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PROBING “LIFE QUALIFICATION” THROUGH EXPANDED VOIR DIRE

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I. INTRODUCTION

The conventional wisdom is that most trials are won or lost in jury selection.¹ If this is true, then in many capital cases, jury selection is

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1. See, e.g., 45 AM. JUR. *Trials* § 144 (1992) (“Experienced trial lawyers agree that a case can often be won or lost in voir dire.”); V. HALE STARR & MARK MCCORMICK, *JURY SELECTION: AN ATTORNEY’S GUIDE TO JURY LAW AND METHODS* § 3.8 (1985) (“Lawyers apparently do win, as they occasionally boast, some of their cases during, or with the help of voir dire.” (quoting HANS ZEISEL, *THE AMERICAN JURY*, ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES 81-84 (1977))); JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 139 (1977) (“Many attorneys believe that trials are frequently won or lost during [jury selection.]”); Jeffery R. Boyll, *Psychological, Cognitive, Personality, and Interpersonal Factors in Jury Verdicts*, 15 LAW & PSYCHOL. REV. 163, 176 (1991) (stating that a “case may be [won] or lost at the [jury selection stage]”); Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY’S L.J. 575, 575-76 (1984) (arguing that “[e]xperienced 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.”); Chris F. Denove & Edward J. Imwinkelried, *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 [the] evidence is even heard.”); 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) (stating that “experts in the field believe that eighty-five percent of the cases litigated are won or lost when the jury is selected”); David Hitner & Eric J.R. Nichols, *Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and the Arrival of Batson*, 23 TEX. TECH L. REV. 407, 409 (1992) (“Experienced trial lawyers view jury selection as a highly tactical, yet always mysterious, exercise in which cases are often won or lost.”); Janeen Kerper, *The Art and Ethics of Jury Selection*, 24 AM. J. TRIAL ADVOC. 1, 3 (2000) (“[M]any skilled trial attorneys maintain that trials can be won or lost during the jury selection process.”); Robert R. Salzman & Suzanne A. Salzman, *Points to Ponder for Arbitration Agreements*, 43 PRAC. LAW. 31, 34 (1997) (“Many trial lawyers believe that a jury trial is

won or lost at the jury selection phase.”); Leslie Snyder, *Attorney Conducted Voir Dire in a Criminal Case*, in *THE JURY 1984: TECHNIQUES FOR THE TRIAL LAWYER* 243, 246 (PLI Litig. & Admin. Practice Course, Handbook Series No. 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.”); Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, If Anything, to Do About It*, 1999 WIS. L. REV. 441, 443 (asserting that the importance of jury consultants is increased by the widespread belief that a trial is often won or lost during jury selection); Symposium, *Panel Two: Innovations for Improving Courtroom Communications and Views From Appellate Courts*, 68 IND. L.J. 1061, 1078 (1993) (Honorable James D. Heiple, Justice, Supreme Court of Illinois, remarking that “[t]he battle in a lot of cases is lost or won before the trial even commences, that is, at the jury selection stage”); Cheryl A. C. Brown, Comment, *Challenging the Challenge: Twelve Years After Batson, Courts are Still Struggling to Fill in the Gaps Left by the Supreme Court*, 28 U. BALT. L. REV. 379, 379 (1999) (“Many attorneys believe that a case can be won or lost during the jury selection stage of the trial.”); Eric Wertheim, Note, *Anonymous Juries*, 54 FORDHAM L. REV. 981, 984 (1986) (“[M]any attorneys believe trials are frequently won or lost during jury selection.”).

Cf. Milstein v. Mut. Sec. Life Ins. Co., 705 So.2d 639, 641 (Fla. Dist. Ct. App. 1998) (Sorondo, J., specially concurring) (“I begin with the premise that jury selection is the most significant stage of any trial.”); IRVIN OWEN, DEFENDING CRIMINAL CASES BEFORE JURIES: A COMMON SENSE APPROACH 92, 109 (1973) (stating that “[a] few authors actually rate [voir dire as] the most important element in trial preparation”); JOHN PROFATT, A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT § 166 (San Francisco, Sumner Whitney & Co. 1877) (“The examination of jurors on the *voir dire* is looked upon by the practitioner as a very critical period of the procedure, when the greatest circumspection and discrimination are to be exercised. Accordingly we find the process lengthened to a tedious and exasperating extent in trials of great importance”); Cathy E. Bennet et al., *How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases*, 46 SMU L. REV. 659, 680-81 (1992) (explaining that a good trial attorney puts the same amount of effort in selecting a jury as is put in presentation at trial “because he or she realizes that he or she can put on the best play in the world, but without an audience that is receptive to the play, it will be misunderstood and not comprehended”); Morris Dees, *The Death of Voir Dire*, 20 LITIG. 14, 14 (1993) (“Skillfully conducted voir dire is the most important element in a fair trial.”); William C. Slusser et al., *Batson, J.E.B., and Purkett: A Step-by-Step Guide to Making and Challenging Peremptory Challenges in Federal Court*, 37 S. TEX. L. REV. 127, 129 (1996) (asserting that jury selection is the most important part of a trial because the jury makes the ultimate decision); Harvey Weitz, *Voir Dire in Conservative Times*, 23 LITIG. 15, 15 (1996) (“Voir Dire is the most important, yet least understood portion of a jury trial.”); Maureen E. Lane, Note, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 SUFFOLK U. L. REV. 463, 467 (1999) (“Because the jurors decide the ultimate fate of their client, some trial attorneys assert that the jury selection process constitutes the most important phase of the trial.”).

But see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 362-72 (1966) (survey finding that trial judges, asked to specify aspects of trial performance likely to produce inequality, did not even mention jury selection practices, indicating that the judges surveyed believed that the differences in jury selection skills affected trial outcomes far less than other advocacy skills); Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 507 (1965) (observing, in a study of civil and criminal jury trials in a Midwestern federal district court in the late 1950s, that “several of the lawyers regarded *voir dire* with disdain, as unlikely to affect materially the result, regardless of what was said or who was challenged or left on the panel. Judging from the performances turned in, there was overall a kind of fatalistic attitude, a feeling that one group of twelve was as likely to be as good or as bad as another.”); Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 424 n.119 (1995) (questioning conventional wisdom on the determinativeness of jury selection); Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 278 & n.4, 282 (2001) [hereinafter Eisenberg et al., *Forecasting*] (concurring broadly with the conception of jury composition as important in outcome determination, but noting the crucial role of facts in capital sentencing; “The most egregious cases will tend to produce death verdicts no matter who sits on the jury; the least egregious will tend to produce life verdicts.” The article continues: “Jury verdicts usually depend more on the facts of the case and less on the personal characteristics of the jurors.”); Michael J. Saks, “Scientific” Jury Selection: Social Scientists Can’t Rig Juries, *PSYCHOL. TODAY*, Jan. 1976, at 48 (reviewing research and concluding that the quality of evidence is more important to the outcome of the case than is the composition of the jury); Shari

literally a matter of life or death.² Given these high stakes and Supreme Court case law setting out standards for voir dire in capital cases, one might expect a sophisticated and thoughtful process in which each side carefully considers which jurors would be best in the particular case. Instead, it turns out that voir dire in capital cases is woefully ineffective at the most elementary task—weeding out *unqualified* jurors.

Empirical evidence reveals that many capital jurors are in fact unqualified to serve. Moreover, the ineffectiveness of the process is far from even-handed. A juror is not "death-qualified" if she would always vote against a death sentence, regardless of the circumstances, and a handful of the jurors who actually serve in capital cases are in fact unqualified for this reason.³ On the other hand, a juror is not "life qualified" if she would always vote for a death sentence upon the proof of capital murder;⁴ if she is a "burden shifter," a person who requires the defendant to demonstrate why she deserves to live;⁵ or because she is

Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178, 182 (1989) (reviewing research and concluding that the quality of evidence is more important in determining the outcome than is the composition of the jury); Rodger L. Hochman, Note, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367, 1397 n.165 (1993) (noting study results demonstrating that determinativeness of jury selection may be overvalued).

2. This is all the more true today in capital cases because, especially in the wake of limitations placed on federal habeas corpus remedies by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2244, 2253-55, 2261-66 (1994 & Supp. 2000), appellate and collateral review have become far more reluctant sources of correction for capital-trial error, in particular for claims of ineffective assistance of counsel. Voir dire must be conducted with the knowledge that "the trial of capital defendants has become 'virtually the whole ball game.'" ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Guideline 1.1 cmt. (1989) [hereinafter ABA GUIDELINES] (quoting William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737, 779 (1984)); see also John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480, 1488-1509 (1999) (analyzing the United States Fourth Circuit Court of Appeals' hostility toward ineffective-assistance-of-counsel claims).

3. Defense lawyers, prosecutors, and trial judges often refer to these jurors as "Witherspoon excludables," or "WEs," referring to the Supreme Court's holding in *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

4. For the use of this term, and its correlated term of "'reverse-Witherspoon' question," see *Morgan v. Illinois*, 504 U.S. 719, 724-25 & n.4 (1992), in which the Court reversed the judgment of the Illinois Supreme Court, 568 N.E.2d 755 (1991). The Illinois court had rejected the death-sentenced petitioner's "claim that, pursuant to *Ross v. Oklahoma*, 487 U.S. 81 (1988), voir dire must include the 'life qualifying' or 'reverse-Witherspoon' question upon request." *Id.* at 778. For an early example of the use of this term, see *People v. Ramirez*, 457 N.E.2d 31, 41 (Ill. 1983).

5. Defense lawyers, prosecutors and trial judges often refer to these jurors as "automatic death penalty" or "ADP jurors." Early use of the term may be found at *Grigsby v. Mabry*, 569 F. Supp. 1273, 1287, 1305-06, 1318 (E.D. Ark. 1983), *rev'd sub nom.* *Lockhart v. McCree*, 476 U.S. 162 (1986). See also *Hovey v. Superior Court*, 616 P.2d 1301, 1310-11 nn.48-49, 1319-20 nn.70-71, 1343-46 nn.110-12 & 115, 1353 n.133 (Cal. 1980), *superseded by statute*, CAL. CIV. PROC. CODE § 223 (West Supp. 2001).

6. This is the term often used by defense lawyers, prosecutors and trial judges. For an early example of the concept's appearing in a capital case, albeit with regard to proof regarding the question of guilt or innocence, see *People v. Cornett*, 198 P.2d 877 (Cal. 1948) (Traynor, J.), in which the court

“mitigation impaired,” a person who is unwilling to consider one or more mitigating factors that the Supreme Court has said jurors *must* be willing to consider.⁷ In contrast to the small number of “death unqualified” jurors who actually serve in capital cases, far larger numbers of jurors who are not “life qualified” serve in capital cases.⁸

Part II of this article will summarize the law relevant to determining who is qualified to sit as a juror in a capital case, and then demonstrate the magnitude of the problem of unqualified jurors as revealed by the current empirical findings of capital juror studies. Part III then examines how and why voir dire malfunctions in capital cases, thereby allowing unqualified jurors to sentence defendants to death. Part IV will suggest several ways in which courts may help rectify the problem of the unconstitutional empanelment of jurors who are “uncommonly willing to condemn a man to die.”⁹

II. THE DOCTRINE AND PRACTICE OF CAPITAL JUROR QUALIFICATION

A. *The Constitutional Constraints on a Capital Juror's Beliefs*

1. The Structure of Constitutional Capital Punishment

In every case, a prospective juror must be able and willing to follow the applicable law in order to be deemed qualified to serve.¹⁰ Put

found that because of faulty instructions by the trial judge, “[t]he jury . . . may have believed that after the prosecution had completed its case the *burden shifted* upon the defendant to prove that the homicide was excusable.” *Id.* at 885 (emphasis added).

7. “Mitigation-impaired” is the term often used by defense lawyers, prosecutors and trial judges.

8. See John H. Blume et al., *Lessons from the Capital Jury Project*, in *THE MODERN MACHINERY OF DEATH: CAPITAL PUNISHMENT AND THE AMERICAN FUTURE* (forthcoming 2001) (manuscript at 8-11 & tbls.1-2 & n.8, on file with the Center for Capital Litigation, Columbia, S.C.) [hereinafter Blume, *MODERN MACHINERY*]; Eisenberg et al., *Forecasting*, *supra* note 1, at 279 (“Capital juries often contain members whose support for the death penalty undermines their impartiality and renders them legally ineligible to serve. Once seated, these jurors push the final verdict heavily toward death.”). The empirical evidence, therefore, casts doubt on the Supreme Court’s postulation that, “[d]espite the hypothetical existence of the juror who believes literally in the Biblical admonition ‘an eye for an eye,’ it is undeniable . . . that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment.” *Adams v. Texas*, 448 U.S. 38, 49 (1980) (White, J.) (citation omitted) (referring to a statute that provided for challenges to jurors who stated that their views on the death penalty would affect their deliberations on fact issues). Although Justice White’s skepticism about the even-handedness of the Texas law seems well placed, it is not that “eye for an eye” jurors are scarce, but that the jury selection process, in Texas and elsewhere, seems exceptionally ineffective at nailing down their actual views and preventing their placement on capital juries.

9. *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968).

10. Theoretically, the Constitution does not require that a juror be willing to impose the death penalty in order to be qualified to serve on a capital jury. See *infra* notes 32-38 and accompanying text. Nevertheless, all United States death-penalty jurisdictions provide that absolute unwillingness to impose a death sentence is cause to excuse a juror in a capital case.

differently, when a juror has beliefs that prevent her from following the law, she should be disqualified. To recognize when a juror's beliefs disqualify her from service in a death penalty case, it is therefore necessary to start with the outlines of capital sentencing law, and then to compare jurors' beliefs against that standard.

Since the mid-1970s, it has been clear that the touchstone of constitutional death penalty statutes is individualized decision-making. After the Supreme Court struck down the death penalty in *Furman v. Georgia*,¹¹ it was clear that the arbitrariness and capriciousness condemned by the Court in *Furman* would have to be cured or at least ameliorated in order for any new statutory scheme to pass constitutional muster. Two approaches were tried. One was mandatory death penalty statutes; the theory behind these statutes was that they eliminated arbitrariness by eliminating all discretion. The Supreme Court, however, struck down statutes that followed this approach. North Carolina's broad mandatory scheme was deemed impermissible for its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."¹² Nor was the breadth of the North Carolina statute the only stumbling block to constitutionality. Narrower mandatory statutes were also overturned because the Court reasoned that evolving standards of decency had rejected the belief that "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."¹³

Other states took a different approach to the arbitrariness problem identified in *Furman*. These states developed schemes of aggravating and mitigating factors that were designed to *guide* discretion. The Supreme Court approved these "guided discretion" schemes in *Gregg v. Georgia*,¹⁴ reasoning that the concerns expressed in *Furman* "can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."¹⁵ Thus, any juror, to follow the law applicable to a capital case, and thus to be qualified to serve, must not *automatically* impose the death penalty; she must be able to consider aggravating and mitigating factors.

Post-*Gregg* capital sentencing law has elaborated on the requirements of both the aggravating and the mitigating aspects of

11. 408 U.S. 238 (1972) (per curiam).

12. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion).

13. *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (plurality opinion) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

14. 428 U.S. 153 (1976) (plurality opinion).

15. *Id.* at 195.

guided discretion. The requirements related to aggravating factors are fairly simple; aggravating factors may not be vague, and they must not penalize constitutionally protected conduct.¹⁶ While the State must prove beyond a reasonable doubt the existence of a statutorily listed factor that aggravates a crime beyond simple murder, it may also introduce evidence of non-statutory factors about the defendant or crime that makes the death penalty more appropriate, including victim impact evidence.¹⁷

The law related to mitigation is more complex. Mitigating evidence neither justifies nor completely excuses an offense, but is evidence that “in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.”¹⁸ The Supreme Court’s mitigation decisions have increasingly stressed that possession of the fullest information possible concerning the defendant’s life and character is highly relevant, if not essential, to the sentencing body’s constitutional ability to determine the appropriate sentence. In *Lockett v. Ohio*,¹⁹ the first of the post-*Gregg* mitigation cases, a plurality of the Court set forth the general principle:

[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.²⁰

In striking down the Ohio statute at issue in *Lockett*, the Court held that the statute’s failure to permit consideration of the defendant’s age or relatively minor role in the offense violated the constitutional requirement of individualized sentencing.²¹ Subsequently, in *Eddings v. Oklahoma*,²² the Court applied the *Lockett* rule to reverse a death sentence where the sentencing judge refused to consider evidence of

16. See *Payne v. Tennessee*, 501 U.S. 808, 825, 827 (1991).

17. See *id.* at 827.

18. BLACK’S LAW DICTIONARY 1002 (6th ed. 1990) (defining “[m]itigating circumstances”). This language has been reiterated or reflected in statute; see, for example, CONN. GEN. STAT. ANN. § 53a-46a(d) (West Supp. 2001). Judicial opinions have noted this definition since the first edition of *Black’s*. See *People v. Leong Fook*, 273 P. 779, 781 (Cal. 1928) (in bank) (citing 2d edition); *Smith v. People*, 75 P. 914, 916 (Colo. 1904) (citing *Black’s* without reference to edition—thus, presumably, citing the first edition). Compare with the current edition’s definition: “A fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce . . . the punishment [in a criminal case].” BLACK’S LAW DICTIONARY 236 (7th ed. 1999).

19. 438 U.S. 586 (1978) (plurality opinion).

20. *Id.* at 604 (footnote omitted).

21. See *id.* at 608 (“The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments.”).

22. 455 U.S. 104 (1982).

"a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance."²³

*Hitchcock v. Dugger*²⁴ further elaborated on the variety of psychological factors that *Lockett* covers. Hitchcock's counsel presented sentencing-phase evidence that, as a child, Hitchcock had habitually inhaled gasoline fumes, on one occasion he had passed out from doing so, and thereafter his mind wandered, that he had been one of seven children in a poor family that had to pick cotton for its living, that his father had died of cancer, and that Hitchcock had been a loving uncle.²⁵ Because the trial judge instructed the advisory jury to consider only *statutory* mitigating circumstances, and the sentencing judge refused to consider these other, *non-statutory* mitigating factors, the Court reversed Hitchcock's sentence.²⁶ Similarly, in *Penry v. Lynaugh*,²⁷ the Court held that the Texas death penalty statute failed to provide the jury "with a vehicle for expressing its 'reasoned moral response'" to evidence of the defendant's mental retardation and abused background.²⁸

Thus, as a constitutional matter, a juror must be open to considering a variety of mitigating evidence. Moreover, *Mills v. Maryland*²⁹ mandates that each juror must be allowed to determine for herself whether the defendant has persuaded her of the existence of a mitigating factor.³⁰ *Mills* holds that juries may not be instructed to impose a sentence of death just because the jurors cannot *unanimously* agree on the existence of a mitigating circumstance.³¹ Therefore, voir dire should ensure that the venire members seated on the jury are empowered to react to mitigating evidence in accordance with the dictates of their conscience, even in the face of adverse reactions from other jurors.

2. Capital Jury Voir Dire Decisions

Thus far we have summarized voir dire implications that flow from the structure of the capital sentencing decision. The more direct—but also more limited—source of guidance are the three Supreme Court decisions that address capital jury selection procedures. *Witherspoon v.*

23. *Id.* at 115.

24. 481 U.S. 393 (1987) (unanimous decision).

25. *See id.* at 397.

26. *See id.* at 398-99 (holding that sentencer may not refuse to consider, or be barred from considering, nonstatutory mitigating evidence).

27. 492 U.S. 302 (1989).

28. *Id.* at 328.

29. 486 U.S. 367 (1988).

30. *See id.* at 384.

31. *See id.*

*Illinois*³² holds that persons who have qualms about the death penalty in general, and who might be inclined to oppose it as a matter of public policy, but who can put aside those reservations in a particular case, and in compliance with their oaths as jurors consider imposing the death penalty according to the relevant state law, may *not* be precluded from serving as capital-case jurors.³³ *Witherspoon*, in short, is a specific “limitation on the State’s power to *exclude*” persons with qualms about the death penalty from capital juries.³⁴ Illinois law prior to 1960 provided that in capital trials, the state could challenge for cause any juror who, on the basis of “religious or conscientious scruples against capital punishment[,] might *hesitate* to return a verdict inflicting [death].”³⁵ The trial judge in *Witherspoon* said, near the beginning of voir dire, “Let’s get these conscientious objectors out of the way, without wasting any time on them.”³⁶ While the Supreme Court declined to conclude that the exclusion of jurors opposed to the death penalty produced juries unconstitutionally predisposed to *convict*,³⁷ it did hold that, with respect to sentencing, the sweeping nature of the Illinois exclusion produced not an impartial jury, but “a jury uncommonly willing to condemn a man to die.”³⁸

Notwithstanding the degree to which *Witherspoon* limits the State’s power to exclude jurors, the Court held in *Wainwright v. Witt*³⁹ that a person with absolutist views on the death penalty—relentlessly favoring it or adamantly opposing it—may be precluded from service, and those absolutist views need not be proved with “unmistakable clarity” in order to disqualify her from service as a juror in a capital trial.⁴⁰ Trial courts are supposed to assess juror qualification with respect to a standard of “whether the juror’s views would prevent or substantially impair the

32. 391 U.S. 510 (1968).

33. *See id.* at 519-23; *see also* Morgan v. Illinois, 504 U.S. 719, 731-32 (1992) (characterizing the holding of *Witherspoon*).

34. Adams v. Texas, 448 U.S. 38, 48 (1980) (emphasis added). It is important to bear in mind that *Witherspoon* does not hold that jurors opposed to the death penalty are unqualified to serve in capital cases; “*Witherspoon* is not a ground for challenging any prospective juror.” *Id.* at 47-48. Instead, *Witherspoon* restricted states from excusing jurors who, despite their reservations about the death penalty, are able in an appropriate case to vote for the death penalty. If it so desired, a state could choose to let WEs—persons who would *never* vote to sentence a defendant to death—serve on capital juries. In contrast, a state could *not* permit ADP jurors to serve. *See Morgan*, 504 U.S. at 728-29, 735. The rule against ADP jurors, which will be discussed below, is not, like the *Witherspoon* rule, a constraint on the State’s power to exclude, but is instead a constitutional limitation on the State’s right to *allow* a juror to serve.

