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Communicating with Capital Juries: How Life Versus Death Decisions Are Made, What Persuades, and How to Most Effectively Communicate the Need for a Verdict of Life

Melissa E. Whitman*

I. Introduction

It is common knowledge in the legal community that the characteristics of those who sit on the jury can be as important, if not more important, than the strength of a case. This fact has been recognized as particularly important in the criminal context, and much attention has been brought to the importance of effective voir dire in determining the predispositions of potential jurors.

Another aspect of the jury process that has received considerable attention is that of how juries make their decisions. Nowhere is it more important for a lawyer to be aware of conclusions that have been drawn on this topic than in the context of a death penalty trial, for it is there that such understanding can become literally a matter of life and death.

In recent years, a number of researchers in the fields of both law and psychology have conducted studies attempting to shed light on how capital juries think and process information. The most prominent and ambitious of these studies were a part of the Capital Jury Project, a federally funded endeavor that sought to understand more fully how capital juries think about a variety of issues. One of the most salient features of these studies, and what makes them dependable and important, was the fact that the research was conducted with real jurors who heard real capital cases, rather than with mock jurors in an artificial setting.

What these studies have shown can help criminal defense attorneys understand more completely the effect their strategies have upon jurors.

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They may also suggest ways the strategies may be amended to become more effective.

This article will summarize the major findings of recent studies and analyses and show how they can be applied to individual trial strategies to insure that capital defendants in Virginia receive the most effective representation possible.

II. How Life and Death Decisions are Made

A. The Responsibility Issue

The decision whether to impose the sentence of death is undoubtedly a weighty one in the minds of all capital jurors. Nowhere else in our society is a citizen asked to take on such awesome responsibility. One commentator concluded that the Capital Jury Project has shown that "a key factor in life versus death decisions in capital cases is the degree of responsibility taken by the various participants," most importantly, by jurors themselves.¹ This commentator also concluded that the research has shown that it is safe to make at least two assumptions about responsibility in regard to capital jurors (1) that perceived responsibility affects decision making and (2) that the greater the perceived responsibility, the less likely it becomes that the juror will choose death.

1. Denial of Responsibility if at All Possible

In a study conducted by Joseph L. Hoffman, the question confronted was that of whether jurors "are prone to abdicate their personal moral responsibility for the death sentencing decision," by artificially distancing themselves from the decision in a variety of ways.² The evidence showed that "most jurors found ways to overcome, or avoid confronting, their sense of personal moral responsibility for the defendant's fate."³ The jurors examined accomplished this goal in a variety of ways, including appealing to God for guidance, turning to alcohol, and misinterpreting the judge's instructions to mean that "the law" compelled a given outcome.⁴ This particular study was conducted in Indiana, a state in which the jury makes a "recommendation" of death to the trial judge rather than a "verdict," as is done in Virginia.⁵ Many jurors convinced themselves that their decisions of

³ Id. at 1156.
⁴ Id.
⁵ Id.
death were not final, as a means of coping with their sense of responsibility. Notably, many of these jurors were aware of the fact that the trial judge was very likely to follow the jury's instructions, yet nevertheless used the "recommendation" language as a means of avoidance. In sum, Hoffman's work has empirically established that it is safe to make the assumption that death penalty jurors will take advantage of any way possible in which to minimize the extent of their personal responsibility for the sentencing decision.8

2. The Mechanisms of Moral Disengagement

Craig Haney has described five ways in which jurors minimize their degree of personal responsibility drawing upon his own research and the research of others, including those involved in the Capital Jury Project. Haney argues that without employing five different methods of moral disengagement, capital jurors would be unable to overcome their innate moral trepidation at taking the life of another citizen.9 In Haney's opinion, these five methods allow capital jurors to psychologically distance themselves from the moral implications of their actions.10 As a result, this distancing allows the continued existence of capital punishment in this country.11

a. Dehumanization

The first mechanism of moral disengagement is the dehumanization of the defendant.12 By viewing the defendant as an "other," a person with whom the jurors have nothing in common and could not imagine interacting with, even to the point of questioning the very humanity of the defendant, jurors are more easily able to justify the killing of another.13

jury sentence of death, and impose life in prison "upon good cause shown." See VA. CODE ANN. § 19.2-264.5 (Michie 1998).

6. Hoffman, supra note 2, at 1156.
7. Id.
8. Id. at 1157.
10. Id. at 1448. Haney also notes that since these mechanisms of moral disengagement are in direct opposition to caring and compassion, they undermine the effect of mitigating testimony in capital penalty trials, thus making a death verdict more likely. Id. at 1450.
11. Id. at 1450.
12. Id. at 1451.
13. Haney notes that the modern execution ritual itself illustrates how extensive bureaucratic procedures are used to ensure that the death row prisoner is completely dehumanized. Id. at 1453. He also shows how other forms of state sanctioned killing have relied upon this documented psychological mechanism with the most obvious examples being war
It has been well documented that juries tend to extend mercy to those defendants with whom they feel some kinship.\textsuperscript{14} Haney argues that the very structure of the current bifurcated death penalty trial itself exacerbates the difficulty encountered by many jurors in relating to the defendant on a human level, because defense attorneys are limited in presenting their case in mitigation until the penalty phase. This phase, at the very tail end of the trial, has been shown to have the lowest degree of effectiveness.\textsuperscript{15} Up until the penalty phase, traditional guilt phase evidence depicts defendants only as violent monsters. It is not revealed that they are the victims of abuse and mental illness, conditions that have often played a pivotal role in causing a defendant's criminal behavior.\textsuperscript{16}

Tipping the scales even further, prosecutorial strategy typically involves characterizing the defendant only on the basis of "isolated, albeit tragic and horrible, moments of aggression." In the absence of counter-balancing mitigation testimony by the defense, this allows the jury to effectively dehumanize the defendant even further and feel little trepidation at retaliating against him with their own violent act.\textsuperscript{17}

Yet another factor to be considered is the often limited resources of the defendant compared to those available to the prosecution.\textsuperscript{18} Given that an effective case in mitigation is usually a lengthy and time consuming process that costs both time and money, this inequity makes it even more likely that the jury will never hear enough of the defendant's mitigating circumstances to make a truly informed life or death choice.

\textit{b. Viewing the Defendant as Deviant, Different, and Deficient}

\textsuperscript{14} Id. at 1451.
\textsuperscript{15} Id. at 1455. Other Capital Jury Project research has established that the penalty trial is the least well-remembered part of a capital trial. See William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 IND. L.J. 1043, 1086-87 & tbl.2 (1995). \textit{See also infra} Part II.D on premature decision-making, indicating that leaving mitigation until the sentencing phase is made even more problematic when one considers studies that have shown that many jurors make their sentencing decisions well before the sentencing phase even begins.


