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# Capital Jury and Absolution: The Intersection of Trial Strategy Remorse and the Death Penalty

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# THE CAPITAL JURY AND ABSOLUTION: THE INTERSECTION OF TRIAL STRATEGY, REMORSE, AND THE DEATH PENALTY

*Scott E. Sundby*†

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## INTRODUCTION

Few ideas reverberate at the core of the human psyche as strongly as that of atonement. Both as individuals and as a society, we expect individuals who commit wrongful acts to seek expiation. From a parent’s admonishment to a child to “say you’re sorry” to national leaders’ apologies on the behalf of their nations for past societal wrongs, the value we place on atonement and our desire to cultivate it as a fundamental societal tenet are seen every day. When the wrongful act is especially egregious, such as the intentional taking of human life,

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we view those who refuse to seek absolution as outcasts who have forfeited their claim to live in society.

It is of little surprise to learn, therefore, that a defendant's lack of remorse often plays an influential role in shaping the outcome of capital trials. A study of prosecutors' closing arguments in favor of a death sentence concluded that "[w]henver possible, prosecutors emphasized the defendant's apparent lack of remorse."<sup>1</sup> Preliminary findings from prior studies of capital juries have found that such a rhetorical strategy apparently often hits its mark: jurors frequently cited a defendant's lack of remorse as a significant factor in precipitating their decision to impose the death penalty.<sup>2</sup> What has not been examined, however, is how jurors draw their conclusions about a defendant's degree of remorse, how different trial strategies affect their perceptions, and how those perceptions influence their decision of whether to sentence the defendant to death.<sup>3</sup>

This Article sheds light on these unanswered questions by exploring exactly how capital jurors use a defendant's degree of remorse when choosing between a death sentence and a sentence of life without parole.<sup>4</sup> Specifically, the Article demonstrates that simply stating that capital juries use remorselessness as a major reason for sentencing defendants to death does not fully capture the role of remorse in capital cases. Indeed, once the full spectrum of jurors is taken into account—both those that sentenced defendants to life ("life jurors") and those that imposed the death penalty ("death jurors")—it becomes apparent that an assessment of remorse involves considerably more than merely a consideration of whether defendants are sorry for their crimes. Instead, the Article finds that much of how juries use

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<sup>1</sup> Mark Costanzo & Julie Peterson, *Attorney Persuasion in the Capital Penalty Phase: A Content Analysis of Closing Arguments*, J. SOC. ISSUES, Summer 1994, at 125, 137.

<sup>2</sup> See Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 LAW & HUM. BEHAV. 185, 198 (1992); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 51-52 (1987-88); Craig Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, J. SOC. ISSUES, Summer 1994, at 149, 163-64; see also WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES* 85-90 (1991) (explaining that various factors, such as the extent of the defendant's remorse, influence the jury's penalty decision). As White notes, "[A] personal expression of remorse . . . [makes] it easier for the jury to see [the defendant] as a person, a member of the human community rather than a monster." *Id.* at 86.

<sup>3</sup> Costanzo & Costanzo, *supra* note 2, at 196 (noting that "[v]irtually nothing is known about the relationship between guilt and penalty phases").

<sup>4</sup> In California, a jury that convicts a defendant of first-degree murder and finds a "special circumstance" that qualifies the defendant for the death penalty has only two sentencing alternatives: the death penalty or life without parole. CAL. PENAL CODE § 190.2(a) (West 1998). Yet, even when the jury finds a "special circumstance," the prosecution is not required to seek the death penalty, in which case the defendant is sentenced to life without parole. See *People v. Keenan*, 758 P.2d 1081, 1097-98 (Cal. 1988) (upholding the prosecutor's discretion to seek a death sentence).

remorse focuses on *how* the defense presents its case to the jury rather than on expectations that the defendant will express sorrow for his actions. The Article concludes by looking at some of the practical and ethical implications of these findings for a defense attorney preparing a capital case for trial.

This Article uses data from the California segment of the Capital Jury Project ("Project"), a nationwide study of the factors that influence the decision of capital jurors on whether to impose the death penalty.<sup>5</sup> In total, the California segment of the Project included thirty-seven sentencing proceedings in which prosecutors asked juries that had convicted defendants of first-degree murder to return death sentences.<sup>6</sup> Of the thirty-seven proceedings, defendants in nineteen cases received death sentences, defendants in seventeen cases received sentences of life without parole, and one case ended in a hung jury over the penalty.<sup>7</sup> During extensive interviews,<sup>8</sup> interviewers posed questions to jurors to gather both qualitative and quantitative data regarding what factors had influenced them and the jury panels on which they sat in deciding whether to impose a death sentence.