35. People v. Carpenter, 150 N.E.2d 100, 103 (Ill. 1958) (emphasis added).

36. *Witherspoon*, 391 U.S. at 514.

37. *See id.* at 516-18.

38. *Id.* at 521.

39. 469 U.S. 412 (1985).

40. *See id.* at 424.

performance of his duties as a juror in accordance with his instructions and his oath."⁴¹ Appellate courts, in most cases, must extend deference to the trial judge's exercise of discretion in determining whether, in the course of voir dire, she "is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law."⁴² Such jurors are often referred to as "*Witherspoon*-excludables."⁴³

In the third decision, *Morgan v. Illinois*,⁴⁴ the Court reiterated that jurors who would "be unalterably in favor of, or opposed to, the death penalty in every case . . . by definition are ones who cannot perform their duties in accordance with law."⁴⁵ In particular, "juror[s] who will automatically vote for the death penalty in every case" must be disqualified from service, because their presence on the jury would violate "the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment."⁴⁶ The right to an impartial jury, guaranteed by the Sixth and Fourteenth Amendments, cannot be secured without "an adequate *voir dire* to identify unqualified jurors."⁴⁷ "[G]eneral fairness and 'follow the law' questions" do not constitute adequate voir dire because:

[A] juror could, in good conscience, swear to uphold the law and yet be unaware that [underlying] dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception.⁴⁸

Importantly, *Morgan* also indicates that a broad range of *mitigation-impaired* jurors are constitutionally unqualified. As Justice Scalia pointed out in his dissent:

[I]t is impossible in principle to distinguish between a juror who does not believe that *any* factor can be mitigating from one who believes that a *particular* factor—*e.g.*, "extreme mental or emotional disturbance[]"—is not mitigating (presumably, under today's decision a juror who thinks a "bad childhood" is never mitigating must also be excluded).⁴⁹

41. *Id.* (internal quotation marks omitted).

42. *Id.* at 426.

43. The Supreme Court also uses this term. See *Lockhart v. McCree*, 476 U.S. 162, 180 (1986); see also *Morgan v. Illinois*, 504 U.S. 719, 733 (1992).

44. 504 U.S. 719 (1992).

45. *Morgan*, 504 U.S. at 735; see also *Lockhart*, 476 U.S. at 176.

46. *Morgan*, 504 U.S. at 729.

47. *Id.*

48. *Id.* at 734-36 (footnote omitted).

49. *Id.* at 744 n.3 (Scalia, J., dissenting) (citation omitted).

In other words, the class of mitigation-impaired—and constitutionally unqualified—jurors includes not only those who are unable or unwilling to ever consider *any* form of mitigation, but also those who are either unable or unwilling ever to consider a *particular* mitigating factor.⁵⁰ We

50. “Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to *consider and give effect* to that evidence in imposing sentence.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (emphasis added).

Although it is not within the scope of this article, we note that, even if all the constitutional qualifications reviewed above were scrupulously implemented, and all unqualified jurors were actually kept from serving on capital juries, the exclusion of the class of persons adamantly opposed to the death penalty in all circumstances would still result in capital juries being composed of persons more inclined to *convict* in the guilt-or-innocence phase than juries that are not death-qualified. See *Grigsby v. Mabry*, 569 F. Supp. 1273, 1291-1305 (E.D. Ark. 1983) (assessing studies showing that going through death qualification increases willingness of individual jurors to convict and condemn, as well as resulting in juries that are more disposed to reach those outcomes), *rev'd sub nom.* *Lockhart v. McCree*, 476 U.S. 162 (1986); *Hovey v. Superior Court*, 616 P.2d 1301, 1314-55 (Cal. 1980) (discussing studies that demonstrate the conviction proneness of death-qualified juries), *superseded by statute*, CAL. CIV. PROC. CODE § 223 (West Supp. 2001); Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 141 n.593 (1996) (reviewing judicial decisions, scholarship, and studies confirming that death-qualified juries are conviction-prone); Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 55-75 (1984) (examining studies that almost universally conclude that death qualification produces juries more predisposed to convict than non-death-qualified juries); Eisenberg et al., *Forecasting*, *supra* note 1, at 283-84 & n.32, 307-08; Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 42, 58 (Reid Hastie ed., 1993). Even though the Supreme Court has rejected arguments that death-qualification impairs a defendant's constitutional right to an impartial jury, see *Lockhart v. McCree*, 476 U.S. 162, 173-84 (1986), the empirical evidence establishes that death-qualified juries are more conviction-prone than other juries, because of either the types of jurors the process selects and excludes, or the effect of the process on jurors' views and perceptions, or both. See, e.g., ABA GUIDELINES, *supra* note 2, Guideline 11.7.2 cmt. (observing that the winnowing of WEs from the venire “effectively skews the jury pool not only as to imposition of the death penalty but as to conviction”); Ronald C. Dillehay & Marla R. Sandys, *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification*, 20 LAW & HUM. BEHAV. 147, 156-64 (1996); Jane Goodman-Delahunty et al., *Construing Motive in Videotaped Killings: The Role of Jurors' Attitudes Toward the Death Penalty*, 22 LAW & HUM. BEHAV. 257, 269 (1998) (discussing study results suggesting death-qualified jurors are more conviction-prone than non-death-qualified jurors); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 128 (1984) [hereinafter Haney, *Selection of Capital Juries*] (“Exposure to death qualification increase[s] jurors' belief in the guilt of the defendant and their estimate that he [will] be convicted.”); James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 275 (1988) (discussing study revealing that individuals strongly opposed to the death penalty are more likely to find mitigating circumstances); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 111 (1984) (concluding from experimental empirical study that death-qualified jurors tend to favor the State in interpreting testimony and require less evidence to convince them of guilt beyond a reasonable doubt, therefore making them more conviction-prone than jurors in general); see also Craig Haney et al., “Modern” *Death Qualification: New Data on Its Biasing Effects*, 18 LAW & HUM. BEHAV. 619, 631 (1994) [hereinafter Haney et al., *Death-Qualification*] (concluding that death-qualification “continues to produce a group of eligible jurors in capital cases—under whatever standard they are defined—that appear to be significantly different on a number of important dimensions from jurors eligible to sit in any other kind of criminal case”). Studies also indicate that death-qualified jurors are more strongly influenced by aggravating factors than are jurors in general. See, e.g., Goodman-Delahunty et al., *supra*, at 269 (concluding from mock jury study that death-qualified jurors will more likely “infer . . . (1) that the defendant intended to murder the victim, (2) that his specific actions indicated premeditation, (3) that

want to be careful not to overstate this holding: *Morgan* does not mean that jurors are required to assign any particular weight to mitigation in any particular case, or to any particular form of mitigation, but only that they must be willing and able to give meaningful consideration to mitigating evidence.⁵¹

Thus, taken together, these constitutional constraints mean that in order to be qualified to serve in a capital case, a prospective juror must be willing and able to: (1) require the State to prove all of the elements of murder and an aggravating factor beyond a reasonable doubt; (2) make an individualized decision in cases where both murder and an aggravating circumstance has been proven beyond a reasonable doubt as to whether death is the right punishment in that case, neither rejecting nor imposing it in every case; (3) give meaningful consideration to a wide range of mitigating factors; and (4) listen to and consider the thoughts of fellow jurors but stand her ground if convinced of a conclusion contrary to that of other jurors.

B. *The Empirical Realities of Capital Jury Composition*

The obvious question is how well current voir dire practices succeed in weeding out unqualified jurors. Here we turn to the Capital Jury Project⁵² ("CJP"), which provides valuable insights into how the

the defendant's substance abuse did not mitigate his actions, and (4) that the defendant would be a future threat to society"); Luginbuhl & Middendorf, *supra*, at 275 (finding that a study of 325 North Carolina venire members showed *Witherspoon*-excludable jurors to be "significantly less supportive of aggravating circumstances than the remaining, death-qualified jurors, while they did not differ with regard to overall acceptance of mitigating circumstances").

51. Our conclusions in this area of the law concur in most respects with those of John Holdridge. See John Holdridge, *Selecting Capital Jurors Uncommonly Willing to Condemn a Man to Die: Lower Courts' Contradictory Readings of Wainwright v. Witt and Morgan v. Illinois*, 19 MISS. C.L. REV. 283 (1999). We do, however, differ with his conclusion that the Constitution does not require that capital jurors be able to consider specific mitigating factors. See *id.* at 303 n.84 (asserting that courts need not permit the defense "to challenge for cause prospective jurors who are unwilling to accord a specific mitigating circumstance a certain (or indeed any) weight" (emphasis added)).

52. The Capital Jury Project ("CJP") is a National Science Foundation-funded, multi-state research effort designed to better understand the dynamics of juror decision-making in capital cases. The CJP is a loose association of academics from different disciplines (primarily law and criminology) and institutions who in 1990 began interviewing jurors in a number of different states who had served on capital cases, some of which resulted in a sentence of death, and some a sentence of life imprisonment. Analyses of the data collected during these interviews began appearing as early as 1993.

Quantitative analyses of CJP data can be found in 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, 189 (2001) (multistate data); William J. Bowers et al., *Forclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1486 (1998) [hereinafter Bowers et al., *Forclosed Impartiality*] (multistate data); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 643 (1999) (multistate data); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1599-1601 (1998) (South Carolina data); Theodore Eisenberg &

capital punishment system in general, and voir dire in particular, work in practice. The picture it paints is not a pretty one, and confirms what many experienced capital litigators believe from their own experience to be true: the death penalty deck is often stacked against the defendant, not by the facts of the case, but by the inclusion of unqualified jurors.

1. Automatic Death Penalty Jurors

The starkest failure of capital voir dire is the qualification of jurors who will automatically impose the death penalty (“ADP jurors”) regardless of the individual circumstances of the case. For example, data from South Carolina⁵³ show that 14% of jurors who have actually served in capital cases believe that the death penalty is the *only* acceptable punishment for a defendant who has been convicted of murder.⁵⁴ Although 14% is an average of slightly fewer than two jurors per twelve-person jury, that number is nonetheless significant. Studies of South Carolina juries show that when eight or more jurors favored death in the first vote of sentencing deliberations, death sentences were the final verdict in greater than 87% of the cases—and when nine or more jurors favored death on the first vote, all the juries studied returned a death verdict.⁵⁵ In contrast, when *fewer* than eight jurors favored death on the

Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 1 (1993) (South Carolina data); Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 373 (2001) (South Carolina data); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 349-350 (1996) [hereinafter Eisenberg et al., *Jury Responsibility*] (South Carolina data); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539-40 (1998) [hereinafter Garvey, *Aggravation and Mitigation*] (South Carolina data); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 28-30 (2000) (South Carolina data); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1161-62 (1995) (North Carolina data); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1188 (1995) (Kentucky data); 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 LAW & SOC’Y REV. 461, 473-74 (1999) (multistate data); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1559 (1998) (California data); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1112-13 (1997) (California data).

Qualitative analyses of CJP data to date can be found in Joseph L. Hoffmann, *Where’s the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1138 (1995) (Indiana data); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1121 (1995) (Georgia data).

53. CJP data indicates “that South Carolina jurors behave much like jurors in other states.” Eisenberg et al., *Forecasting*, *supra* note 1, at 280 & n.10.

54. See Blume, *MODERN MACHINERY*, *supra* note 8 (manuscript at 8 tbl.1). Indeed, significant minorities of jurors believed that death is the only acceptable punishment for some *non-capital* crimes that do not result in a person’s death. See *id.* (manuscript at 10 tbl.2).

55. See *id.* (manuscript at 33).

first vote, *none* of the juries surveyed returned a death verdict.⁵⁶ The final outcome swings precipitously on a difference of only two votes. In "close" cases, the inclusion of constitutionally unqualified jurors who will automatically vote to sentence a convicted murderer to death results in a devastating denial of the defendant's constitutional right to an impartial jury and individualized consideration.⁵⁷

56. "The tipping point is juror eight. If juror eight goes with the prosecution and the jury reaches unanimity, the result will be death; if juror eight goes with the defense, the result will be life." Eisenberg et al., *Forecasting*, *supra* note 1, at 303-04 & tbl.7 & nn.89 & 91.

57. See *id.* at 279 (observing that the seating of jurors whose avid support of the death penalty renders them biased—and legally ineligible to serve—"push[es] the final verdict heavily toward death"); Richard S. Jaffe, *Capital Cases: Ten Principles for Individualized Voir Dire on the Death Penalty*, CHAMPION, Jan.-Feb. 2001, at 35, 36 ("When it comes to the punishment phase, the vote of one or two jurors will often be the deciding factor between life and death.")

In most death penalty states, for example, Arkansas, California, Georgia, Illinois, Kansas, Louisiana, Maryland, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming, and in all federal district court and military court-martial capital prosecutions, it takes only one juror to refuse to vote for the death penalty in a particular case before the law requires that a life sentence be imposed. See Federal: 18 U.S.C. § 3593(c) (1994); Military: 10 U.S.C. § 852(b)(1) (1998) ("No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death."); Arkansas: ARK. CODE ANN. § 5-4-603(a) (Michie 1997); California: *People v. Crittenden*, 885 P.2d 887, 928, 933 (Cal. 1994) (holding that jurors must "unanimously determine that the aggravating factors outweigh the mitigating factors"); *People v. Miranda*, 744 P.2d 1127, 1152-53 (Cal. 1987) ("Generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding. A defendant is, of course, entitled to a unanimous jury verdict in the final determination as to penalty."); Georgia: GA. CODE ANN. § 17-10-31.1(c) (1997) (if a sentencing jury "has unanimously found the existence of at least one statutory aggravating circumstance but is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole"); Georgia case law emphatically favors unanimous jury votes in sentencing verdicts, see *Romine v. State*, 350 S.E.2d 446, 450-51 (Ga. 1986); Illinois: 720 ILL. COMP. STAT. ANN. 5/9-1(g) (West Supp. 2001) ("If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death."); Kansas: KAN. CRIM. CODE ANN. § 21-4624(e) (West Supp. 2000); Louisiana: LA. CODE CRIM. PROC. ANN. art. 905.7 (West 1997); Maryland: MD. ANN. CODE art. 27, § 413(i) (Supp. 2000); Mississippi: MISS. CODE ANN. § 99-19-101(3) (2000); Missouri: MO. ANN. STAT. § 565.030(4) (West 1999) (death sentence will not be imposed if jury "is unable to decide or agree upon the punishment"); New Hampshire: N.H. REV. STAT. ANN. § 630:5(IV) (2000); New Jersey: NJ. STAT. ANN. § 2C:11-3(c)(3)(c) (West 2000) (death sentence may not be imposed "[i]f the jury is unable to reach a unanimous verdict"); New Mexico: N.M. STAT. ANN. § 31-20A-3 (Michie 2000); New York: N.Y. CRIM. PROC. LAW § 400.27(10), (11)(a), (d)-(e) (McKinney Supp. 2001) (jury must be unanimous to impose either death sentence or life without parole); North Carolina: N.C. GEN. STAT. § 15A-2000(b) (2000) (death sentence may not be imposed without jury's unanimous agreement); Ohio: OHIO REV. CODE ANN. § 2929.03(D)(2) (Anderson 2001) (if the jury "unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender"); Oklahoma: OKLA. STAT. ANN. tit. 21, § 701.11 (West Supp. 2001) (jury's death-sentence verdict must be unanimous); Oregon: OR. REV. STAT. § 163.150(1)(c)(B), (1)(e) (1999) (jury may not determine defendant should be sentenced to death if one or more jurors do not believe defendant should receive death sentence); Pennsylvania: 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iv)-(v) (West Supp. 2001); South Carolina: S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 2000) ("The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided."); Tennessee: TENN. CODE ANN. § 39-13-20(g)(2)(B) (Supp. 2000) (death sentence requires that all jurors

sign verdict form stating that they “unanimously find that the punishment shall be death”); Texas: TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2000) (jury must be unanimous in returning special verdicts adverse to defendant in order for the court to sentence defendant to death); Utah: UTAH CODE ANN. § 76-3-207(4)(a)-(c) (1999) (jury must reach unanimous agreement in order to impose death sentence); Virginia: VA. CODE ANN. § 19.2-264.4(D)(1) (Michie 2001) (written death-sentence verdict specifies that the jury is unanimous); Washington: WASH. REV. CODE ANN. §§ 10.95.060(4), 10.95.080(1) (2000) (if jury unanimously finds insufficient grounds for leniency, it must impose death sentence); Wyoming: WYO. STAT. ANN. § 6-2-102(b), (d)(ii) (Michie 2001) (“[I]f the jury does not unanimously determine that the defendant should be sentenced to death, then the defendant shall be sentenced to life imprisonment without parole[,] or [to] life imprisonment.”).

Indiana and Nevada require jury unanimity in sentencing recommendations, but in the absence of a unanimous decision responsibility for sentencing passes to the court or to a panel of judges, which may impose a death sentence; in Indiana, the court in any case is not bound by even a unanimous jury sentencing recommendation. *See* Indiana: IND. CODE ANN. § 35-50-2-9(f) (West Supp. 2001) (“If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.”), which the state supreme court has held to mean that the jury may make a sentencing recommendation only if it reaches a unanimous decision, *see* Hough v. State, 690 N.E.2d 267, 274 (Ind. 1997), but “[t]he court is not bound by the jury’s recommendation.” § 35-50-2-9(e); Nevada: NEV. REV. STAT. § 175.556.1 (1999) (if jury is unable to reach unanimous verdict on the sentence, the trial judge and two other judges appointed by supreme court shall conduct penalty hearing, but death sentence may be imposed only by unanimous vote of panel).

Alabama, Delaware and Florida, however, provide for the imposition of death sentences on less-than-unanimous verdicts. *See* Alabama: ALA. CODE § 13A-5-46(f) (1994) (an advisory verdict recommending a death sentence requires an affirmative vote of “at least [ten] jurors,” and “an advisory verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors”); Delaware: DEL. CODE ANN. tit. 11, § 4209(c)(3) (1995) (jury’s recommendations on the two critical interrogatory issues are reported to the court “by the number of each affirmative and negative votes on each question”); the jury’s recommendations are not binding on the court’s determination of sentence, *see* Shelton v. State, 652 A.2d 1, 5 (Del. 1995) (holding that “the jury makes a recommendation only—the ultimate decision is made by the trial court”); Wright v. State, 633 A.2d 329, 335 (Del. 1993) (holding that “the Superior Court bears the ultimate responsibility for imposition of the death sentence while the jury acts in an advisory capacity”); State v. Cohen, 604 A.2d 846, 856 (Del. 1992); perforce a Delaware jury need not unanimously find the existence of a statutory aggravator nor unanimously find that aggravators outweigh mitigators in order that the court may impose a death sentence; Florida: FLA. STAT. ANN. ch. 921.141(2)-(3) (West 2001) (simple majority of jury suffices for advisory sentence, which is in any case not binding on the trial judge); Jackson v. State, 530 So.2d 269, 271 (Fla. 1988) (trial judge may accept death-sentence recommendation by simple majority vote of jury).

Connecticut, Kentucky and South Dakota do not unequivocally indicate whether the jury must return a unanimous verdict to impose a death sentence. *See* Connecticut: State v. Ross, 646 A.2d 1318, 1352 (Conn. 1994) (holding that death sentence is mandatory only if the jury “determine[s] unanimously that at least one aggravating factor exists and no mitigating factors exist”); *but see id.* at 1373, 1388-90 (Berdon, J., dissenting in part) (arguing that the state’s death penalty statute requires that certain findings regarding aggravation or mitigation be unanimous, but that at no place does the statute require the jury to declare a verdict sentencing the defendant to death—much less that it requires the jury do so unanimously); Kentucky: KY. REV. STAT. ANN. § 532.025(1)(b), (3) (Michie 1999) (unanimity not specified, although the statute refers to a sentencing “verdict,” which implies a unanimous decision); South Dakota: S.D. CODIFIED LAWS § 23A-27A-4 (Michie 1998) (death sentence “shall not be imposed unless the jury verdict at the presentence hearing includes . . . a recommendation that such sentence be imposed”); the reference to a “verdict” implies a unanimous decision); § 23A-27A-5 (death sentence verdict must designate an aggravating circumstance found beyond a reasonable doubt, a standard that presumably requires unanimity). But for authority that a “reasonable doubt” standard does not absolutely require unanimity, *see* Johnson v. Louisiana, 406 U.S. 356, 363 (1972) (holding that “want of jury unanimity is not to be equated with the existence of a reasonable doubt”). Despite the ambiguity of these three states’ statutes, other sources of law may suggest that a requirement for jury unanimity is more likely than not the rule in each state. The requirement for jury unanimity in criminal trials is venerable, having become a settled rule by 1367. *See, e.g.*, 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH

Moreover, if we switch the focus from jurors who are ADP for *all* murder, to jurors who are ADP when considering either the definitions of murder (*capital murder*) or the aggravating circumstances that actually make a defendant *eligible* for the death penalty, the picture becomes bleaker. Data from Kentucky illuminate this disheartening picture. Almost 30% of persons who serve as capital jurors in Kentucky reported that they would *automatically* vote for the death penalty upon conviction for capital murder.⁵⁸ A related problem, even more prevalent, is that a *majority* of capital jurors believe that if *certain* aggravating

LAW 318 (7th ed. 1956); James B. Thayer, *The Jury and its Development, Part II*, 5 HARV. L. REV. 295, 296-97 (1892). This principle is not restricted to the guilty-or-not-guilty determination; the traditional common law rule is that, "absent waiver, jury determinations of critical issues must be unanimous. This requirement of unanimity generally extends to all matters submitted to the jury; it applies to the entire jury determination." *Mills v. State*, 527 A.2d 3, 12 (Md. 1987), *vacated on other grounds*, *Mills v. Maryland*, 486 U.S. 367 (1988). Legislatures may *explicitly* provide for non-unanimous criminal jury verdicts, *see Apodaca v. Oregon*, 406 U.S. 404, 410-13 (1972) (plurality opinion); *Johnson*, 406 U.S. at 362-65; *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912) (dictum); *Maxwell v. Dow*, 176 U.S. 581, 602, 605 (1900) (dictum), but a statute is not to be *construed* in derogation of long-established, familiar common law principles, "except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see also Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.").

