-53.

186. *Id.* at 1042-44; Trahan, *supra* note 45, at 1 (“[C]apital jurors are generally unreceptive to mitigation and predisposed to vote in favor of death.”); Foglia, *supra* note 83, at 192 (explaining that capital jurors cannot meaningfully consider mitigation when over half of them “consider[ed] death the only acceptable punishment” for three types of murder); *id.* at 199. When asked to give examples of relevant mitigation, jurors look to the crime itself, citing examples like it was a crime of passion, or the defendant was less responsible for the killing, or they lacked control over their actions. Vartkessian, *supra* note 82, at 270. One prosecutor similarly gave crime-related examples of mitigation: “[I]s this a defendant who in some way

If they consider a defendant's background, jurors often have unreasonable expectations for what counts as mitigation. For example, when one prospective juror expressed her reluctance to consider mitigating evidence, the judge tried to rehabilitate her by asking if she would consider a life sentence if the defendant had won a Congressional Medal of Honor, was a war hero, or worked in an orphanage with children with AIDS, as if only these extreme and unrealistic examples amounted to legally justifiable mitigation.¹⁸⁷

The most powerful character-based mitigating evidence for jurors, unfortunately, are the categorical restrictions the United States Supreme Court has already placed on the death penalty: a defendant's intellectual disability and committing the crime when under the age of eighteen.¹⁸⁸ Jurors sometimes consider a defendant's age as mitigating, if it is under twenty-five, which may also be somewhat attributed to a relative lack of a violent criminal history.¹⁸⁹

Some researchers have concluded jurors will treat child abuse as mitigating under certain circumstances, especially if state institutions failed to intervene or provide real help.¹⁹⁰ Many jurors, conversely, treat a defendant's presentation of child abuse as a cheap excuse for murder, an attempt to "pawn off" their conduct on their family, as one juror said.¹⁹¹

immediately regretted what was done, tried to help the victim, tried to make amends, or is this someone who callously just walked off? You look at all those things." *Id.* at 269.

187. Vartkessian, *supra* note 82, at 255. The court's examples "could have easily blunted jurors' understanding of relevant mitigation." *Id.*

188. *Atkins v. Virginia*, 536 U.S. 304, 317-21 (2002); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005); Garvey, *supra* note 80, at 57; Garvey, *supra* note 68, at 1564. One study found people with mild intellectual disabilities have been executed because jurors "misunderstood the [intellectual disability] evidence and were persuaded by extralegal racial biases and premature decision making." Leona Deborah Jochnowitz, *Whether the Bright-Line Cut-off Rule and the Adversarial Expert Explanation of Adaptive Functioning Exacerbates Capital Juror Comprehension of the Intellectual Disability*, 34 *TOURO L. REV.* 377, 429 (2018).

189. Sorensen & Marquart, *supra* note 71, at 771-72 (finding that defendants "twenty-five years of age or older received a death sentence more often than individuals ages seventeen to twenty-four."). One multivariate regression analysis of the CJP data found that a defendant's age, especially age eighteen, was the most significant mitigating factor in determining a life sentence. Devine & Kelly, *supra* note 59, at 399.

190. Margaret C. Stevenson et al., *Jurors' Discussions of a Defendant's History of Child Abuse and Alcohol Abuse in Capital Sentencing Deliberations*, 16 *PSYCH. PUB. POL'Y & L.* 1, 25-28, 31-32 (2010); Garvey, *supra* note 68, at 1539.

191. Bentele & Bowers, *supra* note 169, at 1046-47.

Jurors also tend to treat mental illness, unless it borders on insanity or extreme psychosis, as aggravating.¹⁹² One study found that 90% of CJP jurors “rejected the defendants’ diminished mental capacities as having any mitigating effect.”¹⁹³ As one CJP juror explained, the claim that the defendant “was not working with a full deck . . . was stupid.”¹⁹⁴ Another said that “trying to make [the defendant] out like a child” really “hurt their case.”¹⁹⁵

Jurors strongly dislike mitigating claims of drug and alcohol use and abuse.¹⁹⁶ As one juror put it, “nobody forced [the defendant] to take drugs.”¹⁹⁷ Another noted that lots of people “have drug or alcohol problems but they are not out committing capital murders. So I don’t consider that to be mitigating.”¹⁹⁸ Instead, they focus on seemingly rational choices the defendant made leading up to the crime.¹⁹⁹ Given the strength of juries’ negative reactions to this evidence, one commentator suggests arguing that the defendant’s drug or alcohol use did “not prevent actions and choices;” instead, it affected “the decision-making process and decrease[d] inhibitions.”²⁰⁰

Jurors have split reactions to a defendant’s disadvantaged or deprived background.²⁰¹ Like drug and alcohol evidence, jurors who negatively react to childhood trauma note that lots of people have dysfunctional families and suffer childhood abuse, but they do not commit capital murders.²⁰² Many jurors believe a defendant must take

192. *Id.* at 1048; Michelle E. Barnett et al., *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 753-54 (2004); Trahan, *supra* note 45, at 7; Lain, *supra* note 110, at 223-24 (observing that jurors see murderers with a severe mental illness as someone who will be a significant danger in the future).

193. Trahan, *supra* note 45, at 7.

194. *Id.*

195. *Id.*

196. Stevenson et al., *supra* note 190, at 28-32; Garvey, *supra* note 80, at 57; Garvey, *supra* note 68, at 1539, 1565; Trahan, *supra* note 45, at 7-8; Blume et al., *supra* note 20, at 1229-30.

197. Vartkessian, *supra* note 82, at 266.

198. *Id.*

199. Trahan, *supra* note 45, at 12-13.

200. *Id.* at 13.

201. *Id.* at 8-9. *See also* Vartkessian, *supra* note 82, at 280 (noting that jurors believed that “the defendant’s background and personal history” were not “legitimate sentencing factors.”).

202. Trahan, *supra* note 45, at 8-9. As one capital juror explained, “[t]here are tons of people in this world who have had atrocious things happen to them as children, way worse than

personal responsibility for their choices. “He never made a point of changing,” one juror suggested, echoing similar comments by another juror who felt that no matter what happened, “you have to be held responsible for your actions at some point in time.”²⁰³ One scholar suggests that lawyers respond to these concerns by emphasizing that real recovery requires help from others and from institutions, including counseling and treatment, which were likely not “realistic” options for the defendant.²⁰⁴

Capital juries clearly misunderstand and misapply the law.²⁰⁵ In essence, the research has shown that most jurors fairly quickly decide that the defendant is guilty and then look to the instructions to frame the decision they have already made.²⁰⁶ Few capital jurors actually remember the case in mitigation, since it comes so late in the process, by which time they have already made up their minds.²⁰⁷ During trial, jurors experience a sort of information overload that causes them to simplify their decision-making process and, rather than follow established legal standards, they arbitrarily choose a sentence that feels right.²⁰⁸

These concerns led one scholar to conclude that “no amount of mitigation would be sufficient to escape a death sentence,” because jurors cannot engage in the “reasoned, moral decision-making that the Court touted as central to the continued use of capital punishment.”²⁰⁹ Justice Harlan, writing for the Supreme Court, similarly admitted that

this guy, and they have turned out to be upstanding law-abiding citizens.” Vartkessian, *supra* note 82, at 267.

203. Trahan, *supra* note 45, at 8; Vartkessian, *supra* note 82, at 267.

204. Trahan, *supra* note 45, at 13.

205. Barron, *supra* note 169, at 246. As Barron argues, though the Supreme Court requires jurors to consider mitigating evidence to avoid imposing an arbitrary and capricious sentence, the right is meaningless “if the sentencing body is unable or incapable of giving effect to this evidence in determining a sentence.” *Id.* at 248.

206. Vartkessian, *supra* note 82, at 278; Bentele & Bowers, *supra* note 169, at 1053-60; Krauss & Sales, *supra* note 85, at 279; Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 101-112, 118 (1997); Hans, *How Juries Decide Death*, *supra* note 170, at 1237-38; Bowers, *supra* note 70, at 1093.