\textsuperscript{17} Haney, \textit{supra} note 9, at 1456. A final way in which the legal process itself helps jurors dehumanize the defendant is through the extensive use of legal language and the sterile courtroom setting which both serve to detach the defendant even further from his background and circumstances in the minds of the jurors. \textit{Id.} at 1454-55.

\textsuperscript{18} \textit{Id.} at 1458.
The second mechanism of moral disengagement is that of viewing the defendant as deviant, different, and deficient, a mechanism that is related to, but distinct from, the dehumanization discussed above. This mechanism is based upon the premise that "[h]uman beings react punitively toward persons whom they regard as defective, foreign, deviant, or fundamentally different from themselves."\(^9\) This premise has been played out in numerous arenas, the most notable being the exaggeration of distinguishing physical characteristics of foreign enemies in wartime.\(^2\) In the death penalty context, the more different and deviant the jury perceives the defendant to be, e.g., unlike themselves, the more likely the jury is to ignore the moral complexities of the life and death decision and characterize the defendant as purely evil, criminal and deserving of death.\(^2\)

Racism is the most troubling “otherness” problem in the death penalty context, as well as in many others.\(^2\) The legacy of discriminatory death sentencing in the United States illustrates the close connection between the tendency to view those different from ourselves as “other” and the ability to morally distance oneself from life and death decision making.\(^3\) Unfortunately, most death qualified juries are unlikely to share the racial and social characteristics of most capital defendants, thus increasing the probability of distancing and a resulting amoral life or death judgment.\(^4\)

With this problem, as well as with the dehumanization problem discussed above, the tendency of the jury to be unaware of the defendant’s case in mitigation until the penalty phase only widens the gulf between the juror’s experiences and the defendant’s.\(^5\) In sum, the way in which capital trials are structured,\(^6\) and capital jurisprudence’s failure to permit attorneys

19. Id. at 1460.
20. Id. at 1461.
21. Id. Haney cites two studies that illustrate how this mechanism has functioned in the criminal justice system. The first, conducted by Martha Duncan, argued that the ways in which a prosecutor refers to the defendant using “metaphors of filth,” such as “dirt,” “slime,” or “scum,” cognitively reinforced the separation of the “criminals” from the “non-criminals.” By placing the defendant in the “criminal” category, a category distinct from that in which jurors place themselves, the jurors are able to morally disengage themselves from the punitive process. Id. at 1462. The second study, conducted by Louis Masur, analyzed the death penalty in this country during the period between the Revolutionary and Civil Wars. Masur found that foreign-born convicts accounted for a significant percentage of the people executed during this period and explained that juries found it easier to convict outsiders of capital crimes than to convict someone with ties to their community. Id.
22. Id. at 1463.
23. Id.
24. Id.
25. Id. at 1464.
26. The structural characteristics include a bifurcated trial system, prosecutorial strategies focussing upon only isolated horrible incidents, and limited resources and experience of many defense attorneys, to name only a few.
to inform jurors about these types of issues, often encourage jurors to focus upon difference and label it "bad" and apart from themselves. This law and structure can keep them from recognizing the human commonality between themselves and the defendant and the feelings of empathy and understanding that such recognition allows.\textsuperscript{27}

c. Capital Violence as Self-Defense

The third mechanism discussed by which moral disengagement occurs is based upon juror's natural fear of the defendant's potential to commit future violence. Many proponents of the death penalty justify its imposition with the rationale that it protects innocent people and their communities.

Prosecutors often emphasize the heinousness of the crime to jurors, thereby conjuring up punitive and vengeful feelings in hopes of convincing them that death is the only reasonable punishment.\textsuperscript{28} While it is of course reasonable for the prosecution to inform the jury of what are often despicable acts on the part of capital defendants, these graphic depictions often overshadow all else and lead jurors to behave irrationally out of fear when asked to decide between a death sentence and a sentence to life in prison without parole.\textsuperscript{29} In fact, studies have indicated that jurors carefully consider the issue of future dangerousness even when it is not explicitly raised during trial.\textsuperscript{30} Studies have also shown that capital jurors discussed the future dangerousness of the defendant more than any other factor presented and seventy-five percent of jurors concluded that the evidence proved that the defendant would be a future danger.\textsuperscript{31}

The disturbing facts usually involved in death penalty cases only enhance the separation of experience between the defendant and the jurors. This distancing only further promotes anger and fear of the defendant on the part of the jury, feelings that are the essence of self-defense. In the face of persuasive prosecution argument, many jurors decide that the only way to protect their community from the defendant's violence is to sentence him to death.

With the increased trend toward only life without parole as the alternative sentencing option, one would think that concerns about a defendant's

\begin{itemize}
  \item 27. Haney, supra note 9, at 1467.
  \item 28. Id. at 1468.
  \item 29. Id. at 1468. In fact, studies have shown a very low level of violence among both life and death sentenced prisoners, as well as among inmates who were released from prison. See G. I. Giardini & R.G. Farrow, The Paroling of Capital Offenders, in CAPITAL PUNISHMENT 169, 177-84 (Thorsten Sellin ed. 1967) (providing an in depth statistical analysis of recidivism rates of capital offenders).
  \item 30. Haney, supra note 9, at 1467.
  \item 31. Id.
\end{itemize}
future danger would be minimized. This is not necessarily the case. Many jurors do not believe that life without parole actually means that the defendant will never be released from prison. Even more disturbingly, death qualified jurors are more likely to hold this mistaken belief than other jurors, thus raising the possibility that a defendant sentenced to die may have otherwise received a life sentence were this misunderstanding remedied.

d. Minimizing the Reality of Execution

One of the primary factors involved in making the life or death sentencing decision is a contemplation of the actual punishment itself—the execution. A variety of studies have indicated that capital jurors have a skewed vision of what execution actually entails and what it is they are being asked to do to the defendant. This distortion, or lack of understanding, sheds some light on why so many capital jurors vote for death, and comports with well established psychological principles. Failure or unconscious refusal to directly confront the realities of death by execution is,


In states that do not provide for a life in prison without parole option, it has been found that jurors are so concerned over incapacitating the defendant that they will vote for a sentence of death even if they don't believe it is warranted in order to safeguard the community. These jurors believed that a life sentence did not really mean the defendant would be incarcerated for life, but would instead be released on parole relatively soon. There was also evidence in this study that many jurors mistakenly did not view the handing down of a death sentence as necessarily meaning that the defendant would be put to death. Instead, they noted that he would have his opportunity to appeal and the state would likely never get around to executing him. See Austin Sarat, Violence, Representation, and Responsibility in Capital Trials: The View from the Jury, 70 IND. L.J. 1103, 1131 (1995).

For a recent and thorough discussion of the widespread and alarming tendency of jurors to misunderstand death penalty alternatives and the absence of appropriate punishment options, namely life in prison without parole, in some states see Bowers & Steiner, supra note 32.