Arizona, Colorado, Idaho, Montana, and Nebraska provide that a jury will have no part in the sentencing. *See Arizona: ARIZ. REV. STAT. ANN. § 13-703* (West 2001) (trial judge to be sole sentencing); *Colorado: COLO. REV. STAT. ANN. § 16-11-103* (West 1998 & Supp. 2001) (sentencing hearing held before a three-judge panel, presided over by the trial judge); Roxane J. Perruso, Comment, *And Then There Were Three: Colorado's New Death Penalty Sentencing Statute*, 68 U. COLO. L. REV. 189, 192-93, 200-09 (1997); *Idaho: IDAHO CODE § 19-2515(g)* (Michie 1997) ("Upon making the prescribed findings, the court shall impose sentence within the limits fixed by the law."); *Montana: MONT. CODE ANN. § 46-18-301(1)* (2001) ("The [sentencing] hearing must be conducted before the court alone."); *Nebraska: NEB. REV. STAT. ANN. § 29-2520* (Michie 1995) (sentencing performed by presiding judge or by a panel of three judges appointed upon presiding judge's request to the state's Chief Justice, or three other judges appointed upon the Chief Justice's determination that the presiding judge is disabled or disqualified). Nebraska statutes do not explicitly state whether a simple majority of a three-judge panel may impose a death sentence, but the Nebraska Supreme Court has recently held that a panel must be unanimous in order to sentence a defendant to death. *See State v. Hochstein*, 632 N.W.2d 273, 281-82 (Neb. 2001). The Nebraska court held that the sentencing statute was open for judicial construction because of ambiguous language, *see id.* at 280, that the strict construction of penal statutes in favor of a defendant is a fundamental principle of statutory construction, *see id.*, and that where a panel does not unanimously vote for a death sentence the district court must impose a life sentence, *see id.* at 281-82. It further stated that the policies of the state legislature, the U.S. Supreme Court, and the state supreme court had consistently noted the need for reliability in capital sentencing decisions, noted the strong correlation between a capital sentencing hearing and a criminal trial, and related that to Nebraska's constitutional requirement for jury unanimity in criminal cases. *See id.* at 282-83. Finally, the court observed that the three other states that provide for three-judge sentencing panels—Colorado, Nevada, and Ohio—require by statute that the panel be unanimous in order to impose a death sentence. *See id.* at 283.

58. *See Dillehay & Sandys, supra* note 50, at 158-59 (relating findings, based on survey of 148 Kentucky felony jurors, that 28.2% of the respondents who would not be disqualified as jurors under the *Witt* disqualification standard would nonetheless always give the death penalty in cases involving intentional murder); *cf. Eisenberg et al., Jury Responsibility, supra* note 52, at 359 tbl.3, 360 (finding, on the basis of interviews of 153 jurors who sat in South Carolina capital cases, that "[n]early one-third of the jurors were under the mistaken impression that the law required a death sentence if they found heinousness or dangerousness, a result replicated in a multi-state study of the interview data").

circumstances are present then death is the only acceptable punishment.⁵⁹ For example, 70% of capital jurors surveyed in eleven states felt that death is the only acceptable sentence for a person who has previously been convicted of another murder.⁶⁰ Likewise, very substantial minorities of jurors believe that the law *requires* them to impose a death sentence if the defendant's conduct was "heinous, vile, or depraved," or if the evidence proved that the defendant would be dangerous in the future.⁶¹ As discussed above, a state cannot make death the mandatory sentence for any crime,⁶² and a juror who cannot set aside her belief that a death sentence is the only appropriate sentence for certain crimes is likewise constitutionally unqualified to serve on a capital jury.⁶³

A variation on this problem is jurors who are ADP for certain kinds of cases, even if those cases do not fall within the category of a particular aggravating circumstance. For example, some jurors might believe that anyone who rapes and murders a child deserves to die, and in fact there are many such persons in the pool of potential jurors.⁶⁴ These individuals may be qualified for service in some capital murder cases, but in a case involving the rape and murder of a child, they would be an ADP juror, and therefore unqualified to sit.

2. Burden-Shifting Jurors

The death penalty can never be mandatory,⁶⁵ and indeed, in most jurisdictions, the State bears the burden in each case of demonstrating

59. See Blume, *MODERN MACHINERY*, *supra* note 8 (manuscript at 10 tbl.2).

60. See *id.*

61. See *id.* (manuscript at 19 & tbl.6).

62. See *supra* text accompanying notes 12-13; see also *Sumner v. Shuman*, 483 U.S. 66, 77-85 (1987) (striking down a Nevada law mandating the death penalty for the killing of a correctional officer by an inmate serving a life sentence); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion) (stating that "one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense").

63. See *Morgan v. Illinois*, 504 U.S. 719, 729, 735 (1992).

64. See Stephen P. Garvey, Affidavit ¶¶ 9-11, *State v. Delacruz* (S.C. Ct. Gen. Sess. 2000) (Nos. 99-GS-40-40936 to 99-GS-40-40939) (copy on file with the Center for Capital Litigation, Columbia, S.C.).

65. See, e.g., *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (holding that an aggravating circumstance must not apply to every defendant convicted of murder); *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (plurality opinion) (reasoning that evolving standards of decency had rejected the belief that "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender" (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949))); *Woodson*, 428 U.S. at 303 (holding state's broad mandatory scheme impermissible for its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death").

that the death sentence is a permissible punishment.⁶⁶ Thus, much like the presumption of innocence at the guilt-or-innocence phase of the trial, there is an initial legal presumption that a life sentence, not death, is the appropriate penalty, until at least the initial burden of proving the *permissibility of a death sentence* is overcome.⁶⁷ Even at that point, many states' laws place the burden of persuasion on the prosecution to establish that the defendant should be sentenced to death.⁶⁸ No

66. The death penalty is permissible only if the prosecution demonstrates, by proof beyond a reasonable doubt, the existence of an aggravating circumstance; only then is the defendant "death-eligible." See *Gregg v. Georgia*, 428 U.S. 153, 196-97 (1976) (plurality opinion).

67. See Beth S. Brinkmann, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 352-53, 357-73 (1984), for an analysis of the constitutional underpinnings of this presumption, its essential role in capital sentencing, its implications for the allocation of burdens to the prosecution and for procedural reforms, and its fundamental coherence with other basic constitutional and legal principles.

68. That is, once the prosecution fulfills the *Gregg* burden of establishing that the defendant is death eligible by proving an aggravating circumstance beyond a reasonable doubt, such states require that the prosecution clear yet another hurdle, by proving that aggravating circumstances *outweigh* mitigating circumstances, before the jury may impose a death sentence. This is the model of a "weighing" statutory scheme. Here, we employ a somewhat broader definition of this nomenclature than the Supreme Court set forth in *Zant v. Stephens*, 462 U.S. 862 (1983), where it identified "weighing" statutes as ones that instruct juries to give special weight to particular aggravating circumstances, "to consider multiple aggravating circumstances . . . more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." *Id.* at 874; see also *Stringer v. Black*, 503 U.S. 222, 231 (1992) (observing that, at least in some appellate review contexts, "the difference between a weighing State and a nonweighing State is not one of 'semantics'").

As we use these terms here, "weighing" states require the sentencer simply to weigh the aggravating circumstances against the mitigating circumstances in arriving at the sentencing decision. If the jury finds that mitigating circumstances outweigh aggravating circumstances, then it may *not* impose a death sentence, but in most cases it is not *obliged* to impose a death sentence if aggravating circumstances outweigh mitigating circumstances. "Weighing" statutes may, however, require that a jury impose a death sentence if it finds at least one aggravating circumstance and no mitigating circumstance, see *Blystone v. Pennsylvania*, 494 U.S. 299, 303, 306-07 (1990) (concluding that a statute may constitutionally require a sentencer to impose a death sentence if it makes "certain findings against the defendant beyond the initial conviction for murder"), or if the sentencer finds that aggravating circumstances outweigh mitigating circumstances, see *Boyd v. California*, 494 U.S. 370, 377 (1990). In "non-weighing" states, a death sentence is *permissible* once the jury finds an aggravating circumstance beyond a reasonable doubt, but the statutes give the jury no further specific guidance; it may consider all circumstances of the case in determining whether a death sentence is warranted. See *Zant*, 462 U.S. at 874 (approving "non-weighing" statutory scheme).

The United States Military is a "weighing" jurisdiction. See R.C.M. 1004, 1006, reprinted in *MANUAL FOR COURTS-MARTIAL, UNITED STATES II-130, II-134* (2000) (requiring, for imposition of a death sentence, the jury to find unanimously, beyond a reasonable doubt the existence of at least one aggravating factor that "substantially outweigh[s]" any mitigating circumstances). The "weighing" states are: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Indiana, Kansas, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, and Tennessee. The "non-weighing" states are: Alabama, Arizona, Georgia, Idaho, Illinois, Kentucky, Louisiana, Missouri, Montana, South Carolina, South Dakota, Utah, Virginia, Washington, and Wyoming. See Arkansas: ARK. CODE ANN. § 5-4-603(a)(2) (Michie 1997) (aggravators must exist beyond a reasonable doubt, must outweigh all mitigators beyond a reasonable doubt, and must justify a death sentence beyond a reasonable doubt); California: CAL. PENAL CODE § 190.3 (West 1999); Colorado: COLO. REV. STAT. ANN. § 16-11-103(2)(b)(II)(B) (West Supp. 2000) (sentencer is a three-judge panel); Connecticut: CONN. GEN. STAT. ANN. § 53a-46a(c)-(g) (West Supp. 2001) (aggravators must outweigh mitigators to impose death sentence); Delaware: DEL. CODE ANN. tit. 11, § 4209(c)(3)-(4) (2000) (jury must recommend to the court answers to two interrogatories, these

provisions specifying a “preponderance of evidence” standard for question of whether aggravators outweigh mitigators), tit. 11, § 4209(d)(1)b (specifying same weighing standard for judge in determining sentence), *but see* Hameen v. Delaware, 212 F.3d 226, 248-51 (3d Cir. 2000) (stating that Delaware is a non-weighing state, because in determining whether a death-eligible defendant *should* be sentenced to death, “the jury considers all aggravating circumstances, not merely those enumerated in the statute”), *cert. denied*, 121 S. Ct. 1365 (2001); Flamer v. Delaware, 68 F.3d 736, 740, 743, 745-49 (3d Cir. 1995) (in banc) (stating that Delaware is a non-weighing state because in sentencing “[t]he jury is not restricted to the statutory aggravating factors”); Flamer v. State, 490 A.2d 104, 135 (Del. 1983) (finding “that it is clear that Delaware does not have a ‘weighing’ statute as contemplated by the [Supreme] Court in *Zani*”); Florida: FLA. STAT. ANN. § 921.141(2)(b) (West 2001) (jury must find whether sufficient mitigators exist that outweigh aggravators); Indiana: IND. CODE ANN. § 35-50-2-9(k)(2) (West Supp. 2001) (a death sentence may be imposed only if the sentencer finds that “any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances”); Kansas: KAN. CRIM. CODE ANN. § 21-4624(e) (West Supp. 2000) (if the jury finds “that the existence of . . . aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death”); Maryland: MD. ANN. CODE art. 27, § 413(h)(1)-(3) (Supp. 2000) (if aggravators outweigh mitigators, “the sentence shall be death”); Mississippi: MISS. CODE ANN. § 99-19-101(3)(c) (2000) (jury must find there are insufficient mitigators to outweigh aggravators before it may impose death sentence); Nebraska: NEB. REV. STAT ANN. § 29-2522(2) (Michie 1995) (sentencer (the trial judge or a three-judge panel) must determine “[w]hether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances”); Nevada: NEV. REV. STAT. ANN. § 175.554(3) (Michie 2001) (sentencer may impose death sentence only if it finds no mitigators “sufficient to outweigh” aggravators); New Hampshire: N.H. REV. STAT. ANN. § 630:5(IV) (1996) (jury may impose death sentence if it determines that aggravators “sufficiently outweigh” mitigators); New Jersey: N.J. STAT. ANN. § 2C:11-3(c)(3)(a) (West 2000) (sentencer shall impose death sentence if aggravators outweigh mitigators beyond a reasonable doubt); New Mexico: N.M. STAT. ANN. §§ 31-20A-2.B, 31-20A-4.C(2) (Michie 2000) (aggravators and mitigators to be weighed “against each other”; death sentence may not be imposed if mitigators outweigh aggravators); New York: N.Y. CRIM. PROC. LAW § 400.27(11)(a) (McKinney Supp. 2000) (jury may not impose death sentence “unless it unanimously finds beyond a reasonable doubt that” aggravators “substantially outweigh” mitigators); North Carolina: N.C. GEN. STAT. § 15A-2000(b)(2), (c)(3) (2000) (death sentence requires jury finding that mitigators “are insufficient to outweigh” aggravators); Ohio: OHIO REV. CODE ANN. § 2929.03(D)(1)-(3), (F) (West 2001) (if the jury “unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender”); Oklahoma: OKLA. STAT. ANN. tit. 21, § 701.11 (West Supp. 2001) (jury shall not impose death sentence if mitigators outweigh aggravators); Pennsylvania: 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iv) (West Supp. 2001) (jury verdict must be death sentence if aggravators outweigh mitigators, but otherwise death sentence not permitted); Tennessee: TENN. CODE ANN. § 39-13-204(f)(2) (Supp. 2000) (jury may not impose death sentence if aggravators “have not been proven by the state to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt”); § 39-13-204(g)(1)(B) (if aggravators “have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt[,] then the sentence shall be death”); *see also* § 39-13-204(g)(2)(A)(ii), (g)(2)(B).

For “non-weighing” states, see Alabama: Notwithstanding ALA. CODE § 13A-5-46(e)(2)-(3) (2000) (aggravators must outweigh mitigators for jury to recommend death sentence), section 13A-5-48 provides:

The process . . . of weighing the aggravating and mitigating circumstances . . . shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death.

Id. § 13A-5-48 (2000); Arizona: ARIZ. REV. STAT. ANN. § 13-703(F) (West 2001) (trial judge is sole sentencer); Georgia: GA. CODE ANN. § 17-10-30(b) (1997) (jury to “consider” mitigators and aggravators in determining sentence); Idaho: IDAHO CODE ANN. § 19-2515(c) (Michie Supp. 2001) (“Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented are sufficiently

compelling that the death penalty would be unjust.") (trial judge is sole sentencer); Illinois: 720 ILL. COMP. STAT. ANN. 5/9-1(c), (g) (West Supp. 2001) (the sentencer shall "consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty"); Kentucky: KY. REV. STAT. ANN. § 532.025(2) (Michie 1999) (statute indicates only that sentencer is to "consider" aggravators and mitigators); Louisiana: LA. CODE CRIM. PROC. ANN. art. 905.3 (West 2001) ("A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed."); Missouri: Notwithstanding MO. ANN. STAT. § 565.030.4(3) (West 1999) (death sentence will not be imposed if sentencer finds mitigators "sufficient to outweigh" the aggravators), § 565.030.4(4) provides for a non-weighting determination: a death sentence will not be imposed "[i]f the trier decides under all of the circumstances not to assess and declare the punishment at death."; Montana: MONT. CODE ANN. § 46-18-305 (1999) (the court, as sole sentencer, shall impose death sentence if it "finds that there are no mitigating circumstances sufficiently substantial to call for leniency"); South Carolina: S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 2000) (in determining sentence, the sentencer shall "consider" mitigators and aggravators); South Dakota: S.D. CODIFIED LAWS § 23A-27A-3 (Michie 1998) (jury must determine whether mitigators or aggravators exist); § 23A-27A-1 (jury instructed only that it must "consider" aggravators and mitigators); § 23A-27A-4 (death sentence "shall not be imposed unless the jury verdict at the presentence hearing includes a finding of at least one aggravating circumstance"); § 23A-27A-5 (death-sentence verdict must find an aggravator "beyond a reasonable doubt"); Utah: UTAH CODE ANN. § 76-3-207(4)(b) (1999) ("non-weighting" element of statute predominates "weighing" element; death penalty may be imposed only if "the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances."); Virginia: VA. CODE ANN. § 19.2-264.4.B, C, D(1)-(2) (Michie 2001) (statute gives no guidance to the jury as to how it is to assess evidence in mitigation and aggravation in determining sentence; written verdict forms indicate only that jury is to have "considered" all such evidence); Washington: WASH. REV. CODE ANN. §§ 10.95.060(3), (4), 10.95.070 (2000) (in deliberating, the jury is to determine an answer to the question, "are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"; the Code sets forth a non-exclusive list of relevant factors jury may "consider" in deciding whether leniency is merited); Wyoming: WYO. STAT. ANN. § 6-2-102(d)(i)(C), (d)(ii) (Michie 2001) ("The mere number of aggravating or mitigating circumstances found shall have no independent significance," and jurors shall individually and collectively "consider" aggravating and mitigating circumstances.); *see also* Stephen Hombuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 447-49 & nn.35 & 38 (1994).

The federal government is a "non-weighting" jurisdiction, although the wording of the statute governing the deliberations of federal capital juries might at first glance appear to suggest otherwise:

If an aggravating factor . . . is found to exist, the jury, or if there is no jury, the court, shall consider whether all the aggravating factor[s] . . . sufficiently outweigh all the mitigating factor[s] . . . to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating . . . factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

18 U.S.C. § 3593(e)(3) (1994). Although the statute includes the word "outweigh," that indicates the subjective normative judgment the law directs the jury to engage in, and not a mechanical or arithmetic formula imposed on the jury.

Oregon and Texas require sentencing juries to address specified interrogatory issues; neither state's law quite fits into the "weighing/non-weighting" schema. *See* Oregon: OR. REV. STAT. § 163.150(1)(b)(A)-(D), (1)(c)(A)-(B), (1)(d) (1999) (jury must determine four interrogatory issues, regarding deliberateness of defendant's conduct and disregard therein for human life, defendant's future dangerousness, unreasonableness of defendant's response to any provocation, and "[w]hether the defendant should receive a death sentence"; court instructs jury simply to "consider" mitigators in determining those issues, and thus this scheme is more akin to those of non-weighting jurisdictions); Texas: TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1)-(2), (c)(1) (Vernon 2000) (jury must render special verdicts on two issues, and then answer a further issue asking whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a

jurisdiction requires a defendant to prove she should live. Nonetheless, many—perhaps most—capital jurors enter the sentencing phase of the trial having shifted those burdens, possessed of the presumption that the conviction for murder means they should impose the death penalty, and (at best) that the defendant had better come up with some *really good* reason for them to conclude otherwise.⁶⁹

3. Mitigation-Impaired Jurors

As Justice Scalia's dissent in *Morgan* points out, the inability to consider just one statutorily-enumerated mitigating factor renders a capital juror constitutionally unqualified.⁷⁰ Nonetheless, CJP data convincingly demonstrate that a substantial number of *empaneled* capital jurors are indeed "mitigation-impaired." A constitutionally-qualified capital juror must be willing and able to consider and give effect to mitigating evidence.⁷¹ That does not mean she will return a life sentence every time such evidence is shown, but that at least in some degree such evidence will increase the likelihood that she will favor a life sentence. If such evidence has no effect on the juror—or if she feels even *more* inclined to vote for a death sentence if such evidence is shown—then she is constitutionally unqualified, because she is not able and willing to give effect to mitigating evidence.

CJP data indicate that large numbers of jurors are, in fact, mitigation impaired—unable or unwilling to consider particular

death sentence be imposed"; in the presentation of that third issue, this scheme appears more akin to those of non-weighting jurisdictions).

69. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1089-90 & tbls.5-6 (1995) (finding in study of actual capital jurors that one-half had made up their minds as to penalty once they had convicted the defendant and that 64.6% of those who took a stand for either death or life before the sentencing phase of the trial said they were "absolutely convinced" of what the punishment should be, raising doubts as to their ability to be impartial); Bowers & Steiner, *supra* note 52, at 662-63 ("This prevalence of jurors who formulate their position on the defendant's punishment [usually in favor of a death sentence] before the sentencing stage of the trial begins, and stick with it thereafter, for all or most of trial and deliberations, raises a serious question about the effectiveness of jury selection procedures." (footnote omitted)); Bowers et al., *Foreclosed Impartiality*, *supra* note 52, at 1486-1539 & tbls.1-12 (identifying and assessing factors that contribute to early punishment decision-making in the CJP jurors); Eisenberg et al., *Forecasting*, *supra* note 1, at 304 n.90 ("Some CJP research also suggests that many jurors actually decide how they will vote on the defendant's sentence before the penalty phase even begins."); Eisenberg et al., *Jury Responsibility*, *supra* note 52, at 360 ("Nearly one-third of the jurors were under the mistaken impression that the law required a death sentence if they found heinousness or dangerousness."); Eisenberg & Wells, *supra* note 52, at 12-14, 38 n.12; 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, 41 (1987-88) (finding that a significant number of jurors believed that the death penalty was mandatory or presumed for first degree murder); Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1223, 1226 (finding that "jurors who are misled by the capital instructions into believing that the judicial formulas dictate a certain outcome in their deliberations usually have the outcome of death in their mind").