207. Bowers, *supra* note 70, at 1087, 1090-91; Haney, *supra* note 64, at 1228.

208. Katie Morgan & Michael J. Zydney Mannheimer, *The Impact of Information Overload on the Capital Jury’s Ability to Assess Aggravating and Mitigating Factors*, 17 WM. & MARY BILL RTS. J. 1089 (2009).

209. Vartkessian, *supra* note 82, at 267-68. See also Penry v. Lynaugh (*Penry I*), 492 U.S. 302, 328 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002) (discussing how jurors must be able to consider mitigating evidence before they are able to properly use it).

adequately identifying aggravating and mitigating factors and expressing them in a way that “can be fairly understood and applied” by jurors seems “beyond present human ability.”²¹⁰ This is why Wanda Foglia calls capital jury instructions “legal fictions” that are stunningly irrelevant.²¹¹ This is clearly the case, since the legally relevant aggravating and mitigating factors have been shown to only modestly relate to a death sentence.²¹²

Given these hurdles, defense attorneys must do what they can in *voir dire* to find those jurors who understand the legal requirements for mitigating evidence and who will respond to a compelling narrative for a life sentence.²¹³ Scholars have suggested that lawyers find more success with multilayered mitigation strategies that present a complex, but compelling narrative.²¹⁴ CJP jurors who vote for life almost consistently brought up the combination of several pieces of mitigation as significant to their decision, such as a troubled childhood, alcoholism, mental illness, and a lack of criminal history.²¹⁵ These jurors observed that the defense was able to personalize and humanize the defendant, especially when they saw the defendant visibly responding to mitigation testimony, which provoked jurors’ own feelings of empathy.²¹⁶ This may be why one scholar suggested that defense lawyers do what they can to identify the jurors who have had similar life experiences to the defendant’s, but who also have the ability to empathize with that experience.²¹⁷

210. *McGautha v. California*, 402 U.S. 183, 204 (1971), *reh’g granted, judgment vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972).

211. Foglia, *supra* note 83, at 209. One study concluded the “instructions were irrelevant” to capital jurors, since their personal feelings about the death penalty did not change after their service. *Id.* at 205.

212. Devine & Kelly, *supra* note 59, at 402.

213. See SUNDBY, *supra* note 61, at 137.

214. Trahan, *supra* note 45, at 9-10, 14; Barnett et al., *supra* note 192, at 766 (noting that a strategy that combined mental health issues, being under the influence of drugs at the time of the murder, and severe abuse had “significant effects on sentencing outcomes”).

215. Trahan, *supra* note 45, at 10.

216. *Id.* at 9, 11.

217. *Id.* at 13. Trahan observes that some jurors with similar backgrounds can be harsher on a defendant. *Id.*

4. Would This Juror Accept or Deny Responsibility for the Verdict?

Jurors must not be misled, the Supreme Court has said, “that the responsibility for sentencing the defendant lay elsewhere.”²¹⁸ Yet many of them will “use almost *any* available information to downplay their responsibility for the death sentencing decision.”²¹⁹ They “mislead themselves;” like one juror said, “I do not feel qualified to make this decision. I am not a legal expert.”²²⁰ Jurors pass responsibility for the sentence onto the prosecutor, the judge, the appellate courts, or even the law.²²¹ They also think of their verdict as a “group” decision instead of an individual one.²²² Eight of ten CJP jurors deny responsibility for the punishment and claim the “cover of law,” which makes them “more likely to vote for death.”²²³

CJP jurors often resent defense attorneys’ attempts to make them feel personally responsible for the death of the person, especially if it comes across as accusing them of committing murder.²²⁴ As two CJP jurors explained, the “attorney insulted us” with the tactic and it “backfired.”²²⁵

Instead, if the lawyer can more subtly convey personal responsibility, jurors are much less likely to impose a death sentence.²²⁶ One Colorado Method technique involves reminding jurors that the law allows them to show mercy for any reason, that they do not have to justify their decision to other jurors, that each person’s vote is independent of what other jurors decide or what the court or the lawyers

218. *Romano v. Oklahoma*, 512 U.S. 1, 8 (1994) (citing *Caldwell v. Mississippi*, 472 U.S. 320, 326 (1985) (plurality opinion)). The Court has “read *Caldwell* as ‘relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.’” *Romano*, 512 U.S. at 9 (quoting *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986)).

219. Hoffmann, *supra* note 137, at 1138; Costanzo & Costanzo, *supra* note 66, at 162.

220. Hoffmann, *supra* note 137, at 1142-43, 1157; Garvey, *supra* note 80, at 38; Eisenberg et al., *supra* note 70, at 368.

221. See *Mann v. Dugger*, 844 F.2d 1446, 1455 (11th Cir. 1988); Vartkessian, *supra* note 82, at 283; Garvey, *supra* note 80, at 38; Bowers, *supra* note 58, at 223; Sarat, *supra* note 90, at 1130.

222. Sherman, *supra* note 169, at 1245-46.

223. Hoffmann, *supra* note 137, at 1143-44; Eisenberg et al., *supra* note 70, at 377; Bowers, *supra* note 58, at 223; Garvey, *supra* note 80, at 38; Sarat, *supra* note 90, at 1130.

224. Trahan, *supra* note 45, at 6, 11-12.

225. *Id.* at 6.

226. See Sherman, *supra* note 169, at 1247.

think, and that all jurors have to respect each juror's opinion.²²⁷ This empowers some jurors to hold fast during deliberations or reminds others to respect differing opinions. For example, one holdout juror, who clearly internalized these suggestions, reminded the death voters that they were "throw[ing] the switch [themselves]" and that "[i]f [they] say go ahead, that's the same as [if they] are doing it."²²⁸

5. Would This Juror's Life Experience Help Them Empathize with the Defendant?

Each juror has unique personal attributes such as a race, age, sex, gender, sexual orientation, personality traits, and maybe religion or disability, among others. Many of these characteristics have been shown to affect jurors' votes. However, defense lawyers cannot and should not simplistically assume jurors vote based on these attributes in isolation. Jurors' qualities and characteristics intersect in uniquely individual ways.²²⁹ Instead of their individual characteristics in isolation, it is jurors' life experiences, as filtered through their attributes, which make them more likely to react in certain ways to the evidence.

For example, a middle-aged juror of color who grew up in an underprivileged environment may be more likely to empathize with a defendant from a similar background. That same juror, however, may not empathize with the defendant if that juror felt that they were able to get out of their circumstances through hard work and effort. Thus, lawyers should not use these categories to stereotype jurors; they should use them as openings to ask jurors about their experiences and their opinions. For example, simplistically assuming a Black male juror

227. Toobin, *supra* note 7, at 38; Sherman, *supra* note 169, at 1247; Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997).

