

# War and Peace in the Jury Room: How Capital Juries Reach Unanimity

SCOTT E. SUNDBY\*

*Using data from the Capital Jury Project, this Article takes a close look inside the jury room at the process by which capital juries reach a unanimous verdict at the penalty phase. The Article first examines the relationship between first ballot voting patterns and the ultimate sentence, then explores the dynamics of group interaction in achieving unanimity. In particular, by using the jurors' own narratives, the piece delves into the psychological process and arguments through which the majority jurors persuade the holdouts to change their votes. This process is especially intriguing because individual juries do not, of course, have any training in how to deliberate and reach unanimity, and yet they are strikingly similar from case to case in how they convert holdouts to the majority position (with striking differences between the dynamics of juries that reach a verdict of death and those that return a sentence of life without parole). Using the closing argument in the death penalty case of Susan Smith (a mother who did the unthinkable, killing her two children by driving them into a lake and then trying to cast blame on a mysterious black man), the Article concludes by examining how a closing argument might address many of the pressures that affect holdouts.*

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\* Sydney and Frances Lewis Professor of Law, Washington and Lee University School of Law. The Author has benefitted from input from workshops at the law schools at Washington University in St. Louis; University of North Carolina; University of California, Hastings College of the Law; DePaul University School of Law; University of Miami School of Law, and the legal psychology department at Florida International University.

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“These people were converted.”  
—Juror describing the life holdouts’ change in vote.

## INTRODUCTION

If a social scientist were to study group decisionmaking by isolating twelve people in a cramped room, giving them an emotionally charged issue, and then barring them from resuming their daily lives until they unanimously agreed upon a resolution, the researcher quickly would be drummed out of the academy for abusing basic guidelines on experiments with human subjects. Yet, this essentially is what the current criminal justice system does with a jury. Granted, jurors no longer are routinely locked up, as in the fourteenth century, “without meat, drink, fire, or candle, or conversation with others,”<sup>1</sup> or placed in an oxcart until

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1. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 75 (4th ed. 2002) (internal

they reach a verdict.<sup>2</sup> Today's jurors, however, are still asked to deliberate and decide cases under conditions that create a crucible for bringing out the best and the worst in human behavior. Not surprisingly, therefore, juries have become a subject of fascination not only for the lawyers who practice before them, but also for anyone interested in individual and group behavior.

Perhaps nowhere is the fascination greater than with the capital jury as it struggles to decide whether a defendant deserves to die for the crimes of which he has been convicted. How the jury works its way to unanimity in choosing between a life and death sentence is important not only for the lawyers who litigate capital cases, but also for the criminal justice system as a whole. Only by understanding the dynamics of what happens in the jury room and what factors influence whether a death or life sentence ultimately emerges can we begin to make a rational assessment of how our system of capital punishment is working.

This Article uses extensive interviews conducted through the Capital Jury Project ("CJP")<sup>3</sup> with jurors who served on capital juries to see how twelve jurors work their way to unanimity on a verdict of life or death once the jury room door closes. The CJP data will show that even though the jurors are given little guidance on how they should conduct their deliberations, individual juries tend to conduct their deliberative processes in a surprisingly consistent manner, both in how they structure the process and in the arguments that are raised in the jury room. Discovering how alike capital juries are in their techniques for reaching unanimity at the penalty phase may come as a bit of a surprise. After all, jurors do not have any way of benefitting from other juries' experiences, but must learn and adapt as they deliberate. Yet, time after time, as the majority was trying to change the holdouts' votes, the stories were remarkably similar, and it was as if the juries had taken a Jury Penalty Deliberations 101 course followed by an advanced Holdout Persuasion Theory seminar.

While the syllabus's precise content varied from case to case, and especially between life and death cases, the course had five basic steps. The first step involved the uniting of the majority jurors whose views ultimately were to prevail into a consolidated and strong viewpoint. The second stage revolved around isolating those jurors resisting the

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quotation marks omitted).

2. See *United States v. Bailey*, 468 F.2d 652, 665 (5th Cir. 1972).

3. The Capital Jury Project is a nationwide study funded by the National Science Foundation, and since 1992, has interviewed over 1200 jurors in fourteen states. *Capital Jury Project*, S.U.N.Y. ALBANY: SCH. OF CRIMINAL JUSTICE, <http://www.albany.edu/scj/CJPhome.htm> (last visited Nov. 1, 2010). See generally William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) (describing CJP's purposes and procedures).

majority's arguments and focusing the spotlight on the holdouts in an effort to show them that they must have taken a wrong turn in arriving at their conclusion. The third phase entailed the "conversion" of the holdouts to the majority's viewpoint, a moment often marked by extreme emotion. The fourth stage consisted of the majority jurors providing support to the holdouts and of the holdouts reconciling themselves as best they could to the verdict. The final step was the announcement of the unanimous verdict in open court, an event frequently fraught with high drama and for which juries sometimes tried to prepare in an effort to protect their hard-fought verdict.

In undertaking the examination of how capital juries work their way to unanimity, this Article proceeds through seven parts. Part I explores the relationship between the jury's vote on the first ballot at the penalty phase and the ultimate verdict of a life or death sentence. Part II sets the scene for the jury's deliberations by describing how juries organize and debate the evidence and arguments that they have heard regarding whether the defendant should live or die. Part III explains how two factors, worries over the defendant's future dangerousness and the desire to avoid a hung jury, form the backdrop for almost every jury's deliberations. Part IV then delves into the step-by-step process through which majority jurors favoring a death sentence convince jurors holding out for a life sentence to eventually switch their vote to death. Part V undertakes the mirror image analysis of how jurors favoring life persuade holdouts for a death sentence to change their vote. Part VI looks at the emotionally difficult process that juries go through in preparing for the announcement of the verdict, sometimes even conducting a dress rehearsal of being polled by the judge. The final Part examines what lawyers can learn from understanding how capital juries deliberate and how lawyers might use those lessons in the courtroom. This part uses as its centerpiece an analysis of how the defense lawyer's closing argument at the penalty phase of the Susan Smith trial,<sup>4</sup> a South Carolina case where a mother killed her two young children and initially claimed they had been kidnapped,<sup>5</sup> incorporates those lessons.

The data for this Article is primarily drawn from interviews with 152 jurors in thirty-seven cases in California where the death penalty was sought—nineteen of which resulted in an imposition of a death sentence, seventeen of which led to a sentence of life without parole ("LWOP"), and one case that ended in a hung jury over the penalty.<sup>6</sup> Unless

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4. *State v. Smith*, Nos. 94-GS-44-906, 94-GS-44-907, 1995 WL 467562, at \*1 (S.C. Apr. 10, 1995) (regarding an evidentiary issue).

5. See *infra* note 88 and accompanying text.

6. The Author served as the Principal Investigator for the California segment of the CJP. Each juror participated in an interview that, on average, lasted three hours, answering questions designed to elicit both qualitative and quantitative data regarding how their jury deliberated and which factors

otherwise noted, cited statistics and data are from the California segment of the study. All statements in quotations are the actual words of the interviewed jurors.<sup>7</sup>

### I. FIRST BALLOT THRESHOLDS FOR DEATH AND LIFE SENTENCES

Most capital juries are destined to undergo a process of persuading one or more jurors to change their votes to reach unanimity. In only 8% of the studied cases were the juries unanimous on the first ballot at the penalty phase,<sup>8</sup> and most juries went through three or more rounds of voting before unanimity was achieved. Thus, while many individual jurors expressed surprise, sometimes bordering on shock, upon learning that not all of their fellow jurors shared their viewpoint,<sup>9</sup> the first ballot usually served only as an early staging point for further deliberations.

The lack of unanimity on the first ballot, however, should not obscure the importance of the first vote as a strong predictor of the final outcome. On the most general level, in nine out of every ten cases (89%), the jury's penalty verdict followed the outcome favored by a majority of jurors on the initial vote. This rate is almost identical to what Kalven and Zeisel found for jury verdicts generally in their classic 1966 study, *The American Jury*.<sup>10</sup> Unlike guilt-innocence phase verdicts, however, a capital jury's penalty vote requires a significantly more nuanced understanding of what the first vote portends.

Once the data is broken down further, one discovers that the significance of the first vote tally differs significantly between life and death verdicts. While a majority vote on the first ballot favoring a life verdict essentially guarantees a life sentence as the final outcome, it turns out that a majority vote for death on the initial ballot does not carry the same guarantee. Indeed, a simple majority of seven votes for death on the first ballot almost invariably portends the opposite outcome—that

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influenced their decision. All data referenced in this Article are drawn from those interviews and the CJP's study.

7. The Author has verified all of the quotations in this Article for accuracy against the primary source (i.e., the tape or interviewer's notes). The Article's descriptions of cases are based on the jurors' recollections. When necessary, the Author has bracketed material to protect the anonymity of the jurors, or to clarify the context of the quotation. To protect confidentiality, the Author maintains a file of all of the materials used in this Article.

8. For the thirty-seven California cases, juries reached unanimous verdicts in only three cases (two death cases and one life case). Another state in the Capital Jury Project, South Carolina, reported a 17% rate of unanimous first ballots at the penalty phase. See Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 303 (2001). While that rate is higher than California's, the finding still means that more than eight out of every ten juries had to deliberate beyond the first ballot.

9. As one juror commented after describing his surprise that the first ballot was not unanimous, "I wondered what trial [the jurors voting the other way] had been listening to." This juror's astonishment was not an unusual reaction.

10. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 487–89 (1966).

eventually a life sentence will emerge from the jury room. As summarized in Chart 1 below, the ninety CJP cases studied in California and South Carolina showed a strikingly consistent pattern: Only when the vote tally on the first ballot for death reaches a supermajority level does the likelihood of a death sentence become manifest.

CHART 1  
FIRST VOTE FOR DEATH AND FINAL VERDICT  
(COMBINED CALIFORNIA AND SOUTH CAROLINA DATA)<sup>11</sup>

First Ballot Votes for Death	Death Verdicts	Life Verdicts	Hung Jury
9-12	35 <sup>12</sup>	0	0
8	10	5	1
0-7	2	37	0

Viewed from the death side of the ledger, therefore, if nine or more votes were cast for death on the initial ballot, the first ballot essentially sealed the defendant's fate. In every one of the fourteen California cases in which nine or more jurors voted for death, the jury eventually returned a unanimous verdict of death; a 100% death rate identical to that found in South Carolina by Professors Eisenberg, Garvey and Wells.<sup>13</sup> The two states' totals thus are particularly ominous for a defendant where nine or more jurors on the jury vote for death: thirty-five cases, thirty-five death sentences.

As the chart demonstrates, however, once the number of jurors voting for death on the first ballot drops below a threshold of nine, the likelihood of a death sentence correspondingly declines. If eight jurors vote for death, approximately 60% of the cases will end in a death.<sup>14</sup> And once support for a death sentence on the initial ballot constitutes seven or fewer votes, the likelihood of a death sentence drops dramatically: Only two of eighteen California cases came back death.<sup>15</sup> In South Carolina, Eisenberg and colleagues reported an even sharper decline in death sentences once support for a death sentence dropped to fewer than

11. The South Carolina data is from Eisenberg et al., *supra* note 8, at 303. South Carolina does not have hung juries. *Id.* at 281 n.13. If a jury does not unanimously reach a verdict of death, a life sentence is automatically imposed. *Id.*

12. Nine of these cases were unanimous votes for death; seven arose in South Carolina, and two arose in California. *Id.*

13. *Id.* at 303.

14. Where eight jurors voted for death on the first ballot the combined California and South Carolina totals were ten death, five life, and one hung. *See supra* Chart 1.

15. In these two cases, the first ballot votes were, in one case, seven votes for death and, in the other case, five votes for death. In the latter case, however, five jurors also voted "undecided," leaving only two votes for life, a factor which heavily influences the likelihood of a death or life sentence. *See infra* notes 19-22, 69-70 and accompanying text.

eight votes: Not one of twenty-one cases resulted in a death sentence, leaving a combined total of two death sentences out of thirty-nine cases where seven or fewer jurors voted for death on the first ballot.<sup>16</sup>

Because it takes eight or more votes for death before a death verdict becomes likely, the corollary, of course, is that it will take significantly fewer votes for life on the first ballot to tip the odds strongly in favor of a life sentence. And this is evident from examining the California data in Chart 2 from the reverse perspective of the number of votes cast for life on the first ballot (the chart does not include South Carolina data as that study did not report votes cast for life on the first ballot).

CHART 2  
FIRST VOTE FOR LIFE AND FINAL VERDICT  
(CALIFORNIA DATA)<sup>17</sup>

First Ballot Votes For Life	Life Verdicts	Death Verdicts	Hung Jury
5-12	14 <sup>18</sup>	0	0
4	2	2	1
0-3	1 <sup>19</sup>	17	0

The data is again striking in that in every one of the fourteen cases where five or more jurors affirmatively voted for life, a life sentence resulted. And as expected, given that nine votes for death almost guaranteed a death sentence, where three or fewer votes were cast for life on the initial ballot, the result was death in seventeen of the eighteen cases (in the one case in this category that resulted in a life sentence, there had been three votes for life but only eight votes for death, as one juror had voted “undecided”). In the “on the fence” cases where four affirmative votes for life were cast on the first ballot, two juries came back death, two juries returned life sentences, and one jury hung; this result roughly mirrors the earlier finding that once the vote tally for death dropped from nine to eight votes, the likelihood of a death sentence dropped to 60%.

As the data demonstrates, therefore, a first-vote threshold exists that almost always results in either a death or life sentence. The threshold for ensuring a life sentence (five votes), however, is significantly lower

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16. Eisenberg et al., *supra* note 8, at 303.

17. Because Eisenberg, Garvey, and Wells did not provide a separate breakdown based on number of votes for life, *see supra* note 8, it is not possible to combine the South Carolina and California totals. Given the similarity in death sentence rates based on votes for death, though, the rates based on life votes would likely be very similar.