70. See *Morgan v. Illinois*, 504 U.S. 719, 744 n.3 (1992) (Scalia, J., dissenting).

71. See *id.* at 728-29.

mitigating factors—and thus constitutionally unqualified. For most of these jurors, the problem is not that they are unable to consider *any* form of mitigation, but that they are unable to consider certain forms of mitigation. If a juror says that a certain form of mitigating evidence would have no effect on her, or, worse yet, would make her *more* likely to vote for death, the juror is unqualified to serve in cases where evidence of that given form of mitigation will be proffered. By that yardstick, 90% of capital jurors are unqualified to serve in cases where drug addiction is part of the defendant's case in mitigation.⁷² While drug addiction is an extreme case, many other classically mitigating factors are not seen as mitigating by substantial numbers—often heavy majorities—of actual jurors:

PERCENTAGES OF JURORS WHO DO NOT SEE CLASSICALLY MITIGATING FACTORS AS MITIGATING⁷³

Defendant Was a Drug Addict	90.3%
Defendant Was an Alcoholic	86.3%
Defendant Had a Background of Extreme Poverty	85.0%
Defendant's Accomplice Received Lesser Punishment in Exchange for Testimony	82.9%
Defendant Had No Previous Criminal Record	80.0%
Defendant Would be a Well-Behaved Inmate	73.8%
Defendant Had Been Seriously Abused as a Child	63.0%
Defendant Was Under 18 at the Time of the Crime	58.5%
Defendant Had Been in Institutions But Was Never Given Any Real Help	51.8%
Defendant Had a History of Mental Illness	43.9%
Defendant Was Mentally Retarded	26.2%

There is no question that the law of mitigation is in conflict with many jurors' views on these issues. Another example is intoxication. In virtually every state, intoxication, whether by drugs or alcohol, is a statutorily designated mitigating circumstance.⁷⁴ But, to many jurors, not

72. See Garvey, *Aggravation and Mitigation*, *supra* note 52, at 1559 tbl.4.

73. See *id.* (percentage totals include jurors who were "much more," "slightly more," and "just as" likely to "vote for death" if the stated factor were present).

74. See, e.g., *State v. Pierce*, 346 S.E.2d 707, 710-11 (S.C. 1986) ("Evidence of voluntary intoxication is a proper matter for consideration by the jury in mitigation of punishment."), *overruled on other grounds* by *State v. Torrence*, 406 S.E.2d 315, 324-28 & n.5 (S.C. 1991) (Teal, J., separate concurring opinion joined by majority) (abolishing doctrine of *in favorem vitae*). This preponderant legal doctrine is to be distinguished from the long-prevalent common law principle that voluntary intoxication was no defense to a finding that a defendant possessed the *mens rea* as a requisite element of an

only is intoxication not mitigating, it is *aggravating*, and in cases where intoxication is present, such jurors are unqualified.⁷⁵

CJP data reveal one final flaw related to mitigation, though it is difficult to discern whether this is a screening problem, an instruction-comprehension problem, or some combination of the two. Jurors misapprehend the law concerning the burden of proof by which mitigating evidence must be measured. Jurors frequently believe that they may consider only mitigating factors mentioned by the judge, that mitigation must be proved beyond a reasonable doubt, and that findings concerning mitigation (like those concerning aggravation) must be unanimous. These assumptions, however, have no basis in the applicable law. In South Carolina and North Carolina, significant minorities of jurors—16% in South Carolina, and 24% in North Carolina—believe, incorrectly, that they may consider only those mitigating factors that the judge specifically mentions.⁷⁶ This misapprehension is also found in other jurisdictions. Well under half the experimental jurors in a Cook County, Illinois, study understood that they *could* consider mitigating factors not specifically enumerated by the trial judge.⁷⁷

Alarming, 51% of South Carolina jurors and 41% of North Carolina jurors believe that a mitigating factor must be proved beyond a reasonable doubt for it to provide a basis for sentencing a defendant to life; only 26% of South Carolina jurors understand that a mitigating factor need be proved only to a juror's personal satisfaction, and only 24% of North Carolina jurors understand that a mitigating factor need be

offense—indeed, many historical authorities expressed the sentiment that voluntary intoxication was “an aggravation of the offence.” *Montana v. Egelhoff*, 518 U.S. 37, 43-47 (1996) (plurality opinion) (quoting Lord Coke and a consistent line of authority). The *Egelhoff* plurality acknowledged, however, that American law moved away from that position during the nineteenth century, and that by the beginning of the twentieth century, “in most American jurisdictions, intoxication could be considered in determining whether a defendant was capable of forming the specific intent necessary to commit the crime charged.” *Id.* at 47. As of 1996, approximately ten states had *not* adopted this common law development, or had statutorily repudiated it. *See id.* at 48 & n.2.

75. Of the CJP jurors surveyed, 13.6% found the influence of alcohol aggravating, 68.0% said it would not or did not make a difference, and only 18.3% deemed it mitigating; 17.9% found the influence of other drugs aggravating, 63.7% said it would not or did not make a difference, and only 18.5% deemed it mitigating. *See Garvey, Aggravation and Mitigation*, *supra* note 52, at 1555 tbl.2. These sentiments should not be surprising. The intuitive popular judgment of the significance of voluntary intoxication in assessing an individual's responsibility for criminal acts conforms to the sentiments of early common law authorities reviewed in *Egelhoff*, and presumably reflects a straightforward reasoning that responsibility for acts committed while under the influence of alcohol or other drugs flows from the individual's initial choice to consume the intoxicant. The venerable authority for, and the persistence of the perspective noted by, the *Egelhoff* plurality underscores the vital role of *voir dire* in screening and educating venire members in capital cases where intoxication will be an element of the mitigation case if the trial reaches the sentencing phase.

76. *See Blume, MODERN MACHINERY*, *supra* note 8 (manuscript at 16 tbl.4).

77. *See Shari Seidman Diamond & Judith N. Levi, Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 230 (1996).

proved only to a juror's personal satisfaction.⁷⁸ This finding is particularly striking in North Carolina, where such misconceptions should be dispelled by the instructions jurors receive specifying that a mitigating factor must be proved simply to an individual juror's personal satisfaction.⁷⁹ These levels of misunderstanding—or recalcitrant insistence on another standard—can be outcome-dispositive because, as noted previously, there is a very small range of numbers over which differences in initial juror opinions are crucial.⁸⁰

III. HOW AND WHY VOIR DIRE FAILS

If voir dire is designed to weed out unqualified jurors, why do so many end up serving on capital juries? The answer lies both in what does happen in the typical capital trial voir dire, and in what does not.

A. *Perverse Effects of the Voir Dire Process*

If we examine what the process of death qualification itself is like, it becomes clear how that process can affirmatively thwart the very objects it is designed to achieve.

1. Skewing Jurors' Perception of the Law on Capital Punishment Towards Death

Many persons called for jury duty have never been in court prior to their voir dire, and have never been before a judge sitting in her official capacity. In voir dire they are repeatedly asked by the judge if they can "follow the law" and impose a death sentence.⁸¹ Although this question on its face inquires into a juror's *capacity* to return a death sentence, jurors are likely to infer that a death verdict is actually *required* by the law, at least under some, as yet unspecified, circumstances. That is, it gets the juror to think "Oh, 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."

[D]eath qualification may come to resemble a kind of "obedience drill" in which jurors feel they are voluntarily relinquishing the power to

78. See Blume, MODERN MACHINERY, *supra* note 8 (manuscript at 15-17 & tbl.4).

79. See *id.* (manuscript at 16 n.21). The North Carolina statute enumerates mitigating circumstances, and requires proof by a preponderance of the evidence; the state's jury instructions, however, suggest that mitigating circumstances require proof only to a juror's personal satisfaction. See N.C. GEN. STAT. § 15A-2000(b), (c)(1)-(3) (1999); *State v. Johnson*, 257 S.E.2d 597, 617-18 (N.C. 1979).

80. See *supra* notes 56-57 and accompanying text.

81. See *Hirschhorn's Memorandum in Support of Motion to Submit Jury Questionnaire*, 13 Crim. Prac. Rep. (P & F) 318, 318-19 (Aug. 11-25, 1999) [hereinafter *Hirschhorn's Memorandum*].

deviate from the outcome “the law” seems to favor. . . . [T]he personal characteristics of death-qualified jurors render them especially receptive to arguments that they must follow the implicit “promise” made to the court.⁸²

Nor is this conclusion merely a matter of intuition. Mock jury studies show that exposure to the death qualification process makes a juror more likely to assume the defendant will be convicted and sentenced to death; more likely to assume that the law disapproves of persons who oppose the death penalty; more likely to assume that the judge, prosecutor, and defense attorney all believe the defendant is guilty and will be sentenced to die; and more likely to believe that the defendant deserves the death penalty.⁸³ Moreover, the misleading effects of this focus are entrenched and amplified when the prosecutor addresses the jurors in closing argument of the sentencing phase and reminds them of their voir dire “promise” that they could give the defendant the death penalty.⁸⁴

There are other clues regarding authority that jurors in voir dire will absorb subconsciously, and then may use to interpret the events of the trial and to structure their thinking about the appropriate penalty. For

82. 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).

83. See *Grigsby v. Mabry*, 569 F. Supp. 1273, 1303 (E.D. Ark. 1983) (assessing studies showing that going through death qualification increases willingness of individual jurors to convict and condemn, as well as resulting in juries that are more disposed to reach those outcomes), *rev'd sub nom.* *Lockhart v. McCree*, 476 U.S. 162 (1986) (discussing 1979 study); see also *Hovey v. Superior Court*, 616 P.2d 1301, 1356 (Cal. 1980) (rejecting study findings as inconclusive), *superseded by statute*, CAL. CIV. CODE § 223 (West Supp. 2001); Cowan et al., *supra* note 50, at 55-75 (examining studies that almost universally conclude that death qualification produces juries more predisposed to convict than non-death-qualified juries); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 147 (1998) (discussing effects of death qualification on jurors' propensity to convict capital defendants); Haney, *Selection of Capital Juries*, *supra* note 50, at 122-32 (setting forth experimental study results, finding that because discussion of the death penalty pervades voir dire, jurors become more disposed to conclude at the close of evidence that they should impose a death sentence); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2097 (2000) [hereinafter Liebman, *The Overproduction of Death*] (“[B]y repeatedly forcing jurors during the pretrial voir dire to contemplate the imposition of death, [death qualification] mak[es] them substantially more likely to vote for death when the time comes.”); Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1613 (2001) (“‘Even though ‘the law’ does not actually purport to tell the jury which sentence to choose, many jurors misinterpret the trial judge’s legal instructions and manage to convince themselves that ‘the law’ dictates a certain sentencing result.’” (quoting Joseph L. Hoffman, *How American Juries Decide Death Penalty Cases: The Capital Jury Project*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 333, 341 (Hugo Adam Bedau ed., 1997))).

84. For an example of an appellate court’s finding no error in such an argument by the prosecution, see *People v. Noguera*, 842 P.2d 1160 (Cal. 1992). In *Noguera*, the court concluded “that the specific questions posed by the prosecutor on voir dire simply inquired whether a juror would consider the death penalty if the defendant were 18 or 19 and only 1 person had been killed and were thus not improper,” and on that basis rejected the defendant’s argument “that the prosecutor’s reference in his closing penalty phase argument to the voir dire questions and the jurors’ answers to them overcame the jurors’ natural reluctance to impose the death penalty in this case.” *Id.* at 1187-88.

example, in many jurisdictions after the judge questions each juror, it is the prosecutor's turn to voir dire the juror, and defense counsel goes last, even though it is rare for the law to require any particular order.⁶⁵ This convention, however, allows the prosecutor to frame the discussion in important respects, leaving defense counsel to respond to that framing.⁶⁵ It also allows the prosecutor to signal her position as an authority figure; for example, it puts her in a position to explain legal concepts, to get a commitment from jurors to abide by the law in particular respects, and to point out and introduce defense counsel and the defendant to the juror.⁶⁷

2. Tainting the Juror's Account of Her Own Beliefs

The second perverse effect of capital case voir dire stems from the way in which the judge's initial questioning, rather than illuminating the juror's beliefs, often suggests desired answers. Because many jurors are intimidated by the unfamiliar and formal setting, they are subject to subconscious pressures to respond to the authority figure—the judge—by replying in conformity to what they get the sense their answer

85. *But see* N.Y. CRIM. PROC. LAW § 270.16 (McKinney Supp. 2001) (providing that in a capital trial, "the court shall, upon motion of either party, permit the parties, *commencing with the people*, to examine the prospective jurors individually and outside the presence of the other prospective jurors regarding their qualifications to serve as jurors" (emphasis added)).

86. *See* Walter L. Gerash, *Liability for Trampoline Injury*, in 45 AM. JUR. 2D *Proof of Facts* § 11 (1986) (arguing that, in civil suits, "[b]y virtue of going first on voir dire and opening statement, plaintiff's counsel has the advantage of communicating the first total picture of the case to the jury, giving the jurors a working hypothesis about the total picture that is to unfold"); John A. Call, *Handling the Jury: The Psychology of Courtroom Persuasion*, BRIEF, Spring 1987, at 47, 50 ("[A]ll other things being equal, the argument heard first is more persuasive than that heard second unless a significant amount of time has elapsed between the two.").

87. *See* Transcript of Record (Post-Conviction Relief) at 539, 549-51, *Hughes v. Moore* (S.C. Ct. Com. Pl. Oct. 13, 1999) (No. 98-CP-09-101) (Thomas, J.) (expert testimony of John Mauldin, Greenville County (S.C.) Public Defender) (copy on file with the Center for Capital Litigation, Columbia, S.C.). Mr. Mauldin's testimony about the significance of going first in voir dire is reprinted below:

Mauldin: [During voir dire, the prosecutor at trial] went in first every time, which is just what you might in my business say is an absolute no-no

....

Mauldin: [T]hat is not the way it ought to be done.

Q.: Why does it matter?

Mauldin: [L]et's say, if Juror No. 1 comes into the courtroom and is questioned first by the [prosecutor], the [prosecutor] essentially gets to "teach" the juror the meaning of statutory aggravators, mitigation, mitigating circumstances, bifurcated trial, so he does a lot of . . . teaching during the . . . early questions to that juror. If he is allowed the first bite . . . at the apple on every juror, then it's difficult to . . . get an objective view of how all these jurors feel.

....

Q.: [I]n your opinion there's no question that . . . it's important to at least attempt to go first?

Mauldin: Absolutely.

Id. at 549-51.

“should” be.⁸⁸ The typical three-category death-penalty-opinion framework that many trial courts pose to jurors in voir dire,⁸⁹ though designed to expedite the for-cause challenge process, has the unintended consequence of making introspection and honest responses extremely difficult.

The first category is described as composed of jurors who will always vote for the death penalty if the defendant is convicted of murder, no matter what evidence the defense might raise to show that the defendant should not be sentenced to death. The second category consists of jurors who will always vote for a life sentence if the defendant is convicted of murder, no matter how horrific the murder, and no matter what evidence the prosecution might raise to show that the defendant deserves the death penalty. The third and final category comprises jurors who have not decided what the penalty should be if the defendant is convicted of murder, but will want to listen to all the evidence and testimony submitted in the penalty phase and consider it with an open mind. Depending on what they hear, these jurors may come back with either a death sentence or a life sentence.

This is typical of the text as presented to the venire:

1. There is a type of juror who, once the crime of murder has been proved by the State and the juror is considering punishment, feels that he or she is required to give the death penalty in each and every case. This juror simply feels that once a murder has been committed, the death penalty is the most appropriate punishment no matter what the circumstances of the case.
2. The second type of juror is one who, although the guilt of the defendant has been determined, under no circumstances could ever give the death penalty. This juror would not need to hear what the facts and circumstances in aggravation or mitigation in this particular case were because the juror would have his or her mind made up concerning punishment no matter what he or she heard.

88. See *Hirschhorn's Memorandum*, *supra* note 81, at 319-20; see also *Dees*, *supra* note 1, at 15 (“Jurors are terrified about explaining their feelings on sensitive subjects to strangers.”). Juror fears are similarly present when voir dire is conducted by the court:

Venirepersons will frequently hide their true feelings . . . when asked about them publicly, particularly by the judge, who[,] robed and physically elevated, deferred to and addressed as “Your Honor” is the most powerful figure in the courtroom. Jurors will . . . conceal prejudice in order to avoid embarrassment and disapproval by the judge.

Hirschhorn's Memorandum, *supra* note 81, at 319-20.

89. As early as 1985, the South Carolina Supreme Court endorsed this as a proper conceptual framework for ascertaining the constitutional qualification of capital jurors. See *State v. South*, 331 S.E.2d 775, 777 (S.C. 1985) (rejecting claims that the inquiry “improperly steered” jurors).

3. The third type of juror is one who, although the guilt of the defendant has been determined, would not have his or her mind made up in advance concerning punishment. This juror would need to hear the facts and circumstances in aggravation and in mitigation and would want to listen to and follow the law as the judge charges the jury before he or she could make the decision regarding punishment, and if the facts presented so warranted this juror could bring in a verdict of life imprisonment. Also, if the facts presented so warranted, the juror could bring in a verdict for the death penalty.⁹⁰

When the judge presents the prospective jurors with these three general categories,⁹¹ it is obvious which category upright and responsible citizens should choose. Category one is for cold-blooded, heartless killers; its description signals that such a view is unduly harsh and closed-minded—who would *not* listen to evidence before making a decision? Category two is for panty-waist liberals; its description signals that the second view bespeaks a contemptible inability to come to grips with reality—what sort of person would *never* consider a death sentence no matter *how* bad the murder? That leaves category three, which is for regular people. To anyone unencumbered by a law degree, the signal is clear.⁹²

The official position on the adequacy and efficacy of such categories and questions—that the jurors are under oath, and so will give truthful and therefore *reliable* answers—blithely ignores the psychological dynamics at play—and the “invisible but lethal currents of

90. Transcript of Record at 35-36, *State v. Nance*, 466 S.E.2d 349 (S.C. 1996) (No. 24363) [hereinafter *Nance Record*] (copy on file with the Center for Capital Litigation, Columbia, S.C.).

91. For an example of how a judge orally propounds this to a juror:

The Court: Now, in dealing with the penalty phase, there are generally three types of jurors. There's no right or wrong answers; it's just philosophically how people feel. Some jurors say that where an individual has murdered another, I will always be for the death penalty. Some jurors, with equal emphasis, say even though a murder has been . . . committed, I will never be for the death penalty. There is a third class of jurors that say even though the defendant has been convicted of murder, I will consider all of the facts in the case and then I will decide whether or not murder [sic] is appropriate or life imprisonment. Some jurors say always; some say never. The third class say, Well I'm willing to listen; I could do either one depending on how I feel. Would you classify yourself as juror number one, two or three?

Transcript of Record at 157, *State v. Johnson*, 525 S.E.2d 519 (S.C. 2000) (No. 25047) (copy on file with the Center for Capital Litigation, Columbia, S.C.).

92. See Pam Frasher, Note, *Fulfilling Batson and its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Process*, 80 IOWA L. REV. 1327, 1349 (1995) (“Judges routinely ask questions such as, ‘Can you be fair and impartial?’ for which the ‘correct’ answer is obvious to a veniremember. These veniremembers who want to be on the jury respond ‘correctly,’ and judges generally believe their unrevealing answers.”); see also Charles R. Garry, *Attacking Racism in Court Before Trial*, in MINIMIZING RACISM IN JURY TRIALS xxiii (Ann Fagan Ginger ed. 1969) (writing that the typical judge’s idea of voir dire is to simply ask the prospective juror whether he can be fair, “even though Adolf Hitler himself would have answered that question in the affirmative”).

prejudice" latent in the venire.⁹³ It erroneously presumes "that actual bias means "consciously held bias.""⁹⁴ To a court operating on that presumption,

93. See ABA GUIDELINES, *supra* note 2, Guideline 11.7.2 cmt.; see also James H. Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 IND. L.J. 163, 178 (1984-85) ("The assumption that jurors will follow the law appears to be based primarily on wishful thinking."); Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131, 145 (1987) (concluding from an empirical study that "the presumption was not supported that potential jurors who have taken an oath to tell the truth, the whole truth, necessarily do so [I]t is apparent that jurors are not as candid as we presumed.").

Examples of juror untruthfulness and the unreliability of jurors' statements under oath are legion. See, e.g., *United States v. Scott*, 854 F.2d 697, 698-700 (5th Cir. 1988) (finding that actual prejudice was shown where juror failed to disclose that his brother was a deputy sheriff); *United States v. Perkins*, 748 F.2d 1519, 1529-34 (11th Cir. 1984) (reversing verdict and remanding for new trial, finding that actual bias and prejudice were shown where juror intentionally failed to disclose prior associations with defendant and prior involvement in criminal and civil litigation); *United States v. Bynum*, 634 F.2d 768, 769-71 (4th Cir. 1980) (reversing two guilty verdicts, upon finding that juror had failed, "for reasons of shame and embarrassment," to admit that several of his relatives were convicted felons, when asked on voir dire if any of his family members had ever been convicted); *State v. Freeman*, 605 So. 2d 1258, 1259-60 (Ala. Crim. App. 1992) (granting death row inmate new trial after finding that jury foreman failed to disclose, in response to question posed by defense counsel during voir dire, that he was a former police officer), *overruled by Brown v. State*, No. CR-98-0343, 1999 WL 784128, at *5 (Ala. Crim. App. Oct. 1, 1999) (clarifying the law relating to juror misconduct allegations made for first time in postconviction petitions, under requirements for newly discovered evidence in Alabama Rules of Criminal Procedure); *Abercrombie v. State*, 574 So. 2d 879, 879-82 (Ala. Crim. App. 1990) (finding reversible error where potential juror, who was mother of a girl that defendant had previously raped, failed to answer truthfully in voir dire whether she had an interest in conviction of defendant); *Clark v. State*, 551 So. 2d 1091, 1092-94 (Ala. Crim. App. 1989) (affirming appellate reversal of conviction, where one juror did not reveal during voir dire that he had previously served as juror in another drug case in which he had voted for the conviction of the (different) defendant); *Warrick v. State*, 460 So. 2d 320, 324-25 (Ala. Crim. App. 1984) (reversing first-degree manslaughter conviction and remanding for new trial where juror chose not to admit during voir dire that she knew the facts of the case, that the victim's brother-in-law was the juror's immediate supervisor at work, and that she had discussed the facts of and opinions about the case with her supervisor, "at length on several occasions"); *Thompson v. O'Rourke*, 339 S.E.2d 505, 506 (S.C. 1986) (affirming denial of motion for new trial in civil malpractice case, but conceding that in voir dire two jury members had concealed that the prevailing party's attorney (or other members of his firm) had previously handled real estate transactions for them); *State v. Gullledge*, 287 S.E.2d 488, 489-90 (S.C. 1982) (reversing and remanding for new trial, on ground that juror failed to respond affirmatively to voir dire inquiry into whether "any potential jurors were related by blood or marriage to present or former police or law enforcement officers," when she was related by marriage to a deputy sheriff who had been at the scene of the crime, had assumed custody of defendant, and was present in courtroom throughout trial).