228. Hoffmann, *supra* note 137, at 1146.

229. See generally Darrell Steffensmeier et al., *Intersectionality of Race, Ethnicity, Gender, and Age on Criminal Punishment*, 60 SOCIO. PERSP. 810 (2017) (analyzing how individual traits affect decision making); PATRICIA HILL COLLINS & SIRMA BILGE, *INTERSECTIONALITY* (2d ed. 2020) (in-depth study of intersectionality); Bandana Purkayastha, *Intersectionality in a Transnational World*, 26 GENDER & SOC'Y 55 (2012) (analyzing various works on the growing scholarship of intersectionality); Jennifer C. Nash, *Re-Thinking Intersectionality*, 89 FEMINIST REV. 1 (2008) (analyzing how an individual's identity affects decision making).

would sympathize with a defendant, or a white female juror would sympathize with the victim, the lawyer can instead ask each juror about their views regarding poverty, or what they think about how communities of color are treated within the criminal justice system. They can ask the juror about their experiences with those of other races, or whether they have religious views about the appropriate punishment when one commits murder.

a. Race

Jurors of different races perceive evidence differently.²³⁰ White jurors, particularly white male jurors, often accept “culturally rooted racial stereotypes,” and tend to view defendants of color—especially Black males—as criminogenically violent, dangerous, and more deserving of the death penalty.²³¹ White jurors are significantly more likely to undervalue, disregard, and even use mitigating evidence against Black defendants.²³² They tend think the system is too lenient toward or works to benefit communities of color,²³³ that defendants of

230. Brewer, *supra* note 70, at 539-43; Connell, *supra* note 71, at 172.

231. William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497, 1531-32 (2004); Bowers et al., *supra* note 117, at 451-52; Bowers et al., *supra* note 109, at 179, 219; Eisenberg et al., *supra* note 68, at 277; Jamie L. Flexon, *Cognitive Predisposition to Prejudice and Discrimination on Capital Juries: Can Race Be Ignored in the Jury Room?* 91-93, 118 (2006) (Ph.D. dissertation, State University of New York at Albany); Marian J. Borg, *Vicarious Homicide Victimization and Support for Capital Punishment: A Test of Black's Theory of Law*, 36 CRIMINOLOGY 537, 547-49, 562-63 (1998); Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. RSCH. CRIME & DELINQ. 202, 205-06 (1994); Steven F. Cohn et al., *Punitive Attitudes Toward Criminals: Racial Consensus or Racial Conflict?*, 38 SOC. PROBS. 287, 294 (1991); Michael Sunnafrank & Norman E. Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 CORNELL J. SOC. RELS. 1 (1983); *see also* Amy Farrell et al., *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 L. & SOC. INQUIRY 773, 795 (2013) (finding that white jurors are more likely to vote for guilt against Black defendants on the first ballot). We use an “invisible cultural lens” to make quick, and often superstitious judgments about others. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 40 (2001).

232. Lynch & Haney, *supra* note 117, at 353.

233. Brewer, *supra* note 70, at 539-40; EDELMAN, *supra* note 118, at 4; Bowers et al., *supra* note 109, at 180.

color lie,²³⁴ and that a defendant of color is not remorseful.²³⁵ They often have strong negative reactions to the defendant and make little, if any, attempt to understand the circumstances of their life.²³⁶

Nearly two-thirds of white jurors cast their first vote for death, compared to one-third of Black jurors.²³⁷ These jurors justify their preconceived biases about people of color with invalid and irrelevant justifications.²³⁸ White males, in particular, so strongly insist on death sentences that researchers refer to it as the “[w]hite male dominance” effect.²³⁹

Conversely, jurors of color tend to be more critical of the state’s case, less likely to convict a defendant, and much more receptive to mitigation evidence.²⁴⁰ This is because many people of color have a “shared experience of discrimination in formal and informal law enforcement settings.”²⁴¹ These jurors’ experiences make them much more likely to sympathetically view what the state calls “aggravating” evidence, such as a troubled childhood, a criminal history, or run-ins with law enforcement.²⁴²

234. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1294 (2000); see also Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 72-76 (2000) (noting issues with cross-racial lie detection).

235. Bowers et al., *supra* note 109, at 192-93, 212-22.

236. Garvey, *supra* note 80, at 46-47.

237. Eisenberg et al., *supra* note 68, at 286.

238. Bowers et al., *supra* note 109, at 212, 218, 226, 241-42; Ted Chiricos et al., *Racial Typification of Crime and Support for Punitive Measures*, 42 CRIMINOLOGY 359, 378-80 (2004); Brewer, *supra* note 70, at 532; Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1007 (2003); Steven E. Barkan & Steven F. Cohn, *Why Whites Favor Spending More Money to Fight Crime: The Role of Racial Prejudice*, 52 SOC. PROBS. 300, 307 (2005).

239. Devine & Kelly, *supra* note 59, at 395; Bowers et al., *supra* note 109, at 192.

240. Bowers et al., *supra* note 109, at 181; Brewer, *supra* note 70, at 539; Tanya E. Coke, *Lady Justice May Be Blind, but Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 355 (1994).

241. Bowers et al., *supra* note 109, at 180, 242.

242. *Id.* at 196 & 196 nn.111, 201, 211; Brewer, *supra* note 70, at 539; Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans’ Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. SOC. SCI. RSCH. RACE 151, 156 (2004) (noting “substantial differences” in how white and Black jurors view police, prosecutors, courts, and punishment); Coke, *supra* note 240, at 351-60 (explaining how white jurors have limited, and mostly positive interactions with police, while the experiences of people of color tend to be negative); see Frank Tuerkheimer, Forum, *The Rodney King Verdict: Why and Where to from Here?*, 1992 WIS. L. REV. 849, 849 (1992).

Jurors of color are much less likely to impose death sentences.²⁴³ Jurors of color differ from white jurors in how they perceive the system's legitimacy and its potential for error, in their views of the defendant's culpability and remorse, in their empathy toward the defendant, and in their willingness to be merciful.²⁴⁴ They simply are more likely to question the government's case and separate the crime from the person accused.²⁴⁵

Black jurors "are significantly more receptive to mitigation than their white counterparts and more receptive overall," especially when the defendant is Black.²⁴⁶ In fact, one study found that Black jurors were generally more receptive to mitigation evidence no matter the defendant's race, including for white defendants.²⁴⁷ If even one Black male juror serves on a capital jury, the chances of obtaining a death sentence plummet from 71.9% to 42.9%.²⁴⁸ This has been called a "'Black male presence' effect."²⁴⁹ Conversely, only 30% of cases resulted in a death sentence if four or fewer white men sat on a jury but rose to 70.7% if five or more white men sat.²⁵⁰

All too often, "Black jurors see mitigation where whites see aggravation."²⁵¹ In one South Carolina case, white jurors thought a Black defendant lacked (and even faked) emotion when he and his mother pled for his life, which they claimed justified a death sentence.²⁵² But a Black male juror differently thought the defendant "seemed sorry" and the juror regretted succumbing to the other jurors' desire for a death sentence.²⁵³

In a Pennsylvania case, one Black male juror felt white jurors had automatically decided to give the death penalty because the defendant

243. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 124 (2001); Devine & Kelly, *supra* note 59, at 400; Eisenberg et al., *supra* note 68, at 279; Eisenberg et al., *supra* note 88, at 385; *see* Brewer, *supra* note 70, at 531.

244. Bowers et al., *supra* note 109, at 180, 207-11, 216-18, 241-42; Bowers et al., *supra* note 231, at 1531-32; Bowers et al., *supra* note 117, at 451-52.

245. Garvey, *supra* note 80, at 47.

246. Brewer, *supra* note 70, at 539, 542; Brewer, *supra* note 155, at 359.

247. Brewer, *supra* note 70, at 539-40.

248. Bowers et al., *supra* note 109, at 193; SUNDBY, *supra* note 61, at 151.

249. Devine & Kelly, *supra* note 59, at 395.

250. Bowers et al., *supra* note 109, at 193-94.

251. *Id.* at 258.

252. *Id.* at 248.

253. *Id.* at 248-50.

was Black.²⁵⁴ When other Black jurors tried to help them sympathize with the defendant's upbringing, including being abandoned by his mother, abused by his father, and growing up in crack houses, the white jurors were surprisingly disinterested and callous.²⁵⁵ "[T]hey were more concerned about what we were gonna have for lunch and how long was lunch and when we were gonna get out of here."²⁵⁶

One of the two Black jurors in a Florida case said that white jurors simply wanted to impose the death penalty because the Black defendants killed a white police officer.²⁵⁷ "I felt like they didn't give a shit one way or the other. They wanted to go to the football game and they wanted to go home to their husbands and all this type of stuff, and not worry about whether these people were gonna die or not."²⁵⁸ A white female juror confirmed that jurors thought the mitigation evidence was "hysterical" and that it was "difficult not to laugh" at it.²⁵⁹ They just "wanted to go home."²⁶⁰

Some multivariate studies have concluded a juror's race does not significantly predict a sentencing outcome.²⁶¹ This may be because race plays little to no role in most juries' outward discussions, but operates instead at the individual level, both consciously and unconsciously.²⁶²

Defense lawyers should first try to ensure that jury venire panels do not skew heavily, as the research shows they do, toward white jurors.²⁶³ They should also try to keep the prosecution from making

254. *Id.* at 246.