A methodological caveat should be noted before proceeding to the Article's findings. Although the cases included in the study are representative of the pool from which they were drawn,<sup>9</sup> the results must be considered with the caution warranted by a total sample size of thirty-seven cases and the smaller subsets that are studied throughout this Article. Furthermore, although this Article attempts to account for other factors that might affect the analysis, the data on

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<sup>5</sup> See generally William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) (describing the background, purposes, and methodology of the Capital Jury Project). The author of this Article served as the Principal Investigator of the California segment of the Capital Jury Project.

<sup>6</sup> The 37 cases were tried during the years 1988-92, and the interviews were conducted between 1991 and 1992. The study drew cases from a geographic area covering six counties in the middle third of the state. Only trials held within the preceding three years qualified for the study. The study gave priority to jurors from recent cases. The selection process was designed to maintain a balance between life and death outcomes and to obtain a sample of trials from different regions and involving different offenses. See *id.* at 1077-81.

The author previously has used data from 36 of these 37 cases to study the effects of various types of witness testimony on jurors in capital cases. See 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). This Article includes data from an additional death case not incorporated in that prior Article.

<sup>7</sup> The prosecution retried the penalty phase of the one case that had resulted in a hung jury—as allowed under California law, see CAL. PENAL CODE § 190.4(b) (West 1988)—and secured a death sentence. The retrial is one of the 19 death cases from which the study selected jurors to interview.

<sup>8</sup> Interviews ranged from two to 12 hours and averaged between three and four hours each. The interviewer filled out a 50 page questionnaire as the interviewee responded orally to the questions. Most interviewees allowed the interviewer to tape-record the interview; otherwise, the interviewer transcribed the juror's responses.

<sup>9</sup> See Bowers, *supra* note 5, at 1077-81.

which it is based have not undergone a multiple regression analysis.<sup>10</sup> As a result, it is possible that additional factors might have contributed to some of the observations made in this Article regarding the effects of different trial strategies. The Article's analysis, therefore, is offered as a detailed look at the role of remorse and its interaction with trial strategy, but with the recognition that a continuing need exists to study the issues from both a qualitative and quantitative perspective.<sup>11</sup>

## I

### DEATH JURIES AND THE ROLE OF REMORSE

The interviews of jurors who served on a jury that imposed a sentence of death ("death jurors") strongly corroborated earlier findings that the defendant's degree of remorse significantly influences a jury's decision to impose the death penalty. Jurors not only identified the perceived degree of the defendant's remorse as one of the most frequently discussed issues in the jury room during the penalty phase,<sup>12</sup> but the topic also pervaded the interviews themselves. Overall, 69% of the death jurors who participated in the study (fifty-four of seventy-eight jurors) pointed to lack of remorse as a reason for their vote in favor of the death penalty. Many of those jurors cited it as the most compelling reason for their decision. Moreover, it was a theme that arose in every one of the death cases; at least one interviewed juror in each of the nineteen cases raised lack of remorse as a factor that had influenced his decision to sentence the defendant to death.

The pervasiveness of the death jurors' view that the defendant in their case was remorseless is apparent in their responses to the following question: "When you were considering the punishment, did you believe that the defendant was truly sorry for the crime?"

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<sup>10</sup> A study conducted by Professor Baldus, which used multiple regression analysis accounting for 230 potential factors, is the most comprehensive statistical look at the death penalty to date. See David C. Baldus et al., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, in *HANDBOOK OF PSYCHOLOGY AND LAW* 251, 255-62 (D.K. Kagehiro & W.S. Laufer eds., 1992) [hereinafter Baldus, *Law and Statistics*] (presenting statistical evidence that defendants who kill white victims are considerably more likely to receive a death sentence than defendants who kill African American victims); see also David C. Baldus et al., *Racial Discrimination and the Death Penalty in Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 *CORNELL L. REV.* 1638, 1684-95 (1998) [hereinafter Baldus, *Philadelphia Findings*] (discussing the use of multiple regression analysis to analyze race effects in capital cases, and the benefits of using this analysis, in the context of the Philadelphia portion of the Capital Jury Project).