34. "Death qualification" means that the juror's views on the death penalty will not prevent or substantially impair her ability to follow the law and impose either a sentence of life in prison or death. See Wainwright v. Witt, 469 U.S. 810 (1985); Morgan v. Illinois, 504 U.S. 719 (1992).

35. Haney et al., supra note 33, at 626, tbl.2.

therefore, yet another means through which jurors distance themselves from the daunting task before them.37

Classic psychological studies have proven that people who are forced to involve themselves and feel responsible for the well being of others are more likely to behave in a socially responsible, rather than blindly obedient, manner.38 Conversely, people are more likely to punish when the consequences of their decision is minimized and obscured, and the person receiving the punishment is not known or understood by them.39

One important way in which jurors are sheltered from the dreadful reality of the task before them is by the courts’ continued exclusion of evidence about what actually occurs during an execution.40 This lack of exposure to the violence of execution is in direct contrast to the extensive showings by the prosecution of weapons and wounds and victim impact evidence, evidence that is usually presented to jurors in terrifying detail and testified about by many witnesses.41 The result is a trial where jurors are exposed only to the violence wreaked by the defendant, while the violence being advocated by the state as a necessary punishment for the defendant’s crime is cloaked in innuendo and ambiguity.

This lopsided presentation is unfair for it denies the jurors the full facts, facts they need to make a just sentencing decision.42 This unfairness is intensified by the previously cited evidence showing that many capital jurors are misinformed about the meaning of a sentence of life in prison without parole, and are skeptical that a death sentence will actually result in the death of the defendant.43

e. The Scapegoat of Authorization

People are also more likely to punish another if they feel that they have been ordered to do so.44 In the words of one commentator: “[S]ocial scientists have long known that violence is facilitated when those in power define certain situations as ones in which standard moral principles do not

37. See Haney, supra note 9, at 1474-75.
38. See Harney A. Tilk, Socially Responsible Behavior as a Function of Observer Responsibility and Victim Feedback, 14 J. PERSONALITY & SOC. PSYCHOL. 95, 99-100 (1970); see also STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).
39. Id.
40. Howarth, supra note 36, at 1391.
42. See Haney, supra note 9, at 1477-78.
43. Id. at 1477-79.
44. Id. at 1481.
apply and then ‘authorize’ people to act outside the boundaries of normative moral codes.”

The capital trial process has been analyzed as tending to make it seem that the "law" prefers a verdict of death over that of life. As a result of this, in combination with the psychological tendency described above, more people are sentenced to death. A variety of procedures have been noted as implying to jurors that a verdict of death is required if the law is to be followed.

The two most important ones are death-qualifying voir dire and jury instructions given immediately before sentencing. Death-qualifying voir dire has been shown to convince some jurors that by sitting on the jury they are promising the judge that they will impose the death penalty. Depending upon how death-qualifying questions are couched, some jurors have incorrectly interpreted the instruction to “follow the law” as implying that the law requires a death verdict.

Jury sentencing instructions present another problem. Convoluted legalistic language in these instructions often end up presenting the jury with the apparent choice of rendering a “moral,” extra-legal decision (likely to be death, given the jurors death-qualification), or applying a legal formula that they do not comprehend. Often, as a result of this confusion, the defendant is given a sentence of death by default, because the jury did not understand how to apply legal standards that, if properly applied, may have clearly indicated that a life sentence was more appropriate.

Given the difficult moral choice set before capital jurors and the psychological mechanism that allows one to kill more easily if authorized to do so, it is not surprising that most find it easier to make a decision if they can justify it as being mandated by the “law” or the “judge.” In fact, studies conducted within the Capital Jury Project found that eight out of ten jurors interviewed felt that the defendant or the law is the most responsible for the defendant’s punishment, while only 6.4% of jurors felt that the individual

45. Id. See also Herbert C. Hampton & V. Lee Hamilton, CRIMES OF OBEDIENCE: TOWARDS A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY 16-17 (1989).
47. See Haney, supra note 9, at 1482.
48. Id.
49. Id. Haney also opines that the personal characteristics of death-qualified jurors render them particularly susceptible to arguments that they must follow a “promise” made to the court. Id.
51. Haney, supra note 9, at 1483. Confusion often centers around the proper roles of mitigating and aggravating circumstances, miscomprehension that can be remedied with carefully crafted instructions.
This juror was most responsible. This dovetails with the primary thesis explored by Hoffman, positing that jurors will opt to shed themselves of responsibility for the capital sentencing decision if at all possible.

### B. The Role of Remorse in Determining a Sentence of Life or Death

Another factor that has received scholarly attention is the effect that the jury’s perception of a defendant’s remorse, or lack of it, has upon determining whether or not he will receive a death sentence. Scott Sundby is one such researcher whose conclusions are extremely informative. The following is a synopsis of Sundby’s findings as a result of data he gathered from the California segment of the Capital Jury Project.

1. **Remorse is Important**

   Our society expects those members who commit egregious wrongs to seek forgiveness for their sins. In the case of the taking of another human life, the wrongdoer is often deemed to have forfeited his right to continue to live free in society and is also expected to suffer from deep remorse for the life they have brutally cut short. This being the case, it makes sense that capital jurors seek out signs of remorse from capital defendants. It follows also that when remorse is not found, these jurors are much more likely to sentence that defendant to death. Both the study conducted by Sundby, and those that came before, make it clear that a defendant’s lack of remorse plays a significant role in convincing jurors to vote for death.

   Sundby’s article and study, however, also shed light upon how jurors conclude whether or not a defendant is remorseful, how different trial strategies affect jurors’ perceptions, and how these perceptions influence the life or death sentencing decision. One of the most important of Sundby’s findings on a practical level is the discovery that it is how the defense pres-

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54. *Id.* at 1558.

55. *Id.*

56. *Id.*

57. *Id.*


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ments its case that has the most influence upon whether jurors will hold lack of remorse against a defendant. It is critical for criminal defense lawyers to understand how to present their case to a capital jury in a way that won’t allow the jury to play their “lack of remorse card,” for it is this factor that may make the difference between a death sentence and one of life in prison without parole.

First, it is notable that most defendants in the study did not testify. Therefore, the jurors’ perception of the defendant’s remorse, or lack of it, was not based upon the defendant’s words. Instead, jurors based their remorse-related perceptions upon the nature of the defendant’s actions at the time of the crime, such as what the defendant said before and after the killing, and also upon improper acts committed by the defendant while in custody, such as the making of a weapon or an attempt to escape. However, by far the most influential factor that helped to form juror’s perceptions of a defendant’s remorse was his demeanor and behavior during the trial itself.

The most often commented upon indicator of a lack of remorse was the defendant’s seeming lack of emotion. Other related indicators were an air of nonchalance and the appearance of being bored. Jurors commented that without any sign of emotion on the part of the defendant they found it very difficult to view him as a human being, given the horrendous crimes of which he was accused. This inability to humanize the defendant is worrisome for it facilitates the moral disengagement mechanism discussed earlier.