18. One of these cases was unanimous for life.

19. In this case, there had been three votes for life, but only eight votes for death, as one juror voted “undecided.”

than for a death sentence (nine votes), and a life sentence remains a distinct possibility even when as few as four jurors favor life on the first ballot. The reasons for this lower threshold in life cases will be explored later, but the basic lesson is clear: It is possible in life cases for a relatively small group of jurors favoring life to swing a jury all the way over to a unanimous life sentence.<sup>20</sup> By contrast, it is almost impossible for jurors favoring death to obtain a death sentence unless they command at least two-thirds of the jury's vote for death on the first ballot.<sup>21</sup> Thus, while the data lends little credence to Hollywood's heroic view of a lone holdout turning around entire juries, in life cases a minority group of jurors frequently were able to turn around majority sentiment so long as they reach a critical threshold of four or more votes. Or to put it another way, it generally takes at least four Henry Fonda characters, and not just one, to have a real-life jury of "Twelve Angry Men."<sup>22</sup>

The role that the difference in threshold votes between life and death juries plays in the deliberation process can be seen in several other areas of comparison as well. On average, for instance, life cases required five ballots to reach unanimity, while juries in death cases took only three ballots. This difference would be expected given that life cases sometimes had as many as eight jurors who had to be persuaded to change their votes, while death cases normally had at most three jurors who needed to be convinced to crossover. Indeed within the pool of life cases, considerable variation existed depending on the initial ballot: Life juries that necessitated a majority of jurors to cross over from initially favoring death averaged seven ballots,<sup>23</sup> while life juries that began with a majority in favor of life averaged only four votes. This greater likelihood of volatility in vote changes among life juries also might help explain why

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20. In two life cases, the vote for a death sentence during deliberations exceeded eight votes at certain points, peaking as high as nine-to-three for death in one case and ten-to-two in the other. In both cases, however, the core life jurors' refusal to budge eventually swung the jury to a life sentence. Importantly, in each of these cases the initial vote for death was less than nine votes (the threshold which almost always guarantees a death sentence), suggesting that some of the votes for death on later ballots and in the middle of deliberations were "soft."

21. Thus, while overall about 90% of the penalty verdicts followed the majority vote on the first ballot, an important distinction exists between death and life juries: A majority vote for death still resulted in a death sentence in 79% of the cases, but a majority vote for life on the first ballot resulted in a life sentence every time (100%). This result is almost identical to what Eisenberg, Garvey and Wells found in South Carolina. Eisenberg et al., *supra* note 8, at 303-04 (reporting 72% of the cases where the majority on the first ballot voted death resulted in death sentences, and 100% of the cases where the majority on the first ballot voted for life resulted in life sentences).

22. TWELVE ANGRY MEN (Orion-Nova Productions 1957). As Professors Eisenberg, Garvey, and Wells have aptly described the phenomenon, "death verdicts are . . . relatively more difficult to orchestrate [than life verdicts]." Eisenberg et al., *supra* note 8, at 304.

23. One jury with an initial majority for death held twelve ballots before reaching unanimity for life.

jurors who served on life juries were on average much less likely than those on death juries to see their jury as having been “like-minded.”<sup>24</sup>

Despite these differences, however, death and life juries did share one important trait in their deliberations. As Chart 3 below shows, both were likely to have at least one juror who was “especially reluctant” to change his or her vote to reach unanimity.

CHART 3

QUESTION: “WERE ANY JURORS [ON YOUR JURY] ESPECIALLY RELUCTANT TO GO ALONG WITH THE MAJORITY ON THE DEFENDANT’S PUNISHMENT?”

	Death Jurors	Life Jurors
Yes	66%	69%
No	34%	31%

Consequently, even though a death jury, on average, may have had fewer jurors to persuade to reach a unanimous verdict, the odds were high that at least one juror had strongly resisted joining the majority.<sup>25</sup> Likewise, even life juries that started off with a substantial majority for life often reported that at least one juror tenaciously insisted on a death sentence. And, naturally, life juries that began with a majority favoring death were especially likely to have one or more jurors vociferously objecting as they watched the jury’s center of gravity shift dramatically from supporting their view of favoring death to returning a verdict of life. How juries eventually struggled to unanimity is the topic to which the Article now turns.

## II. SETTING THE STAGE AND PROCESSING THE EVIDENCE: “WE HAD CHARTS GALORE”

In almost every case (95%), the jury did not take a vote upon first entering the jury room after hearing the judge’s instructions, but made an initial effort to sort through the evidence that they had heard during the penalty phase. For some juries, the delay in taking a vote was the result

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24. Jurors were asked whether, “In your mind, [was the jury] like-minded, saw things the same way?” The breakdown between death and life jurors in their answers showed life jurors less likely to see their jury as like-minded:

	Death Jurors	Life Jurors
Very Well	15%	3%
Fairly Well	61%	58%
Not so well/Not at all	24%	38%

25. That individual jurors differ from their jury’s verdict apparently is not an uncommon occurrence. A recent study of non-capital cases found that even by conservative calculations, about 40% of the juries studied had jurors who were “dissenters,” in other words, jurors who would have come up with a different verdict than their jury “if it were entirely up to [the juror] as a one-person jury.” Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, 6 J. EMPIRICAL LEGAL STUD. 513, 523–24 (2009).

of having learned at the guilt-innocence phase that voting immediately upon sitting down had a tendency to make deliberations more difficult.<sup>26</sup> As a juror from such a case noted:

We didn't take a vote right away, because we had found out from the [guilt-innocence] phase of the trial that people tend to stick to your first vote. If you go in and say "guilty" or "not guilty" and you make it public knowledge, it's very hard for people to change their mind, very hard, so we chose not to do this the second time.

In one of the few cases where a vote at the penalty phase was taken immediately, the foreperson had intended only to take a "straw vote" to get a feel for where the jury stood, but ended up quite surprised:

I said, "[B]efore we start, let's take a vote," so we passed out slips. I opened up them up and they were all the same—"death." We sat there and looked at each other just a little bit. I was feeling a little guilty because that took us about five minutes. I thought maybe we should discuss it a little bit.

A juror on this same panel, even though strongly for death, also was taken aback and tried to jump-start the deliberations out of a sense of fairness:

The deliberation would have taken half-an-hour, except I kept it going just to bring up questions. Everyone had automatically decided, "bingo, this was death." There wasn't anyone who had any doubts. I can't say I had any doubts, but what I said [was] we have to list all major points the defense has put out, then say whether we agree or disagree with them. So there were a couple of points: that he was brought up in a really bad environment; he had gone there without premeditation, it just happened; he didn't know what he was doing at the time he did it. I didn't think any of those were true, but I thought we should talk them through, so we talked them through. So it was not [a] long deliberation. I was struck how eleven other people were all willing to say, "okay that's it." I mean we're putting a guy to death. I didn't have an argument with people's opinion of what should happen, but that they would be so quick [to decide].

Unable to spark any dissenting views, the jury voted again, this time verbally, and not surprisingly, the vote was still unanimous for death. Another juror on this jury recalled that when they called the bailiff to say that they had reached a verdict, "the bailiff just looked at all of us" in astonishment, and the judge appeared "totally shocked" at how quickly the sentence had been reached.

Most juries, however, found themselves far from united on the proper verdict as they sat down to discuss the evidence. Although a number of jurors by then had started to form leanings towards a death (36%) or a life sentence (24%),<sup>27</sup> a significant portion of the jurors (40%)

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26. *Cf. id.* at 531 (finding that early voting in deliberations and secret ballots were more likely to produce "dissenters" who did not personally agree with the jury's final verdict).

27. For an examination of jurors entering the penalty phase based on impressions formed at the

reported that they entered deliberations at the penalty phase still undecided over the appropriate punishment.<sup>28</sup> At this juncture the jury had jury instructions to weigh the aggravating and mitigating circumstances and to conclude whether a death or life sentence was justified,<sup>29</sup> instructions that the jurors tended to characterize broadly as

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

28. See Waters & Hans, *supra* note 25, at 525–26 (finding in the non-capital context that jurors often change their minds during deliberations).

29. The California jury instruction on how to weigh aggravating and mitigating circumstances has changed over time in how it communicates the weighing process to the jury. The original instruction read: “If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.” See *Boyd v. California*, 494 U.S. 370, 374 (1990). In *Boyd*, the U.S. Supreme Court upheld this instruction against a federal constitutional challenge, concluding that the instruction’s language adequately allowed consideration of mitigating circumstances and thus, did not violate the Eighth Amendment’s ban on mandatory death sentences. *Id.* at 374–76.

The California Supreme Court, however, found the instruction potentially misleading as to the weighing process, which led to a different instruction that elaborated on the process:

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on defendant. After having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

*People v. Duncan*, 810 P.2d 131, 143–44 (Cal. 1991) (explaining jury instruction as product of *People v. Brown*, 726 P.2d 516, 531–32 (Cal. 1985), *rev'd on other grounds*, 479 U.S. 538 (1987)). The current jury instruction essentially reinstates the *Brown* instruction, but makes it clear that the jury is not barred from returning a life sentence even if it does not find mitigating circumstances:

You have sole responsibility to decide which penalty (the/each) defendant will receive.

. . . .

. . . Each of you is free to assign whatever moral or sympathetic value you find appropriate to each individual factor and to all of them together. Do not simply count the number of aggravating and mitigating factors and decide based on the higher number alone. Consider the relative or combined weight of the factors and evaluate them in terms of their relative convincing force on the question of punishment.

Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist. . . .

Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating

asking them to identify the “good” and the “bad” evidence about the defendant and then to balance the two categories of evidence against each other.

Faced with such a daunting factual and moral decision, almost every jury turned to making charts in an initial effort to gain a handle on the question before them. One juror described how when her jury had first entered the jury room, the atmosphere was “pretty stressful and pretty argumentative; people were venting.” At this point, another juror called upon his management training—a relatively common occurrence—and suggested “story boarding . . . we divided up the pros and cons on the chalkboard, we just let everybody speak their mind and we put things on the board, ideas. We would study them and decide which were really important and narrowed it down from there.” Nor was this juror’s description unusual, as almost every jury room ended up with charts up on the wall; one juror’s description of his jury room was typical: “I don’t know if every jury group does this, but we took sheets and plastered [charts] all over the board, all over the walls.”

In undertaking this enterprise, juries tended to use two different types of charts, and some used both. One type of chart, the listing chart, attempted to categorize the evidence into lists of what was “aggravating” and what was “mitigating” (although jurors reported that they most commonly used the headings of “death” and “life” rather than the legal terms). Juries sometimes became quite elaborate in their effort to sort through the evidence and quantify its importance; one jury, for example, “gave each item a 1 to 10. Each juror voted on each circumstance; it was very methodical.” The result was a chart that both identified factors and attempted to quantify their importance.

Although listing factors might sound like a relatively easy exercise to start off the deliberations, a number of juries discovered that even this process sparked disagreements that foreshadowed more intensive debates ahead. A common area of dispute was whether a particular factor was properly listed as an aggravating or mitigating factor. This type of dispute often centered on the defendant’s use of drugs or alcohol during the crime, with jurors split over whether a self-induced altered state of mind could be mitigating.<sup>30</sup> Similarly, jurors often disagreed over

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circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death. To return a judgment of death, each of you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

1 JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS § 766 (2008).

30. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1556–59 (1998) (finding that jurors differ over whether certain types of mitigating evidence is aggravating or mitigating).

how to categorize prior periods in the defendant's life where he had shown himself capable of acting lawfully. Some jurors saw this as aggravating because they believed it showed that the defendant had the free will to choose a life of crime, while others saw the evidence as mitigating because it showed that the defendant was not incorrigibly evil.<sup>31</sup>

The other type of chart that juries often made was in the form of a chronology of the defendant's life. As one juror described the process, "we wound up . . . like how in elementary school you would do a time line." The time line was an effort by the jury to answer the question that, for many jurors, was the key to analyzing the defendant's case for life: Did the defendant at some point in his life have an opportunity to take the "high road," or did the circumstances of his life deprive him of that choice?<sup>32</sup> If the defendant's mitigating circumstances convinced the jury that the defendant never really had a chance to choose the high road, the chances of a life sentence increased greatly.<sup>33</sup> On the other hand, if the jury believed that the defendant, even if he had suffered great hardship or trauma, had been given an opportunity to escape the negative influences at some juncture, then they were much more likely to conclude that he had made the choice to continue down the "low road" and would vote for death. In making this assessment, most capital jurors used a perspective that strongly emphasized individual self-determination and free will. As a result, even powerful mitigating evidence of child abuse or mental illness—evidence that all the jurors agreed was true and emotionally compelling—risked being discounted if the defendant had also had a period of time in a loving home or received treatment for his illness.<sup>34</sup>

With this overarching question in mind, juries consistently plotted out the defendant's time line on a chalk board or on long sheets of paper (what might be called the "butcher block paper" phenomenon) as part of their effort to determine whether the defendant had been propelled toward committing the capital crime by forces beyond his control. The following quotes, each from a different case, give a sense of how juries

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31. *See id.*

32. *See* Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 56–59 (2000) (discussing jurors' responses to different types of mitigation evidence). *See generally* Michelle E. Barnett et al., *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751 (2004) (using vignettes to explore the impact of different types of mitigation); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (examining how jurors respond to different themes of mitigation).

33. *See* Sundby, *supra* note 32, at 1136–39.

34. *Id.* at 1135–36 (noting how jurors' belief in "free will" can trump even powerful mitigating evidence).

would use this technique in trying to puzzle over the defendant's life story:

We really recreated his life. We drew a time line up about what his psyche was like at different points of his life. We wanted to get a handle, a sense of how this person got to be what he was, because we heard a lot of evidence and a lot of letters, dates, and we wanted to get a sense of when things took place. And so we talked about the various things in his life—the mitigating, of course, dominated the early parts, because that was the abuse and things. And then as we worked our way through his life we found we got more into the aggravating. There was a fair amount of discussion about whether he had the ability [to change his life] after he committed his first crime and he went to prison and allegedly got some kind of counseling. You know, some people felt he had a chance to turn around and chose not to.

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The primary thing we had to go over was his youth, his background, his prison record, his life in the youth authority system. Did he have available psychiatric help? Did they have clergy help? And we went into great length on the abuse of him as a child. We had a big billboard, sheets of paper about half the size of this table, and we went up there and listed all the things that we could possibly list on his behalf, and then we came and listed all the things that were definitely proven against the man. We put these all in sequence, and we took hours to do this—a day and a half I guess.

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We had a chalkboard and we put all the events on the board. Then we went about debating each phase of his life, and you could see people strongly moved and defending him because of his abuse, and you could see people coming back to the viciousness or heinousness of the crime. And you could see where it was going—and we talked about each incarceration, each strong armed robbery, each part of the abuse again. We broke it up into segments and put it up on the board and debated and discussed each section and debated whether, you know, where the flaws were. That lasted for a couple of days, three days or so, and then we took a vote.

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It's pretty dramatic. I mean the whole experience is very story like. There was a story that unfolded, and it's incredibly vivid, the facts of his childhood. We put it into chronology because everything came at us in bits and pieces, and part of the puzzle was trying to put it into some sort of order. There were very few unanswered questions. It's very surprising how only hearing a story, like radio, is so much more vivid than seeing something. You become, at least I do, become much more involved as the evidence unfolded.