<sup>11</sup> In a separate article in this symposium, Professors Eisenberg, Garvey, and Wells take a much needed statistical look at the role of various factors in shaping capital jurors' perspectives about whether defendants are remorseful. See Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 *CORNELL L. REV.* 1599 (1998).

<sup>12</sup> Two-thirds of the jurors stated that their panel had discussed the defendant's degree of remorse during the sentencing phase either a "great deal" (26%) or a "fair amount" (40%).

TABLE 1  
DEATH JURORS' PERCEPTIONS OF DEFENDANTS' REMORSE

When you were considering the punishment, did you believe that the defendant was truly sorry for the crime?

	Juror Response ( <i>n</i> =78)	
	No. of jurors	% of jurors
Yes, sure he was sorry	3	4
Yes, I think he was sorry	4	5
Not sure, he acted sorry but it might have been just a show	3	4
No, he acted sorry, but it was a show	2	2
No, he didn't even pretend to be sorry	66	85

When reviewing these findings, it is important to remember that, with a few notable exceptions,<sup>13</sup> most defendants did not testify. Consequently, jurors generally based their conclusion that a defendant lacked remorse on factors other than the defendant's words at trial. In some cases, the jurors based their perceptions on the nature of the defendant's actions at the time of the crime.

Interviewer: Among the topics you did discuss, what was the single most important factor in the jury's decision about what defendant's punishment should be?

Juror: The special circumstances of how he killed the woman, and then actually told other people that he did it. He told other people that she was pleading for her life and he "blew her away." I think some of the words were "I killed the bitch" or something like that. (M<sub>1</sub>D<sub>1</sub>).<sup>14</sup>

In several other cases, the jury deduced the defendant's lack of remorse from his improper acts while in custody, such as making a weapon ("after he was in prison, he made a weapon out of a toothbrush—he had absolutely no remorse whatsoever"), (F<sub>1</sub>D<sub>2</sub>), or attempting to escape, (M<sub>2</sub>D<sub>3</sub>).

Above all else, however, the defendant's demeanor and behavior during the actual trial shaped the jurors' perceptions of the defen-

<sup>13</sup> See *infra* text accompanying notes 35-36, 66-69, 84-88; *infra* Part III.B.1, D.

<sup>14</sup> To protect the anonymity of the jurors who participated in the study, this Article identifies quotes from jurors with an "M" and "F" to indicate gender, followed by a sequentially assigned number according to when the juror is first quoted in the Article. In addition, the Article indicates whether the jury in each case returned a life sentence ("L"), death sentence ("D"), or hung on the sentence ("H"), and then indicates the case's sequentially assigned number.

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 anonymity or to clarify the context of a quotation. To protect confidentiality, the author maintains the file of all of the materials used in this Article.

dant's remorse. Jurors scrutinized the defendant throughout the course of the trial, and they were quick to recall details about demeanor, ranging from his attire to his facial expressions.<sup>15</sup> Although the following juror's comment is stated somewhat more voyeuristically than most jurors' remarks, it does capture the high level of awareness that the jurors brought to the courtroom:

[He] very seldom looked at the jury. I was always looking at him. I was always trying to catch his eye. When I was there I watched him a lot. In fact, I watched all of them. That was part of the experience—to watch. I roamed the audience, I watched him, I watched the judge, I watched the lawyers. I'm a snoop; I like looking, so it was just really neat for me. I just was in heaven watching expressions, watching all the people. That part was interesting. (M<sub>3</sub>L<sub>2</sub>).

Interestingly, the jurors did not focus on the defendant's demeanor due to some misguided belief in physiognomy (i.e., the defendant *looked* like an evil person). At first, in fact, the death jurors usually perceived the defendant's appearance as non-threatening or even likable. Typical comments would observe: the defendant "looked too nice to commit murder," (M<sub>4</sub>D<sub>5</sub>);<sup>16</sup> "by appearance, you would have thought, 'here's Joe College,'" (M<sub>6</sub>D<sub>6</sub>); or the defendant was "likeable," (F<sub>6</sub>D<sub>7</sub>).<sup>17</sup> Having often brought a Hollywood-inspired expectation to their jury service that the defendant would look "criminal," many jurors were surprised that the defendant had appeared so harmless at the outset of the trial.<sup>18</sup> Only the rare juror claimed that he had sized up the defendant as a killer from the outset, like the juror who reported that upon first seeing the defendant he "had a bad