255. *See id.* at 246-48.

256. *Id.* at 247.

257. *Id.* at 244-45.

258. *Id.* at 245.

259. *Id.* at 246.

260. *Id.*

261. Connell, *supra* note 71, at 172; Devine & Kelly, *supra* note 59, at 402.

262. Brewer, *supra* note 70, at 543; Connell, *supra* note 71, at 172; Devine & Kelly, *supra* note 59, at 402-03; Bowers et al., *supra* note 109, at 195, 264; Flexon, *supra* note 231, at 2-5 (explaining that stereotype influence happens at the subconscious level often related to race-biased media exposure).

263. Noelle Nasif et al., *Racial Exclusion and Death Penalty Juries: Can Death Penalty Juries Ever Be Representative?*, 27 KAN. J.L. & PUB. POL'Y 147, 147-52, 158-59 (2018); EDELMAN, *supra* note 118, at 3; Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & HUM. BEHAV. 31, 46 (1984); *Illegal Racial Discrimination in Jury Selection*, *supra* note 112, at 4-6; Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide"*, 45 L. & SOC'Y REV. 69, 73 (2011). "American jury systems tend to overrepresent white, middle-aged, suburban, middle-class people and underrepresent other

race-based juror strikes to select an all or a mostly white jury.²⁶⁴ Defense lawyers should proactively seek to seat a diverse jury, especially when representing defendants of color.²⁶⁵

However, defense counsel should not engage in “racial, ethnic, or gender stereotyping” or make race-based strikes.²⁶⁶ Race alone “is not a reliable proxy for a more meaningful inquiry into a person’s

groups in our society.” 1 Jurywork: Systematic Techniques § 5:2 (2020). Additionally, “many lawyers and judges still tend to view whites as presumptively impartial” while people of color, in contrast, “are seen as self-interested.” Coke, *supra* note 240, at 347; *id.* (“[T]he baseline of neutrality is defined in white, middle-class terms.”).

264. *Batson v. Kentucky*, 476 U.S. 79, 100 (1986); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Georgia v. Carr*, 506 U.S. 801 (1992). G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87, 122 (2008) (finding that Black jurors are disproportionately excluded based on their disfavor of the death penalty); see Coke, *supra* note 240, at 327-29.

265. Coke, *supra* note 240, at 331; *id.* (“Mixed race juries help to vindicate the defendant’s interests in a fair trial and the courts’ interest in promoting thorough, unbiased adjudications.”). The Court has explicitly prohibited striking a juror based on race. *McCollum*, 505 U.S. at 59; *Carr*, 506 U.S. 801. However, a plurality of the Court admitted a “special seriousness” of a “risk of racial prejudice” among capital jurors. *Turner v. Murray*, 476 U.S. 28, 36, 36 n.8, 12 (1986); *id.* at 35 (finding that the wide range of juror discretion presents “a unique opportunity for racial prejudice to operate but remain undetected”).

There are compelling reasons for defendants of color to strike white jurors whose “dignitary interest” in sitting on a jury pales in comparison to the constitutional right of a defendant of color to equal protection and to a fair and unbiased jury. *Id.* at 331-48; Sarma, *supra* note 125, at 920-21 & 921 n.55; John J. Francis, *Peremptory Challenges, Grutter, and Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 VT. L. REV. 297, 337 (2005); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 111 n.185 (1993). The defense has an obligation to challenge and check state power and should use the peremptory to mitigate racial bias. Smith, *supra* note 112, at 1175-76 & 1175 n.84; Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 100 (1990); Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 341 (1982). Defendants of color also have little ability to entirely remove white jurors from the pool, whereas the government can easily do this with jurors of color. Coke, *supra* note 240, at 344-45; JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY: WITH A NEW PREFACE xxiv (2000). Arguably, *Grutter v. Bollinger*, 539 U.S. 306 (2003) justifies using race as a “plus factor” among a multifactor analysis for the compelling state interest in achieving a diverse jury panel. Sarma, *supra* note 125, at 921 n.55; Francis, *supra*, at 359-63; Phoebe A. Haddon, *Does Grutter Offer Courts an Opportunity to Consider Race in Jury Selection and Decisions Related to Promoting Fairness in the Deliberation Process*, 13 TEMP. POL. & CIV. RTS. L. REV. 547, 552-54 (2004); see also *Batson*, 476 U.S. at 87-88 (commenting on how discrimination in jury selection hinders justice); *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994) (explaining the harms from selection procedures that exclude jurors of color).

266. Smith, *supra* note 112, at 1175.

experience and attitudes.”²⁶⁷ Instead, lawyers should evaluate jurors’ life experiences “with race in mind,” recognizing that it is ultimately a juror’s receptivity to mitigation that matters.²⁶⁸ The “diversity in perspective” of people of color simply helps them understand aggravation and mitigation differently and more empathically than the perspectives and life experiences of most white jurors.²⁶⁹

When the jury is racially diverse, all jurors become less confident in the defendant’s guilt, are less hostile, more lenient, deliberate longer, more carefully assess the evidence, and are more likely to vote for life.²⁷⁰ Jurors of color can helpfully “translate” or culturally explain the evidence from a defendant’s life that white jurors perceive as aggravating.²⁷¹ Black male jurors especially can provide a distinct and powerful perspective that has been shown to be “especially effective” at countering the pro-death positions of white jurors.²⁷²

267. *Id.*; see also Abbe Smith, “Nice Work If You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 *FORDHAM L. REV.* 523, 547 (1998) (stating that although race may impact jury selection, race is only one factor among many); Coke, *supra* note 240, at 359 (explaining that while a juror’s race should not be *the* factor, “it is a potential predictor of socio-cultural experience and attitudes”).

268. Smith, *supra* note 112, at 1169 (“If race matters in society, it should matter to criminal lawyers.”); see Devine & Kelly, *supra* note 59, at 402-03. Both Abbe Smith and Alafair S. Burke have argued that prosecutors’ higher obligations should make them forgo peremptory challenges or use them to make a jury more “reflective of the broader community.” Smith, *supra* note 112, at 1169-71; Alafair S. Burke, *Prosecutors and Peremptories*, 97 *IOWA L. REV.* 1467, 1474-76, 1488 (2012).

269. Connell, *supra* note 71, at 172-73.

270. Sommers, *supra* note 120, at 597; Tabak, *supra* note 118, at 260-61 (noting that “study after study” confirms these effects); Sommers & Ellsworth, *supra* note 238, at 1028; Sarma, *supra* note 125, at 911; Sommers & Ellsworth, *supra* note 113, at 221 (arguing that the inclusion of Black jurors influences jurors to adopt “egalitarian values” and “make[s] bias less likely”); Bowers et al., *supra* note 109, at 187; see Nasif et al., *supra* note 263, at 148, 161-62. Burt Neuborne explains that a diverse jury assures that the mix of facts found reflects “the varying assumptions and predispositions” of “people of widely differing cultural and experiential backgrounds.” Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 *N.Y.U. L. REV.* 419, 432 (1992).

271. Taylor-Thompson, *supra* note 234, at 1285; SUNDBY, *supra* note 61, at 152. Even so, “[p]lacing the responsibility for guarding against discriminatory verdicts on a few minority jurors is as unfair to those jurors as it is to defendants.” Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 *TUL. L. REV.* 1807, 1845 (1993).

272. These conversations often involve “tension, conflict, and hostility across racial lines.” Bowers et al., *supra* note 109, at 195-96, 202.