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Only once the evidence was placed on the charts and discussed did a jury generally take their first vote. As seen earlier, this initial vote tended to be strongly predictive of the final penalty verdict based on the different thresholds for a death and life sentence. But, as also noted,

most juries were unlikely to find themselves unanimous at the outset and more deliberations were required before the jury reached a verdict. While those deliberations would focus on the facts of the individual case, in the background were two major concerns that affected almost every juror's vote and decisionmaking.

### III. THE TWO ELEPHANTS IN THE JURY ROOM: THE MEANING OF LIFE WITHOUT PAROLE AND THE FEAR OF A HUNG JURY

Having just convicted the defendant of murder, the first concern among jurors is unsurprising and essentially constitutes the capital juror's Hippocratic oath: ensuring that, above all else, the defendant will never kill again. Jurors consistently expressed the view—even those who were strongly moved by the defendant's case for life—that they would vote for a death sentence if they were not assured that the defendant would be safely locked away.<sup>35</sup>

With this concern in mind, the meaning of "life without parole" often played a critical role in shaping a juror's vote and the jury's deliberations. As a number of studies have found,<sup>36</sup> jurors often are highly skeptical about the meaning of "life without parole," and one of the most common questions asked during the penalty deliberations is an inquiry attempting to clarify whether "life without parole" guarantees the defendant will never be released.<sup>37</sup> Juries tended to ask this question once they had become deadlocked and an uneasy détente existed in the jury room. Jurors favoring life would have acknowledged that they would of course vote for death if they thought the defendant would ever get out of jail; the jurors favoring death would have agreed that arguments existed for a life sentence, but would have maintained that a life sentence could not guarantee the defendant would not be back on the streets. With the deliberations stalemated, the jury would send out their inquiry to the judge. In fact, several juries sent their question to the judge about the meaning of life without parole at the same time that they asked what would happen if they were deadlocked.

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35. See Sundby, *supra* note 32, at 1165–67 (describing a case where some jurors' concern that defendant's mental illness would make him dangerous in the future overrode the mitigating evidence that he was a paranoid schizophrenic); see also John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1047–49 (2008) [hereinafter Blume et al., *Competent Capital Representation*]. See generally John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397 (1998).

36. See 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 (1998) (discussing CJP findings on jurors' skepticism about life without parole, and summarizing other studies).

37. SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 36–39 (2005).

Where the judge's response triggered a return of a life verdict, it usually was because the judge's response was understood as an assurance that the defendant would never be released. This assurance took away the main argument of the jurors favoring death, and a life sentence was usually forthcoming, and often fairly quickly.

On the other hand, jurors arguing for a life sentence were undermined if the jury thought that the judge was in any way indicating that a life sentence was not fail-safe. One juror's description of her jury's decision vividly illustrates how skepticism about the meaning of life without parole can act as the fulcrum in swinging the jury to death or life:

We were not in total agreement that he should have death but we were in total agreement that he should not be back in society, and if we could have given a verdict that would not have been overturned in some future day, that would have kept him in prison forever, then I believe the jury would not have given the death penalty.

With the defendant's possible release having become this jury deliberation's focal point, the jury asked the judge whether the defendant might ever be released, and "[the judge] for some reason could not answer the question and he told us that." With the judge unable to allay the jury's fears, the juror noted, "[W]e didn't deliberate very long at all," because even those jurors who had been holding out for life had to agree that "God knows what would have happened, you know, Charles Manson would be out again, or anybody could be out again . . . . Given that option, we had to give him death." This juror concluded by suggesting that if the jury could have imposed "many life sentences" they would have felt sufficiently reassured and not have imposed a death sentence, a suggestion that poignantly reflects many jurors' perception that only a verdict stretching toward eternity could safely ensure that the defendant will be incarcerated forever because the criminal justice system is too lenient.<sup>38</sup>

The second constant concern of jurors may be more surprising. Jurors almost uniformly saw a hung jury as not only an undesirable result, but as a failure. This was in part because of pragmatic concerns such as the expense of a new trial ("[I]t was like 'oh God,' another trial 'costing the taxpayers.'") and the desire to avoid making another jury undergo the same ordeal ("[T]he thought of a new trial was a horrible thought."). More fundamentally, though, the aversion to not reaching a final verdict stemmed from sitting on a trial for weeks or months and feeling that they would have "seriously failed" in their duty if they had hung after all of that time.<sup>39</sup> Jurors, therefore, tended to see reaching a

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38. Bowers & Steiner, *supra* note 36.

39. The length of the trial, however, does not appear to be a determinative factor. Professor Sandys uncovered a similar concern over becoming a hung jury with jurors in Kentucky cases, where trials generally lasted a much shorter time. Marla Sandys, *Cross-Overs—Capital Jurors Who Change*

unanimous verdict as a key measure of their jury's success, and they often said that they felt individual responsibility to drive their jury to reach a verdict.

The jurors' natural aversion to becoming a hung jury was often heightened if they alerted the judge that they had become stalemated. The judge usually responded by instructing them on the need to try and reach a unanimous verdict,<sup>40</sup> and the message was not lost on the jurors that the judge did not want a hung jury. As one juror paraphrased the judge's response, "The judge said, '[Y]ou'll be here until the cows come home.'" This message was strengthened by the fact that many jurors felt that the jury itself was in some sense on trial and would be judged by whether they had reached a verdict; because jurors generally liked their judge and cared about the judge's—and to a lesser extent the lawyers'—assessment of the jurors, the felt need to reach unanimity was a powerful dynamic in the jury room and for individual jurors.

#### IV. THE PERSUASION OF LIFE HOLDOUTS TO REACH A UNANIMOUS VERDICT OF DEATH

With the twin concerns over the meaning of life without parole and being a hung jury in the background, the question in the push to unanimity became how those jurors who were resisting the majority's desired sentence could be persuaded to change their minds. It was at this point that juries demonstrated a remarkable consistency in the process through which they ultimately reached a unanimous verdict. For cases where the majority jurors were trying to persuade a juror holding out for life to change his or her vote to death, the process began with the forming of a united front among those jurors favoring death.

##### A. STEP ONE: FORMING A UNITED FRONT

Psychologists have discovered that when groups deliberate and an initial disagreement exists, group members tend not to move toward a "middle" position, but actually become even more extreme in the

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*Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1199 (1995).

40. A judge's instruction to continue deliberations is sometimes referred to as a "dynamite charge," or *Allen* charge, named after the Supreme Court case *Allen v. United States*, that approved of a jury instruction encouraging minority jurors to reconsider their views in light of the views of the majority. 164 U.S. 492, 501–02 (1896). The California Supreme Court has disapproved of the *Allen* charge generally because of its potential coerciveness, see *People v. Gainer*, 566 P.2d 997, 1000 (Cal. 1997), but judges are allowed to give supplemental instructions encouraging the jury to deliberate further in a manner that ensures they consider the views of other jurors. See *People v. Moore*, 117 Cal. Rptr. 2d 715, 724–26 (Ct. App. 2002). The U.S. Supreme Court has held that *Allen* charges do not constitute constitutional error at the penalty phase of capital cases. See *Lowenfield v. Phelps*, 484 U.S. 231, 237–41 (1988).

direction of their original leanings.<sup>41</sup> Psychologists attribute this tendency to two factors: First, the more discussion that occurs in favor of a particular view, the greater the number of reasons that are generated to support group members favoring that position; and, second, as some people discover that others in the group share their perspective, they will become more extreme in their views as a way to establish their individuality within the group.<sup>42</sup>

With death juries in particular, the effects of group polarization could be seen at work. This was in part because, as noted earlier,<sup>43</sup> a death jury almost always had at least eight votes for death on the first ballot; as a result, the arguments for a death sentence dominated the jury's discussion by virtue of numbers alone. Moreover, the convictions of those favoring death—even those who at first were only tepid in wanting a death sentence—tended to strengthen as discussion after the first vote continued, until many expressed the view that a death sentence was the only correct outcome.

That most jurors favoring death at this point were convinced that a death sentence was the *only* justifiable legal and moral outcome is critical to understanding the dynamics in the jury room where a death sentence emerged. From these jurors' perspective, the legal and moral equations yielded only one logical answer. To disagree with that answer, therefore, was the same as hearing someone trying to argue against an obvious truth. One juror captured this sentiment when he complained that the holdout in his case "was just one juror who was basing his ideas like somebody that says, 'H<sub>2</sub>O isn't water and 5 times 5 isn't 25.'"

This certainty may seem contradictory to the law governing the death penalty. The Supreme Court has held that a mandatory death penalty is unconstitutional, and jury instructions are to make clear that the jury is not required to return a death sentence but has the option of a

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41. Psychologists call the phenomenon "group polarization," which can be slightly misleading, because the tendency is not to split groups into two poles, but for individuals to move more strongly in the direction of their initial tendencies. PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, *THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE* 320–22 (1991). A number of wonderful experiments have illustrated this phenomenon of group polarization. In one classic experiment, researchers found that following a group discussion, French students who held only a mild dislike for Americans at the outset were far more critical of Americans after the discussion. See Serge Moscovici & Marisa Zavalloni, *The Group as a Polarizer of Attitudes*, J. PERSONALITY & SOC. PSYCHOL. 125, 125–35 (1969). Another experiment convened a group of women with moderate pro-feminist leanings and found that they held much stronger pro-feminist views following their discussion of feminist issues. See David G. Myers, *Discussion-Induced Attitude Polarization*, 28 HUM. REL. 699, 708–12 (1975). Experiments have confirmed this tendency of group discussion to push members towards a more extreme view of their original leanings in a number of areas. See, e.g., ROGER BROWN, *SOCIAL PSYCHOLOGY: THE SECOND EDITION* 200–48 (1986) (summarizing experiments involving attitudes on race relations).

42. ZIMBARDO & LEIPPE, *supra* note 41, at 321.

43. See *supra* Part I.

life sentence.<sup>44</sup> And while some jurors may misunderstand the instructions as requiring a death sentence if they find an aggravating factor,<sup>45</sup> for many jurors the certainty lay in the idea that even though a death penalty was not automatically required, the facts of their case allowed only one possible verdict—that of a death sentence. Though difficult to generalize, jurors voicing this view have often described their decision to vote for the death penalty as based on the idea that the defendant’s murder of the victim so upset the moral balance that the *only* way to right the moral balance was for the defendant to forfeit his life.<sup>46</sup> Each juror’s sense of what constituted the proper moral balance was complicated and colored by a multitude of factors, such as the juror’s worldview, the victim’s actions, the defendant’s perceived remorse, and even the trial strategy.<sup>47</sup> For those jurors strongly in favor of death, however, the balance seemed so clear in their case that, even if discretionary, they believed that any person who balanced aggravating and mitigating factors would have to agree that under the law, a death sentence was the proper result.

The conviction that death was the only justifiable sentence affected the jury’s deliberations in several ways. First, the certainty worked to shore up support for a death sentence among those jurors who were not initially strong in their opinion either for death or for life. Thus, while a death sentence requires a threshold of at least eight votes for death, some of the votes for death might be “soft” and still subject to persuasion. These “swing voters,” consistent with the polarization phenomenon, frequently stated that they became more sure in their support of a death sentence in part because the other jurors were so certain that a death sentence was correct. One juror, who actually voted for life on the first ballot, typified this reaction in explaining that she changed her vote to death because, “Well, I guess in a way it was the strong feelings [of the other jurors]. I knew I didn’t have to change . . . , but I looked at the awful, terrible things he had done and I couldn’t argue with what he had done in the past.”

In addition to this tendency to move “soft” jurors more strongly towards death, the strengthening conviction among majority jurors that a death sentence was the only acceptable punishment also affected how the holdouts for life were perceived. Because these holdouts for life were

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44. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

45. See, e.g., Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 6–7 (1993) (finding about 30% of jurors believed that they were required to impose a death sentence if they found the defendant posed a future danger).

46. See Scott E. Sundby, *The Death Penalty’s Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1959–61 (2006).

47. See generally Blume et al., *Competent Capital Representation*, *supra* note 35 (discussing mitigating evidence in capital cases).

seen by the jurors favoring death as having made a “mistake” (as not understanding that two plus two equals four), the question for the majority jurors as deliberations dragged on became why the holdouts were refusing to acknowledge their mistake. Majority jurors favoring death consistently arrived at several common explanations for the life holdouts’ perceived intransigence.

Often majority jurors stated that the holdouts actually understood that a death sentence was the correct decision demanded by the law, but the difficulty was that they lacked the fortitude to vote for what, deep down, they knew was the right decision. From this perspective, therefore, the majority jurors’ task was to assist the holdouts in overcoming their fears, a perspective reflected by the following comments from jurors in different cases:

The weak ones had doubts not because of the evidence but because of their fears—the stronger ones helped them out and they were okay . . . The majority gave the reluctant jurors the strength they needed, because they couldn’t have done it otherwise.

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Two or three of the jurors couldn’t come to grips with the decision that we all as a group worked through . . . I knew what they had decided, [that death was the proper verdict,] but obviously they couldn’t bring themselves to that decision, and they needed time to think about it.

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People felt [John] deserved the death penalty, but it’s a tough decision, and some needed to have their hands held.

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The couple of jurors who were not sure [about death] at the first vote really were sure, they just felt that they should take more time and consider the evidence before committing to anything.

A number of majority jurors favoring death thus came to feel that it was their duty to give the holdouts the “strength” to arrive at what the holdouts in fact knew was the right conclusion.

From the majority’s vantage point, this perceived inability to do what the law required—impose a death sentence—was usually attributed to the holdouts as having become too emotional in their approach to the decision once confronted with the enormity of sentencing someone to death.<sup>48</sup> Typical comments characterized the holdouts as “ha[ving] to search their souls,” or as someone who “was intelligent, but . . . became emotional when making certain decisions.” By being too emotional, the holdout was also likely, from the majority’s standpoint, to be too susceptible to the defendant’s arguments (“[T]here were two jurors who

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48. For example, as one juror summarized, “I guess they felt they were mortals and shouldn’t do it.”

were very impressed with the bleeding heart aspect of the defendant's final argument.""). The majority also sometimes speculated that the holdouts' hesitancy might be due to unstated religious reasons.<sup>49</sup>

In a similar vein, it also was commonplace for the majority jurors to see the life holdouts as demonstrating a naiveté about the realities of life and the defendant's actions. One juror's characterization of the holdout as "a sweet lady, looking for the good in people" carried a poignant undercurrent of sadness that the real world did not match the holdout's rose-colored view. A juror in another case said he had tired of the holdouts' "baloney . . . [of] starting to feel sorry for him—well, he hadn't had this, and he hadn't had that," and he concluded that "some people didn't understand" the reality that "you've got an individual here, that's twenty-one years old, running around shooting people!" Another juror similarly thought that the lone holdout on his jury "felt that the past really didn't happen, that the defendant would be good; it took a few days for him to finally put it together that the same guy did the aggravating things as had the mitigating factors."