Sundby found that only a very small percentage of the jury panels analyzed perceived the defendant as remorseful but a far greater percentage handed down a life sentence. The fact that jurors who find the defendant unremorseful can still sentence him to life indicates that an absence of remorse does not necessarily mean the defendant will be sentenced to death. As explanation, Sundby concluded that remorse should not be viewed narrowly as meaning only that the defendant felt sorry for his

60. Id. at 1558-59.
61. Id. at 1560.
62. Id. at 1560-61.
63. Id. at 1561-62.
64. Id. at 1563. A much smaller number of jurors pointed to the defendant’s displays of anger and inappropriate behavior at trial as indicators of a lack of remorse, while an even smaller number stated that the defendant’s physical appearance was an indicator of a lack of remorse. In most cases, however, the defendant did not misbehave or appear “criminal.” Id.
65. Id. at 1564.
66. Id.
67. See supra Part II.A.2.
68. Id. at 1565.
69. Id.
actions, but should instead be expanded to include whether or not he was willing to accept some responsibility for the crime he committed. Looking at remorse in this way, Sundby found that the more responsibility the defendant took upon himself for the crime, the greater the chance that the jury viewed him as remorseful.

2. The Relevance of “Denial” and “Admission” Defenses

Concluding that defendant's acceptance of responsibility influences the jury's decision making, Sundby then noted that whether or not the defendant utilized a “denial” or an “admission,” defense played a pivotal role in determining whether the jurors would view him as remorseful and, therefore, less deserving of a death sentence.

A “denial” defense was one in which the defendants maintained their innocence and denied all involvement in the killing, while an “admission” defense was one in which the defendants contested an element of the crime (e.g., premeditation) or the existence of a special circumstance (e.g., the killing occurred during a robbery), but did not deny participation in the crime.

In those cases where the defendant employed a “denial” defense, the jury was twice as likely to impose a death sentence, while the juries in “admission” defense cases chose a verdict of life over death in a ratio of three to two. Sundby's research also showed that the negative impact of a “denial” defense was exacerbated by the defendant taking the stand on his own behalf and denying his involvement in the crime, for it indicated an even greater degree of denial of responsibility.

As one would expect, the situation was entirely different when a defendant used an “admission” defense. When such a defendant verbally acknowledged his participation in the killing, the likelihood of his receiving a life sentence significantly increased.

3. The Importance of When Remorse is Expressed

Sundby also analyzed cases in terms of whether the defendants expressed remorse at the penalty phase. These included both “denial” and
"admission" defense cases. The resulting data clearly indicated that the earlier defendants express remorse the better, for if such statements do not come until the penalty phase juries are likely to be very skeptical of their sincerity and are unlikely to grant mercy.  

Apparently, in order for remorseful testimony at the penalty phase to be effective, the defense must somehow incorporate evidence of some acceptance of responsibility into the guilt phase. Only then does the later testimony appear genuine. This tendency causes the defendant’s case in mitigation to run a great chance of being rendered ineffective. For example, facts from the defendant’s history such as drug or child abuse will only seem like yet another example of the defendant denying responsibility for his crime. Instead, the data indicated that the defendant’s case in mitigation, if concentrated in the penalty phase, is much more effective if the defendant has previously accepted a certain amount of responsibility for his actions. As discussed above, one way to show an acceptance of responsibility is for the defendant to pursue an “admission,” rather than a “denial” defense strategy, thereby increasing the chance that jurors will take penalty phase mitigation testimony seriously. An “admission” defense strategy also has the added benefit of providing opportunities to weave mitigation testimony into the guilt phase, testimony which can then be harmonized with later penalty phase testimony.

C. How Capital Juries Perceive Expert and Lay Testimony

In addition to his work involving the role of remorse, Scott Sundby also analyzed how capital jurors perceive, use, and compare expert and lay testimony. The results of his research shed important light upon the relative persuasiveness of different types of witness testimony. Sundby’s findings may contradict the assumptions of many defense attorneys about
how experts are perceived and the most effective way of presenting mitigating evidence.  

1. The Messenger is as Important as the Message

Sundby’s research clearly indicates that the jury will have biases for and against different types of witnesses which will contribute to the effectiveness of certain testimony. The three types of witnesses analyzed were professional experts, lay experts, and “family and friends” witnesses.

a. Professional Experts

These are defined as those experts who possess training or education beyond the knowledge of the average juror. Most charge a fee for their testimony and have no previous connection to the defendant. These types of experts are used often for a number of reasons. First, they are available, for courts will often supply such experts under the aegis of Ake v. Oklahoma to safeguard the defendant’s due process rights. Second, because the process for obtaining such experts is apparent and relatively straightforward, many attorneys with little capital defense experience understandably view retaining such an expert as a way to feel more in control of the complex capital litigation process.

Despite the popularity of expert witnesses, the data strongly indicated that these were the defense witnesses viewed most negatively by jurors. They were well remembered by jurors, even though often for not being...
believable.\textsuperscript{94} Also, interestingly, professional experts for the defense received a much more hostile reception than those testifying for the prosecution.\textsuperscript{95} This was attributed to the fact that prosecution experts are used principally to rebut theories proffered by the defendant, not advance their own, as well as the fact that they are not perceived as being paid for their testimony as is the case with defense witnesses.\textsuperscript{96} The data, however, was not entirely discouraging. When the professional experts were received positively their testimony was shown to heighten the chances of the defendant receiving a life sentence.\textsuperscript{97}

There were three primary reasons cited for the jurors' mistrust of professional expert testimony. The first was that they were very likely to be perceived as "hired guns" for they were thought to tailor their opinions for the benefit of whomever was paying them.\textsuperscript{98} This perception of expert witnesses as "hired guns" effects defense witnesses far more often than witnesses for the prosecution. Since prosecution experts are not specifically paid for their work on the case, they are not perceived as having as much to gain from tailoring their testimony as are witnesses for the defense.\textsuperscript{99} Defense counsel apparently are not communicating to jurors that these witnesses have a greater potential for bias because their entire income depends on government employment, as compared with the receipt of a one-time fee.