Several examples illustrate the amount of juror untruthfulness and unreliability that permeated just one case. One juror who served on a California capital jury that sentenced the defendant to death replied on the juror questionnaire that she had not been the victim of a crime, and that she had never had experience with any persons who were sexually or physically abused when they were children, or with any persons who sexually and physically abused children. When the District Attorney asked her on voir dire whether she had been the victim of a crime, the juror mentioned only that about seventeen years earlier two children had burglarized and vandalized her home. This juror did *not* disclose that when she was thirteen years old a businessman giving her a ride home raped and assaulted her. See Joint Statement of Disputed and Undisputed Facts for Evidentiary Hearing at 2-3, *Sims v. Calderon* (C.D. Cal. June 12, 2000) (No. CV-95-5267-GHK) (copy on file with Center for Capital Litigation, Columbia, S.C.); Memorandum of Points and Authorities in Support of Motion for an Evidentiary Hearing at 4-7, *Sims v. Calderon* (C.D. Cal. Mar. 31, 1998) (No. CV-95-5267-GHK) [hereinafter Memorandum of Points and Authorities] (copy on file with Center for Capital Litigation, Columbia, S.C.).

A second juror responded untruthfully on her questionnaire that in reading about the case in a newspaper she had not been informed of any of the "facts" of the case, when in truth she was aware of

a juror who [swears] he [will] judge the case solely on the evidence presented at trial [is] taken at his word, no matter what his actual predisposition [may be]. But such a restrictive and wooden approach to voir dire is unsupportable in light of the unassailable truth that direct and general inquiries about juror bias cannot be expected to uncover all forms of partiality.⁹⁵

True, most jurors will not consciously lie;⁹⁶ instead, they will summarily try on each hat for size, and decide that the most attractive one fits. This commonsense conclusion is affirmed by both the CJP data discussed in Part I, and by actual voir dire records. Those who have conducted or observed capital-case voir dire will universally confirm that it is rare to hear a juror volunteer, "No, I can't promise to be fair to both sides, and I can't promise to follow the law," and that jurors infrequently identify themselves as other than a category-three juror. Moreover, most of those who do step outside the obviously preferred category will identify themselves as category-two, or *Witherspoon* excludables. It is uncommon to hear a juror admit to being a category-one, automatic death penalty juror, and yet the CJP data show that such individuals are in reality abundant on actual capital juries.⁹⁷

many material, substantive, and prejudicial facts of the case, including the conviction of the defendant's purported accomplice. During voir dire the juror untruthfully denied that she recalled any of the substance of what she had read. Then, during the trial, she violated the judge's instructions and her oath as a juror by discussing with other jurors the accomplice's conviction, and what the accomplice's life was like in prison. See Memorandum of Points and Authorities, *supra*, at 7-9.

A third juror lied by denying that she knew any victims of abuse. In fact, her husband was just such a victim. Then, during sentencing deliberations, she tainted the other jurors by telling them about her husband's experiences, and suggesting that the effects of the defendant's superficially similar experiences of abuse did not mitigate his subsequent violent acts. See *id.* at 13-15.

94. *People v. Williams*, 628 P.2d 869, 873 (Cal. 1981) (quoting Note, *Voir Dire Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493 (1970) (restricting voir dire questions to inquiries conducted only in aid of the exercise of challenges for cause), superseded by statute, CAL. CIV. PROC. CODE § 223 (West Supp. 2001); see also *Silverthorn v. United States*, 400 F.2d 627, 638 (9th Cir. 1968) (recognizing "that in the absence of an examination designed to elicit answers [that] provide an objective basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient [to test that impartiality]'" (alteration in original) (quoting *Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir. 1963))).

95. *Williams*, 628 P.2d at 873 (citations omitted); see also *Goins v. McKeen*, 605 F.2d 947, 953 (6th Cir. 1979); *United States v. Dellinger*, 472 F.2d 340, 348 (7th Cir. 1972).

96. But see *supra* note 93 and *infra* note 131 and accompanying text.

97. The rarest—virtually nonexistent—response, despite judges' explicit invitation of it, is an assertion by the juror that her views do *not* correspond to any of these three categories.

Court: Now after you read those three categories could you place yourself in any one of those categories?

Juror: Yes, sir.

Court: Which one did you place yourself in?

Juror: The third one.

....

Defense Counsel: [Y]ou indicated type three?

Juror: Yes, sir.

Observers have also noted that of the small number of jurors who initially identify themselves as category-one (or ADP) jurors, many quickly backtrack and re-categorize themselves as qualified-to-sit threes under pressure from judges and prosecutors; in contrast, those jurors who initially describe themselves as category-two jurors, and, as a consequence, appear not to be death-qualifiable, rarely can be "rehabilitated" into category-three jurors by defense counsel.⁹⁸ There are two reasons for these disparities in rehabilitation.

First, although this sort of judicial behavior is not readily subject to quantifiable analysis, experienced capital defense practitioners frequently have the impression that *judges* are quicker and more fluent in backing down venire members who initially self-identify as category-one jurors from their absolutist position, compared to their handling of those who initially call themselves category-two jurors. This is not necessarily attributable to a judge's *consciously* favoring a death-sentence outcome. Instead, it is probably a symptom of the broader problem associated with death qualification. It psychologically insinuates in trial participants the assumption that death is the optimal outcome.⁹⁹ The mission of death qualification means that judges look at the whole process through the mental lens of this thought: "The ability to give death is what we're looking for."¹⁰⁰ Therefore, when a juror says,

Defense Counsel: But you understand that there are more than three types of people?

Juror: Yes, sir.

Nance Record, *supra* note 90, at 37-38.

98. See Jaffe, *supra* note 57, at 36 ("Unfortunately, the process favors the prosecution; jurors who conscientiously oppose the death penalty rarely retreat from their position. By contrast, jurors who initially say they would vote for the death penalty for anyone convicted of murder can often be easily rehabilitated by prosecutors soliciting assurances that they can be fair and follow the law, regardless of their beliefs."). But see Michael T. Nietzel & Ronald C. Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 LAW & HUM. BEHAV. 1, 7 n.8 (1982) ("It is generally believed that a skillful defense attorney can, in the course of individual sequestered voir dire, rehabilitate or 'save' most venirepersons whom the prosecution would challenge because of their anti-death-penalty sentiments.").

99. A recent article has analyzed lower court decisions as having read *Witt* broadly, to allow prosecutors to ask case-specific voir dire questions as bases for challenges for cause, while reading *Morgan* narrowly to preclude such questions and challenges by the defense.

These courts have reasoned that because the state capital punishment statute authorizes the death penalty under the facts of the case to be tried, a prospective juror who cannot fairly consider this punishment under those facts is a prospective juror who is unable to follow the law. However, courts have almost universally refused to extend that reasoning to defense challenges for cause.

Holdridge, *supra* note 51, at 301. Holdridge has identified an excellent example of how the law of capital punishment and the process of qualifying capital jurors easily and pervasively refocus the outlook of trial judges away from the impartiality that should be their highest duty. See *id.* at 302-03. Instead, many trial judges slip into the assumption that death is the *goal* of the law and the process, not merely an *option*.

100. Put another way, the task of death qualification leads judges to conceive of the core problem (or issue or mission) in capital jury selection as "Looking for someone who can impose a *death* sentence"; they fail to apprehend that a task of *equal* constitutional urgency is "looking for someone who can impose a *life* sentence."

"Sure, I'd always sentence a convicted murderer to death," the judge naturally thinks, "We've got just a little glitch here; we need to get rid of the 'always.'" In contrast, when a juror says, "Sure, I'd always sentence to life," the judge automatically thinks, "We've got *two* problems here; we would need to get rid of 'always' *and* get rid of 'life.'"

A second reason for the more frequent backpedaling by category-one jurors may lie in psychological differences between category-one and two jurors. Category-one jurors are likely to associate their views with those held by persons in authority, tend not to perceive their own position as being in opposition to that of the State,¹⁰¹ and therefore are predisposed to follow the lead of the judge if she points toward category three as the one desired.¹⁰² Category-two jurors, in contrast, more often conceptualize their views as a *dissent* from the authoritative position of the State, and therefore are less likely to moderate their views in response to the desires of an authority figure, such as a judge.

B. Inadequate Individualized Questioning

Thus, voir dire tends both to prime jurors for the death penalty, and to prime them to say that they could return either a death sentence or a life sentence, and that they would consider "the situation and all of the evidence." But this is only half of the problem. When skilled defense lawyers are permitted to thoroughly explore those statements, they are able to uncover some of the jurors who are really ADP jurors (at least for certain facts), and are *not* capable of carrying out the constitutional obligations of capital jurors.¹⁰³ Unfortunately, many judges sharply restrict such exploration, and many defense lawyers are not very adept in the precise, yet fluid, inquiry that is required.

Very few protections for the rights of the accused are calculated to expedite criminal proceedings, and the voir dire necessary to safeguard a capital defendant's right to a fair trial is no exception. Judges face strong pressure to curtail those protections and thereby save the extra time they require.¹⁰⁴ First, judges must deal with the administrative pressure of crowded dockets. Second, they have legitimate concerns over increased

101. Cf. Thompson et al., *supra* note 50, at 111 (concluding from an experimental empirical study that, compared to jurors in general, death-qualified jurors tend to favor the state in interpreting testimony, require less evidence to convince them of guilt beyond a reasonable doubt, and are more likely to convict).

102. See Frasher, *supra* note 92, at 1348-49 (discussing empirical studies showing that jurors readily grasp what judges want to hear and answer accordingly).

103. See, e.g., Jaffe, *supra* note 57 at 37-38.

104. For example, when a juror "says one thing but actually means another[,] . . . [f]or the sake of judicial economy and expediency, judges will quickly accept the juror's words at face value." *Id.* at 37.

state expenses and increased juror inconvenience, both of which are, or at least seem to be, implicated by expanded voir dire.¹⁰⁵ Third, trial judges in many death-penalty jurisdictions are elected,¹⁰⁶ and in the back of their minds, they may worry that voters will not be pleased by measures that make it harder for the State to convict accused murderers or to secure the death penalty upon convictions.¹⁰⁷

Fourth, and perhaps most importantly, judges' rulings on the scope of voir dire also suggest that they often misunderstand the law in this area. Many courts severely restrict the scope of inquiry they permit counsel in voir dire, believing and asserting that the extremely limited questioning they do allow is sufficient to ascertain which jurors may be unqualified—even though “the evidence suggests that a single question or a narrow line of questioning may be a poor means of determining [whether] prospective jurors think in ways that may impede their compliance with the constitutionally imposed standards.”¹⁰⁸ Despite the

105. *But see* United States v. Dellinger, 472 F.2d 340, 370 n.42 (7th Cir. 1972) (expressing sympathy with the trial judge's desire to expedite voir dire, but stating that “expedition is clearly subsidiary to the duty to impanel an impartial jury”).

106. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776-80 (1995) (explaining that judges in nearly all capital punishment states are elected).

107. *See* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases 1973-1995*, 78 TEX. L. REV. 1839, 1839-45 (2000); Liebman, *The Overproduction of Death*, *supra* note 83, at 2112 nn.197-99; *see also* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 470-75 & n.39 (1998) (reviewing the effect of political pressures on local and trial court death-penalty decisions, and political attacks on state appellate court judges).

On the other hand, one article has concluded that Arizona's experience with a law that invests capital-case sentencing authority solely in the trial judge indicates very little politicization of judges arising from the pressures of capital trials—although the sole authority cited in support of that conclusion, the testimony before the Colorado legislature of the Chief Counsel of the Criminal Appeals Section of the Arizona Attorney General's Office, is surely neither disinterested nor incontrovertibly authoritative. *See* Perruso, *supra* note 57, at 208. We suspect that the article's more illuminating insights on the political pressures judges face in death penalty cases may be found in its discussion of the reasons Colorado adopted a statute removing capital sentencing authority from juries, placing it instead with a panel of three judges. Proponents of the statute claimed that “the people” of the state were frustrated that Colorado juries were refusing to impose death sentences, and wanted “a workable death penalty.” *Id.* at 206 & nn. 98-100 (citing, as authority for ascertaining the will of the people of Colorado, the legislative testimony of the Chairman of the Capital Litigation Subcommittee of the District Attorneys' Council, and a state senator, Ray Powers). One state senator forthrightly stated that the purpose of the legislation was to produce more death sentences. *See id.* at 207 & n.103 (“Why don't we then just say that we want more death penalties . . . ?”). Senator Powers, who sponsored the bill, explicitly acknowledged and welcomed the politicization of judges on the issue. He assumed that in the wake of the judicial sentencing statute the issue of the death penalty would “come[] up in appointing judges, . . . [and] if they have a liberal bias against the death penalty, maybe they should not be retained.” *Id.* at 208-09 (quoting statement from Senate hearings). Colorado's public defenders and defense attorneys, with less enthusiasm, agreed on the likely results of the statute, *see id.* at 210, and a Denver District Court judge publicly expressed concern that the statute might “politiciz[e] the appointment of judges in terms of whether they favor the death penalty or not.” *Id.* at 212 (quoting Judge Lynne Hufnagel).

108. Bowers et al., *Foreclosed Impartiality*, *supra* note 52, at 1503; *see also* United States v. Shavers, 615 F.2d 266, 268 (5th Cir. 1980) (stating that general questions were “too broad” and “might

Supreme Court's clear statement in *Morgan*, that general inquiries into whether a juror can "be fair" and "follow the law" are too superficial to detect jurors "who cannot perform their duties in accordance with law," and thus are inadequate to secure a defendant her constitutional due process right to a fair and impartial jury,¹⁰⁹ many jurisdictions severely limit the questions that counsel may ask on voir dire.¹¹⁰ Appellate courts have upheld trial courts' refusal to let defense counsel ask whether jurors are *willing to consider*¹¹¹ as mitigating factors such things as emotional and physical abuse, young age, and limited intelligence;¹¹² youth or voluntary intoxication;¹¹³ refusal to let counsel explore jurors' attitudes toward drug and alcohol intoxication as a mitigating circumstance;¹¹⁴ refusal to allow "open-ended inquiries about possible mitigating evidence";¹¹⁵ and refusal to let defense counsel ask jurors to speculate

not reveal latent prejudice"); *United States v. Dellinger*, 472 F.2d 340, 375 (7th Cir. 1972) ("Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial. A juror might well answer negatively in good faith, without stepping to consider the significance or firmness of impressions he might have gained from news reports. *We think the question is not adequate to bring out responses showing that jurors had gained information and formed opinions about relevant matters in issue if in truth any had.*" (emphasis added)); Cathy E. Bennett, *Psychological Methods of Jury Selection in the Typical Criminal Case*, CRIM. DEF., Mar.-Apr. 1977, at 11, 13 ("Judges usually do not realize that they are seen by jurors as both powerful and fair, and that this attitude on the part of jurors creates an expectation in their minds that they *should* say they can be fair and impartial, whether or not this is true."); *Hirschhorn's Memorandum*, *supra* note 81, at 320 ("Courts have consistently recognized that jurors are often unaware of their own prejudices and preconceptions, and do not acknowledge them when publicly asked general questions on *voir dire* such as whether there is any reason they cannot be fair and impartial.").

109. See *Morgan v. Illinois*, 504 U.S. 719, 726-27, 729, 734-35 (1992) (asserting that the Sixth and Fourteenth Amendments' guarantee of an impartial jury gives defendants the right to challenge prospective ADP jurors for cause, the exercise of which requires voir dire beyond "general fairness" and "follow the law" questions).

110. For example, the South Carolina Supreme Court has interpreted *Morgan* to uphold trial courts' limitation of voir dire regarding mitigating circumstances. It has held that *Morgan* does not require questioning concerning specific mitigating factors, but simply recognizes the right of a capital defendant to challenge for cause any prospective juror who indicates that she will automatically vote for death in every case of a convicted murderer. See *State v. Powers*, 501 S.E.2d 116, 121-22 (S.C. 1993). Accordingly, the state supreme court concluded that *Morgan* does not require the trial court to permit a defendant to voir dire jurors on "how they would be affected by evidence of mental impairment, age, and other mitigating circumstances, since such questions would *'stake out'* [a] juror and pledge him to a future course of action." *Id.* at 122 (quoting *State v. Skipper*, 446 S.E.2d 252, 261-63 (N.C. 1994)). "[G]eneral questions as to whether [a] juror would consider mitigating circumstances as charged by the judge are sufficient." *Id.* at 122.

111. Compare the constraints courts commonly impose on defense inquiries with the California Supreme Court's generous interpretation of prosecution inquiries. In *People v. Noguera*, 842 P.2d 1160 (Cal. 1992), in which the court concluded "that the specific questions posed by the prosecutor on voir dire simply inquired whether a juror would *consider* the death penalty" notwithstanding particular mitigating factors, "and were thus not improper." *Id.* at 1188.

112. See *United States v. Tipton*, 90 F.3d 861, 878 (4th Cir. 1996).

113. See *Soria v. Johnson*, 207 F.3d 232, 243 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2 (2000).

114. See *McQueen v. Scroggy*, 99 F.3d 1302, 1329 (6th Cir. 1996).

115. *Plantz v. Massie*, No. 99-6075, 2000 U.S. App. LEXIS 13017, at *36 (10th Cir. June 9, 2000) (ascribing trial court limits on voir dire to Oklahoma state law).

about circumstances they would consider to be mitigating.¹¹⁶ The most common justification for upholding such restrictions is the view that these questions are attempts to “stake out” jurors,¹¹⁷ committing them to a certain course of action in advance.¹¹⁸ Some courts, notwithstanding *Morgan*, *Penry*, *Eddings* and *Lockett*, have actually ruled that a juror is not disqualified if she views a certain mitigating factor, such as youth, as aggravating.¹¹⁹

Thus, although the Supreme Court has said that jurors are unqualified if they cannot ever find that certain factors would constitute sufficient mitigation to warrant a life sentence, rather than a death

116. See *McCarty v. State*, 904 P.2d 110, 115 (Okla. Crim. App. 1995) (ruling that trial court’s prohibition was not an abuse of discretion, especially in light of counsel’s ability to determine, through proper questioning, whether jurors could follow instructions to consider mitigating evidence). The South Carolina Supreme Court has upheld a trial court’s ruling not to permit the defendant “to ask jurors whether they would consider that [the defendant] did not have a significant prior criminal history of violence.” *State v. Hill*, 501 S.E.2d 122, 127 (S.C. 1998). In response to the defendant’s position that *Morgan* stands for “the proposition that general questions about whether a juror would follow the law are not adequate in *voir dire*,” the state supreme court asserted that the United States Supreme Court had “held the defendant was entitled to know if jurors would consider general mitigating evidence. The Court did not hold that the defendant was entitled to know if a juror would consider specific mitigating evidence.” *Id.* at 127.

117. The term “stake out” has also been applied to *voir dire* in general, non-capital criminal cases. See *State v. Rogers*, 656 So. 2d 768, 771-72 (La. Ct. App. 1995) (holding that counsel’s inquiry improperly attempted to introduce testimony concerning specific sequence of acts); *State v. Jones*, 491 S.E.2d 641, 647 (N.C. 1997) (finding counsel’s questions would confuse the average juror at the stage where no evidence or instructions on applicable law were properly before jury, stating that questions would tend to “stake out” jurors, and eliciting a pledge to a future course of action (quoting *State v. Vinson*, 215 S.E.2d 60, 68 (N.C. 1975))); *Anne M. Payne & Christine Cohoe, Jury Selection and Voir Dire in Criminal Cases*, 76 AM. JUR. TRIALS § 31 (2000) (“*Voir dire* questions [that] attempt to ‘stake out’ the jurors and determine what kind of verdict the jurors would render under a given set of circumstances are improper, even where the questions are posed as hypotheticals.” (footnotes omitted) (citing *State v. Nobles*, 515 S.E.2d 885, 894 (N.C. 1999))).

118. See *Soria*, 207 F.3d at 244 (finding that questions on specific mitigating factors were “attempt[s] to improperly commit the prospective jurors to a certain view regarding mitigating evidence anticipated to be presented in this case”); *Tipton*, 90 F.3d 861, 878-79 (4th Cir. 1996) (finding defense counsel neither requested that a specific “reverse-*Witherspoon*” question be put to any specific juror, nor objected contemporaneously to the district court’s mode of inquiry as to basic death penalty attitudes, and the trial court’s refusal to question or allow detailed questioning about specific mitigating factors was not an abuse of its discretion); *State v. Myers*, No. 96-CA-38, 1999 WL 94917, at *36 (Ohio Ct. App. Feb. 12, 1999) (ruling that *Morgan* “does not require trial courts to allow individual *voir dire* and separate questioning of jurors regarding their willingness to consider specific mitigating factors”—but that “inquiries of that kind should be allowed concerning any mitigation that the juror may be asked to consider,” and that the trial court’s limits on questions concerning jurors’ “willingness to consider separate, specific mitigating factors” nonetheless left the *voir dire* “adequate to reveal any bias against mitigation that would render a juror ineligible to serve,” and thus was not an abuse of discretion); *State v. Dixon*, No. 68338, 1997 WL 113756, at *18 (Ohio Ct. App. Mar. 13, 1997) (stating that counsel may not “improperly survey prospective jurors on specific mitigating factors [that] are going to be introduced at a later stage of the proceedings,” notwithstanding the court’s recognition that *Morgan* “prohibits the trial court from restricting proper jury questioning about a juror’s ability to consider relevant mitigating factors”); *Plantz v. State*, 876 P.2d 268, 279 (Okla. Crim. App. 1994) (permitting questions on particular mitigating circumstances “would make *voir dire* an open forum for discussion of any circumstances accompanying the murder, both mitigating and aggravating”).