As would be expected, the harshest assessments were reserved for life jurors who did not quickly come around to the majority view. Majority jurors knew that at voir dire the holdout would have had to respond to the *Witherspoon* questions that he or she could impose a death sentence; otherwise the juror would not have been allowed to serve on a capital jury.<sup>50</sup> Majority jurors, however, usually became convinced that jurors who held out for more than a few ballots were, when push came to shove, actually against the death penalty. Usually this was explained as the holdouts having a blind spot that made them unable to honestly acknowledge their opposition. Thus, jurors favoring death would make comments like:

[The holdout] never admitted it, but it became very clear, we felt later that he clearly did not believe in the death penalty. A lot of us have things where we just cannot be honest about them, [and] I think that

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49. Some life jurors did attribute their position in part to their religious beliefs, as did some death jurors. See SUNDBY, *supra* note 37, at 73–74; see also Theodore Eisenberg & Stephen P. Garvey, *The Merciful Capital Juror*, 2 OHIO ST. J. CRIM. L. 165, 190 (2004) (finding that "high mercy" jurors were more likely to be regular church attendees).

50. Under Supreme Court doctrine, a juror can be excluded for cause from serving on a capital jury if his or her views would "substantially impair" their ability to follow the law. See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). This process, known as death qualification, revolves around asking the juror about his or her beliefs on the death penalty. *Id.* at 439. These questions are commonly referred to as the "*Witherspoon* questions," derived from the Supreme Court case *Witherspoon v. Illinois*, 391 U.S. 510, 513–15 (1968). The effects of death qualification on the racial, gender, and attitudinal composition of capital juries has been the subject of considerable legal and psychological criticism. See generally, Bruce J. Winnick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 849–50 n.443 (collecting various studies and critiques of the death qualification process).

was one of his things he wouldn't cop to, but he definitely was against the death penalty.

Nor were the majority jurors necessarily unsympathetic toward what they viewed as the holdout's perceived change of heart when the reality of actually having to impose a death sentence loomed:

You know it's all good and okay to say you believe in the death penalty, but when you look at somebody across the room and know that you're giving him the death penalty, I'd like to tell you, you can very well think, "[W]ell, maybe I don't believe in it." I think that's really the decision [the holdout] came to—I really think she changed her mind.

Less frequently, jurors thought that the life holdouts had knowingly lied to get on the jury:

I think some people—and I don't want to be openly harsh to them, I'm telling this on tape—I think they answered some of the questions at the jury selection not quite as accurately as they should have. As I understand the process of jury selection, they had to answer "yes" that they could impose the death penalty, and something tells me that [they] answered the question dishonestly. By the way, I think the defense counsel did a terrific job of putting people like that on the jury. That's his job, I'm not being critical, that's his job, but it was a very disappointing part of being a juror.

If the holdout proved especially intransigent, majority jurors sometimes engaged in a bit of amateur psychoanalysis and concluded that a holdout "had problems." When engaged in such psychoanalysis, majority jurors usually saw the holdout as having become too emotionally fixated on the defendant for various reasons:

She had this unnatural attachment to him or something. I think that she mothered him in some way. Do you know what I'm saying? Like she had some type of maternal need to protect him. She kept saying that he wasn't a bad person—yes, he shot the guy five times after he pleaded for his life—but he's really a nice guy. It had more to do with him than anything she believed [about] capital punishment.

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It was an older gentleman and basically what he felt at the last minute was he had this kind of feeling that it could have been his son. His son was basically the same age and he just started identifying with [the defendant] a little bit.

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[The holdout said he] didn't want to take a father away from his daughter—he was projecting his own feelings on the daughter.

Some exasperated jurors simply would summarize the holdouts' motives as unfathomable, with observations such as: "[The holdout] was psychotic;" "[The holdout] was bizarre, unstable—she cracked at sentencing;" "She had definite problems;" "She was just a crazy lady, most of us agreed." One juror ventured the theory that a pregnant

holdout's "craz[iness]" and her reluctance to vote for death was because "she was growing life."

Thus, in understanding how juries that returned death sentences reached unanimity, it is critical to realize that, in a room dominated by jurors arguing for death (remember that almost always at least eight jurors will have voted for death), many of the members of the majority will come to believe that the law in their case leads to one possible outcome: a death sentence. This strong belief, reinforced by a supermajority of jurors voicing in roundtable fashion that "the law" requires death—that that two plus two in fact equals four, not five—in turn tends to encourage a view of those jurors arguing for life as individuals who are letting emotion cloud their rational judgment.

#### B. STEP TWO: THE "EDUCATION" AND ISOLATION OF THE HOLDOUTS

With the majority having formed a strong united front in favor of death, motivated by a perception that the jurors favoring life were letting emotion cloud their judgment, the stage was set for the majority to push towards unanimity. The manner in which life holdouts were persuaded to change their votes was remarkably consistent from jury to jury in terms of the themes of the arguments advanced for death, as well as the eventual reactions of the holdouts. By this point in the deliberations, a strong and vocal majority would have repeated the arguments for death over and over. They would have stressed that the defendant was an explosively dangerous person, who either would kill again in jail or, worse yet, find a way out of prison. They would have discredited the defendant's mitigating evidence as not explaining the horrific murder ("just because somebody had an unhappy childhood doesn't mean they have to go for a life of crime") and would have declared that the defendant had chosen to take the low road ("[H]e'd been given opportunities in life, but never, . . . , took advantage of them.").

In pushing for unanimity, majority jurors often began by arguing to the life holdouts that they needed to separate their own personal feelings from their duties as jurors. Majority jurors were able to make this argument sincerely, as they generally did perceive the legal process as responsible for the defendant's death sentence, rather than themselves as individuals. When asked about whether they felt personally responsible for sending someone to death, jurors frequently responded along the lines of, "the law hung him, not us," or, "I didn't feel that *I* was killing someone." In a similar vein, jurors sometimes would cast the decision as one that the defendant himself had essentially made: "It was his decision to shoot the guy, not mine." Not surprisingly, when asked to rank who was "most responsible for the defendant's punishment," jurors consistently chose by a significant margin "the defendant because his conduct is what actually determined the punishment" (50%), or "the

law” (26%), distantly followed by “the jury” (9%), “the individual juror” (9%), and “the judge” (5%).<sup>51</sup>

These types of responses might at first seem counterintuitive because the law makes very clear that each juror must individually decide whether the death penalty is warranted.<sup>52</sup> Moreover, it is hard to imagine a more subjective decisionmaking process than being asked to “weigh” aggravating factors such as the vileness of the crime against mitigating circumstances like child abuse. What became apparent is that many jurors coped with the immensity of the death-penalty decision by embracing the idea that they were playing a role in a larger scheme and were carrying out a duty that society and the legal system had placed upon them: “[W]e comforted each other by saying, ‘this was the law and this is what he had done, and he’s done it to himself.’” Jurors regularly spoke of having “a job to do,” or in terms of having carried out an arduous civic duty. One juror analogized sitting as a capital juror to “rescuing people from a burning house—you may not want to go in and rescue someone, but you force yourself to do it.” And a significant part of how these jurors perceived their role was, as one juror described it, “[not] interject[ing] my personal thoughts when I was representing the law—set[ting] aside your own personal feelings is what I was trying to do.” Or, as a juror in another case explained, she had tried to be “the perfect juror” by avoiding emotion and being as “objective” as possible.<sup>53</sup>

Not surprisingly, therefore, majority jurors often saw defusing the life jurors’ concerns over being personally responsible for the death of

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51. Not all jurors, of course, separated themselves from the decision. A few openly embraced it, like the juror who stated: “I felt that my vote ought to count, [and] I would’ve taken a gun and gone down and popped him right down there in the [courthouse] basement.”

52. Some have suggested that jurors’ inclination not to identify themselves as the actor primarily responsible for the death sentence may show that jurors do not fully understand that the law requires the juror to make a personal determination of the proper punishment. See Joseph L. Hoffmann, *Where’s the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 *IND. L.J.* 1137, 1155–60 (1995); see also Bowers, *supra* note 3, at 1093–98. Others have concluded, after examining other indicators of jurors’ sense of responsibility, that “jurors generally accept responsibility for the sentence they impose,” but that “the data also suggest ample room for improvement.” Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 *BUFF. L. REV.* 339, 379 (1996).

53. The effort by these jurors to take emotion out of their decision did not necessarily mean that they were not affected by the magnitude of what they were doing. In trying to describe the enormous responsibility that they had thrust upon them, jurors occasionally would invoke the idea that “it’s like you’re playing God.” One juror who voted for death commented that “the whole process is very disturbing . . . and I’ve been trying to get rid of the memory, knowing that this person has to live with what we’ve decided—I sure didn’t like playing God.” Another juror, who had pushed hard for death, did not use a divine metaphor but recalled, “[I]t was much more emotionally laden than I had expected. I had thought it would be much more antiseptic, but it turned out to be much more personal, essentially because we’re being asked to commit murder.” More often, jurors simply would explain, “I don’t see how you can’t get emotionally involved with the case—you’re in up to your neck,” or “unfortunately it was up to us,” or “[the judge] put it on us—he said, ‘you have all the information, now you make the decision.’”

another person as the linchpin to persuading the holdouts to change their vote to death. Majority jurors would describe how their task “was just convincing [the two holdouts] that it was okay to come to that verdict, that’s what the system is all about, that’s what it’s for,” or “helping” holdouts to recognize that “this is the law of the land” so that the holdouts could “feel comfortable getting over” their doubts of whether they had the right to take someone’s life. Sometimes the effort to relieve the holdout’s anxieties was reinforced with the suggestion that even if the holdout changed her vote to death, the chances of an execution were slim: “[T]he only way to [change the holdouts’ vote] we knew, was to convince the holdout jurors that more than likely he would never be executed in this state—the possibility of him being executed is very remote.”<sup>54</sup>

Occasionally, the majority’s task focused on addressing a holdout’s individualized worries. One life holdout, for instance, who had struggled with whether she could be responsible for the death of another person and had found the decision, in her own words, “very emotional,” also had a particular concern if she changed her vote: How would she explain a death sentence to her daughter who was vehemently opposed to the death penalty? This juror explained that during the penalty phase, she had often thought about her daughter’s feelings and worried, “[H]ow will she look at me as her mother who now has convicted someone to a death sentence?” To help this juror “cope” with her daughter’s reaction, the other jurors rehearsed with her how to explain that the death penalty was “the law of the land, we were the ones there [at trial], we heard the facts.” The majority’s counseling session played a crucial part in persuading the holdout that she could vote for death and handle the reactions of others who “will say, how could you possibly do that?”

In trying to move life holdouts to a more “objective” view, the ubiquitous charts often played a critical role. Indeed, many jurors believed that the main virtue of the listing exercise was that it helped exorcise the emotional component of the decision. As one juror noted, “We tried to be objective—we used a blackboard to think in a linear, non-emotional way.”

The listing charts had the particular potential to tilt the discussion towards death. This was in part because frequently, especially if the

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54. The ability to make this argument convincingly may depend on the state. In some states, such as California, its relatively low execution rate (1.6% of all death sentences imposed) is well publicized; other states, like Virginia and Texas, on the other hand, execute at much higher rates. See *Executions Per Death Sentence*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-death-sentence> (last visited Nov. 1, 2010) (giving execution rates based on executions per death sentence, ranging from Virginia, which has carried out executions for over two-thirds of the death sentences imposed, to states like New Jersey, which, despite fifty-seven death sentences, never carried out a single execution before abolishing the death penalty in 2007).

defendant had prior convictions, the items on the aggravating side lent themselves more readily to being listed, and, of course, every chart had the murder of the victim at the top of the list.<sup>55</sup> Moreover, the listing charts tended to be particularly problematic for a defense that relied on an overall theme based on a series of events to comprise a “story for life.” In those cases, the chart had the potential of breaking apart the overall story into a number of events that, alone, might not seem particularly compelling. Thus, a defendant whose life story did not center around events of a momentous magnitude (for example, a mother committing suicide in front of him as a child) might not “chart well,” because his was a story of a slow descent into mental illness, or a gradual involvement in gang activity or drug use due to a lack of guidance from parental figures.<sup>56</sup> This effect of neutralizing the mitigating evidence could be especially pronounced if the gradual descent at the same time resulted in the defendant racking up aggravating factors in the form of prior offenses that increased in severity from petty larceny to drug offenses to murder—factors that charted well as aggravating factors. Stated another way for those of a literary bent, a tragedy like *Hamlet* might chart well because of the murder of Hamlet’s father, but the slow and painful spiral of events that culminate in Tom Joad’s killing of a police officer in the *Grapes of Wrath* might be far less compelling once the narrative is broken into lists.

Moreover, the charts provided the majority jurors a tangible way of communicating to the holdouts the majority’s view that the holdout was clouding his or her decision with emotion. Some sense of how the listing chart could influence the jury’s deliberations can be seen in one juror’s account of how a chart played a critical role in changing her vote from life to death (this juror was described by the majority jurors as a strong holdout for life):

We got in there and we weren’t quite sure what to do. It was tough and very tense deliberations. Somebody said what we need to do is we need to go to the blackboard, and we need to write reasons for the death penalty and reasons for life imprisonment. So we went over each. We debated would that go for life or would that be death penalty or would it fall somewhere in between? We had more disagreements when we were looking at [the decision between life and death] as one big clump, and one person saw it one way and one person saw it that way. [The chart] really helped make things clear, and if we did have

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55. Whether the victim was a random victim or in some way engaged in behavior that jurors saw as leading to the crime often influenced the jurors’ decision. See generally Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003) (discussing the role that the victim plays in a capital jury’s sentencing decision).

56. The ability of lists to influence decisionmaking is consistent with findings in other disciplines, such as communication and organization theory. See Christopher Seeds, *Strategy’s Refuge*, 99 J. CRIM. L. & CRIMINOLOGY 987, 1035–36 (2009). Professor Seeds insightfully contrasts decisionmaking based on “lists” and “story telling” using another CJP case. *Id.* at 1034–37.

that tense disagreement, we said okay that [factor] can fall in the middle. It still took a while once we had it up on the board. It was something you had to sit there and really, really think about. It wasn't like we looked at it and said, okay.