The second reason for juror mistrust of professional expert testimony was the tendency of the jurors to be hypercritical and skeptical of the expert's theories, qualifications, and preparedness. This readiness to discount an expert's testimony was closely related to the distrust engendered by the "hired gun" perception discussed above.\textsuperscript{100} In addition, many jurors simply had a generalized suspicion of experts, for they were thought to be "not in touch with reality," often cloistered in their "ivory towers" with little understanding of the real life application of their theories.\textsuperscript{101} Many jurors also expressed the impression that the expert was attempting to manipulate them with their testimony by casting doubt where there was none.\textsuperscript{102} Finally, when many jurors compared their own life experiences and known theories of human behavior they would rarely comport with the

\begin{itemize}
\item \textsuperscript{94} Id. at 1123-24.
\item \textsuperscript{95} Id. at 1125.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id. at 1124-25.
\item \textsuperscript{98} The fact that the expert is paid for his or her services always comes out, for it is textbook strategy for cross-examining expert witnesses to ask them about their fees. Id.
\item \textsuperscript{99} Id. at 1128-29.
\item \textsuperscript{100} Id. at 1130.
\item \textsuperscript{101} Id. at 1132.
\item \textsuperscript{102} Id. at 1134.
\end{itemize}
theory advanced by the defense’s professional expert.103 The defendant’s behavior was, naturally, not considered “normal” by jurors, and when the defense expert attempted to explain the reasons for the “abnormal” behavior, many jurors would discount such testimony as flying in the face of their concept of personal responsibility.104 A remarkable number of jurors had shared certain experiences with the defendant, such as an impoverished childhood or drug addiction, and would often note that, unlike the defendant, while these were true hardships, they had survived them without committing murder.105 In sum, many defense experts’ mitigation oriented theories run in direct opposition to jurors’ notions of free will, making most jurors extremely skeptical of the experts’ testimony.

A final insight into jurors’ perceptions of professional experts was the danger that their testimony would be ignored or even deemed harmful if it were not shown how this testimony blended with the general theory of the case.106 For example, an expert’s testimony was construed as communicating the opposite of what the defense intended in the case of a psychiatrist who, by describing the defendant’s mental illness noted that without medication he would become violent.107 What was intended as evidence lessening the defendant’s culpability instead created a fear that unless the defendant were subjected to capital punishment he would kill again.108

b. Lay Experts

In contrast, jurors reacted very favorably to lay experts: experts who had knowledge of the defendant, or the defendant’s experiences, through their own experiences and who had insights based upon that knowledge.109

103. Id. at 1136-37.
104. Id.
105. Id. at 1137-38. On this important issue, it is important to attempt to communicate two points. First, the law is not asking jurors to make a choice between those like themselves who overcome obstacles like abuse, poverty, and neglect without killing and those with similar obstacles who killed. Instead they are being asked to choose which murderers should spend the rest of their lives in prison and which should be executed. Since that is the choice, should not the obstacles (e.g., abuse and neglect) weigh in the defendant’s favor? Further, should it not be possible to recognize and celebrate those who faced adversity but did not turn to violence without having to kill those who, like the defendant, also struggled against them but failed?
106. Id. at 1142-43.
107. Id. at 1144.
108. Id.
109. Id. at 1118. Statistically speaking, lay experts received the most favorable positive to negative impression ratio in the study. Jurors named them as among the most influential witnesses fifteen times, while they were only reported as backfiring on three occasions. Id. at 1124.

An example of a lay witness with knowledge based upon interaction with the defendant is that of a prison guard in a facility where the defendant was incarcerated, while an example
The lay witness was not perceived as having a personal bias for, or necessarily any direct knowledge of, the defendant. An added benefit is that the witness usually testifies free of charge.\textsuperscript{110} The lay witness’s testimony is not derived from professional training or education, as with professional experts, but directly from his or her experiences.\textsuperscript{111} This favorable reaction is not surprising for lay experts have the opposite attributes of professional experts, who engendered such negative reactions.

Within the group of lay witnesses, the most effective were those who would not have been thought to be supportive of the defendant, such as the testimony of a prison guard or a nurse.\textsuperscript{112} Another benefit of lay witnesses who testify based upon their common experiences with the defendant was that they provided context to the professional expert’s testimony concerning such things as a childhood riddled with abuse or neglect.\textsuperscript{113} Yet another benefit is that it is virtually impossible for the prosecution to undermine their testimony through cross-examination. Again, however, even though lay witnesses are favorably received, it is important that their testimony be consistent with the general theme of mitigation.\textsuperscript{114}

c. “Family and Friends” Witnesses

These witnesses, while not quite as overwhelmingly effective as lay witnesses, were named as positive influences a great majority of the time.\textsuperscript{115} While inherently biased in favor of the defendant, a defendant’s family and friends frequently testify during the penalty phase of the trial to appeal for mercy on the defendant’s behalf.\textsuperscript{116} This testimony was generally well received and expected, despite its inherent bias.\textsuperscript{117} In fact, it was the absence of such testimony that worked against the defendant, for jurors deemed the absence of such character witnesses to indicate true depravity, on the theory that if even his family would not say something positive on his behalf, he must be beyond redemption.\textsuperscript{118}

\textsuperscript{110} Id. at 1118.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 1147.
\textsuperscript{113} Id. at 1146.
\textsuperscript{114} Id. at 1150.
\textsuperscript{115} Id. at 1124. These witnesses were named as positive influences for the defense thirty-nine times and were viewed as backfiring only fifteen times. These numbers are almost the mirror opposite of those received by professional experts. Id.
\textsuperscript{116} Id. at 1119.
\textsuperscript{117} Id. at 1151-52.
\textsuperscript{118} Id. at 1152. The worst possible scenario, however, is when the defendant’s family
The effectiveness of this sort of testimony relates to its ability to show that someone cares about the defendant as a son or a brother, thus humanizing the defendant and showing that he is more than just a cold-blooded killer. This view of the good within the defendant is very important mitigation at the penalty trial. The jury has usually just experienced a trial filled with images of the horrible things the defendant has done, images which are resonating in their minds at the start of the penalty trial.

While some jurors contended that they were not affected by this kind of testimony, it is probably impossible for a juror to discount it altogether, even if only subconsciously. In addition, family testimony may be invaluable if part of the defendant's case in mitigation revolves around such things as child abuse. The testimony by a sibling of the defendant, for example, is an extremely effective way of entering the narrative of the abuse suffered by the defendant into evidence. Another benefit to these witnesses, as with lay expert witnesses, is the difficulty of the prosecution in cross-examining such a witness on such topics as their love for the defendant, or their descriptions of the child abuse suffered by the defendant and the witness, thus making these witnesses relatively risk-free.

d. The Importance of a Coherent Theme

One of the most important lessons to be learned from Sundby's data is that the most successful defense cases used a combination of different types of testimony to create a coherent, harmonious theme that spanned both the guilt and penalty phases of the trial. Using lay experts whenever possible; "family and friend" witnesses for emotional input and to flesh out the case in mitigation; and professional experts to complement, but not overshadow, the testimony of the two other groups, provides the greatest chance of securing the client a sentence of life.