As I argued earlier, defense attorneys must find out what jurors think on these issues.²⁷³ The importance here is to have open and honest conversations, and as much as possible, to help identify and rate those jurors who will unfairly make racially biased judgments as well as those who would be more likely to understand and to empathize with the defendant's case.

b. Sex and Age

Generally speaking, male jurors of all ages, excepting males younger than thirty, vote for the death penalty at much higher rates than women.²⁷⁴ Women are likely to holdout for life sentences, but also tend to succumb to pressure and change their votes.²⁷⁵ Nearly 82% of female CJP jurors reported regretting their vote.²⁷⁶

Sometimes female jurors impose harsher sentences on male defendants, but studies have not fully explained these differences.²⁷⁷

273. Smith, *supra* note 112, at 1175 (arguing that attorneys should focus on uncovering and identifying prospective jurors' biases and make cause-based challenges); Tabak, *supra* note 118, at 264 ("[D]efense counsel may want the jury to include people who talk honestly about their views about race rather than denying that they have any racial attitudes."). As several social psychologists argued, by making people aware of discrepancies between conscious ideals and sometimes unconscious negative responses, the lawyer can "take advantage of the genuinely good intentions of aversive racists to motivate them to gain the experiences they need to unlearn one set of responses and learn the new set that they desire." Dovidio et al., *supra* note 123, at 535; Rapping, *supra* note 109, at 1021-22.

274. Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 21 (1994); Eisenberg et al., *supra* note 68, at 277; Brewer, *supra* note 70, at 539 (noting that female jurors are consistently more receptive to mitigation than male jurors); Monica K. Miller & R. David Hayward, *Religious Characteristics and the Death Penalty*, 32 L. & HUM. BEHAV. 113, 117 (2008) (finding gender more predictive than age or race); Borg, *supra* note 231, at 549, 554-55, 559 (finding these trends); Fox et al., *supra* note 53, at 503, 518-19 (finding older Republican married males with children the most likely supporters of the death penalty); Crystal M. Beckham et al., *Jurors' Locus of Control and Defendants' Attractiveness in Death Penalty Sentencing*, 147 J. SOC. PSYCH. 285, 285, 293-94 (2007) (showing that younger women are also more likely than older women to vote for death).

275. Heather Pruss, *The Role of Juror and Jury Gender during Capital Deliberations: A Guided Qualitative Analysis* (Dec. 2014) (Ph.D. dissertation, Indiana University).

276. Michael E. Antonio, *Stress and the Capital Jury: How Male and Female Jurors React to Serving on a Murder Trial*, 29 JUST. SYS. J. 396, 399-401 (2008); Michael E. Antonio, *I Didn't Know It'd Be So Hard: Jurors' Emotional Reactions to Serving on a Capital Trial*, 89 JUDICATURE 282, 284-88 (2006).

277. Karl L. Wuensch et al., *Effects of Physical Attractiveness, Sex, and Type of Crime on Mock Juror Decisions: A Replication with Chinese Students*, 24 J. CROSS-CULTURAL PSYCH. 414, 422-25 (1993); Beckham et al., *supra* note 274, at 295. One study found that juries

One study found that equal male/female juries were more likely to vote for death, but that female-majority juries “were significantly less likely to decide in favor of death.”²⁷⁸ Female CJP jurors have been “consistently more receptive to mitigation than their male counterpart[s].”²⁷⁹ This could be because men tend to talk more than women, interrupt others, and control and dominate the discussion, while women in general tend instead to seek compromise and understanding.²⁸⁰

People in their late teens and early twenties tend to vote for life; death sentences peak in middle age, then decline rapidly as the person ages past their forties.²⁸¹ Young men similar in age to the defendant tend to impose a more lenient sentence.²⁸² However, one study found that “gender had much less effect on jury sentencing behavior than did race and age.”²⁸³

c. Religious Beliefs

Some jurors’ religious beliefs affect their sentencing decisions. Jurors have said that “God guided [them]” to impose a death sentence, believing, as another juror thought, that they must follow God by “simply demand[ing] death when a life had been deliberately taken.”²⁸⁴ Some jurors’ “favorite explanation” for the death penalty is “an eye for an eye.”²⁸⁵ Researchers have found that jurors with “angry and judgmental images of God” have the most punitive attitudes regarding

composed of eight or more women had a slightly higher death-sentencing rate, but it lacked statistical significance. Baldus et al., *supra* note 243, at 124-25.

278. Tara N. Richards et al., *Predictors of Death Sentencing for Minority, Equal, and Majority Female Juries in Capital Murder Trials*, 26 *WOMEN & CRIM. JUST.* 260, 273 (2016).

279. Brewer, *supra* note 70, at 539.

280. Bowers et al., *supra* note 109, at 195 n.110; John E. Baird, Jr., *Sex Differences in Group Communication: A Review of Relevant Research*, 62 *Q.J. SPEECH* 179, 181 (1976); Connell, *supra* note 71, at 170-71; see DEBORAH TANNEN, *YOU JUST DON’T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 24-25 (2013).

281. Beckham et al., *supra* note 274, 291-95.

282. *Id.* at 295.

283. Baldus et al., *supra* note 243, at 124-25.

284. Hoffmann, *supra* note 137, at 1148-49, 1154; Geimer & Amsterdam, *supra* note 69, at 44.

285. Gross, *supra* note 154, at 1451-52.

the death penalty.²⁸⁶ They have also found that white, not Black, male fundamentalist Christians have the strongest pro-death views.²⁸⁷

Many Christian jurors, particularly Biblical literalists, have been taught to support the death penalty and will vote for it.²⁸⁸ In one study, nearly 80% of Southern Baptists (almost all of whom were white) voted for death, compared to about 50% of other denominations.²⁸⁹

d. Personality Traits

Extraverted and conscientious people are more likely to favor the death penalty, while people who are open to experience and agreeable are less likely to support it.²⁹⁰ Jurors who prioritize internal motivation and hard work tend to attribute crime to a lack of self-control, and are more likely to discount mitigating evidence and vote for death.²⁹¹ As one juror argued, “okay, maybe he was abused . . . but he should have been able to turn his life around over time.”²⁹²

286. Christopher D. Bader et al., *Divine Justice: The Relationship Between Images of God and Attitudes Toward Criminal Punishment*, 35 CRIM. JUST. REV. 90, 90 (2010).

287. Chester L. Britt, *Race, Religion, and Support for the Death Penalty: A Research Note*, 15 JUST. Q. 175, 175, 183-90 (1998); Harold G. Grasmick et al., *Religion, Punitive Justice, and Support for the Death Penalty*, 10 JUST. Q. 289, 301-10 (1993); Harold G. Grasmick et al., *Religious Beliefs and Public Support for the Death Penalty for Juveniles and Adults*, 16 J. CRIME JUST. 59, 74 (1993); Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 31 J. SCI. STUDY RELIGION 76, 79, 82-85 (1992); James Davison Hunter, *Religion and Political Civility: The Coming Generation of American Evangelicals*, 23 J. SCI. STUDY RELIGION 364, 369 (1984); Borg, *supra* note 231, at 548-49; Miller & Hayward, *supra* note 274, at 118.

288. Young, *supra* note 287, at 76; Borg, *supra* note 231, at 548-49; Miller & Hayward, *supra* note 274, at 117; see Bader et al., *supra* note 286, at 99. Jerry Falwell once wrote, “the Bible clearly teaches capital punishment for capital crimes, to protect the intrinsic value of a person’s right to life.” Jerry Falwell, *Capital Punishment for Capital Crimes*, 1 FUNDAMENTALIST J. 8, 8 (1982).

289. Eisenberg et al., *supra* note 68, at 279, 286.

290. Monica Robbers, *Tough-Mindedness and Fair Play: Personality Traits as Predictors of Attitudes Toward the Death Penalty-an Exploratory Gendered Study*, 8 PUNISHMENT & SOC’Y 203, 211 (2006).