I was one of the last to vote for the death penalty. If I hadn't been able to look at these things independently, I don't think I ever could have come to a death penalty decision myself. I had to live with this decision for the rest of my life, and I had to have reasons that I could live with. I didn't have them to begin with, and I wasn't finding them from what [the pro-death jurors] were saying [before we made the list]. So that's why when we went to that infamous list, I was able to, in my own mind, arrive at a death penalty decision and feel like I had qualified it rather than just going along with people.

As the juror's narrative makes clear, the process of dissecting and listing the defendant's case for life had the effect of taking away its emotional impact on the juror when she reacted to the case as a "clump," and ultimately led her to vote for death based on the "reasons" put up on the "infamous list."

The effort to move the holdout away from a "personal" to a "legal" view also often involved the majority querying the holdout on whether she was being completely upfront about her reasons for resisting a death sentence. At this point, the majority often returned to the *Witherspoon* questions that had been asked during jury selection, which are intended to keep someone who is opposed to the death penalty from serving on a capital jury.<sup>57</sup> The majority would ask the holdout if his or her reasons for a life sentence were, at bottom, simply a personal inability to impose a sentence of death. Jurors would tell the holdout, for instance, that "she had stated sometime along the line that she could issue a death penalty if warranted and now was not the time to change her mind," or would "remind [the] uncertain ones that they had testified that they could vote for death." The implicit, and sometimes explicit, suggestion being, of course, that the holdouts had not been entirely honest with themselves during jury selection in saying that they could impose the death penalty and that they could follow the law. This line of questioning acted as a chisel for chipping away at the legitimacy of the holdouts' reasons for favoring life and further characterized the divide as one based on those who wanted to apply the law objectively—the majority favoring death—and those who were defying their oaths by allowing their personal emotions to dictate their vote—the life holdouts.

These questions were all the more powerful because the majority jurors were not posing them as a rhetorical ploy, but because they sincerely believed that the case for death was so strong that the only logical explanation for the holdout's disagreement was that she did not believe in the death penalty. Moreover, the tone usually was not a direct

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57. See discussion *supra* note 50.

accusation to the holdout that “you lied,” but an almost sympathetic commiseration that someone could easily think in the abstract that they could impose a death sentence only to discover that the reality of sending someone to the death chamber was much different. The message, though, was the same: The holdout now needed to try and set aside her personal feelings and live up to her oath to follow the law.

In chipping away at the legitimacy of the holdout’s views, majority jurors also liked to pose hypotheticals to the holdout concerning what more it would take to convince them to impose a death sentence: Mutilation? Multiple victims? Holdouts’ responses that they would impose the death penalty if the defendant had been a serial killer (or as one death juror sarcastically characterized a holdout’s argument for life, “[I]t was only one little murder[.]”) were addressed by pointing out that the jury instructions only required an intentional killing and not a series of killings. Holdouts’ efforts to argue that the defendant appeared remorseful were usually met with incredulity by majority jurors, who would make comments such as, “[The holdout] said that she really thought he was sorry and that if he had done it over it wouldn’t have been done that way—[and] I said, ‘he would [have] done it the same darn way, he would [have] been just a little more cautious,’” or “[the holdout] kept saying . . . he wasn’t a bad person, yes, he shot someone five times . . . but he’s really a nice guy.” Nor did more novel arguments fare better, like the holdout who suggested that she wanted life because death was “too easy” a punishment, as the defendant no longer would have to live with the consequences of the murder. This argument was sarcastically dismissed by a majority juror who stated, “[T]hat was [the holdout’s] big thing you know, that [death] is not punishment enough, and, ‘okay,’ I said, ‘so what are we going to do, are we going to torture him?’” Under this type of intensive grilling, the holdout’s answers often added to the appearance that she had not been totally honest in saying that she could impose the death penalty where the law allowed it.

And if the holdout tried to counter that she could impose a death sentence, but she did not believe this was a case for death because of the defendant’s background, such as child abuse or mental illness, the majority’s response usually was to chastise the holdout for forgetting about the victim. A juror in one case remembered reaching a breaking point because she thought that the holdout was totally focused on the defendant:

I stood up, we had been talking it over again and finally I just said something to the effect, “[Martha] just think if he took your son—because she has a son—and held him in a small dark place and he pointed a gun at him and while your son begged for his life for ten minutes, he continued to shoot him with a pistol. Tell me how you feel about that. Just think about it for a minute.” Then I made some big speech and then jumped out of the room and slammed the door because I was so mad I was going to kill her.

Predictably, the emotional temperature in the jury room continued to rise the longer the holdout insisted on life despite the majority's efforts to make him or her see that the law required a sentence of death. At this juncture, the prospect of a hung jury often played an important role. For the majority jurors pressing for death, the fear of a hung jury and its consequences provided the motivation to continue trying to persuade the holdout rather than to simply declare the jury hung. Majority jurors for death would comment, for example, on how "the evidence was so strong that we couldn't take a chance on it being a mistrial," or that they "weren't sure if he would have to be tried all over for both parts [the guilt and penalty phases]." Demonstrating again how jurors sometimes use misperceptions to fill informational voids,<sup>58</sup> one juror reported that the jury in his case had been convinced that a hung jury on the sentence meant that the judge could impose a sentence less than life or that the defendant might go free all together. As we will see, these concerns about the consequences of a hung jury, often fueled by a judge's refusal to clarify what would happen if the jury hung, usually led death holdouts to reluctantly agree to life.<sup>59</sup> With a strong majority of jurors for death, on the other hand, these same concerns acted to reinvigorate the majority's drive to obtain a death sentence. As the prospects of a hung jury grew, so did the majority's determination to convert the life holdouts.

Moreover, in a number of juries, the majority jurors used the idea that the holdout's refusal to change her vote would result in a hung jury as a way to further isolate the holdout and turn the pressure up several notches: "We would talk about how awful it would be to have this whole thing thrown out and retried because it was eleven-to-one. We really harped on that." This idea of unfairness—that one juror could dictate the result against the wishes of eleven others—would often be coupled with the idea that the holdout would then be responsible for the possible consequences. One juror favoring death, for instance, described how his jury used its belief, which unbeknownst to them was mistaken, that a hung jury would result in the defendant receiving a whole new trial as an argument against the holdout, stressing that "if they still chose not to [change their vote to death], that one person is going to be given the responsibility" of whether the defendant might end up "free or not."

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58. The Supreme Court has held that no constitutional right exists for the defendant to have the jury informed of the consequences of a deadlocked jury. *See Jones v. United States*, 527 U.S. 373, 382 (1999).

59. *See infra* notes 76–79 and accompanying text.

### C. STEP THREE: THE CONVERSION OF THE LIFE HOLDOUTS

One reason the conversion of life holdouts tended to be particularly emotional and difficult—especially, as will be seen, when compared to the conversion of death holdouts—was that a life holdout would change his or her vote only if genuinely convinced that they had been mistaken and that a life sentence was indeed the *wrong* choice. In other words, a juror favoring life will not change her vote and send someone to the death chamber if he or she simply sees the majority's favoring of death as an honest but understandable difference in opinion. To change the life holdout's vote, therefore, the majority jurors must actively convince the holdout that a death sentence is *the only right answer* and that to cling to a life vote is to defy the law and their oath as a juror. Unless the death jurors can convince the life holdouts that they are wrong, life holdouts almost always will refuse to vote for death simply to reach a unanimous verdict. Even life holdouts who after the trial regretted changing their vote to death stated that at the time they finally switched their voted to death in the jury room, they had come to believe that a death sentence was the "correct" outcome.

The moment of conversion for jurors who had held out for life normally came as they felt increasingly isolated and began to be plagued by self-doubts. Holdouts reported that after what seemed to be endless rounds of trying to justify their position, they began to ask themselves whether maybe, in fact, they were misunderstanding the law. Part of the growing self-doubt was because the dynamics of the situation meant that as the minority juror, the holdout was the one who was constantly being asked to explain why she saw matters differently. The effect was to place the burden on the life holdouts to justify their disagreement, to prove the majority jurors wrong, or, as one majority juror summed up his jury's dealings with a single holdout: "[I]t was her against everybody."

Moreover, the majority's questioning of the holdouts was interlaced with the belief that the holdouts' difficulty was that they simply were not comprehending how the law worked; in other words, they were not understanding that two plus two equals four and not five. One juror's description of how his jury proceeded gives a sense of how this attitude was intertwined throughout the majority's interaction with the holdout:

So we kind of said to [the holdout] why do you say this? Why do you feel this way? Do you have any feelings about your decision? Let's go over it . . . We'd put it all on the board . . . and boom, boom, boom, we discussed each and every one of these steps [with the holdout], so now she could make her decision without us having any bearing on it, and it worked great. We outlined it for her. She had cluttered the issues, and this way she could say, "I feel better about it."

As the juror's comments reflect, the attitude being communicated to the holdout was that she had made a mistake and, with all the attention

intensely focused on her, the rest of the jury was intent on helping her find the correct answer.

Sometimes the psychological isolation was further intensified by how the majority reacted to the holdout's resistance. One jury, for instance, that had arrived at an eleven-to-one vote for death after several ballots, asked the holdout to explain once again why she felt that way. The holdout gave a response similar to her earlier ones, and the majority proceeded to tell her why they still thought she was mistaken. At this point, the holdout said she "needed some space," so, as one of the majority jurors explained, "to be respectful, we put her in the corner, and she thought about it while we read books or chatted—the next vote was unanimous." Again, the majority's intentions were honorable, to give her space to think, but the message—physically reinforced by "put[ting] her in the corner" in a manner reminiscent of a recalcitrant student being sent to the corner of the classroom—was one highlighting her isolation as the only person thinking that life was justified.

And while these Q&A sessions between the majority and minority jurors usually started off fairly cordially, if they dragged on, the majority could become less gentle in letting the holdout know that he or she stood alone in their beliefs:

Oh, it got to the point where everybody started yelling at her and screaming at her. . . . There was something missing that she just couldn't put her finger on and we kept telling her, "what the hell is it that you don't see?" You know, "what is it you don't see?"

In one of the most dramatic examples, Professor Bowers and his colleagues have reported an interview from Louisiana where ten jurors wanting death literally formed a circle excluding the two jurors who wanted life. As one of the two holdout jurors recalled:

[The ten jurors] went and sat on over in the little corner and discussed it all without, without us. I remember it very well because we were isolated, the black girl and I were not even allowed to sit with them. . . . And so about three days and three nights of that, of isolating themselves from us and we [were] not going to have anything to do with it. She kind of broke down, and then I broke down, and I said, "Well, what the heck, I'm not going to sit up here and send myself to the hospital." And, uh, she got sick to her stomach about the whole thing and went into the bathroom and was vomiting. And I went in there to help her, you know, and got a rag and was washing her face. And they came in and told us to get out of the bathroom.<sup>60</sup>

While most juries did not experience such overtly coercive tactics, the very process of deliberation and identifying the basis for disagreement was bound to foster a sense of isolation among even the

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60. 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, 252 (2001) (the verdict in the case ended in a life sentence despite the majority jurors' behavior).

hardest of holdouts. And, not surprisingly, with juries where a holdout persisted in holding out for life for a substantial period of time, the majority's feelings of frustration would spike, and the holdout's sense of isolation would intensify; voices were raised, tables were pounded, and tears were shed. One juror's description of her jury's deliberations was consistently echoed by jurors in other cases with strong holdouts: "There was one holdout, a woman, and she held out for a long time—it came down to eleven people to convince her [and] she was crying a lot while we were convincing her."

Intriguingly, though, many of the holdouts announced their switch to death not at the height of such emotional exchanges, but after a pause in the deliberations and a momentary respite from the heated arguments. Sometimes the calm in the storm simply was adjourning for the night, other times a majority juror—often the foreperson—would suggest that the jury needed to take a break to calm down, or the holdout would request a chance to think by herself (although finding a place of refuge usually meant locking oneself in the bathroom or sitting off in a corner). While the majority jurors exhibited no conscious design of trying to trigger a holdout to change her vote by providing a temporary sanctuary from the majority's interrogation, psychologists have found that where individuals have resisted group pressure, sometimes the removal of the pressure will trigger the change in position that the pressure itself would not.<sup>61</sup>

The life holdouts' description of the sense of isolation and self-doubt that crept in as the deliberations dragged on also has a strong basis in psychological research. In a famous experiment, social psychologist Solomon Asch asked the subject to perform the exceedingly simple task of identifying which of three lines on one side of a board was the same length as a line on the other side.<sup>62</sup> Asch's twist, however, was that two individuals who were a part of the experiment went first and were instructed to choose one of the incorrect lines as the match. An astonishing 75% of the experiment's subjects then chose to disregard what their own eyes were telling them and instead identified the same incorrect line as that chosen by the confederates.<sup>63</sup> When later debriefed, the subjects easily identified the correct line but stated that when the other individuals had identified the incorrect line, they had doubted

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61. Jack W. Brehm & Millard Mann, *Effect of Importance of Freedom and Attraction to Group Members on Influence Produced by Group Pressure*, 31 J. PERSONALITY & SOC. PSYCHOL. 816, 823 (1975).

62. Solomon E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in DOCUMENTS OF GESTALT PSYCHOLOGY 222, 223–24 (Mary Henle ed., 1961) [hereinafter Asch, *Effects of Group Pressure*]; Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1, 68–70 (1956).

63. Asch, *Effects of Group Pressure*, *supra* note 62, at 223–28.

themselves, thinking that perhaps they had misunderstood the instructions, or that their eyes were failing them.<sup>64</sup> Later variations of the study have found that the tendency to doubt one's self and the desire to conform to the judgment of others is particularly strong where the task involves value judgments, where one's opinion must be stated in front of others, and when only two options are given to choose between<sup>65</sup>—scenarios with obvious parallels to a capital jury's penalty phase deliberations.