D. Premature Decision Making: The Foreclosure of Impartiality in Capital Sentencing

and friends testified against the defendant. Id. at 1160-61.
119. Id. at 1155-56.
120. Id. at 1156-57.
121. Id. It is also important to present this sort of testimony in sufficient detail to show a full factual picture of the defendant, for without such a picture, jurors may view such testimony as an attempt to emotionally manipulate them. Id. at 1160-61.
122. Id. at 1159-60. As mentioned above, this is provided so that the witness will relate impressions and experiences that will not work against the defendant. Id. at 1161. See supra note 113 and accompanying text.
123. Id. at 1163.
124. Id. at 1164.
The bifurcation of a capital trial is intended to allow sentencing to be free of constitutionally impermissible arbitrariness and discrimination and to prevent jurors from allowing the guilt decision to be influenced by punishment considerations. This is thought to be achieved by applying special rules of evidence to the sentencing phase which allow the relatively flexible articulation of both aggravating and mitigating factors, as well as a different set of instructions from the judge, in order that jurors can make a fair decision untainted by the emotion engendered by the guilt phase.

A recent study conducted by William J. Bowers, Marla Sandys and Benjamin D. Steiner indicates, however, that nearly half of capital jurors decide upon the appropriate punishment before the sentencing phase even begins. This means that these jurors are relatively impervious to the specially tailored evidence and arguments concerning sentencing, and to the judge's sentencing instructions. These findings call into question both the efficacy and fundamental fairness of the bifurcated system as it now operates. The researchers convincingly demonstrate that those jurors who decide punishment so prematurely violate the defendant's right to an impartial jury, for these jurors are not capable of making a reasoned moral choice between a sentence of life or death, if their minds are closed to the entire sentencing phase of the trial. While it is established that the ability to keep an "open mind" and to resist the tendency to reach conclusions prematurely are the hallmarks of being a good juror, this data indicates that a sizable percentage of jurors chosen to sit on capital cases are unable to live up to these ideals.

Even more threatening to the hope of a fair trial is that a majority of those who stated that they had decided the sentence during the guilt phase, were "absolutely convinced" of their positions. This data suggests that a juror's early decision concerning punishment will dominate their subsequent thinking about punishment and also indicates a likelihood that these jurors will hold fast to their early positions through the end of the sentenc-
ing phase. Subsequent data did indeed lend support to both of these suggestions. In contrast, with those jurors who were undecided as to punishment at the guilt phase, it was impossible to predict how they would eventually decide, indicating that the evidence presented at the sentencing phase was given at least some effect.

Many jurors who made their punishment decision prematurely made their decision at the time evidence was presented at the guilt phase. In addition, this was a more common occurrence among pro-death jurors than among those that prematurely decided for a life sentence. Also, for those jurors who made their simultaneous decisions during jury deliberations at the guilt phase, the pro-life jurors significantly outweighed the pro-death jurors in number. Interestingly, in contrast, almost three-quarters of those jurors who were undecided on punishment at the guilt stage stated that they made their determinations as to guilt and punishment on different grounds.

Other especially relevant findings were that an early stand for a death sentence often seemed to arise from the perception that the defendant was “unrepentant” and likely to be a danger in the future. For those jurors who voted for life, however, it was often questions about the defendant’s responsibility for the crime or his background that tipped the scales toward a verdict of life. Also interesting was the finding that many early pro-death jurors operated under the presumption that strong proof of guilt justified the death penalty, a finding that indicates a clear misunderstanding of both law and procedure.

132. Id. at 1490-91.
133. Id. at 1491-93. Six out of ten jurors who thought they knew what the correct punishment was at the guilt phase of the trial held to their opinions for the rest of the trial. Id. at 1491.
134. Id. at 1493.
135. Id. at 1493-94. The data indicated that 48.5% of all jurors who took a stand on punishment prior to the sentencing stage of the trial stated that the presentation of evidence was the point at which they formed their opinion on punishment. Id. at 1495. Also, more pro-death jurors (54.6%) than pro-life jurors (39.0%) stated that this was when they made their decision. Id.
136. Id. at 1494.
137. Id. at 1495-96. 28.1% of pro-life jurors decided the defendant’s fate during jury deliberations at the guilt phase, as compared to only 10.1% of pro-death jurors. Id. at 1495.
138. Id. at 1494.
139. Id. at 1502.
140. Id.
141. Id. at 1497. On the contrary, it is established that the death penalty should not be the appropriate punishment for all murderers, but only for the most culpable of offenders. The fact that a defendant is found guilty of murder does not automatically mean he should receive death. There must be a means of distinguishing a case in which the death penalty is warranted from one in which it is not. See Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard
Finally, the researchers asked jurors about the acceptability of the death penalty for seven different types of murder in order to determine if the jurors' personal feelings about the death penalty may impair their ability to properly function as members of a capital jury. In order to function properly, jurors must not regard the death penalty as an unacceptable option given certain aggravating circumstances, nor can they regard it as the only acceptable punishment given mitigating circumstances.

Disturbingly, over half of the jurors interviewed stated that they thought that death was the only acceptable punishment for three of the murder types: repeat murder, premeditated murder, and multiple murder. Half of the jurors stated that the only acceptable punishment was death for the killing of a police officer, or for murder by a drug dealer, and almost a quarter of the jurors interviewed thought death was the only appropriate punishment for three of the remaining four crimes—including rape without murder! Only for a planned attempted murder did fewer than one in four jurors state that death was not the appropriate punishment.

Clearly, many of the jurors chosen for capital juries fail to appreciate the principle set forth in Woodson v. North Carolina, that the death penalty is never the only acceptable punishment for a capital offense. The researchers also proffer that this widespread predisposition toward a death sentence may contribute to the common tendency to decide the defendant's punishment prematurely.

III. Altering Trial Strategies in Response to These Findings

The materials discussed above strongly suggest the need to reexamine penalty trial approaches and tactics. New approaches must be found to address the obstacles identified here, as well as to make more persuasive the affirmative case against death. There is no recipe or formula for this, of course. What follows are a few suggested approaches dealing with some, but not all, of the issues identified in this article.

142. Id. at 1504.
143. Id. at 1504-07.
144. Id. at 1504.
145. Id.
146. Id. at 1505. Only 15.7% of jurors felt that death was the only appropriate punishment in such a case. Id.
147. 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); see also Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty is disproportionate punishment for the rape of an adult woman where the victim is not killed).
148. Bowers et al., supra note 126, at 1505.
149. Id.
A. Addressing the Responsibility Issue

1. Emphasize Personal Responsibility

Given that the data has shown that most jurors try to avoid personal responsibility for their sentencing decisions if at all possible, the capital defense attorney must make every effort to impress upon the jury their personal responsibility for the taking of the defendant's life. Death penalty jurors must be told in "strong, unequivocal language" that their role is both a difficult one and one which they cannot in truth pass off onto the "shoulders" of the judge, the defendant, or an abstract concept of "the law." This message should be communicated at as many points during the sentencing phase as possible. It should be mentioned in the opening statement, in the closing argument, and in proposed sentencing instructions.