<sup>15</sup> Lawyers may want to note that the recall of sartorial detail was not limited to the defendant. Indeed, sometimes jurors' fashion comments were based on an unfavorable comparison of the attorney's dress to the defendant's attire: "The defendant always wore the exact same outfit. . . . I could say the same for the prosecuting attorney—he wore the same suit every day," (F<sub>2</sub>L<sub>1</sub>); "[The defendant] dressed better than his attorney did," (F<sub>3</sub>D<sub>4</sub>).

<sup>16</sup> This defendant's appearance in particular garnered comments from the jurors. Two jurors expressly stated that the defendant's appearance was "confusing" because the defendant "was likeable," (M<sub>5</sub>D<sub>5</sub>), and he "did not look like a killer," (M<sub>4</sub>D<sub>5</sub>). Other jurors on the panel likewise commented that he looked "like the Pillsbury doughboy, like you could have put your arm around him and felt very comfortable," (F<sub>4</sub>D<sub>5</sub>), and that "he was such a normal looking guy—I thought a number of times this guy could be my kid brother," (F<sub>5</sub>D<sub>5</sub>).

<sup>17</sup> Other comments along these lines included: "[The defendant] was dressed up to look like an accountant or a banker," (F<sub>7</sub>D<sub>8</sub>); "[T]o look at him, you would not think he was a criminal," (M<sub>7</sub>D<sub>9</sub>); "He was a good looking man, the ladies of the jury were kind of impressed with him. Didn't look like a killer to me," (M<sub>8</sub>H<sub>1</sub>); "If I had seen him sitting anywhere else, I would have thought that he was a nice, perfectly sincere person," (F<sub>8</sub>D<sub>10</sub>).

<sup>18</sup> A juror in a life case succinctly captured this feeling of surprise by saying: "When I first saw him, I didn't know it was a murder case. . . . I thought it must be a civil case or something. He looked pretty clean-cut." (M<sub>9</sub>L<sub>3</sub>).

feeling that . . . I don't know how I can describe it. It's kinda like the feeling you would have when you first saw a rattlesnake." (M<sub>10</sub>D<sub>11</sub>).

Although most jurors did not initially view the defendant's demeanor as frightening or remorseless, those early perceptions often radically changed shortly after the trial began. In a few cases, the defendants displayed their lack of remorse rather bluntly. In two stark examples, the defendants angered jurors by laughing during the proceedings,<sup>19</sup> especially during testimony about the victim, and by openly engaging in flirtatious behavior.<sup>20</sup> Almost unbelievably, the defendant in one of these cases directed his flirtations toward a juror. (F<sub>10</sub>D<sub>4</sub>).<sup>21</sup> In a third case, the defendant set the tone of the trial early when, after his attorney announced in the presence of the newly seated jury that the defense was satisfied with the jury, the defendant declared, "no, we're not," and engaged the judge in a yelling match. This defendant's disruptive interventions continued throughout the trial, which led the jurors to conclude that the defendant was "utterly remorseless." (F<sub>11</sub>D<sub>13</sub>).<sup>22</sup>

In most cases, however, the defendant did not exhibit such flagrantly callous behavior. Instead, jurors had to deduce remorselessness from the defendant's general demeanor during the course of the trial. What struck jurors again and again was the defendant's lack of emotion during the trial, even as the prosecution introduced into evidence horrific depictions of his crimes. A thesaurus editor looking for entries to describe someone without any human emotion simply could look to a sampling of the death jurors' descriptions of various defendants:

"He was blasé, an expressionless person. When we were ready to go out and give the verdict, I was almost ready to cry, and yet there was never any expression from him. It was like doing a trial on a wooden plank." (F<sub>12</sub>D<sub>1</sub>).

"Just really bored with the whole thing. He sort of just doodled through the whole thing. Even during the testimony of the child [survivor who discovered his parents' bodies], he did not seem to show any emotion at all." (M<sub>12</sub>D<sub>5</sub>).

"He appeared unconcerned. He kind of had a cocky air, like it didn't really matter." (F<sub>13</sub>D<sub>8</sub>).