#### D. STEP FOUR: WELCOMING THE HOLDOUT BACK INTO THE FOLD

When the holdout did announce that she finally was ready to vote for death, the moment of conversion usually was fraught with emotion, especially if protracted deliberations had severely frayed the jurors' patience with each other. The release of emotion did not just come from the holdout, as the entire jury had been under tremendous stress trying to reach a unanimous decision. Jurors recalled the moment with descriptions such as “[the holdout] cried, we all cried, there was not a dry eye in the jury room—it was very emotional,” or “people were very upset, people cried and not just the women.” After the holdout's decision to make the verdict unanimous, the majority often tried to welcome the holdout back into the “family” with gestures of reconciliation, such as giving the holdout a hug or a consoling pat on the back.<sup>66</sup>

Majority jurors usually described the catalyst for a life holdout's conversion as recognition of the correctness of the majority's viewpoint. Sometimes this recognition was ascribed to having “worked out their doubts,” or to having “come to grips” with the decision, or sometimes to the holdout not having understood the law at first. In most instances, the majority jurors thought that the process of conversion had been accomplished without coercion, and while a small percentage of majority jurors did attribute a holdout's change of vote to the majority's pressure rather than a change in heart,<sup>67</sup> even those jurors usually did not convey any sense that the result was unjust or unfair. They may have been uneasy with the process, but they also tended to believe that the pressure had only hastened the holdout's arrival at what everyone, including the

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64. *Id.*

65. Saul M. Kassir, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 704 & nn.74–75 (1990); see also SUNDBY, *supra* note 37, at 81–84 (summarizing psychological research on conformity).

66. One of the more unusual conciliatory acts that has been reported occurred at the trial of ousted Panamanian dictator Manuel Noriega for narcotics smuggling: The jury, which had earlier prayed with the holdout, filled the jury room with Gospel hymns after finally reaching unanimity to convict. William Booth & Michael Isikoff, *Noriega Jury Frustrated by Lone Holdout*, WASH. POST, Apr. 11, 1992, at A1.

67. One juror, for example, stated with respect to a holdout, “She [finally] went [for] the death penalty, I think more so on pressure[.] I think she felt pressure.”

holdouts, knew was the correct verdict. As one juror explained, “I wouldn’t have allowed [a majority juror] to browbeat [the holdout] to that extent if I didn’t think that [the holdout] really felt he should receive the death penalty.”<sup>68</sup>

#### V. THE PERSUASION OF DEATH HOLDOUTS TO REACH A UNANIMOUS VERDICT OF LIFE

When the focus is switched to juries that returned a life sentence, the deliberative process in many ways mirrors the one followed by death juries. They approached the evidence in a similar fashion by making charts, and followed the same four steps leading up to the announcement of the verdict. At the same time, as would be expected given the different sentencing outcomes, a number of important differences arose in how jurors responded to majority pressure, in the arguments that were put forward, and in the reasons why the death holdouts eventually changed their vote to life.

##### A. STEP ONE: FORMING A UNITED FRONT IN FAVOR OF LIFE

Juries that returned unanimous life verdicts were similar in consolidating and strengthening their views through the deliberation process, but with several intriguing variations. Because life juries occasionally began with as few as three jurors voting for life, in some cases the consolidation process revolved around first cementing a bloc of minority jurors for life.<sup>69</sup> A juror in a case who had been with the initial majority for death observed with some exasperation that “there were four to five jurors who were like-minded [for life] and in agreement from the start. They saw eye to eye, stuck up for each other, and made it hard to have a one-on-one discussion.” A juror in another case similarly described how two jurors immediately formed an alliance:

We went around the room and we decided that each one should say what they feel and why. It was then we discovered that we had one person who honestly and completely did not believe in the death penalty. He said that the reason he got on the jury was that he had said if everyone else agree[d] he would have [to] go along with it, but his personal thought was that we do not kill people. He said that if the whole jury said death he’d have no choice but to go along with it, but that opened up a whole new door because then we had another guy who said, “I have such respect for this man for being so honest in

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68. A fifth step, the announcement of the verdict of death, still lay ahead for the jury. Because of the shared similarities with juries that reached life verdicts, the final step for life and death juries is described together. *See infra* Part VI.

69. In their study of non-capital cases, Waters and Hans likewise found that the larger the minority faction disagreeing with the majority’s viewpoint, the more likely the dissenters would “hang” the jury rather than acquiesce to the majority position. Waters & Hans, *supra* note 25, at 523–24, 537–38.

saying that he doesn't believe in the death penalty that, then, I too won't vote for the death penalty."

While the jurors favoring death strongly suspected that the second juror also had been deceptive about being able to impose the death penalty, the two jurors were joined by a third juror voting for life, and the alliance of these three jurors was to prove so unshakeable as to eventually swing the entire jury to life. In cases like these, therefore, unlike in death cases, if a minority of jurors favoring life could unite and provide initial support to each other in refusing to yield to the majority's view, the minority viewpoint eventually could overtake the jury's verdict.<sup>70</sup>

The other intriguing variation between life and death majority jurors was that the life jurors did not tend to view those jurors favoring death as being irrational or not willing to follow the law. This did not mean, of course, that death holdouts were necessarily viewed in a flattering light. Occasional comments were made suggesting that the death holdouts had been rigid ("unwilling to compromise"), lacked compassion ("they didn't want the taxpayers to feed the defendants the rest of their lives"), and were overly concentrated on the crime ("[T]hey would not take into account anything else, pure and simple."). And sometimes the observations were phrased in less than congenial terms ("old rednecks"), or implied that the death holdout had been less educated ("[H]e was an Archie Bunker."), or had ulterior motives ("[H]e was trying to get out of work and focusing attention on himself."). Reminiscent of the "unnatural attachment" comments about the life holdouts, a few remarks were made suggesting that a death holdout had become fixated on the victim's family, such as the comment by the juror who observed:

We had one person in there that . . . felt some kind of connection to [the victim's] family. She sat closest to the family, they were always in the same spot in the audience, and she was always looking over at them, so she always brought that up quite a bit.

Generally missing from the life jurors' commentary, however, was the strong sense that anyone favoring death in their case had to be

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70. That individuals are able to resist majority pressure if they have the support of others is also well established in the psychological literature. Asch did follow-up experiments to the "line experiment." See *supra* note 62 and accompanying text. He found that if he included just one person who chose the correct answer, even while increasing the number of individuals identifying the incorrect line, the chances of the experiment's subject choosing the correct answer increased significantly. Asch concluded, "It is clear that the presence of . . . one other individual who responded correctly was sufficient to deplete the power of the majority, and in some cases to destroy it." Asch, *Effects of Group Pressure*, *supra* note 62, at 231. Asch also discovered, however, that when he further varied the experiment so that the one confederate who initially responded correctly then "deserted" to the majority's incorrect position in the middle of the experiment, the subject's "experience of having had and then lost a partner restored the majority effect to its full force, . . . point[ing] to a fundamental psychological difference between the condition of being alone and having a minimum of human support." See *id.* at 232.

wrongheaded and mistaken. In other words, while the death jurors generally began with an unwavering premise that a death sentence was the one and only correct outcome, the life jurors' starting premise in trying to persuade the death holdouts usually was that a life sentence was the best outcome, but they could understand how someone might argue for death (and, of course, to sit on a capital jury, even a juror favoring life in a case will have affirmed to the court that he or she could vote for a death sentence under certain circumstances).<sup>71</sup> This difference in starting points meant that life jurors were less likely to see those favoring death as having personality problems, as having lied to get onto the jury, as unable to face reality, or as simply being unable to see the "right" answer. This did not mean that life jurors always were kinder and gentler in trying to persuade the death holdouts, but, as will be seen, the different starting premises often led to different tactics and arguments.

#### B. STEP TWO: THE "EDUCATION" AND ISOLATION OF THE HOLDOUTS

As with the juries that returned a death sentence, once a clear majority had formed in favor of life, the burden was in effect shifted to the minority jurors favoring death. The process again tended to play out as a series of questions directed by the majority jurors at the holdouts, whose answers in turn were likely to elicit multiple responses from the majority jurors favoring life. One majority juror on a jury that found itself standing at eleven-to-one for life, for example, explained how his jury questioned a holdout for death:

We just said, "[W]ell show us then inside the [jury] instructions and tell us the reasons why you think this way . . ." I should say that we weren't saying you don't know what you're talking about. We didn't try to bias this person. We said, "[W]ell, how did you arrive at that?" We tried to make it so that only one person was talking at a time so you didn't have three or four people trying to stress their point home. We made it up front prior to even talking to her that we're not trying to sway her—just let us know, maybe we made the mistake.

While the majority jurors in the case were trying to be open-minded and non-coercive (and this attitude appeared to be genuine), the upshot of the majority's question to the holdout was to ask, "So, tell us why you alone are right in wanting death and the eleven of us are mistaken in believing that life is the proper penalty."

It was at this point, as the deliberations came to a crossroads of either reaching a unanimous verdict or having to declare itself hopelessly stalemated, that the majority's tactics often diverged between life and death juries. The critical juncture was the same—convincing the holdouts that they needed to switch their votes to reach unanimity—but the

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71. See *supra* note 50 (discussing death qualification of capital jurors).

arguments and holdouts' reasons for changing often differed between life and death juries.

As seen earlier, life holdouts would change their vote to death only if the majority jurors convinced the holdouts that, indeed, they had misunderstood the law and that death was in fact the sentence required by the circumstances of the case.<sup>72</sup> By comparison, life jurors trying to persuade a death holdout have a somewhat easier task. The life jurors do not have to ask the death holdout to give up her passionate belief that the defendant deserves death, but only to agree to settle for what is still an extremely severe sentence of life without parole. In other words, life jurors need not actively convince the death holdout that the holdout's desire for a sentence of death is wrong and that a life sentence is the only right answer. Rather, the majority need only convince the death holdout that a sentence of life without parole is sufficient to fulfill the jury's duty, even if it may not fully satisfy the holdout's sense of full justice.

In undertaking this task, life jurors directed a variety of arguments at death holdouts, or as one juror put it, “[W]e *shared* with [the holdout] why he should vote life.” As would be expected, much attention was given to convincing the holdouts that a life sentence would not be an easy sentence for the defendant (“[T]hey kept working on the one guy, they told him that life without parole wasn’t going to be easy, a sweet young guy in prison wasn’t going to have an easy time.”). Majority jurors also would try to pry the holdouts’ focus away from the victim and towards the horrors of the defendant’s childhood or other mitigating circumstances: “We put the holdout in [the defendant’s] family—if it was your brother, would he deserve death?” A juror in another case told of how “there were some very human appeals made by certain individuals on the ability to show mercy. And guilt to an extent was used—it’s like, ‘are you that hard of a person that you can’t find mercy in your heart,’ things like that.” A life juror in another case reminded the holdout that he had promised during voir dire, in response to what are known as reverse-*Witherspoon* questions, that he would not automatically impose a death sentence.<sup>73</sup> The juror then said to the holdout, “God damn it, if you told them that you could decide for life, what more mitigating circumstances do you need to hear, how much worse could someone’s life be that you can’t even consider life as a possibility?” In cases where lingering doubt existed about the defendant’s role in the murder, life

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72. See *supra* Part IV.C.

73. The Supreme Court has held that a capital defendant has the right not to have a juror sit who automatically would impose the death penalty, just as the State has a right not to have a juror sit on a capital case who could not impose the death penalty. See *supra* note 50. As a result, a potential capital juror is asked questions during voir dire (the “reverse-*Witherspoon* questions”) to ensure that the juror would be able to consider mitigating evidence arguing for a sentence less than death. *Morgan v. Illinois*, 504 U.S. 719, 724–25 (1992).

jurors had additional leverage to persuade those for death: “[W]e weren’t 100 percent sure if he pulled the trigger . . . [and] suppose something came up . . . you couldn’t change your vote if he’s already been killed.”<sup>74</sup>

### C. STEP THREE: THE CONVERSION OF THE DEATH HOLDOUTS

These arguments swayed some votes to life, especially those who had not been strongly for death, and softened the position of many other jurors who earnestly had argued for death. Ultimately, however, the most ardent holdouts for death appeared to change their votes primarily for one reason: the fundamental desire to avoid another trial.

In instances where a death holdout was changing his or her vote to life, a judge’s “persistence” (as one juror termed it) in returning the jury to deliberations often triggered the decision to switch their vote to achieve unanimity. Faced with the realization that the life jurors were not going to budge, some death holdouts finally changed their votes just to end the deadlock. Such holdouts would explain, often with a prefatory remark that certain jurors had “lied” to get on the jury because they had not really believed in the death penalty, that, “I gave in because I didn’t want a retrial.” Or, as another juror more elaborately described her switch:

JUROR: We asked to speak to the judge, that we were deadlocked and did it have to be twelve people agreeing and what would happen if some of the people absolutely wouldn’t change their mind, would it become a hung jury? And he told us that they would have to get a new panel and get twelve jurors and hear the penalty phase again.<sup>75</sup> And the people at that point, the two people who felt he should have the death penalty, figured if they have to go through that they’re never going to find twelve people for the death penalty, so it would be a waste of time. So at that point, the two people really didn’t have that much choice but to change their mind under pressure.

INTERVIEWER: Under pressure?

JUROR: Yeah.

INTERVIEWER: Sounds like you were one of those two people?

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74. The role of lingering or residual doubt as a mitigating factor is complicated. Jurors will say that if they had a doubt that the defendant was in fact the person who committed the crime, they would vote for a life sentence; they then, however, almost always proceed to explain that they never would have voted guilty in the first place if they had entertained any doubts. By contrast, lingering doubt over the defendant’s role in the crime or motive—for example, uncertainty over whether the defendant was the triggerman—often is a persuasive mitigating factor for jurors. See Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1577–84 (1998).

75. The practices of instructing jurors on the consequences of a deadlocked jury vary. See *supra* note 58 (explaining that there is no constitutional right to have the jury instructed on the consequences of a deadlocked jury at the penalty phase).

JUROR: Yeah. There was no way [the ten jurors for life were going to change their mind.] The more I tried to reason with them, the more they clung to their view. It was a waste of time.

Another death holdout's anger at having to change his vote because people had "lied" to get on the jury resurfaced during the interview. Asked why he finally changed his vote to life, the juror snapped back, voice rising, "because I'm not going to spend the rest of my life here discussing it. How about *that*? Does that make sense?"

The death holdouts' decision to change their vote once they realized that the majority's position for life was unyielding was usually accompanied by a further rationale as to why a life sentence, even if not their initial preference, would be acceptable. Sometimes the holdout would explain that he or she became convinced that a life sentence actually would be the safer way to keep the defendant locked away forever. For example, one holdout explained that at the time of their deliberations, he heard on the news about a death sentence that had been overturned. He stated that even though he knew that the jury was supposed to consider only the evidence, he became convinced that a murder conviction and death sentence would be overturned "on some trumped up reason like inadequate defense or newly discovered brain damage." For this juror, as with most jurors no matter their sentence preference, a reversal of the defendant's conviction was the one possibility to be guarded against at all costs. The juror thought the safest option, therefore, would be to acquiesce to a life sentence in the belief that it would lessen the chance that the conviction would be overturned on appeal.