119. See *Vuong v. Scott*, 62 F.3d 673, 680 (5th Cir. 1995).

sentence, lower courts frequently prohibit the questioning of potential capital jurors on just those points. Moreover, some judges not only forbid discussion of specific mitigating factors as "staking out," but *also* forbid open-ended hypothetical inquiries ("What *might* you want to hear about in considering whether any mitigating factors exist?") on the theory that they encourage jurors to think about factors that ultimately may be irrelevant to the case.¹²⁰ What can an attorney do then? If counsel cannot ask about factors relevant to the particular case and cannot ask hypothetical questions, what is left? Only questions so general that they are unlikely to elicit anything more thoughtful than the same "right" answer suggested by the judge's initial question about the three categories of jurors.

C. *Incompetent Voir Dire*

A defense attorney conducting voir dire in a capital case faces urgent tasks: she must *identify* jurors that she can effectively challenge for cause, employ questioning techniques that will enable her to *challenge* ADP jurors for cause, identify jurors who are appropriate targets for *peremptory* strikes, use effective methods to "*rehabilitate*" and "*save*" from state challenges-for-cause those jurors who have reservations about the death penalty, and "*educate* jurors as to their rights to be free from harassment and disrespect so that they can exercise their individual judgment, regardless of the group dynamics."¹²¹ The truth is that many defense attorneys are not particularly good at this crucial aspect of capital defense.

120. See *People v. Saiz*, 660 P.2d 2, 4 (Colo. Ct. App. 1982) (holding that the trial court "gave counsel full opportunity to question jurors regarding any matters [that] might have shown bias or prejudice . . . Hence, its limitations on the use of hypothetical questions were well within its discretion and will not be disturbed on appeal."); *State v. Poole*, 214 S.E.2d 774, 775-76 (N.C. Ct. App. 1975) (holding that trial court did not err in sustaining State's objection to defendant's question in voir dire, asking juror to speculate on how he would respond to other jurors' disagreement with his position); *State v. Patterson (Patterson I)*, 351 S.E.2d 853, 854-55 (S.C. 1986) (finding no error in trial court's determination that hypothetical questions posed by defense counsel to be improper); *State v. South*, 331 S.E.2d 775, 778 (S.C. 1985) (holding that "the purpose of *voir dire* is to insure each juror can make a decision based on the evidence presented, rather than hypothetical evidence."); see also *Kerper*, *supra* note 1, at 9 (arguing that asking jurors hypothetical questions to determine how they might decide an issue is generally deemed objectionable and should be distinguished from questions that seek to uncover similarities from jurors' past experiences).

Other authority takes the position that hypothetical questions should *not* be barred in voir dire. See *Payne & Cohoe*, *supra* note 117, §§ 31, 58 (arguing that counsel can use hypotheticals "in voir dire to explain the proper application of the law, provided, however, that the hypothetical does not contravert away the need to prove the only disputed element of the offense, or otherwise seek to determine in advance a juror's opinion concerning the weight of certain evidence." (footnotes omitted)).

121. *Jaffe*, *supra* note 57, at 42 (emphasis added).

Probably the most common shortcoming is the failure to establish a common language; jurors frequently do not understand what attorneys and judges are talking about. Jurors, of course, do not understand the law.¹²² They come to court, naturally and understandably, with all kinds of misconceptions about the law, *and* with a wholly inadequate understanding of how lawyers use the language of the law. We in the profession are used to dealing with the arcane and stilted parlance of our trade every day, but jurors are not.¹²³

Even after only a year of law school, it is difficult for law students to remember how strange and counterintuitive they once found the language to which they have become accustomed. It is therefore not surprising that after years in practice or on the bench, when lawyers and the judge start talking to jurors about the jurors' views on the death penalty for someone convicted of "murder," the lawyers assume that the jurors know what "murder" means. Jurors, however, do not reflexively restrict the meaning of "murder" to the definition found in the state penal code.

For example, in South Carolina, murder is defined as "the killing of any person with malice aforethought, either express or implied."¹²⁴ But when jurors are asked their opinions or views about the appropriateness of the death penalty for someone convicted of murder, and, as experienced capital practitioners hear time and time again, respond that

122. The CJP data emphasize the seriousness of this problem by revealing how widespread misconceptions about the law are among jurors who have *already served* in capital trials. The CJP jurors have been through voir dire (ostensibly certifying them as constitutionally qualified), have heard from defense counsel and prosecutor, have received the judge's instructions on the law, and have presumably applied the law as instructed. If any group of people would be "*lay experts*" on the law of the death penalty, one would expect it to be these jurors. Nevertheless, their responses reveal deeply troubling misconceptions about the law, illustrating profound shortcomings in the system, which surely begin in voir dire, when—because of ill-founded restrictions or counsel's shortcomings—courts fail to screen out unqualified jurors, and attorneys are unable or fail to educate properly jurors who are theoretically qualified, but vulnerable to misconceptions about the law that will render them ADP in practice.

123. The confusion over legal language that people who are not legal professionals experience during voir dire is substantially the same as that which jurors experience at the other end of the trial, during jury instructions.

Capital instructions typically employ "complex language, unfamiliar words, one-sentence definitions of terms, and many sentences with multiple negatives." Jurors interviewed by the Capital Jury Project commented on how difficult the instructions were to understand. Others noted that their requests for clarification simply led the judge to reread the instructions. When asked, "What do you remember most about the judge's instructions?", several jurors reported that they were lengthy and hard to remember. Others said the instructions, "were full of legal talk," and "very long and complicated, hard to retain and interpret as fast as he was reading it."

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) (quoting Luginbuhl & Howe, *supra* note 52, at 1169); *see also* Blume, MODERN MACHINERY, *supra* note 8 (manuscript at 36); Eisenberg & Wells, *supra* note 52, at 15.

124. S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1985).

"it would depend on the circumstances" of the case, many of these potential jurors are not contemplating circumstances attendant to the intentional killing of another human being with malice aforethought. Instead, all too often the potential jurors are thinking of "circumstances" that would make the act or incident a killing in self-defense, an accident, an act in the "heat of passion," a product of insanity; that is, they are thinking of circumstances that would make the crime not a murder at all, let alone a capital murder.¹²⁵ "Accordingly, [defense lawyers] must frame questions that clarify the inquiry and focus entirely upon whether the prospective juror can consider any punishment but death for someone who intentionally, without legal justification, takes the life of another person."¹²⁶

Furthermore, many (perhaps most) of these laypeople do not understand that murder—intentional killing unredeemed by self-defense, accident, insanity and so on—without more is not a death-penalty-eligible crime in *any* American jurisdiction. An aggravating circumstance must be established before it is even *permissible* to impose a death sentence.¹²⁷ Juror misconceptions about this and other legal principles arise out of an enormous gap in understanding, and unfortunately courts and lawyers often do not take the time to educate jurors on the legal contours of murder as a crime, nor to find out their views on this complex area of law and life.

Moreover, language barriers are far from the only obstacle to competent voir dire in a capital case. Even experienced trial lawyers

125. For example:

The Court: [To a self-described category-one juror] [I]n every event where a murder had been committed, you feel . . . , no matter what the circumstances, that the death penalty is the most appropriate punishment. Is that correct?

Juror: Yes, sir.

The Court: And no matter what the circumstances are?

Juror: I guess if it was like self-defense murder, I mean like if someone was trying to kill me, broke in my home and was trying to kill me and I killed them before they could kill me.

The Court: So there are some circumstances where you wouldn't think the death penalty is the most appropriate punishment?

Juror: Yes, sir.

The Court: Are there any other ones that you can think of?

Juror: Just self-defense of my child or myself.

Nance Record, *supra* note 90, at 45. The court excused this juror *sua sponte* following voir dire by prosecution and defense and further questioning by the court, *see id.* at 52, but her misunderstanding of the concept of "murder" illustrates the chasm of understanding that separates legal professionals from most potential jurors.

126. *See* Jaffe, *supra* note 57, at 38.

127. *See* *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976) (plurality opinion) (holding that because the Georgia death penalty statute channeled the jury's discretion by requiring that "it must find and identify at least one statutory aggravating factor before it may impose a penalty of death," the state had appropriately guarded against the chance that a jury might "wantonly and freakishly impose the death sentence").

typically have little formal training in voir dire for any type of case (civil or criminal), let alone in the highly specialized field of capital voir dire, and in many states, capital cases are the only time an attorney, as opposed to the judge, will conduct voir dire. In addition, because of limited funding available for appointed counsel in capital cases in many states,¹²⁸ the attorneys representing indigent defendants in capital cases

128. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1843-44, 1853-55 (1994) [hereinafter Bright, *Counsel for the Poor*]; Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 14, 16, 18 (1996) (discussing state techniques for appointing capital case lawyers, including patronage selections without regard for experience; low-bid contract systems; and low-budget reimbursement schemes with piece-work rates for a limited number of motions); Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1, 4-5 (1992) (criticizing Alabama's compensation limits for discouraging thorough representation at the trial level); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 492-93 (1993) (criticizing low compensation for appointed counsel as discouraging the private bar from developing capital trial expertise); Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 677-82 (1989) (pointing out that underfunding and consequent understaffing create burdensome workloads, and thereby profoundly undermine the chance for effective representation); Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 310-14 (1991) (discussing how limits on reimbursement can drive counsel's effective hourly wage below the minimum wage); Albert L. Vreeland, II, Note, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 642 (1991) (arguing that "'per case maximums present an immediate threat' to the indigent accused's Sixth Amendment right to counsel"); Mary Flood, *What Price Justice?*, HOUS. CHRON., July 1, 2000, at 1A (concluding that even recently increased pay for appointed capital attorneys falls far below what a skilled attorney can receive from a paying client); Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, N.Y. TIMES, Feb. 5, 2000, at A1 (quoting statements by Chicago's former chief prosecutor and current mayor, Richard M. Daley, that "lawyers in some [capital] cases were incompetent, and even when they were competent they often did not have the money to conduct their own thorough investigations and compete against the police and [better financed and highly experienced capital] prosecutors"); Editorial, *No Money for Justice: State Will Help Prosecute Death-Penalty Cases but Falls Short in Ensuring a Fair Defense*, PHILA. INQUIRER, Mar. 8, 2000, at A22 (inveighing against the Pennsylvania legislature's refusal to allocate money for capital case defense, despite appropriated state funds to help local prosecutors in death penalty cases); Sara Rimer, *Questions of Death Row Justice for Poor People in Alabama*, N.Y. TIMES, Mar. 1, 2000, at A1 (describing that low compensation rates often make appointed capital trial counsel decide to limit work on a capital case to one-tenth, or even one-twentieth, the time necessary for adequate preparation, and discourages good lawyers from taking such cases more than once); Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES, July 16, 1995 (Magazine), at 21 (comparing capital representation by well-staffed Philadelphia public defender office to that by underpaid appointed counsel; few, if any, public-defender clients are sentenced to death, while from 1993-1995, thirty-three defendants represented by appointed counsel were sentenced to death); Editorial, *Rush to Death*, ST. PETERSBURG TIMES, Feb. 10, 2000, at 16A (discussing a Florida case in which a "young, inexperienced lawyer who knew little about presenting a capital defense" not only did little for his client, but was deplorably underpaid, and presented no witness to testify about defendant's "long history of mental illness" because as the attorney later testified in court, "he could not afford to call witnesses"); Stan Swofford, *A Reasonable Doubt: Are There Innocent People on North Carolina's Death Row?*, GREENSBORO NEWS & REC., Aug. 6, 2000, at A1 (comparing North Carolina's cap on compensation for appointed counsel representing indigent capital defendants, to the local "free-market" rate for an experienced criminal defense lawyer, which is about 135% higher).

are often inexperienced.¹²⁹ For the defense, all too often, a capital trial is "amateur hour," while the State is usually represented by a skilled, seasoned prosecutor.¹³⁰ This imbalance of professional competence, which skews every part of a capital trial, often preordains a jury consisting of jurors predisposed to impose the ultimate punishment, even if the judge is inclined to permit extensive voir dire.

IV. MAKING VOIR DIRE IN CAPITAL CASES EFFECTIVE

Voir dire in capital cases is very difficult even without the burdens and barriers often imposed on defense counsel. Prospective capital jurors have difficulty in expressing their views, and have reasons to misrepresent them; as a consequence, neutral, nonsuggestive questioning by the judge is essential, as is the opportunity for extended, detailed follow-up questioning by competent defense attorneys.¹³¹

129. See, e.g., Bright, *Counsel for the Poor*, *supra* note 128, at 1843 n.49, 1857-66 (providing numerous examples of incompetent capital defense lawyers); Coyne & Entzeroth, *supra* note 128, at 14-19 (citing numerous postconviction cases documenting the assignment of capital cases to lawyers who had no criminal—much less capital—trial experience and were only a few months at the bar or, in one case, was a third-year law student; and lawyers who got to trial without having read the state's capital sentencing statute, who thought the governing statute was one overturned years before, or whose list of "criminal" cases read in preparation for trial consisted (in toto) of *Miranda* and *Dred Scott*); Johnson, *supra* note 128 (identifying as a "common thread" in miscarriages of justice in capital cases that "poorly financed, often incompetent defense lawyers [have] failed to uncover and present crucial evidence"; and giving various examples "from around the nation of [death penalty] lawyers who slept through trials, or came to court drunk" or who were assigned to handle capital cases despite "specializing in tax law . . . [and] never [having] tried a criminal case").

130. See Bright, *Counsel for the Poor*, *supra* note 128, at 1844-45.

131. See Neal Bush, *The Case for Expansive Voir Dire*, 2 LAW & PSYCHOL. REV. 9, 12-14 & n.14 (1976); Interview with Clive A. Stafford Smith, Executive Director, Louisiana Crisis Assistance Center (New Orleans), in Lake Charles, La. (Mar. 14 1996) (discussing the subject of juror evasiveness in capital-trial voir dire, and the crucial need for the trial attorney to sustain focus in the difficult and involved task of drawing out a venire member's actual views on the death penalty); see also ANN FAGAN GINGER, JURY SELECTION IN CRIMINAL TRIALS: NEW TECHNIQUES AND CONCEPTS § 7.36, at 296-97 (1975 & Supp. 1977) (quoting expert testimony in a high-profile case, *United States v. Baker* (W.D.S.D. 1974) (No. Cr. 73-5021) (arising out of the Wounded Knee incident), to the effect that two surveys showed that venire members consciously and deliberately lied under oath, and that truly fair-minded individuals were more likely to be forthright to the court about the possibility of being biased, and thus were more likely than truly prejudiced jurors to be excused for cause); Dees, *supra* note 1, at 14 ("Put simply, prospective jurors lie. Put more generously, jurors give socially acceptable answers."); Jaffe, *supra* note 57, at 36 ("If we ask appropriate and skillful questions, a number of jurors will admit these beliefs [that death is the only appropriate punishment for anyone convicted of murder].").

Judicial opinions, too, have observed that a person's unquestioning confidence in her own fairness is a powerful signal that others should subject that assumption to close scrutiny. See e.g., *People v. Williams*, 628 P.2d 869, 873 n.2 (Cal. 1981) (remarking "that the accuracy of a person's estimation of his own fairmindedness is likely to be inversely proportional to the depth of his actual prejudices and predispositions"), *superseded by statute*, CAL. CIV. PROC. CODE § 223 (West Supp. 2001).

A. *Avoiding the Pitfalls of Suggestive Judicial Questioning and Staging*

As discussed in Part III, even if jurors are not intentionally misstating their opinions, the structure of the questioning process encourages ADP jurors, in particular, to describe their beliefs inaccurately. Eliminating the initial and suggestive choice between three simplistic categories should be the *first* step in a genuinely illuminating voir dire. The judge can, instead, productively begin inquiry into a juror's attitudes by asking an open-ended question¹³² such as "How would you describe your attitude toward the death penalty?" For jurors whose answers are vague, or nonresponsive, judges should be prepared with alternative phrasings, such as "How do you feel about the death penalty?," or "When, if ever, do you think its appropriate?" The importance of nonsuggestive questioning has been well-documented with respect to eyewitness identification and other examples of memory recall.¹³³ We think that if a juror cannot coherently answer such a question without suggestion, she is not qualified to sit as a juror in a capital case. Moreover, if a juror in response to nonsuggestive questioning articulates a disqualifying view, "rehabilitation" is inappropriate.¹³⁴

Second, there can be no question that individual, sequestered voir dire of venire members is far more effective at encouraging jurors to

132. The virtues of this approach were noted in *People v. Crowe*, 506 P.2d 193 (Cal. 1973), in which the court recognized "the danger that a biased juror may be unwilling to confess that bias openly, and that questions to which there is a 'right' and a 'wrong' answer may be less likely to reveal such bias than more open-ended questions." *Id.* at 204 n.31.

133. See Bill Nettles et al., *Eyewitness Identification: 'I Noticed You Paused on Number Three'*, CHAMPION, Nov. 1996, at 11, 12 (noting that the Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is "unnecessarily suggestive"); Gary L. Wells & Eric P. Seclau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 767, 775-78, 785-87 (1995) (discussing how even inadvertent, subconscious suggestiveness in oral communication, body language or procedure by police can lead eyewitnesses to make mistaken identifications, or to express confidence in their identification that their actual memories do not warrant); Gary L. Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy*, 1 PSYCHOL. PUB. POL'Y & L. 726, 727 (1995) ("Research and theory on lineups, memory interview techniques, and eyewitness confidence, for example, make use of cognitive processes other than memory, such as social influence Police somehow feel perfectly free to fire poorly constructed questions at eyewitnesses . . . and generally not use any theory of a proper memory interview.").

134. See Bowers et al., *Foreclosed Impartiality*, *supra* note 52, at 1541-42 ("Efforts to rehabilitate apparently biased prospective jurors by asking them whether they could follow the judge's instructions and abide by their oaths as jurors cannot be trusted."); Jaffe, *supra* note 57, at 36-37 (showing how nebulous answers readily hide truly ADP sentiments). A proscription of "rehabilitation" for both prosecution and defense is the *ideal* condition of voir dire because it is the condition most conducive to the empannelment of genuinely qualified capital jurors. Realistically, however, this is not likely to become universal practice in the near future. Therefore, our position that trial counsel *must* be adept at rehabilitation, see *supra* text accompanying note 121 and *infra* note 191 and accompanying text, is consistent with our conclusion here.

"speak the truth" than is group questioning.¹³⁵ As the Supreme Court observed in one case, "[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact [of] requiring such a declaration before one's fellows is often its father."¹³⁶ Scholarship corroborates this conclusion:

135. See *United States v. Dansker*, 537 F.2d 40, 56 (3d Cir. 1976) (finding that individual examination of jurors "is the most effective manner by which to discover latent prejudices on the part of a particular juror. Indeed, under certain circumstances it may be the only means of assuring a defendant his right to an impartial jury."); *Commonwealth v. Hooper*, 679 N.E.2d 602, 604 (Mass. App. Ct. 1997) (finding "that an individual voir dire is more conducive to juror candor" in matters of racial prejudice than are general questions to the venire); Bush, *supra* note 131, at 19 ("Courts have accepted the proposition that individual *voir dire* (out of the presence of other jurors) promotes candor."). New Jersey's Supreme Court "insist[s] on an individualized *voir dire* for capital cases '[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing.' Because juries have so much more discretion, there is a greater need to screen out those jurors who cannot be impartial." *State v. Loftin*, 630 A.2d 677, 698 (N.J. 1996) (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986) (citation omitted)).

136. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (unanimous decision); see also *United States v. Rezaq*, 134 F.3d 1121, 1140 (D.C. Cir. 1998) (Wald, J.) (concluding that "the collective *voir dire* is not ordinarily the instrument of choice for discerning the impartiality of jurors"). In one capital case, Judge Clark of the Court of Appeals for the Eleventh Circuit noted:

"The voir dire in this case . . . was conducted in the presence of all the prospective jurors. The inhibiting effect of a large audience and the tendency for potential jurors to incorporate other's [sic] voir dire testimony into their own made a careful and probing voir dire all the more important. Moreover the danger that potential jurors would be prejudiced by comments made by other potential jurors during voir dire made questioning a more delicate exercise."