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<sup>19</sup> "I was really appalled by it all because he would laugh; he would find things funny and would sit there and would laugh." (F<sub>3</sub>D<sub>4</sub>).

<sup>20</sup> "[He was] flirting and winking at the people—the women that came in and that kind of thing." (F<sub>9</sub>D<sub>12</sub>).

<sup>21</sup> The juror with whom the defendant had flirted described herself as "repulsed." (F<sub>10</sub>D<sub>4</sub>). Another juror urged her to "flip [him] the bird" in response, but she feared that it would cause a mistrial.

<sup>22</sup> Similarly, one juror characterized another defendant who had laughed periodically and had engaged in disruptive behavior as "very unremorseful." (M<sub>11</sub>D<sub>14</sub>).



"It appeared that he was bored and indifferent to the whole thing. I guess you imagine him sitting there and crying or something, but there was no emotion. I never saw any emotion." (M<sub>6</sub>D<sub>6</sub>).

"There seemed to be such a lack of feeling, compassion on the defendant's part—to describe it you could say he was cocksure or appeared to be." (F<sub>14</sub>D<sub>2</sub>).

"Nonchalant." (F<sub>15</sub>D<sub>2</sub>).

"Never made any eye contact with the jury. Just sat there with his head down and showed no feeling at all—I wanted him to show some emotion." (F<sub>16</sub>D<sub>9</sub>).

"He never seemed moved by anything, not [the autopsy] pictures, the slides, nothing got a reaction out of him. He had this little manila folder, and he would take notes all the time. He wore these horn-rimmed glasses, and I was really appalled by it all. If it were me, I would throw myself at the mercy of the court. I would talk 'til I was blue in the face. I would say something—not just sit there with a smirk on my face." (F<sub>3</sub>D<sub>4</sub>).

"Cocky, to the point that he'd wave to all the jurors when he was introduced in court." (F<sub>17</sub>D<sub>3</sub>).

"The defendant acted as though the entire trial was a farce. It seemed as if he resented the fact that he had to be put through the process, as if we were inconveniencing him." (M<sub>13</sub>D<sub>11</sub>).

"[W]hen I looked at him, he always seemed to be the same. There never seemed to be any different kind of expression. He just never seemed to change—ever." (F<sub>18</sub>D<sub>14</sub>).

"We saw no remorse—almost a cocky attitude." (F<sub>19</sub>D<sub>15</sub>).

"Cocky, disruptive, clever, smart, calculating. Did I say disruptive?" (F<sub>20</sub>D<sub>13</sub>).

As the comments indicate, the defendants' lack of visible emotion and their perceived attitude of nonchalance, or even boredom, engendered both anger and astonishment in the jurors. As stated by one juror, "I just couldn't imagine sitting there seeing the victim's mother and . . . father and sister-in-law and even the children and, still, no emotion." (F<sub>3</sub>D<sub>4</sub>).<sup>23</sup> That the defendant could show so little concern, and even be cocky and arrogant in some instances, indicated to most jurors that the defendant lacked any sense of human compassion or remorse. One juror aptly explained why the lack of emotion was so upsetting: "We would have liked to have spoken to him because he showed so little emotion and so little remorse. We just wanted to kind of figure out, *are you human?* We were kind of looking for any-

<sup>23</sup> Jurors sometimes explained their shock at the defendant's attitude by comparing how they or their friends would have behaved had they been in the defendant's position. One juror, for instance, had a son who had been battling many of the same drug and alcohol problems that had plagued the defendant. Although initially inclined toward showing sympathy, this juror pointed out that, unlike the defendant, if her son "had done something like this, he would have been full of remorse." (F<sub>1</sub>D<sub>2</sub>).

thing, anything to find remorse." (M<sub>14</sub>D<sub>15</sub>). This type of angry bewilderment over how defendants on trial for their lives and faced with graphic evidence of their heinous misdeeds could be so emotionless led one juror to observe with a sense of morbid satisfaction: "He was just there staring ahead. He never looked at us, never met our eyes—except when we gave him the death penalty. *Then he looked at us, and that felt real good.*" (M<sub>1</sub>D<sub>1</sub>).