291. Beckham et al., *supra* note 274, at 286-87; SUNDBY, *supra* note 61, at 149; Osborne et al., *supra* note 129, 344-48; Richard A. Stevick et al., *Locus of Control and Behavioral Versus Self-Response Measures of Social Interest*, 36 J. INDIVIDUAL PSYCH. 183, 188 (1980); Julian B. Rotter, *Generalized Expectancies for Internal Versus External Control of Reinforcement*, 80 PSYCH. MONOGRAPHS GEN. & APPLIED 1, 25 (1966).

292. SUNDBY, *supra* note 61, at 149.

Other jurors process the world externally, attributing a person's behavior to experiences outside their control.²⁹³ These jurors are much less likely to find a defendant guilty, and tend to sympathize with mitigating evidence and vote for life.²⁹⁴ These are the jurors who, as one juror related, "kept insisting that [they] look at the childhood" and who made "compassionate speeches" reminding the other jurors that the defendant was also a victim who had been shaped by his life circumstances.²⁹⁵

e. The Importance of Empathy

From the crime through the trial, the government will relentlessly emphasize "the ferocity and monstrosity of the crime" well before the defense can respond.²⁹⁶ Between most jurors and the defendant is an unavoidable "cultural chasm."²⁹⁷ That is why attorneys must use voir dire find jurors whose life experiences will help them to bridge the gap so that they can relate to and understand the defendant.²⁹⁸ Jurors do not fit in simplistic categorical boxes. Consequently, defense attorneys must get to know them and try to exclude those who simply will not get it, who will not understand the defendant, and they must do their

293. Lyn Y. Abramson et al., *Learned Helplessness in Humans: Critique and Reformulation*, 87 J. ABNORMAL PSYCH. 49, 54 (1978); Beckham et al., *supra* note 274, at 287.

294. Jacqueline Pope & Robert Meyer, *An Attributional Analysis of Jurors' Judgements in a Criminal Case: A Preliminary Investigation*, 27 SOC. BEHAV. & PERSONALITY 563, 565, 569-73 (1999); Beckham et al., *supra* note 274, at 287; Osborne et al., *supra* note 129, at 340; see Richard Izzett & Leslie Fishman, *Defendant Sentences as a Function of Attractiveness and Justification for Actions*, 100 J. SOC. PSYCH. 285, 288-89 (1976); SUNDBY, *supra* note 61, at 141-43.

295. SUNDBY, *supra* note 61, at 149-50.

296. Ghoshray, *supra* note 130, at 494.

297. Sarma, *supra* note 125, at 913; *id.* at 927 ("[T]he more cultural distance there is between a prospective juror and a defendant, the less likely it is that that juror will vote for a life sentence in the penalty phase."); see Brewer, *supra* note 70, at 533. Others have called this a "psychological barrier" or an "empathic divide." Ghoshray, *supra* note 130, at 485, 491-506; CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM, in AMERICAN PSYCHOLOGY LAW SOCIETY SERIES 203 (Ronald Roesch ed., 2005); see also Haney, *supra* note 162, at 1463 (describing the impact of cultural differences on capital sentencing); Rozelle, *supra* note 157, at 785 (noting that capital juries do not "reflect the myriad backgrounds, experiences, and perspectives of a jury of one's peers").

298. Brewer, *supra* note 70, at 532; Thomas W. Brewer, Don't Kill My Friend: the Attorney-Client Relationship in Capital Cases and Its Effect on Jury Receptivity to Mitigation Evidence 22-23, 31-35 (2003) (Ph.D. dissertation, University at Albany, State University of New York) (on file with author); Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 HOFSTRA L. REV. 1161, 1171 (2018).

best to choose jurors who can understand the defendant's story and especially those who can empathize with it.

6. How Does This Juror View Expert Testimony?

Defense attorneys must approach the use of paid expert witnesses with great caution since capital jurors view them as hired guns who are paid to, as one juror put it, "say whatever you want them to say."²⁹⁹ Even worse, because jurors do not often understand expert testimony, they reject it entirely.³⁰⁰ One juror explained that the defense's "so-called expert" tried to get them to ignore their own perceptions, which "failed so miserably" because jurors "felt manipulated."³⁰¹ She called the choice to call an expert "an incredible, blatant stupidity on their part."³⁰² In one CJP study, two-thirds of jurors felt defense experts backfired or were hard to believe and only a fifth of jurors saw experts making positive contributions to the case.³⁰³ The same biases do not occur with government experts, because jurors see them as salaried professionals who have little interest in manipulating their testimony.³⁰⁴

The mirror opposite finding comes from family members and friends who testify for the defense. Jurors tend to see them much more positively because they have no financial incentive to testify.³⁰⁵

To counter these problems, as Scott Sundby suggests, defense lawyers should only use an expert as "an accompanist who is there to help the jury understand the other evidence that they have heard during the trial," particularly to highlight aspects of the family members'

299. SUNDBY, *supra* note 61, at 145; Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1115, 1127-28 (1997).

300. Dale A. Nance & Scott B. Morris, *Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Small Random-Match Probability*, 34 J. LEGAL STUD. 395, 434 (2005); *see* Sundby, *supra* note 299, at 1132-34. "Jurors expressly stated that they ignored the testimony of experts when it differed significantly from their preconceived notions of a phenomenon." Krauss & Sales, *supra* note 85, at 276.

301. Sundby, *supra* note 299, at 1134.

302. *Id.*

303. *Id.* at 1123. One study found mock jurors better related to and supported clinical expert testimony as opposed to actuarial expert testimony. Krauss & Sales, *supra* note 85, at 90.

304. Sundby, *supra* note 299, at 1128-29.

305. *Id.* at 1124.

testimony in a way that is not “excessively complex.”³⁰⁶ If they plan to use expert testimony, defense counsel must carefully assess and rank jurors on this issue.

7. Is the Juror Likely to Harbor Doubt About the Defendant’s Guilt?

One of the most powerful reasons jurors vote for life is “continuing uncertainty” about the defendant’s guilt.³⁰⁷ In one study, 69% of Florida capital jurors indicated that the major reason they voted for life was because they had doubt about the defendant’s guilt.³⁰⁸ According to one multivariate regression analysis, “lingering doubt about guilt was associated with a 94% lower likelihood of death.”³⁰⁹ While this situation “is not particularly common,” it appears to be “influential when it exists.”³¹⁰

This is incredibly difficult to handle pretrial, since it only arises in the innocence case. In one study, nine of ten CJP jurors strongly resented defense efforts to question the verdict during the penalty phase, which led the authors to suggest attorneys avoid this strategy unless they feel jurors are “second-guessing their guilt[y] verdict.”³¹¹

Perhaps in voir dire, lawyers can encourage jurors to vote not guilty and to avoid saving those doubts for sentencing. But many jurors might negotiate a guilty verdict to extract a life sentence concession from death-prone jurors. That is no consolation in the innocence case. There are no easy answers. If necessary, especially in the guilt case, counsel should explore the issue with jurors and rank them on their likelihood to fit in this category.

306. SUNDBY, *supra* note 61, at 145; Sundby, *supra* note 299, at 1115, 1124-25; Krauss & Sales, *supra* note 85, at 276; Trahan, *supra* note 45, at 12.

307. Devine & Kelly, *supra* note 59, at 403; Garvey, *supra* note 68, at 1563 (finding that 77.2% of jurors with lingering doubts were less likely to impose a death sentence); Trahan, *supra* note 45, at 11. One study found that Black jurors were much more likely than white jurors to have lingering doubts about guilt affect their punishment decisions. Bowers et al., *supra* note 117, at 451-52; Bowers et al., *supra* note 109, at 232.

308. Geimer & Amsterdam, *supra* note 69, at 27-28.

309. Devine & Kelly, *supra* note 59, at 401.

310. *Id.* at 403.

311. Trahan, *supra* note 45, at 5, 11. Trahan concluded, “mitigation strategies that focused on raising doubts as to the defendants’ guilt were generally ineffectual.” *Id.* at 11.