Berryhill v. Zant, 858 F.2d 633, 641 (11th Cir. 1988) (Clark, J., specially concurring) (quoting unpublished order at 18, No. 85-258-R (N.D. Ga. June 30, 1986)); see also *Coleman v. Kemp*, 778 F.2d 1487, 1542-43 (11th Cir. 1985) (observing that "in light of the overwhelming evidence that the community had prejudged both guilt and sentence, . . . the conclusory protestations of impartiality in the voir dire are not sufficient to rebut the presumption of prejudice"); *United States v. Hawkins*, 658 F.2d 279, 283 (5th Cir. 1981); *United States v. Davis*, 583 F.2d 190, 196-98 (5th Cir. 1978); *United States v. Starks*, 515 F.2d 112, 125 (3d Cir. 1975) ("In a case with serious racial and religious undertones and where the court is facing a ten-day trial, good sense would seem to suggest that the court adopt the practice of individual examination so that defense counsel may be in a position to make individualized judgments with respect to peremptory challenges."); *United States v. Dellinger*, 472 F.2d 340, 376 (7th Cir. 1972) ("We feel bound to concede that such a single question posed to the panel en bloc, with an absence of response, achieves little or nothing by way of identifying, weighing or removing prejudice from prior publicity." (quoting *Patriarca v. United States*, 402 F.2d 314, 318 (1st Cir. 1968)); *Silverthorne v. United States*, 400 F.2d 627, 639-40 & n.15 (9th Cir. 1968); REPORT OF THE COMMITTEE ON THE OPERATION OF THE FEDERAL JUDICIAL CONFERENCE, JUD. CONF. U.S. 59 (Oct. 29-30, 1970) (stating that "trial judges in their broad discretion over voir dire proceedings, may occasionally find it appropriate to examine jurors individually, out of the presence of other jurors, when questions relevant to the case may call for *personal* or *potentially embarrassing responses*." (emphasis added)), quoted in *United States v. Colabella*, 448 F.2d 1299, 1304 n.7 (2d Cir. 1971); *State v. Moseley*, 445 S.E.2d 906, 914 (N.C. 1994) (declining to require that trial courts always use sequestered, individual voir dire, but admitting that a lack of juror candor—whether based on a juror's reluctance to be open before a group, or learning to formulate answers to be excused from the panel, or learning to respond so as "to conceal preconceived determinations regarding guilt or innocence"—is a "danger . . . present in every case in which sequestration and individual *voir dire* is not allowed"); *Commonwealth v. Johnson*, 269 A.2d 752, 757 (Pa. 1970); Bush, *supra* note 131, at 19 ("Courts have accepted the proposition that individual *voir dire* promotes candor."); cf. *Gov't of Virgin Islands v. Dowling*, 814 F.2d 134, 137 (3d Cir. 1987) (observing "that 'an individualized examination is the most effective manner by which to discover latent prejudices on the part of a particular juror.'" (quoting *United States v. Dansker*, 537 F.2d 40, 56 (3d Cir. 1976))); *Coppedge v. United States*, 272 F.2d 504, 508 (D.C. Cir. 1959) (addressing inquiry into jury prejudice during the course of trial: "It is too much to expect of human nature that a juror would

Researchers have accepted that individual questioning of jurors promotes candor where as the collective questioning is ineffective at obtaining juror candor. . . .

. . . Social science research supports individually questioning jurors outside the presence of other jurors as the most effective method to obtain candid answers to all questions, especially the more difficult questions. Researchers noted that “studies about conformity have demonstrated that to avoid calling attention to themselves, panel members subjected to collective questioning do not willingly volunteer information about themselves or reveal opinions that deviate from the other panel members.”¹³⁷

It is also clear that some venire members in group voir dire will observe the questioning of jurors before their turn comes, and attempt to structure their answers either to get on the jury or to keep off it.¹³⁸ Thus, because candid responses are necessary to determine who is qualified to serve and who is not, individual sequestered voir dire is necessary. In some instances, it also proves more efficient, in that it prevents jurors from being tainted by references to the external sources of information or otherwise prejudicial remarks.

Third, judges should avoid phrasing that implies that the task is to sentence the defendant to death.¹³⁹ At every point in the qualification process, judges should speak in the alternative about the penalties that

volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial”).

137. Debora A. Cancado, Note, *The Inadequacy of the Massachusetts Voir Dire*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 81, 96-97 (2000) (footnotes omitted) (quoting NAT'L CTR. FOR STATE COURTS, JURY TRIAL INNOVATIONS, chs. III-1, 68 (1976)); see also Broeder, *supra* note 1, at 503, 511, 528 (discussing juror admissions in one study that they had lied or failed to speak out during group voir dire because of nervousness); David Suggs & Bruce D. Sales, *Juror Self Disclosure in Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 259-60 (1981) (noting researchers' findings of increased anxiety in people called for jury service, and pressures undermining juror candor and encouraging conformity).

138. See Payne & Cohoe, *supra* note 117, at § 21 (“Group voir dire increases the probability that some prospective jurors will contrive to be seated or excused.”); Bush, *supra* note 131, at 14, 20 (pointing out study results showing the learning that takes place during group voir dire; specifically, how jurors noticed that other jurors who admitted to, i.e., being crime victims or having police relatives were excused, and thus withheld such information when their turn came in voir dire).

139. For the dangers latent in the “processing” effect, see *Hovey v. Superior Court*, 616 P.2d 1301 (Cal. 1980), *superseded by statute*, CAL. CIV. PROC. CODE § 223 (West Supp. 2001). In *Hovey*, the court noted:

In a typical death-qualifying voir dire, the judge and the attorneys repeatedly instruct the jurors about the steps leading to the penalty trial and question each prospective juror, oftentimes at considerable length, concerning his or her attitudes about capital punishment. These repeated displays of concern about the death penalty before any evidence of guilt has been presented may prompt the jurors to infer that the court and counsel assume the penalty trial will occur.

Id. at 1348; see also *supra* note 69 (reviewing literature on the prevalence of jurors' reaching sentencing decisions even before the sentencing phase begins).

might be imposed. Thus, rather than describing the bifurcation of the trial as first deciding whether the defendant is guilty and then deciding whether to impose the death penalty, a judge should refer to deciding whether the defendant is guilty *or innocent*, and *if* she is found guilty, then deciding whether to sentence him to death *or to life imprisonment*. Or, to take another example, the judge should not ask a juror whether she can follow the law and impose the death penalty, but whether she can follow the law and impose the appropriate sentence, either death or life imprisonment as the case may be. If this speech pattern at first seems unnatural or a cumbersome alternative to a convenient shorthand, a judge could consider whether she would prefer to refer, at all times, only to "the innocence/life option," for example, describing bifurcation as first "determining innocence" and then "determining whether a life sentence is appropriate."

Fourth, judges should minimize signals that the prosecutor is the secondary authority figure. The judge can introduce the defendant, all of the defense and prosecution lawyers, and other trial participants in the courtroom, instead of letting the prosecutor do so. The judge can also alternate the order of voir dire, sometimes allowing defense counsel to go first, and sometimes the prosecutor. Indeed, given the numerous other signals that the prosecutor is the one with authority—she puts her case on first, she calls police officers to testify, she refers to herself as "We the people of the State of New York"—it would be more truly equitable to allow defense counsel always to go first.¹⁴⁰ Moreover, it would be useful for the judge to say from the outset something to this effect:

If you reach a guilty verdict, then the law will be satisfied by either a sentence of life imprisonment or of death. The Prosecutor would ask for a sentence of death, and the defense counsel would ask for a sentence of life imprisonment, but they would be the only ones asking you for either verdict. I am here, at all stages, only to determine the admissibility of evidence and instruct you on the law. The law and I will be completely satisfied with either a not-guilty or guilty verdict—and, should we come to a sentencing phase, with either a life sentence or a death sentence, whichever is your decision.

Fifth, and finally, the CJP data suggest that judges should begin—in voir dire—the difficult task of educating the jury as to the nature of mitigation and the burdens that fall to each party, since it is clear that jurors do not adequately absorb these concepts when their instruction in

140. Allowing the defense to sit nearer the jury would, for similar reasons, ameliorate some of the prejudicial influences that are especially pernicious in capital trials.

the concepts is delayed until the sentencing phase. Rules concerning a jury's application of aggravating and mitigating factors to sentencing vary from state to state on such matters as whether factors must be enumerated by statute, and each side's burden of proof.¹⁴¹ Despite these actual variations, jurors show uniform beliefs about burdens of proof and sentencing factors that appear impervious to the actual similarities or differences in the law between jurisdictions.¹⁴² In particular, pervasive burden-shifting views among these experienced jurors, who have been instructed in the law by a judge, strongly indicate that common, popular-culture notions about the law and about trials outweigh and overwhelm jurors' efforts to grasp and act on complex, subtle and sometimes counterintuitive rules of law concerning burdens of proof and the need for unanimity in reaching certain decisions. Jurors' erroneous, burden-shifting notions appear to constitute a body of received wisdom that resists closing arguments by lawyers and instructions from judges, and the complexity of burden allocation in capital trials may exacerbate these predispositions. When jurors are baffled or overwhelmed, they are far more likely to resort to their pretrial impressions for guidance.

Capital jurors must make not one decision, but a sequence of decisions,¹⁴³ each with different combinations of unanimity requirements and burdens of proof. Given this sequence, it is not surprising that significant numbers of jurors believe the defendant has the burden of proving mitigation beyond a reasonable doubt; after all, the prosecution has to prove the existence of an aggravating factor by that standard. Similarly, it is not surprising that former jurors wrongly believe that mitigation must be *unanimously* agreed upon, or that a *statutory* mitigating factor must be present to justify a life sentence, because jurors make the understandable layperson's mistake of assuming that superficially similar categories must be subject to the same standards and applied in the same way. In applying the law to mitigation, therefore, jurors simply (albeit erroneously) transfer to that task the requirements that they must be unanimous in agreeing on the presence of an *aggravating* factor, and that at least one *statutory* aggravator must be present to make a case death eligible.

Thus, voir dire offers the judge an opportunity to begin educating jurors about the complexity of capital sentencing law. She need not lecture each juror on all of these details, but she can add to the open-

141. See Blume, MODERN MACHINERY, *supra* note 8 (manuscript at 13-17 & tbls.3-4).

142. See *id.* (manuscript at 13-15 & tbl.3).

143. See Shafer v. South Carolina, 121 S. Ct. 1263, 1272 (2001) (noting that jurisdictions typically "give[] capital juries, at the penalty phase, discrete and sequential functions").

ended questions about a juror's attitudes a summary of the legal burdens on the prosecution and the defense, followed by a question whether the juror will follow instructions on those burdens, and concluding with an assurance that if the jury does not understand the law, they should ask her for further instruction. The reason to start this process at voir dire is not only that it allows repetition, which is crucial to comprehension, but also that, as the CJP data reveal, most jurors have made up their minds about the sentence prior to the close of the guilt phase.

B. Expanding Attorney-Conducted Voir Dire

1. Permitting Attorney Participation

At least in capital cases, courts must permit attorneys to voir dire potential jurors. Judges can and should cover some of the most basic preliminary elements of voir dire, such as previous knowledge of the case, acquaintance with the parties, statutory qualifications, general background information, and so on.¹⁴⁴ Moreover, as noted in the previous section, judges increase the reliability of the qualification process when they pose open-ended introductory questions concerning death penalty attitudes. A judge, however, is not an advocate, and lacks the knowledge and incentive that are crucial to a lawyer's effectiveness in voir dire.¹⁴⁵ In order to assure "adequate *voir dire* [absent which] the trial judge's responsibility to remove prospective jurors who will not be able

144. Judicial questioning on these matters also saves time for the attorney, time that she can use during her questioning "to frame the issues of the case and listen to the jurors." *Part I: Voir Dire—Choosing the Best Jurors and Establishing the Theme of the Case*, 13 *Crim. Prac. Rep.* 316, 316 (1999) [hereinafter *Part I*].

145. See Frasher, *supra* note 92, at 1348–49. The article elaborates:

Empirical studies indicate that potential jurors answer attorney-asked questions more candidly than those questions asked by the judge. Judicial questioning is less effective since judges are unable to probe potential jurors' biases thoroughly because they lack both the advocates' knowledge about the case and the advocates' incentives to obtain useful information about the jurors' ability to make a fair decision. Judges routinely ask questions such as, "Can you be fair and impartial?" for which the "correct" answer is obvious to a veniremember. Those veniremembers who want to be on the jury respond "correctly," and judges generally believe their unrevealing answers. When trial judges use their discretion to restrict questioning for the sake of efficiency, they may, in turn, force attorneys to use peremptory challenges based on stereotypes.

Id. (footnotes omitted); see also JEFFERY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION: GAINING AN EDGE IN QUESTIONING AND SELECTING A JURY* 50 (1995) ("Because of the high status generally accorded to the judge, voir dire examination conducted by the judge is less likely to yield candid and honest answers by jurors than lawyer- or judge/lawyer-conducted voir dire."); Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 *STAN. L. REV.* 545, 548–49 (1975) (contending that a well-prepared lawyer is best situated to question jurors and identify bias); Gold, *supra* note 93, at 170 (arguing that attorney detection of bias is more effective because advocates are better qualified to expose juror bias in their specific cases).

impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled,"¹⁴⁶ questioning by advocates is necessary.¹⁴⁷

Indeed, the language of *Morgan* clearly anticipates attorney-conducted voir dire: "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, *through questioning*, that the potential juror lacks impartiality. It is then the trial judge's duty to determine whether the challenge is proper."¹⁴⁸ A number of jurisdictions recognize the peculiar need for attorney participation in capital case voir dire, but even if the jurisdiction does not so provide by statute, as a constitutional matter, trial courts should grant the defendant the opportunity to have counsel conduct voir dire.

2. Employing Questionnaires

For the judge who is concerned that permitting attorney participation will expand voir dire to intolerable lengths, preliminary questionnaires promise both time-savings and increased candor.¹⁴⁹

"[J]urors are willing to admit unfavorable opinions in written responses to questionnaires that they would hesitate to reveal out loud in the courtroom. . . . [E]xamples [include] negative opinions of racial or ethnic groups, and prejudicial attitudes about attorneys and prejudicial attitudes about attorneys and the court system."¹⁵⁰ Courts should

146. *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992) (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion)).

147. See *Dees*, *supra* note 1, at 14. As *Dees* argues:

Skillfully conducted voir dire is the most important element in a fair trial. Most judges seem not to believe this, or they believe it the wrong way. They think that any twelve people with no direct interest or obvious prejudice will make a fine jury; and they think that is all any defendant can demand. Such judges would not hire a legal secretary or law clerk that way, yet they apparently think a perfunctory selection process is good enough for a jury that will decide the fate of a person's property, or perhaps his life.

Id.

148. *Morgan*, 504 U.S. at 733 (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985)).

149. Courts across the country have acknowledged the value of questionnaires, and have frequently endorsed their use. See e.g., *United States v. Layton*, 632 F. Supp. 176, 177 (N.D. Cal. 1986). Even if not customary practice in a jurisdiction, courts should invite and encourage counsel to submit a motion requesting the administration of a juror questionnaire. A hearing on the matter may illuminate the issues to the court's satisfaction, but it is likely that such a hearing will not be so extraordinarily revealing as to be an essential preliminary to the court's agreement to the administration of the questionnaire. See *Part I*, *supra* note 144, at 316.

150. *Part I*, *supra* note 144, at 316. In a capital trial in Greenville, South Carolina (*State v. Harris* (S.C. County Ct. 2000) (Nos. 2000-GS-3119, 2000-GS-23-3120, 2000-GS-23-3121)), one venire member had, in a response to a questionnaire item, written that one of his nicknames is "Racist." Interview with Jeffrey P. Bloom, Attorney at Law (Columbia S.C.) (Richland County, S.C. Public Defender, 1992-1999), in Greenville, S.C. (Oct. 19, 2000). Then, when the juror was personally in court, on the witness stand, and sworn in, defense counsel asked him *why* people who know him call him that. See *id.* He professed ignorance. (A defense attorney reported that he heard one of the State Law Enforcement Division ("SLED") agents, sitting near the defense table and guarding the defendant, scoff,

encourage prior agreement between defense counsel and the prosecutor on the questions in the questionnaire to expedite the process; courts may also find that attorneys will be willing "to prepare, copy and disseminate the questionnaire[] so that its administration does not inconvenience the court."¹⁵¹

The virtue of having attorneys assume extensive responsibility for questionnaires lies primarily in the complexity of creating effective instruments for uncovering sources of bias. Experienced capital defenders do not use standard-form questionnaires; each capital defendant, each capital case and each local jury pool are so distinct that they require highly individualized surveys.¹⁵² In most instances, defense attorneys will be willing to take on the task of composing the questionnaire, in part because it is to their advantage to integrate that task into their crucial work of deciding on a theme of the case, and developing and staying focused on that theme through all stages of the trial.¹⁵³

3. Expanding the Scope of Permissible Inquiry

Voir dire is "conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion."¹⁵⁴ Yet, this discretion is bounded by the constitutional basis of the right to adequate voir dire. The Sixth Amendment guarantees an impartial jury, one composed of "jurors who will conscientiously apply the law and find the

sotto voce, "Liar"). One of the defense attorneys later speculated that, as the juror was filling out the form, it had not really dawned on him that he would actually be on the stand, under oath, in open court, facing questions on what he wrote. *See id.*

151. *Part I, supra* note 144, at 316.

152. *Cf. Payne & Cohoe, supra* note 117, § 84 (asserting that even in non-capital trials "[t]rial counsel must adapt his questions to the individual case, the community in which the case is to be tried, and the nature of the prospective panel being questioned").

153. Indeed, experienced defense counsel will almost certainly hire a jury expert to assist in preparing the questionnaire. Knowledgeable attorneys know that there is simply no substitute for an expert's analysis and guidance in preparing a useful survey (not to mention in adequately preparing counsel for jury selection, and in assisting counsel in evaluating individual jurors throughout voir dire and jury selection). *See id.* § 12 ("A consulting psychologist can be of great assistance during jury selection and voir dire, whether as a resource tool before trial to help develop the jury selection strategy, or during voir dire to assist in directing the questioning of prospective jurors."); ABA GUIDELINES, *supra* note 2, Guideline 11.7.2 cmt. ("Since capital cases demand an even more expansive voir dire than general criminal cases, counsel should consider obtaining the assistance of . . . a specialist." (footnote omitted)).

154. *Ristaino v. Ross*, 424 U.S. 589, 594-95 (1976) (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895)); *see also* *State v. Patterson (Patterson II)*, 482 S.E.2d 760, 765 (S.C. 1997); *State v. Davis*, 422 S.E.2d 133, 140 (S.C. 1992), *overruled on other grounds*, *Brightman v. State*, 520 S.E.2d 614, 616 n.5 (S.C. 1999); *State v. Smart*, 299 S.E.2d 686, 691 (1982), *overruled on other grounds*, *State v. Torrence*, 406 S.E.2d 315, 324-28 & n.5 (S.C. 1991) (Toal, J., separate concurring opinion joined by majority) (abolishing doctrine of *in favorem vitae*).

facts.”¹⁵⁵ In the words of Lord Coke, a juror must “be indifferent as he stands unsworn,”¹⁵⁶ and a juror whose evaluation of the evidence is likely to be jaundiced by prejudgment cannot be deemed to meet this requirement.¹⁵⁷ Because impartiality goes to “the fundamental integrity of all that is embraced in the constitutional concept of trial by jury,”¹⁵⁸ whenever it is threatened, “the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.”¹⁵⁹ “[A] suitable inquiry is permissible in order to ascertain whether the juror has *any* bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried.”¹⁶⁰

The question, of course, is when a “suitable inquiry” is required. The mere possibility of partiality does not entitle the defendant to question jurors; for example, the Supreme Court has held that a defendant is not entitled to question jurors concerning possible prejudice against people with beards,¹⁶¹ even if the defendant has a beard and such a bias is conceivable. Rather, the Due Process Clause mandates “an assessment of whether under all of the circumstances presented there [is] a constitutionally significant likelihood that, absent questioning about [the source of prejudice],” the jurors will not be impartial.¹⁶²

This standard is applied with special scrutiny in capital cases. Thus in *Turner v. Murray*,¹⁶³ with respect to the risk of racial bias, the Supreme Court gave two reasons for presuming that in a capital case, unlike other cases, voir dire with respect to potential bias is necessary. First, it noted an increased likelihood that bias will affect a capital case: “[Given] the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.”¹⁶⁴ Equally important, however, was the increased seriousness of a biased determination, according to the Court, “[t]he risk of racial prejudice infecting a capital sentencing proceeding is

155. *Wainwright v. Witt*, 469 U.S. 412, 423 (1985); see also *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (noting that “trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community”).

156. *Reynolds v. United States*, 98 U.S. 145, 154 (1878) (quoting COKE ON LITTLETON 155b (19th ed. 1832)).

157. See *id.* at 154-56.

158. *Turner v. Louisiana*, 379 U.S. 466, 472 (1965).

159. *Estelle v. Williams*, 425 U.S. 501, 504 (1976).

160. *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) (alteration in original) (emphasis added) (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895)).

161. See *Ham v. South Carolina*, 409 U.S. 524, 527-28 (1973).

162. *Ristaino v. Ross*, 424 U.S. 589, 596 (1976).

163. 476 U.S. 28 (1986) (plurality opinion).

164. *Id.* at 35.

especially serious in light of the complete finality of the death sentence."¹⁶⁵

Thus, because unexplored racial attitudes of potential jurors in capital cases hold a significant risk of undermining the jury's indifferently conscientious application of the law and because deviation from indifferent application has such harsh consequences in capital cases, the defendant has a right to voir dire the venire members about the details of their attitudes toward race. If potential jurors' attitudes toward the death penalty itself similarly risk undermining the jury's indifferently conscientious application of the law, then the defendant must be permitted to voir dire the venire members about the details of their attitudes toward the death penalty. As Chief Justice Hughes expressed it,

If in fact . . . [venire members] were found to be impartial, no harm would be done in permitting the question, but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit.¹⁶⁶

With respect to the *subject* of inquiry, the logic of *Turner* compels the conclusion that death penalty attitudes warrant questioning: "[Given] the range of discretion entrusted to a jury in a capital sentencing hearing," biased attitudes about the "mandatory" nature of the death penalty or the role of mitigating evidence clearly present a "unique opportunity" for juror prejudice¹⁶⁷ to operate covertly, but to devastating

165. *Id.*

166. *Aldridge v. United States*, 283 U.S. 308, 314 (1931) (Hughes, C.J.). The Chief Justice's further remarks are also apt here:

[T]he government [argues] that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

Id. at 314-15.