Death holdouts also frequently voiced the concern that a death sentence would simply trigger an ad infinitum appeals process:

[I]f we imposed the death penalty it would be meaningless because there would be appeal after appeal after appeal and it would go on and on and cost the state a lot of money, and it would keep the defendant hanging on Death Row. So nothing would be resolved—just give him life in prison.

Another juror noted that the appeals process would add the aggravation of the case never going away for the jurors: "What's the point of sending him to the death row? He's just going to appeal for the next twenty years and we're going to have to read about it for all those years, and the taxpayers are going to have to pay for all of it." Another death holdout after saying that he changed his vote "only [because] I didn't want a hung jury," added "[and] if death is given, they don't get death, they sit on death row, so he's going to get [life] anyway."<sup>76</sup> Consequently, these

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76. As noted earlier, the strength of this perception may vary by state depending on execution rates within each state. *See supra* note 54.

death holdouts, believing that insisting on a death sentence might lead to more litigation and uncertainty, changed their vote to life.

Especially worrying for death holdouts, however, was the possibility that if they hung the jury by holding out for death, not only would the defendant receive a new sentencing hearing, but his conviction for capital murder also might become unraveled. This concern often was expressed to the judge through a question asking what would happen if they were unable to reach a unanimous decision. Some judges did inform the jury of what would occur: The capital murder conviction would stand and the prosecutor would decide whether to seek a new penalty phase with a new jury.<sup>77</sup> Often, though, the judge would decline to explain, telling the jury, as one juror recalled, “that it wasn’t any of their concern.”

Faced with this uncertainty, especially the misperceived possibility that the defendant might be tried again and found guilty of a lesser crime or, worse yet, be acquitted, death holdouts would explain that they “absolutely did not want to hang,” because “we did not want to risk the defendant getting away later, and we didn’t know the consequences of not agreeing.” One death holdout faced with a judge who “refused to tell us what would happen,” felt a sense of “hopelessness” and changed his vote to life because he “didn’t know what would happen.” A juror in another case remembered the judge as responding: “And don’t even ask unless that is your true, absolute situation, and triple-check before asking again.” This response led the death holdouts to believe the jury was “getting into big trouble areas,” so they changed their votes to avoid being hung. Another death holdout faced with the judge’s “unhelpful” refusal to clarify recounted:

So it finally dwindled down to me and another guy, we were the last two to hang on, and it came down to the last vote, and this took about a week and a half to decide, so we finally gave him life so we wouldn’t have to have a complete mistrial and have another trial.

A juror in the same case who had favored life recounted how the jurors arguing for life had used the judge’s refusal to explain the consequences to their advantage: “[We] told them we had worked very hard over the past three months to find [the defendant] guilty of first-degree murder, and what if we couldn’t reach a decision and the next jury came in and found him guilty of a lesser crime?” Given a vacuum of information, the jury had answered the question that the judge had refused to answer with

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77. The consequences of a hung jury at the penalty phase vary by jurisdiction. While in California the result is the retrial of the penalty phase, in some states and in federal death penalty cases, a hung jury at the penalty phase will result in a life verdict. See David McCord, *Lightning Still Strikes: Evidence from the Popular Press That Death Sentencing Continues to Be Unconstitutionally Arbitrary More than Three Decades After Furman*, 71 BROOK. L. REV. 797, 824 & n.92 (2005) (noting that in most jurisdictions a hung jury results in a life sentence, but that Arizona, California, and Kentucky permit the retrial of a penalty phase that ends in a hung jury).

a worst case scenario of a whole new trial, and the death holdouts, faced with either becoming a hung jury or voting for life, opted to take what they saw as the safe option of agreeing to life<sup>78</sup> (recall, however, that uncertainty about the consequences of being hung also could push a jury towards a death sentence if the jury's majority was favoring death over life).<sup>79</sup>

Sometimes juries found unique ways to extend an olive branch to the death holdouts, while still reaching unanimity for life. Two juries, for instance, found themselves deadlocked in favor of life by respective ten-to-two and eleven-to-one margins, but with the death holdouts strongly resisting the majority. Independently, both juries found a similar solution to the impasse through the jury instructions. As part of the instructions, the jury was told that while they *could* impose a death sentence if they determined that the aggravating circumstances outweighed the mitigating, they were never required to do so. In other words, the jury was always free to choose a life sentence or, as it is sometimes stated, was free to exercise mercy. These two juries reached an agreement with their holdouts that the jury unanimously would agree that the aggravating circumstances outweighed the mitigating circumstances (the death holdout's position), and the holdout in return would agree to join the majority in exercising mercy by voting for life. One death holdout explained that this "compromise" had allowed him to switch his vote to life in good conscience, because it vindicated his concerns by recognizing the horror of the crime and the importance of the victim. Even some of the jurors favoring life saw the compromise as more than a makeshift diplomatic solution: "[It allowed] our jury [to] kind of made a statement [to the defendant] that what you did was totally, totally unacceptable, you cannot treat a human life like that, but it still allowed us to show mercy by giving him life where the choices were life or death."

Still another jury creatively broke a deadlock with a holdout who throughout the deliberations had focused on the need to give the victim's family "justice," strenuously arguing that a life sentence would make the survivors feel like the victim's life had been forgotten in the process. After a number of rounds of the same give-and-take, one of the majority jurors came up with a proposal that the holdout switch his vote to life but then personally contact the victim's family and let them know that he had championed their cause in the jury room and that everyone recognized

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78. Similar concerns apparently motivated some jurors to vote for life in the sentencing of John Lee Malvo (one of the Beltway juvenile snipers). See Michelle Boorstein, *Mistaken Belief About Mistrial Troubles Jurors*, WASH. POST, Dec. 25, 2003, at B1 ("Jurors deciding whether to sentence Lee Boyd Malvo to life in prison or death said this week they had feared that if they did not come to a unanimous decision, a mistrial would be declared—an erroneous belief that led several who believed Malvo should die to vote to spare his life.").

79. See *supra* Part IV.C.

that the victim's death was a terrible tragedy. With that concession, the holdout changed his vote to life.

And, of course, in the background of these decisions was always the specter of the meaning of life without parole.<sup>80</sup> As strong as the death holdouts' desire was to avoid a hung jury, many of the holdouts were adamant that they never would have changed their vote if they also had not been convinced of one fundamental fact: Life without parole meant that the defendant would never get out of prison. Death holdouts typically would explain that "[o]nce I was able to accept the fact that he wasn't going to walk in ten years or twelve years, that he would spend the rest of his life in prison, it changed my vote," or that "the major factor [in persuading me to change my vote] was the [judge's] assurance that [the defendant] would be in jail forever."

One last factor that appeared to persuade some death holdouts to change their vote can be attributed to what psychologists have termed leniency bias: the inclination of those favoring a harsher outcome to resolve doubts in favor of leniency when confronted with a sizeable group arguing for a more lenient disposition.<sup>81</sup> Death holdouts faced with a number of jurors arguing for life sometimes recalled their discomfort in arguing for death when most of the other jurors were for life. One juror, for instance, observed, "[I]t's extremely difficult to sit and say you don't think someone deserves to live—we weren't going to sit and fight with people to get someone killed." Another juror stated, "[W]e knew it would [be] an uphill battle from when we took the first vote [and only four jurors voted for death], because it's harder to convince people for death than it is for life." And as one juror who had argued for death before finally switching his vote explained, "I changed my vote to give [the defendant] the benefit of a doubt, it was a matter of being humane." Yet another holdout noted that while he had argued strongly for death because he believed the defendant deserved death, "in my heart it was okay to give life knowing that [Ricky] was going to in jail for the rest of his life," and that voting for life had been "a lot easier" than arguing for death. Of course, yielding to a leniency bias may be easier when being lenient still means that the defendant will spend the remainder of his life in prison.

#### D. STEP FOUR: RECONCILIATION, MORE OR LESS

Some death holdouts came to peace with changing their vote, but a fair number of holdouts continued to express great dissatisfaction with the life verdict after the trial, lamenting that their juries had not had the "guts to stand behind our guilty verdict [and impose] death," or had

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80. See *supra* notes 35–39 and accompanying text.

81. ZIMBARDO & LEIPPE, *supra* note 41, at 322.

“wimped out when it came to the penalty phase.” Another holdout, when asked if he wished he had done anything differently, said that in retrospect, “I wish it had been a hung jury; we gave in too easily on the penalty part.” These were jurors who had strongly believed that death was the only just verdict and had trouble accepting that the other jurors had not agreed.

In contrast to death majority jurors who usually saw a life holdout’s change in vote as a result of the holdout realizing that he or she was “mistaken,” life majority jurors frequently—and correctly—attributed a death holdout’s change in vote to a pragmatic decision to avoid a hung jury, rather than to an acceptance of the majority’s position of favoring a life sentence. A life juror recalled how the two death holdouts had left the room when it became evident that the other jurors would not vote for death, and “I’ll never forget the look on [one holdout’s] face [when they returned]. She was pissed. They said, ‘[W]e don’t want to become a hung jury; we don’t like our decision [to change our vote to life], but that’s the decision we’re making.’” This life juror could not resist glancing at the holdout as the judge read “life in prison” and observed that it was evident that the holdout was “enraged.”

Perhaps the starkest evidence that some death holdouts changed their minds not because of a change in heart but to avoid hanging the jury was the consolation they sometimes took in speculating about the defendant’s life in prison. One death holdout, for example, stated that he finally agreed to a life sentence because “[the defendant] would probably be tormented himself in [jail].” Another holdout consoled herself that by switching her vote to life, she had both saved the state money by not allowing the defendant to pursue endless appeals *and* had actually enhanced the chances that the defendant would be executed, only now the execution would be by rival gang members in jail rather than through the far less reliable mechanisms of the state’s legal machinery. Still another holdout, who had been quiet and introspective throughout the interview, calmly revealed that he was able to “give up a death sentence” because AIDS was epidemic in the prison system, and he knew, therefore, that the defendant was certain to contract the disease and die a slow, painful death.

## VI. THE FINAL STEP: SURVIVING THE VERDICT

One might have expected that after a jury’s tribulations in reaching unanimity, the announcement of the verdict would be the easy part. Juries, however, invested a surprising amount of energy into the process. Even for juries that had settled on a life sentence, the verdict’s announcement was a moment full of drama as the defendant stood waiting to hear whether he would live or die. As the clerk or judge read the verdict of “life,” jurors varied widely in their reactions. Some jurors

cried because it was “finally over,” while some who had unsuccessfully held out for death felt anger and even rage because the jury had refused to return a sentence of death. Occasionally the defendant added to the drama, like the defendant who “raised his hand like, ‘yeah!’” and pumped his lawyer’s hand as the clerk announced the life sentence. The juror who angrily recalled the incident had struggled mightily with whether a life sentence was a sufficiently severe sentence, and the defendant’s acting as if he had won a sporting contest “really made me mad. I was pissed, I was, I swear to God—that one thing really sticks in my mind.” By contrast, a different jury, and one of the few that had readily arrived at a unanimous life sentence, shook the defendant’s hand and wished him luck as they filed out after the verdict was read.

Not surprisingly, however, it was the announcement of a death verdict that invariably filled the air with tension. Lawyers may be surprised, since having the jury polled is treated as something of a formality, that jurors sometimes had strong reactions to being polled. They often reacted with surprise during the guilt phase when the defense attorney first would request that the jury be polled (“[W]hat did she think, we’re going to lie?”), and sometimes were alarmed to hear their name being stated over and over in front of the defendant. As one juror recounted, “The worst part of the trial was when the jury was polled on the 21 counts [at the guilt phase] in open court. ‘[Leo Martinez], how did you vote?’—21 times! I cringed every time they said my name like that, it’s easy to remember someone’s name when it’s said 21 times.”

Because the jury already would have been polled at the guilt stage, jurors knew when it was time for the penalty verdict to be announced that they would be polled. As would be expected, the polling process was particularly stressful for juries who had dealt with a protracted life holdout and knew that the holdout would now be forced to individually announce “death” in front of the courtroom. A juror in one case captured well the emotional turmoil that polling could cause for such a jury. After describing the torturous deliberations that had culminated in the holdout agreeing to vote death, the juror found the interval between the holdout telling the jury that she would change her vote and the announcement of the verdict agonizing: “[The holdout] was crying very hard . . . she just [kept saying] this was the toughest thing she ever had to do in her life, and it was for all of us.” The juror found the subsequent polling of the jury bordering on cruelty. When first asked if the judge had polled the jury, the juror had replied, “Bastard, yeah he did.” She then continued:

We had to say “yes” [we voted for] the death penalty, [which] I thought was pretty shitty. You know, you vote, it’s on paper, then why [make us stand up] to this guy’s face and say, “[Y]eah, we want you to die.” I just didn’t think that was right.

Particularly galling for the juror was that the judge appeared callously oblivious to what the jury was going through as they were being polled. Although the jury box was full of sobbing jurors, the juror saw the judge acting as if a ho-hum business meeting had just concluded: “[T]he judge then tells you, ‘[T]hank you for fulfilling your civic duty, and have a [happy holiday]’—and I was furious—and then he says, ‘[W]ell, we’ll walk you to your cars.’”

While jurors may not have liked the procedure, realizing that they would be polled did lead many juries that were returning death sentences to double-check that all of the jurors were prepared to announce “death” in open court. Jurors occasionally would report that after reaching unanimity their jury would wait before summoning the bailiff, just to make sure that no one would change their minds. A foreman in one case had warned his jury,

[W]e’d probably be polled and to make sure before we knocked on [the jury room] door and said we had our decision, that everybody was [100 %] sure, because we’d be polled and we’d be asked individually, and how kind of foolish it would be if someone decided to change their mind in-between.

Juries that were under the greatest stress, of course, were those that had a life holdout who was seen as wavering despite having changed their vote to death. As one juror on a jury with such a life holdout noted, they had discovered at the guilt phase that “there’s something about saying it that is different than just doing it on a piece of paper where nobody knows who you are.” As a result, the other jurors had real concerns that the converted holdout might “fall apart” in open court when questioned by the authoritative figure of the judge and feeling the defendant’s eyes upon him. Because of such concerns, some juries in this situation actually practiced being polled, conducting a dress rehearsal; as one juror described it, “[I]nstead of just taking a paper count, we went around the room a couple of times, and we’d have to say [death] like we’d have to say it in the courtroom.” Bowers and his colleagues report one juror’s story of how a jury in such a case “coached” the holdout in an effort to make sure that his vote for death survived the polling process:

Everybody finally decided, with the exception of the older black gentleman, he was still very unsure until the last, I would say up until the last 30 minutes. He was very upset about saying “yes” to the death penalty. And I was afraid that when we went back out and the judge asked each one of us how we, how we pleaded, I was afraid he was gonna say “not sure” or “no,” but he did say [yes] . . . I told him when the judge talks to you, just say, “yassir” . . . I don’t want to use the word we coached into saying “yes,” but I guess in reality we did.<sup>82</sup>

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82. Bowers et al., *supra* note 60, at 255 (alteration in original).