8. How Will This Juror Perceive Defense Counsel?

The credibility of the defendant's case often hinges on how jurors relate to defense counsel. They watch attorneys from the outset, scrutinizing the lawyer's words and actions to determine whether they are trustworthy.³¹²

Jurors' evaluation starts in voir dire.³¹³ When lawyers think, "I've got to find the bad people and get rid of them"—that permeates the atmosphere. The jurors pick up on an adversarial tone and will see you more as someone who has something to sell than someone who is interested in what they think."³¹⁴ Defense lawyer Gerry Spence explained that jurors can easily see beneath the fake smile and friendliness that the lawyer wants to kick them off the jury, and no one "want[s] to be rejected . . . Rejection is pain."³¹⁵

Instead, jurors respond better when attorneys try to "get to know [the jurors] as human beings and let them know [them as attorneys]."³¹⁶ One method offered by the Trial Lawyers College (TLC) is "predicated on building a relationship between the lawyer and the juror."³¹⁷ Attorneys do not pick a jury; instead, they build "a tribe—a community

312. Trahan, *supra* note 58, at 180; Antonio, *supra* note 68, at 224-26. One law professor wrote that "[d]efense counsel must be aware that his manner of interacting with his client expresses his estimation of his client and conveys to the judge or jury how they in turn should value the defendant." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 321 (1983).

313. See *To Win the Trial, You Must Win the Trust of the Jury*. An Interview with Paco Duarte, WA Regional Faculty Co Leader Voir Dire Seminar at Sleeping Lady, TRIAL LAWS. COLL. SUCCESS STORIES (Feb. 19, 2016), <https://www.triallawyerscollege.org/blog/to-win-the-trial-you-must-win-the-trust-of-the-jury-an-interview-with-paco-duarte-wa-regional-faculty-co-leader-voir-dire-seminar-at-sleeping-lady/> [<https://perma.cc/93RJ-W56G>] [hereinafter *To Win the Trial*].

314. *The Power of Conversation During Voir Dire An Interview with Connie Henderson, Voir Dire Seminar: WA Regional Faculty Co Leader*, TRIAL LAWS. COLL. SUCCESS STORIES (Feb. 10, 2016), <https://www.triallawyerscollege.org/blog/the-power-of-conversation-during-voir-dire-an-interview-with-connie-henderson-voir-dire-seminar-wa-regional-faculty-co-leader/> [<https://perma.cc/6GJR-D6DU>].

315. Lepir, *supra* note 24, at 399-400.

316. *My belief that the Jury that will always save you . . . An Interview with Steve Fury, 2006 Grad and Voir Dire: WA Regional Faculty Co Leader*, TRIAL LAWS. COLL. SUCCESS STORIES (Feb. 3, 2016), <https://www.triallawyerscollege.org/blog/my-belief-that-the-jury-that-will-always-save-you-an-interview-with-steve-fury-2006-grad-and-voir-dire-wa-regional-faculty-co-leader/> [<https://perma.cc/2WND-EA47>].

317. Lepir, *supra* note 24, at 398. Training in this method costs \$1,699 for the most recent seminar. *Washington Regional Seminar 2020: Voir Dire*, TRIAL LAWS. COLL., <https://www.triallawyerscollege.org/course-listing/washington-regional-seminar-2020-voir-dire/> [<https://perma.cc/9TUQ-4LGF>].

of people who work together to resolve a real human problem in a way that will be just and fair.”³¹⁸ As one lawyer reflected, he worked “to respect and trust jurors” and “be thankful, genuinely thankful,” that they would take time to listen to the case, particularly since they were the client’s only chance for justice:

[We have] to hear, really hear, the juror; to understand the juror; to be grateful for the juror’s honesty, even when it is terrifying; to share honestly with them as we engage them in conversation; and to be ourselves. In turn, jurors reciprocate our candor and effort with trust and with their willingness to listen to us.³¹⁹

This might require lawyers to “radically tell[] the truth,” as one capital defense attorney explained, such as revealing the lawyer’s own biases or even admitting to the flaws in the case.³²⁰

Jurors strongly dislike “sales pitches,” theatrics, flippancy, and hostile or aggressive tactics, especially if they feel the attorney is trying to limit the truth or control the witness.³²¹ These attitudes have consequences. One capital juror felt that because defense counsel “didn’t try enough” it “affected the jury” so that they “had less sympathy” for the defendant.³²²

On the other hand, jurors tend to trust defense attorneys who “modeled a close relationship with their clients,” which increased jurors’ receptivity to mitigating evidence by 66.3%.³²³ Lawyers cannot do this unless they get out of the office and get to know their clients, their families, so that they can sincerely communicate that they care—because they actually do.³²⁴ It will not be an act; it will be what the lawyer really feels.³²⁵ If the lawyer does not really care for the client, jurors react quite negatively and view counsel as manipulative because

318. *To Win the Trial*, *supra* note 313.

319. *Id.*

320. *Story-Telling That Saves Lives: TLC Grads Jake Watson and Brian White Save Their Client from the Death Penalty*, TRIAL LAWS. COLL. SUCCESS STORIES (Jan. 20, 2016), <https://www.triallawyerscollege.org/blog/story-telling-that-saves-lives-tlc-grads-jake-watson-and-brian-white-save-their-client-from-the-death-penalty/> [<https://perma.cc/DY5S-RSPP>] [hereinafter *Story-Telling That Saves Lives*].

321. SUNDBY, *supra* note 61, at 166; Trahan, *supra* note 58, at 170-71, 175, 178-79.

322. Geimer & Amsterdam, *supra* note 69, at 53.

323. Trahan, *supra* note 58, at 179; Brewer, *supra* note 155, at 356.

324. *Story-Telling That Saves Lives*, *supra* note 320.

325. *Id.*

they can see the lack of relationship between the attorney and the client.³²⁶

An attorney's genuine feeling can change the case. In one case, David Wymore wept as he told jurors tragedies from his client's life.³²⁷ Jurors started to cry with him.³²⁸ Steven Curtis, one of the victims who survived the shooting, found himself moved by Wymore's sincerity: "I was beginning to believe it. This is crap! This is a serious flaw here!"³²⁹ The jury that had just convicted the defendant was not even close on a death sentence: 9-3 for life.³³⁰

V. A BROADER APPROACH

The research shows what factors matter to jurors when they vote for life or for death. Defense lawyers should try to more broadly rank jurors on these factors. I propose that attorneys work with a score sheet similar to the ones I have created below. Using a score sheet like this one, a defense attorney can question the juror on these topics and rank them, using the Colorado Method's scale, on each of these topics. For example, a lawyer may ask jurors about the heinousness of the murder they will be called to evaluate. Some jurors will react more strongly to that evidence: one juror, who would give the death penalty to any murderer, would score a "seven." Another juror, who would admittedly have a strong reaction to the heinousness of the crime, but who indicates that they could look past it and still give someone a life sentence, might be a "two" or a "three." A juror who says no matter how bad the crime, they would still give a life sentence, would be a "one." The lawyer would question jurors about other issues, such as their ability to understand jury instructions. One juror might be particularly receptive to and able to understand jury instructions, so they would score a "one" or a "two" on that topic. Another juror might have difficulty with the instructions, and be predisposed to ignore them. They might score a "six" on that issue. Thus, the lawyer scores and ranks each juror on each factor. With a completely filled-out score sheet, the lawyer then assigns a final Colorado Method score.

326. Brewer, *supra* note 155, at 340, 356-57, 360; Trahan, *supra* note 58, at 175-80.

327. Parloff, *supra* note 13, at 89-90.

328. *Id.* at 90.