It should also be emphasized that while the balancing of aggravating and mitigating factors is intended to guide the jurors' discretion, the outcome of this "balancing" is not intended to result in a mathematically based sentencing "answer." This should, hopefully, prevent jurors from transferring responsibility for the defendant's fate from themselves to "the law." It is also important to clarify for jurors the fact that being chosen to sit on a capital jury does not mean that they in any way promise to impose the death penalty should the defendant be found guilty. Instead, the Woodson principle should be explained in clear, non-legalistic language, with the goal of eliminating any potentially deadly confusion.

2. Counteracting the Mechanisms of Moral Disengagement

a. Dehumanization and Viewing the Defendant as "Other"

One of the most important ways to counteract the tendency of capital jurors to view the defendant as less than human and, therefore, easily deserving of death is to weave as much of the case in mitigation into the guilt phase as possible. This will serve to show the defendant earlier in life in a context other than that of "murderer." Using lay and "family and friend" witnesses when at all possible is a good idea. This will, obviously, be much easier to accomplish at the sentencing phase, but, if the case in chief includes any facts that could be attested to by these types of witnesses rather than professional experts, every effort should be made to choose the former over the latter.

150. See Hoffman, supra note 2, at 1157-58.

151. Since Virginia does not subscribe to the procedure of the jury making only a sentencing "recommendation" to the judge, this means of abdicating responsibility should not be a problem. Nevertheless, it must be assumed that jurors are aware that there is an appeals process in capital cases.
It is always important to emphasize commonalities between the defendant and the jurors so as to diffuse the psychological tendency of jurors to distance themselves from those viewed as different from them. Bringing out the fact that the defendant attended local schools and participated in local sports is just one way of doing this. However, care must be taken not to have this sort of information backfire by leading the jurors to be irrationally fearful of his reentering their community or by causing an “I grew up in the same way but didn’t become a killer” reaction.

It is also helpful to emphasize the fact that most aggressive behaviors are learned defensively as a result of abuse, rather than a completely irrational reaction resulting from an inherent defect in the defendant’s psyche.

As with any trial, there are always countervailing considerations, such as a hostile family, which may prevent the use of such witnesses and the introduction of certain helpful humanizing evidence. Nevertheless, just keeping in mind the importance of counteracting the prosecution’s attempts to characterize the defendant as only a killer will assist in presenting the defendant in as sympathetic a light as possible.

Also, given that racism is the most common factor causing a jury to consider the defendant only as “other,” it is important to make every effort possible to ensure that jurors of the defendant’s race are included on the panel. At the very least, an effort should be made to eliminate those jurors with little or no experience with other races. A *Batson* challenge may be appropriate in some instances and should be made whenever possible. Statistics on death penalty discrimination may also be brought to the jurors’ attention, at the voir dire stage, and beyond, if the judge will allow it.


Given that future dangerousness is the factor most discussed by capital jurors, it is vital to explain to jurors that a sentence of life in prison without parole means exactly that in Virginia. It is also vital to explain to jurors that a sentence of death does in fact mean that the defendant will be executed. This information should, whenever possible, be accompanied by evidence that the defendant would be a model prisoner, and unlikely to kill again in prison or effect an escape.

Another prudent strategy is to try to give the jurors a greater understanding of the reality of execution, for the research has indicated that most jurors have a skewed vision of how executions are actually carried out. By exposing the jurors to the reality of state-sanctioned killing in all its gory details, the jurors may be more likely to feel responsible for the potential killing of the defendant. Such evidence may also help to counterbalance the

152. *See Batson v. Kentucky, 476 U.S. 79* (1986) (permitting defendant to establish that black jurors were excluded on the basis of race and that the system of peremptory challenges was operated in a discriminatory fashion).
violence of the prosecution's evidence concerning the nature of the defendant's crime. This issue can be addressed both during voir dire and in penalty trial evidence.  

B. Using the Remorse Issue to the Defendant's Advantage

The most important lesson to be learned from the information gathered concerning the role of remorse is the importance of structuring the guilt-innocence presentation so that it harmonizes, rather than contradicts, the mitigation theme at the sentencing phase. The research has clearly shown that pursuing a standard strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt is not likely to be a winning strategy in most cases. Also, the hope of creating a lingering doubt in the minds of the jury has been shown to be limited in its effect.

Instead, it is critical for the defense to portray the defendant as taking responsibility for his actions, unless, of course, it is a case in which the evidence against the defendant is weak. It is not advisable to pursue a "denial" defense unless the evidence will clearly support such an approach. Pursuing a "denial" defense in hopes of an acquittal, followed by evidence of remorse in the sentencing phase, has been shown to be a likely recipe for a death sentence. By pursuing an "admission" defense, on the other hand, the defendant shows a certain amount of acceptance of responsibility for his actions, even if his demeanor in the courtroom does not communicate remorsefulness. The defense must be careful that the "admission" defense be based upon a plausible theory of the case, however, so as not to undermine the defendant's basic acknowledgment of the killing and to be sure to weave a common thread of mitigation into both the guilt and sentencing phases of the trial.

In sum, the defense attorney should consider carefully the dire ramifications of a "denial" defense if the defendant is found guilty. The attorney should counsel the defendant as to the risk of pursuing such a course if the prosecution's case is strong, as well as tell the defendant of the benefits of pursuing an "admission" defense instead. If the client insists upon a "denial" defense despite these admonitions, the attorney should be wary of saving

153. Care should be taken, however, that this evidence is not perceived as an attack on the death penalty itself. It is simply a way to impress upon the jurors the gravity of the decision they are called upon to make.

154. See Sundby, supra note 53, at 1597-98.

155. Id. at 1579, 97.

156. Id. at 142.

157. As recent revelations of four hundred incidents of gross prosecutorial misconduct discovered recently by the Chicago Tribune have illustrated, the "denial" defense is sometimes the truth and being unjustly convicted of a crime one did not commit is a possibility if the prosecution does not abide by their ethical responsibilities. See Ken Armstrong & Maurice
all mitigating evidence until the sentencing phase of the trial for the data indicates that any remorse shown at this point, after a conviction and a "denial" defense, will be seen as disingenuous and consequently ineffective.

C. Using Witnesses Wisely

The lessons to be learned from the research concerning jurors’ reactions to different types of witnesses is that the messenger is as important as the message. The research has indicated that principal reliance upon professional expert witnesses is not a sound capital trial strategy. Instead, it is much more effective to, in Sundby's words, think of the presentation of witnesses during trial and sentencing as a symphony. Some types of witnesses are better used as accompanists rather than soloists, while it is always important to be sure that whichever witnesses are used, their testimonies harmonize rather than contradict each other.