167. *Turner*, 476 U.S. at 35. Prejudgment with respect to death penalty issues—such as whether the punishment is mandatory or the significance of mitigation—legitimately correlates to racial prejudice as a necessary object of inquiry under the reasoning of *Turner*. Just as "inquiry as to racial prejudice derives its constitutional stature from the firmly established precedent of *Aldridge* and the numerous state cases upon which it relied, and from a principal purpose as well as from the language of those who adopted the Fourteenth Amendment," *Ham v. South Carolina*, 409 U.S. 524, 528 (1973), the constitutional necessity for inquiry into death penalty attitudes among the venire must flow from the Supreme Court's firmly established precedents of *Tuilaepa*, *Sumner*, *Roberts*, and *Woodson*, that the death penalty can never be mandatory, from the Court's firmly established precedents of *Morgan*, *Penry* and *Eddings* that jurors must be able and willing to give effect to mitigating evidence, and to the exhaustively analyzed bases for those decisions in the Eighth Amendment.

effect.¹⁶⁸ The “especial[] serious[ness] in light of the complete finality of the death sentence” also weighs toward questioning about juror attitudes toward the death penalty.¹⁶⁹ Indeed, *Morgan* holds as much, clarifying that, in a capital case, questioning of potential capital jurors as to whether they would automatically vote for the death penalty on the facts of the particular case, or could consider and give effect to the relevant mitigating factors in the case, is not only suitable, but constitutionally *required*, if a capital defendant is to receive a voir dire adequate to protect her right to a trial before an impartial tribunal.¹⁷⁰

The only open question is how much and what kind of voir dire on death penalty attitudes is warranted. It is here that the CJP data are compelling; when voir dire is cursory, it fails its purpose, and results in the seating of biased, constitutionally unqualified jurors. If voir dire in capital cases is to succeed in its constitutionally *required* mission of swearing in an impartial jury able to follow the law, far more detailed—and probative—inquiry is required. We now turn to what sort of questions are needed and whether there are other legal barriers to asking those questions.

The starting point is recognition of the ineffectiveness of theoretical inquiries as to whether a venire member has biases against the death penalty as a general proposition. Instead, the defendant must be allowed to question potential jurors as to whether they will consider and give effect to the mitigating factors relevant in the particular case.¹⁷¹ The types of questions that judges frequently bar, labeling them “staking out,” “sneak preview,” or “loaded questioning,”¹⁷² are not in fact

168. In addition to those jurors who are prejudiced in favor of the death penalty, some jurors favor a life sentence in the particular case in which they serve, but vote for a death sentence out of the mistaken belief that they have no opinion under the law. See Josh White & Brooke A. Masters, *Va. Court Overturns Death Sentence: Inmate Was Convicted of Slaying Teen in '99*, WASH. POST, April 21, 2001, at B1 (quoting the jury forewoman of a Virginia capital case, that “I was very confused, and I felt that I had to sentence him to death . . . I was looking for a reason to be able to let him live in prison rather than be executed, and I felt I didn’t have that opinion under the law.”). Although most scholarly and professional attention to this manifestation of juror error tends to focus on addressing the problem by reforming jury instructions, it is at least as important to begin correcting such misapprehension at the beginning of the trial, during voir dire.

169. *Turner*, 476 U.S. at 35.

170. See *Morgan v. Illinois*, 504 U.S. 719, 733-35 (1992).

171. See, e.g., *McQueen v. Scroggy*, 99 F.3d 1302, 1329 (6th Cir. 1996) (affirming that defendant could properly question jurors to obtain helpful information about their attitudes toward drug and alcohol intoxication as a mitigating circumstance).

172. See *United States v. Lancaster*, 96 F.3d 734, 740-42 (4th Cir. 1996) (en banc) (no error to disallow question on how juror would weigh testimony of different witnesses) (overruling *United States v. Evans*, 917 F.2d 800 (4th Cir. 1990)); *State v. Southerland*, 447 S.E.2d 862, 866 (S.C. 1994) (“An inquiry as to the weight a juror would give one kind of witness over another invades the province of the jury.”); *State v. Longworth*, 438 S.E.2d 219, 221 (S.C. 1993) (finding “no error in disallowing questions regarding the weight a juror would give one witness over another”); *State v. Davis*, 422 S.E.2d 133, 139 (S.C. 1992) (finding no error in barring inquiry into whether juror would give more weight to testimony

attempts to lock jurors into a particular course of action, but inquiries into whether jurors are actually prepared to act as the Supreme Court has said they must: to *consider* giving weight to mitigating factors. Defense counsel must first address the ability of potential jurors to meaningfully consider *any* mitigating evidence—to establish that they *could* truly consider and evaluate it. Follow-up inquiry regarding *specific* mitigating factors is, however, also necessary.

Done properly, inquiry concerning specific mitigating factors does not seek a relative assessment of the weight a juror would give certain substantive evidence. Rather, the appropriate inquiry seeks to ascertain a juror's *ability* to weigh or give effect to mitigating evidence. This entails no unsanctioned "sneak preview" of *how* jurors will weigh specific mitigating or aggravating evidence at trial. As distinguished from an improper "preview," such questioning is a necessary and constitutionally-sanctioned inquiry into whether a juror is already biased. This is because such case-specific penalty bias remains a basis for disqualification even if the juror, in the hypothetical capital case, could consider a penalty less than death.¹⁷³ Nor is the scope of inquiry into specific mitigating factors an improper attempt to "stake out" jurors. A defendant making such inquiries is merely protecting her constitutional right to a fair trial by assuring that all jurors before whom she is tried are *capable* of weighing all relevant mitigating factors. During voir dire, therefore, defense counsel should be allowed, at the very least, to inquire into each individual juror's ability to consider and give effect to the relevant statutory mitigating factors.¹⁷⁴

of police officer than to that of civilian witness), *overruled on other grounds*, *Brightman v. State*, 520 S.E.2d 614, 616 & n.5 (S.C. 1999); *State v. Adams*, 306 S.E.2d 203, 212 (S.C. 1983) (holding improper the subject matter of question regarding whether juror would give more weight to testimony of police officer than to that of civilian witness), *overruled on other grounds*, *State v. Torrence*, 406 S.E.2d 315, 324-28 & n.5 (S.C. 1991) (Toal, J., separate concurring opinion joined by majority) (abolishing doctrine of *in favorem vitae*).

173. As the Supreme Court has pointed out, when a death penalty statute requires that a juror consider all the aggravating factors and mitigating factors supported by the evidence, a juror "who would invariably impose the death penalty upon conviction cannot be said to have reached this decision based on all the evidence," and thus is a *lawless* juror, "for such a juror will not give mitigating evidence the consideration that the statute contemplates." *Morgan*, 504 U.S. at 738. As Justice Scalia observed, "it is impossible in principle to distinguish between a juror who does not believe that *any* factor can be mitigating from one who believes that a *particular* factor—e.g., 'extreme mental or emotional disturbance[]'—is not mitigating." *Id.* at 744 n.3 (Scalia, J., dissenting) (citation omitted).

174. Evidence is mitigating if it leads to an inference that "might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). Under *Lockett*, relevant mitigating evidence includes, per se, anything which bears upon the record, background and history of the defendant or the circumstances of the crime, and lessens the defendant's moral culpability. Compare *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) with *Skipper*, 476 U.S. at 7 n.2 (evidence of defendant's "personal hygiene practices" would be irrelevant to a sentencing determination), and *State v. Plath*, 313 S.E.2d 619, 627 (S.C. 1984) (stating that "how often [defendants] will take a shower" is irrelevant to the sentencing determination). All relevant mitigating evidence must

This conclusion is all the more compelling in view of case law indicating that when the shoe was on the other foot—when the prosecutor wants to ask analogous questions—courts are often willing to allow such inquiry.¹⁷⁵ The Alabama Court of Criminal Appeals applied an analysis we think is correct. *Grayson v. State*¹⁷⁶ upheld a trial court's decision to let a prosecutor ask if jurors "believe solely because an individual has been drinking alcoholic beverages that they are less responsible for their criminal acts than otherwise"; if "the fact that a defendant had no prior criminal record would keep any of you from voting for the death penalty"; if "the fact that [defendant] had an accomplice would affect any of your ability to vote for the death penalty"; and if "the fact that the defendant was 19 at the time that a crime was committed[] would . . . affect any of your abilities to return a death penalty."¹⁷⁷ The court found none of the questions improper because they did not "eliminate consideration of, or force the jury not to find, any mitigating factors".¹⁷⁸

A party may not solicit a promise to return a particular verdict. In asking [these] question[s], the prosecutor was not asking for a commitment or promise from the prospective jurors to vote for the death penalty. He was merely attempting to determine if any of the potential jurors were of a mind-set that would affect their verdict as tending to show bias or interest. The parties have a right, within the sound discretion of the trial court, to do this.¹⁷⁹

be considered by the jury. See *Morgan*, 504 U.S. at 729; *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Lockett*, 438 U.S. at 604. Accordingly, defense counsel must be allowed to pursue on voir dire the ability of each potential juror to consider and give effect to such evidence.

Moreover, defense counsel must be allowed to inquire as to any bias that would impair a juror's ability to follow the law with respect to mitigating evidence presented or elicited at either the guilt/innocence or sentencing phase of the trial. Indeed, the question that the Supreme Court insisted should have been asked in *Morgan*, "[i]f you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?," *Morgan*, 504 U.S. at 723, refers to the "facts" to be elicited at trial. By requiring the proposed question in *Morgan*, the Supreme Court mandated inquiry into whether jurors harbor any preconceptions that would prevent them from considering the "facts" elicited at trial because they have "predetermined the terminating issue of [the] trial, that being whether to impose the death penalty." *Id.* at 736.

175. A recent article surveyed an extensive number of cases in which appellate courts upheld trial court rulings giving prosecutors wide latitude in capital-case voir dire, even when the same courts disallowed similar defense inquiries and challenges for-cause. See Holdridge, *supra* note 51, at 290-99 & nn.56-58.

176. 675 So. 2d 516 (Ala. Crim. App. 1995).

177. *Id.* at 522.

178. *Id.*

179. *Id.* (alterations in original) (citations omitted) (quoting *Ex Parte Ford*, 515 So. 2d 48, 52 (Ala. 1987)).

This, we think, was rightly decided and reasoned,¹⁸³ and ought to be applied with an even hand to defense inquiries.¹⁸¹

C. Assuring Competent *Voir Dire*

In the end, of course, the willingness of a court to permit probing *voir dire* means nothing if defense counsel does not know how to conduct it. In the long run, legislatures must reckon with the enormous complexity of capital trial representation,¹⁸² which demands that defense counsel be trained,¹⁸³ experienced,¹⁸⁴ prepared,¹⁸⁵ and adequately

180. That is not to say that any juror's affirmative answers to most of these questions should have been *cause* for excusing that juror. A juror's "belief that intoxication diminishes culpability," and acknowledgment that "the existence of an accomplice" or "the defendant's age being 19" would affect her ability to vote for a death sentence, are indications of *legally necessary* sensitivity to mitigation, not of constitutional disqualification. Of course, the prosecutor may use such questions to search for leads to disqualifying sentiments, or to ascertain jurors to target for peremptory strikes. On the other hand, to the extent that an inquiry into whether a defendant's lack of a prior criminal record would "*keep*" a juror from voting for a death sentence is a request for an *absolute* commitment on the juror's response to prospective evidence, that question is "staking out" under current case law, and should not have been allowed unless modified to a noncommittal form—e.g., asking about "willingness to consider."

181. In another death penalty case, the prosecutor appeared to attempt, during *voir dire*, to introduce case-specific testimony concerning aggravated murder, and the Sixth Circuit held that there was no error in allowing the prosecutor to ask venire members whether they would be:

bothered by the method of death and how a person dies, . . . we are talking about a knife . . . about a blade that long being stuck in a man and him bleeding through his liver and bleeding internally. Do you have a stomach for that, to listen to the coroner testify about the method of death?

Byrd v. Collins, 209 F.3d 486, 531 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001). When the prosecutor followed up by asking whether the jurors could "set that aside, however gruesome the details . . ." the court stated:

This demonstrates that the prosecutor, far from trying to inflame prospective jurors against Petitioner, was attempting to determine whether the prospective jurors could remain fair and objective regardless of the emotional impact that the facts of this brutal crime might have on them. This type of questioning is not improper . . .

Id. (footnote omitted). We would question whether this was the correct interpretation of the prosecutor's motives, but putting questions of disingenuousness aside for the moment, would otherwise think the result correct.

There are other examples of courts finding reason to allow prosecutors substantial leeway in asking hypothetically-posed case-specific questions in *voir dire*. See *People v. Noguera*, 842 P.2d 1160, 1187-88 (Cal. 1992) (concluding "that the prosecutor's questions [whether the defendant's relative youth and fact that there was not more than one victim would prevent the jurors from imposing a death sentence] were entirely proper because they were directly relevant to whether a juror would be subject to a challenge for cause"); *People v. Pinholster*, 824 P.2d 571, 588-89 (Cal. 1992) (declining to find error in trial court's permitting prosecutor to ask case-specific questions on *voir dire*, reasoning "that 'a question fairly phrased and legitimately directed at obtaining knowledge for the intelligent exercise of peremptory challenges may not be excluded merely because of its additional tendency to indoctrinate or educate the jury'" (citation omitted) (quoting *People v. Williams*, 628 P.2d 869, 877 (Cal. 1981))).

182. See ABA GUIDELINES, *supra* note 2, Guideline 1.1 cmt. (concluding that "death penalty cases have become so specialized that defense counsel has duties and functions definably different from those of counsel in ordinary civil cases").

183. See *id.* Guidelines 5.1(I)(A)(vi), 5.1(I)(B)(ii)(d), 9.1.

184. See *id.* Guidelines 5.1(I)(A)(ii)-(v), 5.1(I)(B)(ii)(a)-(c).

185. See *id.* Guidelines 11.3, 11.4.1-2, 11.5.1, 11.6.1-4, 11.7.1-3, 11.8.3 (discussing wide-ranging preparation required with respect to ascertaining the prosecution's sentencing intentions, conduct of

funded.¹⁸⁶ At the very least, if statute does not so provide, *courts* should require counsel to have no less than five years of felony trial experience,¹⁸⁷ and to have completed formal training programs in capital defense.¹⁸⁸ Hands-on training is absolutely indispensable; nowhere is the adage “practice makes perfect” more true.¹⁸⁹ Voir dire alone presents a daunting array of challenges, and courts should urge the establishment of CLE training programs focusing on this critical aspect of capital defense.

pretrial investigation and client consultation, decisions on pretrial motions, plea negotiations, general trial strategy, including relation of guilt/innocence-phase strategy to sentencing-phase strategy, voir dire and jury selection, and specific sentencing-phase strategy).

186. See ABA GUIDELINES, *supra* note 2, Guidelines 8.1, 9.1, 10.1 (calling for appropriate funding of supporting services, attorney training, and attorney compensation); Liebman, *The Overproduction of Death*, *supra* note 83, at 2147 (arguing for states to adopt a comprehensive package of reforms in order to ensure adequate representation and funding for the defense in capital cases).

187. See ABA GUIDELINES, *supra* note 2, Guideline 5.1(I)(A)(ii) (urging that lead trial counsel have “at least five years litigation experience in the field of criminal defense”); see also Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implications for the Nation*, 29 IND. L. REV. 495, 501-02 (1996). This portion of the article discussed Indiana’s adoption of legislation in the early 1990s making state funds available to local jurisdictions that satisfy the Indiana Public Defender Commission’s guidelines for appointment of qualified counsel in capital cases, and the Commission’s incorporation within its guidelines of a state supreme court rule. See *id.* at 500-12. With respect to indigent defendants:

- (1) The rule requires that two “qualified” attorneys be appointed in all death penalty proceedings.
- (2) The rule establishes qualifications for lead and co-counsel. Lead counsel must “be an experienced and active trial practitioner with at least five (5) years of criminal litigation experience.” Also, lead counsel must have had prior experience as lead or co-counsel in at least five felony jury trials [that] were tried to completion and have had prior experience in at least one case in which the death penalty was sought. (The Commission had recommended that lead trial counsel have had at least nine prior felony jury trials.)
- (3) Co-counsel must “be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience.” In addition, co-counsel must have had experience as lead or co-counsel in at least three felony jury trials that were tried to completion. (The Commission had recommended that two of the prior felony jury trials have been trials in which the charge was murder or a class A felony under Indiana law.)
- (4) Additionally, no lawyer is qualified to serve as lead or co-counsel unless they “have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.”

Id. at 501-02 (footnotes omitted) (discussing IND. R. CRIM. P. 24 as proposed and adopted); see also Carol Marbin Miller, *State High Court Raises Bar for Death Row, Capital Case Lawyers*, MIAMI DAILY BUS. REV., Nov. 5, 1999, available at <http://www.floridabiz.com/expcfm/display.cfm?id=2266> (last visited Apr. 4, 2001) (discussing Florida Supreme Court’s promulgation of rules on minimum standards for capital defenders; lead defenders must have five or more years criminal-case trial experience, including nine or more jury trials in serious or complex matters and two or more capital cases; trial judges encouraged though not required to appoint two defenders in each case); Maurice Possley & Ken Armstrong, *Revamp Urged in Handling of Capital Cases: Study Seeks Higher Attorney Standards*, CHI. TRIB., Nov. 4, 1999, at N1 (reporting reforms in a dozen or more states that “have established minimum standards for defense attorneys in capital cases,” which usually “require that at least two attorneys be appointed in capital cases and that they have a certain number of years of experience in trying criminal matters”).

188. See ABA GUIDELINES, *supra* note 2, Guidelines 5.1(I)(A)(vi) to (I)(B)(ii)(d), 9.1.

189. See Thomas F. Liotti & Ann H. Cole, *Quick Voir Dire: Making the Most of 15 Minutes*, N.Y. ST. B.A. J., Sept. 2000, at 39, 39 (“As with most aspects of trial work, only practice can help an attorney turn voir dire into an art form.”).

Courts can substantially enhance the just administration of the law if they are attentive to the enormous range and depth of the challenges facing an attorney in the competent conduct of voir dire in a capital trial. Competent voir dire requires strategies for ferreting out hidden biases,¹⁹⁰ techniques for rehabilitating jurors who express reluctance to impose the death penalty,¹⁹¹ analysis of interpersonal and group dynamics in formulating the defense's jury-selection strategy,¹⁹² an agenda for confronting the dangerous mistaken notions about criminal law that many ordinary citizens bring with them to the venire,¹⁹³ educating jurors in their obligation to resist peer pressure when they are unpersuaded,¹⁹⁴ and communicating the defense's theme of the case.¹⁹⁵ Judges have a uniquely authoritative position from which to inform and persuade the bar at large, and legislators, that the complexity of capital defense is such that few, if any, attorneys will be prepared to handle those tasks without extensive training, including moot court exercises.

It makes it far easier for judges to fulfill their roles as neutral arbiters of the law when the advocates appearing before them—prosecutors and defense counsel—are comparably capable, and possess

190. See ABA GUIDELINES, *supra* note 2, Guideline 11.7.2 cmt. (warning of the "invisible but lethal currents of prejudice" that, almost invariably, many venire members cleave to).

191. See *id.* Guidelines 1.1 cmt., 11.7.2(B) ("Counsel should be familiar with techniques for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable."); Nietzel & Dillehay, *supra* note 96, at 7 n.8 ("It is generally believed that a skillful defense attorney can, in the course of individual sequestered voir dire, rehabilitate or 'save' most venirepersons whom the prosecution would challenge because of their anti-death-penalty sentiments.").

192. See GINGER, *supra* note 131, § 11.27 (illustrating the importance of jurors' interpersonal relations in juries' deliberations); DONALD E. VINSON & DAVID S. DAVIS, *JURY PERSUASION: PSYCHOLOGICAL STRATEGIES & TRIAL TECHNIQUES* 188-89 (3d ed. 1996) ("[T]rial lawyers must evaluate the individual's potential interaction with other members of the jury panel. . . . [A] person may possess attributes [that] would ordinarily disqualify him as a desirable candidate but nevertheless be acceptable because of potential social group influences; and, of course, the opposite may be the case.").

193. See JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* 138-40 (1987) (concluding, on the basis of "the disparity between existing legal principles and the opinions of laymen and potential jurors about these principles" (for example, the opinion that a criminal defendant should prove her innocence is held by well over a third of the population), that voir dire is an indispensable opportunity to address such misconceptions, and to discern which jurors are so entrenched in them that they must be excused for cause).

194. See Jaffe, *supra* note 57, at 36 ("[W]e should convey that the decision concerning the death penalty is not a group decision, but an individual moral decision; and decisions and thought processes must be respected at all times during the deliberation.").

195. See JEFFREY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION: GAINING AN EDGE IN QUESTIONING AND SELECTING A JURY* 50 (1995) ("Crucial for success at trial is identifying a persuasive theme of the case. . . . Developing questions that reveal the potential jurors' receptivity to the party's theme is important."); Stephen B. Bright, *Developing Themes in Closing Argument and Elsewhere: Lessons From Capital Cases*, 27 *LITIG.* 40, 41 (2000) ("Voir dire provides not only an important opportunity to identify biases that may interfere with a juror's ability to consider counsel's theory of the case, but a chance to persuade the jury."); Call, *supra* note 86, at 48-49 ("Jury selection is not the most important task during voir dire. During voir dire the attorney needs to decide which veniremen to challenge, indoctrinate the potential jurors with respect to key points of the trial story, and make a good first impression. The second and third tasks are the most important.")

comparable resources. From the courts' point of view, then, ideally the attorneys representing indigent defendants will work in a well-staffed, properly funded statewide office for indigent defense, either one devoted to, or with a section that has established expertise in, capital defense.¹⁹⁶ The bench will provide a great service if it can impress on the bar and on legislators the complexity and *necessity* of abiding by the constitutional requirements of providing each defendant a fair trial by an impartial jury, and the great advantages of meeting those requirements through a guarantee of truly capable counsel at trial, as compared to having to defend the errors of *incapable* counsel on direct appeal and collateral proceedings.

V. CONCLUSION

“Voir dire is short and then you die.” That bleak (and pithy) description was our working title for this article. As we finished our work, we became less, well, *dire*. There are many intractable legal problems, and certainly the administration of the death penalty has its share. Life qualification, however, is not such a problem. Relatively minor changes in voir dire practices would go a long way toward assuring that the jurors who decide who lives and who dies are legally qualified to do so. *Life* will always be short, but voir dire can and should be longer—longer than a mere cursory glance at the jurors our system charges with life and death decisions.

196. See ABA GUIDELINES, *supra* note 2, Guideline 3.1(a).