329. *Id.*

330. *Id.*

Juror Name and Number	Mitigation-Aggravation						
	1	2	3	4	5	6	7
Case-Specific Issues							
Heinousness/Viciousness							
Δ's history of violence							
Δ's risk of future dangerousness							
Δ's expression of remorse							
Victim empathy							
Δ's and/or victim's race							
Juror-specific factors							
Susceptibility to group pressure							
Juror predisposition to impose sentence							
Ability to understand jury instructions							
Accept or deny responsibility for the verdict							
Juror's life experience							
Views of expert testimony							
Lingering doubt							
Trusts defense counsel							
Attorney-identified factors							
Colorado-Method Ranking							

Juror Name and Number	Mitigation-Aggravation						
	1	2	3	4	5	6	7
Case-Specific Issues							
Heinousness/Viciousness						x	
Δ's history of violence				x			
Δ's risk of future dangerousness						x	
Δ's expression of remorse		x					
Victim empathy					x		
Δ's and/or victim's race				x			
Juror-specific factors							
Susceptibility to group pressure				x			
Juror predisposition to impose sentence				x			
Ability to understand jury instructions					x		
Accept or deny responsibility for the verdict					x		
Juror's life experience						x	
Views of expert testimony				x			
Lingering doubt				x			
Trusts defense counsel				x			
Attorney-identified factors							
Colorado-Method Ranking					5		

For example, I have filled out the chart for a sample juror. This juror scored quite high, a “six,” on the heinousness of the crime, future dangerousness, and the juror’s life experience. These are factors that have been shown to be among the most significant in predicting a juror’s vote for death. But the juror also would respond favorably if the defendant were to express remorse. The juror scores a “four” and “five” on most other issues, so they clearly tilt toward death. Defense counsel

would know how vicious the crime is and whether the defendant might express remorse during the trial. In this case, say the defendant would express sincere remorse, but the crime is quite heinous. The attorney may balance these factors out and rate the juror as a “five” overall.

There are several advantages to this approach. Very few of these topics directly involve the death penalty, which avoids overemphasizing punishment with jurors before they have decided the guilt question. Instead, this approach allows attorneys to question jurors about the case-specific issues and the juror’s unique personal characteristics that the CJP research has shown affect their sentencing determination. It also moves voir dire questions away from abstract considerations of a juror’s position on the death penalty to more concrete and highly relevant factors that do not openly appear to jurors as issues related to punishment.

That said, I do not advocate wholly abandoning discussing the death penalty in jury selection. The prosecution and the court will do it anyway, especially if the defendant does not contest guilt. But in all cases and in the innocence case particularly, my approach keeps defense lawyers from excessively questioning jurors about the death penalty and it helps them avoid creating the impression that everyone in the room thinks a death sentence is a foregone conclusion.

There are some limitations to this approach. First, and perhaps most importantly, courts often will not allow this kind of inquiry. Some judges allocate minutes, not hours, to conduct capital jury voir dire. In these cases, the Colorado Method may be the most feasible, if not the only option. I suggest that a lawyer facing this situation argue for the time to thoroughly question jurors, though I recognize the argument may fail.

Second, this Article cannot account for all the factors that may affect a given juror’s vote for life or death, which could include strong sympathies with law enforcement, prior experiences in the criminal justice system, a relationship with a crime victim, an exposure to pretrial publicity, or any other number of other factors. The form has blank spaces on it because attorneys may want to add factors that are unique to their case. They may also need to remove factors if they are not applicable. While I have tried to canvas the literature, I recognize that this list of factors is nowhere near comprehensive. This method is limited to issues that have research-based support. Researchers have not studied every possible factor that could relate to capital juror decision-making. For many of these questions, there just are not

answers. To some extent, this method remains like jury selection itself: an imprecise and sometimes subjective endeavor.

Third, from the earliest conceptions of this piece, I have questioned how attorneys would weigh various factors. We know that the heinousness of the crime, fear of future dangerousness, and a defendant's expression of remorse are among the strongest predictors of a death or a life sentence. But how would an attorney rank these factors against ones that have less predictability, such as a juror's personality characteristics or life experiences or views of expert witnesses? Without assigning statistically valid weights to each factor, I am worried that attorneys would over- or underemphasize a factor on the form.

Additionally, capital cases vary greatly and are difficult to fit into a one-size-fits-all form. One cannot predict which factors might carry greater weight in one case versus another. An attorney whose client killed multiple victims in a particularly tortuous way may weigh heinousness greater than an attorney whose client is highly remorseful. Attorneys may want to assign weights in their case, but I did not feel I could quantitatively assign numbers without further testing. I recognize the statistical shortcomings associated with the ad hoc ranking this Article proposes. This is where the Colorado Method's simplicity shines. But defense attorneys already make judgments on the fly with the Colorado Method. This system merely expands the number of factors attorneys would consider in making their Colorado Method numerical ranking choice.

I add one caution. I propose attorneys have genuinely open, candid, careful, and sensitive conversations with jurors about some of the most deeply personal events in their lives. This requires an empathetic approach. Many capital defense attorneys might struggle adopting it as their personalities tend toward the use of more aggressive litigation strategies. I believe an attorney who attempted this method without tact, genuineness, and openness would find that jurors would sense the attorney's lack of sincerity, refuse to disclose relevant information, and feel manipulated. It may seriously jeopardize the client's case.

Also, as I have already explained, many attorneys are more comfortable with the Colorado Method. Its simplicity may be its biggest strength and many attorneys would rather stick with a known, workable strategy. I do not denigrate the method.

However, I anticipate that most attorneys using a form like this Article has proposed will, when faced with a decision to argue a cause-based challenge or to exercise a peremptory challenge, be grateful they have much more information at their disposal. They can compare their scores with each other. Aware of the research findings and, with the best information in hand, they can make a holistic choice. This is not intended to be, nor could it be, a method to precisely predict how jurors will vote. It is only intended to offer lawyers a better and more rounded predictive tool.

Finally, I have not empirically tested these factors to see their applicability in real-world settings. I believe this could be done, however, if attorneys filled out a form such as this on an actual case and then subsequently tested whether their rankings correlated with jurors' final votes, especially studying which rankings proved to be the most predictive of sentencing outcomes. Without further quantitative testing, this proposal remains speculative. I anticipate, however, that further study would confirm the merits of the broader consideration I propose, simply because it is derived from evidence-based findings.

V. CONCLUSION

"A system that would take life must first give justice," John J. Curtin, Jr., then President of the American Bar Association, told the Senate Judiciary Committee in 1991.³³¹ I have proposed a more expanded procedure defense attorneys can use when they select capital juries. But this is a panacea.

In 1966, the preeminent legal scholars Harry Kalven Jr. and Hans Zeisel wrote that even the best procedural changes and innovations designed to remedy the concerns about "evenhanded justice" in the administration of the death penalty would "remain demeaningly trivial compared to the stakes."³³² They concluded that "no human should be called upon" to decide whether a person deserves death.³³³

It is a decision no human being *can* make. We just are not "capable of deciding who should live or die in accordance with the law."³³⁴

331. *Violent Crime Control Act of 1991: Hearings Before the Committee on the Judiciary, United States Senate, One Hundred Second Congress, First Session, on S. 618 and S. 635*, 102d Cong. 334 (1992) (testimony of John J. Curtin, Jr.).

332. KALVEN, JR. & ZEISEL, *supra* note 146, at 448-49.

333. *Id.* at 449.

334. Foglia, *supra* note 83, at 207.

Especially with a 68% error rate in capital cases,³³⁵ CJP research shows that jurors cannot “decid[e] who deserves the death penalty in the way the U.S. Supreme Court has held the [C]onstitution requires.”³³⁶ As Justice Thurgood Marshall wrote, “the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system.”³³⁷ Defense attorneys do not have the capacities to make these calls either. No one should be expected to do the impossible. This proposed method of capital jury selection should be short-lived. It should end when we decide to abolish the death penalty once and for all.

335. Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 216-17 (2004); Berry III, *supra* note 82, at 891.

336. Bowers & Foglia, *supra* note 43, at 51.

337. *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980).