Counsel would do well to consider using professional expert testimony only when integrated with the testimony of lay witnesses and to resist the urge to rely principally upon professional experts simply because they are easily obtained through formal legal procedures. A better course is to take the time to carefully search every possible avenue for possible lay witnesses, for they are the most effective. This will involve many interviews with a myriad of different people, who are not fellow professionals with whom counsel feels comfortable. However, the effort may be well worth it, given the value placed upon the testimony of these witnesses. It may even be more effective to eliminate professional expert testimony entirely from the penalty phase, and concentrate solely upon the testimony of lay and “family and friend” witnesses.


158. Sundby, supra note 85, at 1115.  
159. Id.  
160. Id. There is another reason to be wary of the use of professional experts in certain contexts. Virginia Code section 19.2-264.3:1 provides capital defendants with a mental mitigation expert. VA. CODE ANN. § 19.2-264.3:1 (Michie 1998). This assistance can be valuable in putting together the case in mitigation. Under the current state of Virginia law, however, the expert should be fully utilized as a member of the defense team, but not called to testify. There are a number of reasons why such an expert should not testify. First, once the defense gives notice that such an expert will be called to testify, the Commonwealth can counter that testimony with its own expert's analysis of the defendant. Second, if the defense's expert testifies, the defendant has given up his Fifth Amendment right to remain silent for the Commonwealth is entitled to a copy of the expert's report. Third, the Commonwealth is likely to call its own expert witness to testify and this testimony will cancel out, if not eclipse, the effect of the defense's expert. The tendency for jurors to view defense experts as "hired guns" more often than those called by the prosecution, and the preexisting fear of the defendant's future dangerousness, will together cause the prosecution's expert testimony to often carry the day.
“Family and friends” witnesses should be called to humanize the defendant if at all possible, for the absence of such testimony is noted very unfavorably by most jurors. The testimony of these witnesses can shed important light upon certain mitigating factors, such as child abuse, other family stressors, and failures of schools and agencies. Such testimony can be accompanied with that of impartial lay witnesses to show the effect of certain types of experiences. Finally, the professional expert may play a supporting, summarizing role.

D. Being Aware of the Premature Decision Making Tendency

Commentators acknowledge that this is a very difficult tendency to counteract, defying any simple solution short of the elimination of capital punishment altogether. At the very least, however, defense attorneys must make every effort to focus questioning during voir dire upon the circumstances under which a juror feels the death penalty is the only acceptable punishment.161

As the law now stands in Virginia, the only means of counteracting this destructive tendency is to perform careful and thorough voir dire and to include as much mitigating evidence in the guilt phase as possible so as to confront the tendency of many jurors to make their sentencing decisions upon the close of the presentation of the evidence. If all mitigation evidence is reserved for the penalty trial, it is likely that about half of the jurors will turn deaf ears to even the most persuasive mitigation evidence for these jurors will have already made their sentencing decisions.

IV. How to Most Effectively Communicate with Juries—Remembering Your Audience

One principle that often is overlooked by many in the legal system is the seemingly obvious point that unless the means of communication is intelligible to the audience, even the most convincing and meritorious argument possible will have little effect. More specifically, unless jurors are able to make sense of what they are being told about the law, and the factors that must be considered, there is little chance that they will be able to appropriately apply the law. Studies have, in fact, shown that the degree of jury comprehension is shockingly low.162 Comprehension has been documented at less that 50% with portions of certain instructions.163

161. See Bowers et al., supra note 126, at 1541-43.
Two researchers, James Luginbuhl and Julie Howe, have also proven that there is a high level of misunderstanding of jury instructions, including great misunderstanding of what is meant by the concept of mitigating evidence and how it is to be used in determining the appropriate sentence.\textsuperscript{164} Luginbuhl and Howe have also shown that these misunderstandings not only make it very difficult for the law to be applied properly, but also systematically predispose jurors to favor a death sentence over a sentence of life.\textsuperscript{165}

Statistics such as these have prompted researchers and legal scholars to attempt to draft jury instructions that help jurors apply the law more effectively. When psycholinguistic principles are employed, comprehension has been shown to increase.\textsuperscript{166} There are a number of simple concepts based upon these principles that attorneys can keep in mind when writing proposed jury instructions and planning arguments.

Avoidance of long, complex sentences; they have been shown to be more difficult to understand.\textsuperscript{167} Second, use of negative sentences should be as sparing as possible, for it has been proven that negative sentences are not as well understood as affirmative ones.\textsuperscript{168} Third, as a general rule it is always preferable to use the active (e.g., "The district attorney has accused the defendant of . . ."), rather than the passive voice (e.g., "The defendant was accused by the district attorney of . . .").\textsuperscript{169}

In regard to vocabulary, it is important to avoid using legal jargon whenever possible. While using legalistic language is common in the legal community, it is not a vocabulary understood by the average juror.\textsuperscript{170} Psychologists have noted that through the use of "convoluted verbiage, destructive conduct is made benign and people who engage in it are relieved of a sense of personal agency."\textsuperscript{171} It is this means of moral disengagement that the capital defense attorney must seek to counteract if at all possible. Use of everyday words that are easy to understand is one way to ensure that capital jurors are aware of their roles in the capital trial process, and are prevented from abdicating responsibility for their sentencing decisions.


\textsuperscript{165} \textit{Id.} at 1177.

\textsuperscript{166} \textit{See AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE} 148 (1982).

\textsuperscript{167} \textit{Id.} at 168.

\textsuperscript{168} \textit{Id.} at 172.

\textsuperscript{169} \textit{Id.} at 175-76.

\textsuperscript{170} \textit{Id.} at 176-77. For example, using the words "mitigation" and "aggravating factors" may confuse rather than enlighten jurors.

Finally, it has been proven that concrete words are more easily understood than abstract ones. One way to determine whether a word is "concrete" is to try to visualize it. If you can do this, it is a concrete word. It is also prudent to avoid using homonyms, synonyms, and antonyms, for all have been shown to have a negative effect upon comprehension.

In sum, by considering these basic psycholinguistic principles, the capital defense attorney can optimize the chances that the jury will have a better understanding of the law and, therefore, increase the chance that proper use will be made of legal concepts such as standards of proof and mitigating and aggravating factors. When jurors are confused by the law they will either misapply it or discount it altogether and rely upon their "gut" feelings. Considering that the default sentence in a capital case has been shown to be a sentence of death, not life, it is imperative that the jury not be confused by the law. That is because most of the law of sentencing, if properly applied, would point to a sentence of life, not death.

V. Conclusion

None of these studies provide a mathematical formula which can be applied to a capital case to ensure that the trial is free from arbitrariness and prejudice. However, they do provide insights into the ways in which capital jurors think and react to certain trial tactics which can help defense attorneys provide the best representation possible. As defense attorneys in Virginia know, given the pro-death political climate, any insights into the minds of capital jurors are valuable.

172. See Elwork et al., supra note 166, at 178.
173. Id. For example, compare the word "house" to the word "hope." The former is a concrete word, while the latter is not.
174. Id.
175. Id. at 178-80.
176. See Haney, supra note 9, at 1483.
177. Id.