Juries whose deliberations had revolved around converting a strong life holdout were also the ones where the actual polling in the courtroom became a private drama for the jury as they sat there wondering if the holdout would change his or her vote at the last moment. One juror recalled his nervousness as the judge announced “death,” and he cast a sidelong glance at the holdout and saw her “g[etting] all upset, I could see her start, like she wanted to take it back.” In the end, however, as with all the cases in the study, once the jury’s verdict had been announced, no juror actually voted differently when polled.

#### CONCLUDING OBSERVATIONS

Given the central role that juries play in our capital punishment system, it is essential that we gain a clear understanding of how jurors make the decision whether to impose a death sentence. In particular, drawing back the curtain on how capital juries reach unanimity offers insights into how lawyers might structure their case to enhance the likelihood of a life sentence.

In light of the critical importance that one vote might make in tipping the jury towards life or death,<sup>83</sup> the obvious first lesson is the need to use voir dire to seat a jury most open to the defendant’s case in mitigation. This involves both identifying those jurors who in fact are not open to mitigation (and may not be readily identifiable without extensive questioning), as well those jurors who will be most receptive to the defendant’s life story.<sup>84</sup>

Next, the lawyer will want to try to shape the conversation that will occur in the jury room once the jurors begin to deliberate. In particular, this will mean anticipating the different types of charts that the jurors are likely to use. With the expectation that the jurors may make a listing chart, for example, a defense attorney in her closing argument can present the narrative for the case for life with labels for different episodes in the defendant’s life that would help jurors favoring life to articulate items to list.<sup>85</sup> In similar fashion, a defense lawyer can provide a chronology of the defendant’s life that will help configure the timeline that the jury is likely to make once back in the jury room.<sup>86</sup>

Most fundamentally, however, the defense lawyer’s task is to provide possible life holdouts the tools in advance to resist the pressures

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83. See *supra* Part I (detailing differences depending on how many jurors vote for death on the first ballot).

84. See Blume et al., *Competent Capital Representation*, *supra* note 35, at 1058–62 (describing techniques for “life qualification” of jurors).

85. This strategy was suggested by Professor Andrea Lyon at a faculty workshop as a way of trying to influence how the listing chart might look.

86. See SUNDBY, *supra* note 37, at 141–42 (describing instances where lawyers actively characterized the case for life to help shape jurors’ perception of the defendant’s timeline).

of the majority once they retire to the jury room. This requires a strategy that insulates jurors favoring life from being convinced by the majority jurors that their position is an illegitimate one because they are in some sense not following the law. This strategy begins as early as voir dire, by instilling in every potential juror an understanding that the law recognizes that the death penalty is a moral judgment for each individual juror to make.<sup>87</sup> This understanding means, in turn, that as with any moral judgment, individuals may differ on the merits and each juror is entitled to respect for his or her individual viewpoint, even if that viewpoint may differ from the majority's position. Because the death penalty decision is a value-based moral judgment, the lawyer also can forewarn jurors that they may find it difficult to articulate the reasons for their belief that life is the proper sentence, but that does not mean that the juror's basis for that judgment is any way illegitimate, or not allowed by the law.

The closing argument in the Susan Smith case is a masterful example of a lawyer communicating these themes to the jury. Susan Smith had done the unthinkable, killing her two children by driving them into a lake and then trying to cast blame on a mysterious black man.<sup>88</sup> Her lawyers, Judy Clarke and David Bruck, had the difficult task of trying to convince the jury to suspend their horror long enough to listen to how a mother had come to kill her own children. To do this, they had introduced powerful evidence of how Susan had been a victim of incest growing up and had called upon a full array of witnesses—family members, school teachers, counselors and a psychiatrist—to convince the jury that another horror had occurred besides the crime: the swallowing up of a good person by a horrible depression that led her to do a horrible act.<sup>89</sup>

As David Bruck stood before the jury in Union, South Carolina to present his closing argument, he first summarized the witnesses' testimony describing Susan Smith's hellish descent into depression after she had become an incest victim. He then picked up the Bible that had prominently been on the judge's bench for the entire trial and turned to the Book of John for a story that was to form the heart of his appeal to the jury:

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87. Although the Supreme Court has struggled with how to characterize the effect jurors are to give mitigating evidence as part of their decision, see *California v. Brown*, 479 U.S. 538, 541–43 (1987) (debating how instruction not to rely on “mere sympathy” would affect jurors' consideration of mitigating evidence), Justice O'Connor's statement that jurors are to have a “reasoned *moral* response” to the mitigating evidence is frequently cited. *Id.* at 545 (O'Connor, J., concurring).

88. *Woman Held in Drowning of Two Sons Is Arraigned*, N.Y. TIMES, Jan. 17, 1995, at A10.

89. Transcript of Record at 42, *South Carolina v. Smith*, Nos. 94-GS-44-906, 94-GS-44-907 (S.C. July 28, 1995), 1995 WL 789245.

This Bible has sat on that desk for the whole trial. And each one of you put your hand on it before voir dire, and every single witness put their hand on it. And I would submit to you that it may be time to look inside and see if there is anything in here that bears on the decision that you have to make. You may not have realized this before, but there is a death penalty sentencing proceeding in the Gospel. . . . It's not a verbatim record, but he took down enough so that we have a very good picture of what happened in this trial . . . . I think you probably all know it by heart.

And John's record of that trial reads like this. "Jesus went unto the Mount of Olives. And early in the morning he came again into the temple and all the people came unto him and he sat down and taught them. And the scribes and Pharisees brought unto him a woman taken in adultery. And when they had set her in the midst, they say unto him Master, this woman was taken in adultery in the very act. Now, Moses in the law commanded us that such should be stoned, but what sayest thou?"

And then John drops out of the verbatim transcript and explains what was going on. He says this they said tempting him, that they might have [grounds] to accuse him. And the background to that is that . . . the criminal law of the City of Jerusalem at that time was the Old Testament . . . . And it was written in the Bible that the penalty for adultery was death by stoning. And if anybody said otherwise, they were committing the crime of heresy, a blasphemy. And that was a capital crime. And the people that had asked him that question wanted him—they thought they had him pegged. You see, they thought that Jesus was—I guess nowadays we would call it a bleeding heart liberal—somebody who doesn't have any concern for the rights of society but only cares about the poor criminal. They thought they knew—they thought they could predict what his response would be. . . . And that he would say something like well, I know it says that in the Bible, but that's really a kind of a steep punishment for adultery. And I don't really know if that's—if that would be the right thing to do. Why don't you just, you know, do something else, or give her another chance. And had he said that, that would have been a capital crime. That would have been blasphemy. . . . But that's not what he said at all.

Instead of contradicting what [the] law required, he said this. The first thing he said after they put this trick question to him—the first thing he did, he stooped down and with his finger wrote on the ground as though he heard them not. So they pressed on. "So when they continued asking him, he lifted up himself and said unto them, he that is without sin among you, let him first cast the stone at her. And then he stooped down and wrote on the ground. And they which heard it, being convicted by their own conscience, went out one by one, beginning at the eldest, even unto the last, and Jesus was left alone and the woman standing in the midst."<sup>90</sup>

By recounting Jesus's reaction to the Pharisees' demands, Bruck had reminded the jury that mercy not only was a value embraced by Jesus, *but also* that one can be merciful without violating the law.

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90. *Id.* at \*32–33.

Bruck also realized, however, that the *Smith* jurors might have a very human tendency to think of how their decision would be judged by others, both within their small community and by the world at large, which was watching through the news media. If they chose a life sentence, how would they respond to the inevitable questions that they would receive about not imposing a death sentence on someone who had killed her own children? He also knew, as many holdouts have said, that the arguments for life might be hard to articulate in a way that sounded logical or rational, especially in the face of such a horrible crime. Again, Bruck returned to the Bible story, asking the jurors to think about what happened from the perspective of the “jurors” in the Bible story, those who had listened to Jesus and had chosen not to stone the woman:

Now, of course, we know the rest of the story of Jesus. But we don't know the names of any of those people that he spoke to that day, the ones with the rocks in their hand ready to carry out the death penalty that was commanded by law. . . . We don't know their life stories. . . . They are vanished in the [mists] of time. And we only can guess. But we can guess what happened next for them, because they had gone . . . home presumably that night and they saw their friends and they saw their neighbors. And don't you know that people probably asked them what happened? “I bet you really gave it to her.” And the response would have had to have been “well, no, actually we didn't.” And then the next obvious question would be “well, why not? Didn't she really do it?” And the response would have had to have been “oh, no, it wasn't that. Wasn't that. She was caught in the act. It was beyond a shadow of a doubt. She did it all right.”

“Well, what's up? Why didn't you do it?” And then you can imagine the sort of the awkwardness that was followed, how hard it would be to explain. “Well, I don't know. We were going to do it, and everybody was ready to do it, and—well, there was this, you know, preacher there, and he said some things and it didn't really make that much sense, but he wrote on the sand and everything. I don't really remember what happened. But it's just—everybody just kind of changed their mind and it didn't seem like that good of an idea. And anyhow, look, we didn't do it, okay?”

Don't you think that's sort of how the conversation went? And that was that. And those people probably went through their lives wondering if they had done the right thing; wondering if they had maybe failed in their duties as good citizens for the City of Jerusalem . . . . Of course, we know that they didn't. They didn't at all. We know what happened. We know who touched their hearts, and how, and why. But they didn't know that. They were just ordinary people. There was no explanation of what was happening that they could have. It would be years before the Gospel was written.<sup>91</sup>

By referring to the “ordinary people” who felt moved by Jesus's words, Bruck was able to forewarn the *Smith* jurors that they should not be

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91. *Id.* at \*33.

surprised if they discovered in the jury room that they could not quite explain fully in words why they feel they should vote for life. He also touched upon the concern that some jurors might have that they were “fail[ing] in their duties,” reassuring potential holdouts that to give life does not mean that they are not carrying out their oath as jurors to uphold the law. And while a decision for life might cause them some immediate unease and doubt, viewed through the long lens of history, they would be joining a line of other “jurors” whose legacy of showing mercy lasted far longer than any personal discomfort.

Then Bruck specifically reached out to any juror who might find herself in a holdout’s situation. Turning to the Biblical story one last time, he reassured any juror who might find herself standing alone that she is entitled to her opinion, and, indeed, that the pressure she felt to change her vote might very well be a “test” of her moral courage that she had to pass, just as the “jurors” to whom Jesus spoke did:

Well, there were some differences between the procedure that was followed and the law that had to be applied at that sentencing hearing in the City of Jerusalem nearly two thousand years ago . . . One is that your decision must be unanimous. At the temple that day everybody had their own rock, and anybody who chose to do it could throw that rock at that woman and smash her with it. . . . [I]n order for her to live, everybody had to decide not to do that.

Your responsibility is a little different, because your verdict for death, for death, must be unanimous. In other words, you each have a stone. . . . [b]ut no stone may be thrown unless all twelve agree. And what that means as a practical matter, you know, each of the people in front of the temple that day were tested for each of them. Individually all . . . passed that test.

The test that the law imposes on you is a little bit different, because death cannot be imposed unless each of your names appears on this verdict form. Which means that, unlike the people there that day, it may not be that all twelve of you will be tested. It could be—I don’t think this will happen, not from the evidence that we have heard, but it could—it could happen—that the form will come to you with nine names already on it, already signed for death, or ten, or eleven, and only your name is needed to write the verdict for death. That could happen. And if that does happen, then perhaps the other jurors are not being tested with you at all. And perhaps only you will be tested and the other eleven will be part of this test.

Now, I guess you could say that wasn’t really much of a test . . . [W]ho on earth could think that you should be stoned to death for committing adultery? Well, that may seem obvious to us today, but it wasn’t obvious then . . . And there may come a day when our understanding of mental illness, and of suicide, and of depression, and of what’s fair and what’s not, advances to the point that it will be obvious that Susan Smith should not have been sentenced to death. But apparently it’s not obvious to everyone now. And that’s why this is a test. If it was easy, it wouldn’t be a test.

One thing that's not present in the transcript, according to John, of that trial is any indication that a prosecutor was there, much less the prosecutor of the ability of the one that you just heard. And who knows had there been one reminding people of the harm to the community and the terrible heinousness of the crime and horror of what had been done. Who knows if the results might have been different and that that woman would have died under the pile of rocks. The whole episode would have been just one more [of] millions of episodes of man's inhumanity to man [and] never would have made the Bible and none of us would have ever heard about it.<sup>92</sup>

And, then, anticipating the possibility that a life holdout might feel overwhelmed by the majority's insistence that the juror put emotions aside and be 'rational,' he continued:

Judge Howard . . . will list the aggravating factors which you know about, and he will list the mitigating factors. Mitigating is just a word that says in favor of life. It means in favor of life for whatever reason. He will tell you that you are not limited to the mitigating factors that he and I have been able to think of in the evidence. But you can consider any reason for life at all that you think is fair.

And then he will also tell you that you can impose life for no reason at all. That is the law. It doesn't really mean for no reason at all, because no one would do something for no reason at all. It means for the sort of reason that you can't express, except you feel in your heart that it's not the right thing to do. The law recognizes that now as it did not in Jerusalem two thousand years ago. The instructions in a way give you permission to do what those jurors that day did. They didn't have facts of the crime that made them think that the law didn't apply or that death shouldn't be imposed. They just realized because they had heard a lesson about humility and the limits of human judgment, and they saw this woman, and they knew in their hearts that that lesson applied to this situation and they didn't take her life. And they couldn't have said why. They couldn't have explained it, but it felt wrong.

What that instruction that you will get from Judge Howard means is that if it is nothing more than the prompting of your conscience and the dictates of your heart that makes you hesitate, that makes you doubt, that makes you wonder whether the death penalty is the right thing to do, then you are to listen to that, and that is your decision. That is not violating the law. That is not violating your oath. That is following the law. That is being faithful to your oath.<sup>93</sup>

The *Smith* jury unanimously returned a verdict for life, but one cannot help think that if a juror had found himself or herself as a holdout, bolstered by such a closing argument, the juror just might have been able to hang on.

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92. *Id.* at \*33-34.

93. *Id.* at \*34-35.

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