Given the great importance that the death jurors placed on the defendant's remorselessness, it is not surprising that many jurors said that if the defendant had made some showing of remorse they might have switched their votes from death to life. One juror offered a rather vivid expression of the jury's desire to hear the defendant sincerely say he was sorry for his actions:

If he had given me any type of sorry—something to indicate his sorrow for what he's done. I wouldn't be interested in him begging for his life, but just for him to have said, first of all, he was sorry, and second of all, just being sincere, that he wished he'd never done it and all this type of thing. Maybe that is a kind of begging—I don't know. Otherwise I'm seeing him as cold, calculated and controlled, and having no remorse or feeling whatsoever for what he has done, and that to me made a big impression. I don't know if it would have changed a great deal, but yes, it would have made some difference in the balance—we were told to balance; I forget the exact words—the good and the bad, in a sense, and it would have made a difference. (F<sub>12</sub>D<sub>1</sub>).<sup>24</sup>

In thirteen of the nineteen death cases, at least one juror explicitly insisted that he would have voted for life rather than death had the defendant shown remorse.<sup>25</sup>

The lessons learned so far confirm what both prior studies and common sense suggest: defendants who are sentenced to death are highly likely to have been seen by the jurors as remorseless. The jurors based their perceptions of a defendant's lack of remorse largely on the defendant's demeanor at trial, which ranged from emotionally flat at best to cocky or arrogant at worst. Because the death jurors perceived this demeanor as disturbingly inconsistent with what they

<sup>24</sup> One juror in a different case commented less reticently: "It's very true, [saying he was sorry] might have swayed us, I have to admit, because there was a lot of why the hell didn't he get his butt up there and say something. Beg!" (M<sub>6</sub>D<sub>6</sub>).

<sup>25</sup> In addition, these statements often reflected a belief that others on the jury would have voted for life. For example, one juror simply declared:

Everybody was just waiting for him to say he didn't mean to do it. The defense had already pretty much admitted that he had done it. So if he'd have just gone up and said, "hey, I'm sorry, I didn't mean to do it," the jury would not have sentenced him to death—they would not have. (M<sub>15</sub>D<sub>16</sub>).

Another juror in a different case stated, "I know that for some of the women, if he would have been repentant, they would never have been able to give death." (M<sub>10</sub>D<sub>11</sub>).

considered would be a typical human reaction to having committed such a horrible crime, they viewed it as clear evidence of the defendant's lack of remorse. In turn, jurors often then relied upon the defendant's remorselessness as a primary reason for imposing the death sentence. Jurors also frequently articulated the reverse corollary that they likely would have voted for a life sentence instead of death had the defendant expressed remorse.

All of these observations suggest that defense attorneys representing defendants who are either unwilling or unable to testify and convince the jury that they are truly sorry inevitably should brace themselves for hearing the jury announce a verdict of "death." They would be wrong.

## II

### LIFE JURIES AND THE ROLE OF REMORSE

"He didn't pretend to be anything. He just didn't show a lot of emotion." (F<sub>21</sub>L<sub>3</sub>).

"He just showed no emotion, just like this was a walk in the park." (F<sub>22</sub>L<sub>3</sub>).

"Very clinical." (F<sub>23</sub>L<sub>4</sub>).

"It was just like, 'I'll get off.' I mean really it was stone face. There was no emotion." (F<sub>2</sub>L<sub>1</sub>).

"I felt sick thinking how anyone could do such a thing and sit there and act like nothing is going on." (F<sub>24</sub>L<sub>5</sub>).

"Just sat there. He didn't do much expression at all. He didn't show any emotion at all." (M<sub>16</sub>L<sub>6</sub>).

"He appeared relaxed, just like another day, and of course, no remorse, because he didn't do it, so why should he be sorry?" (F<sub>25</sub>L<sub>7</sub>).

"He was just a lump on a log, sitting there." (M<sub>17</sub>L<sub>2</sub>).

"He never really showed any emotion. Just like, 'hey, no big deal.'" (M<sub>22</sub>L<sub>12</sub>).

"I actually felt like he did not take it seriously. He laughed several times." (F<sub>26</sub>L<sub>8</sub>).

"He was very casual about everything that was happening. He was trying to be cool, you know, he was just trying to be a tough guy." (M<sub>18</sub>L<sub>9</sub>).

"We didn't see any remorse, acted or real." (M<sub>19</sub>L<sub>10</sub>).

One might have predicted from the importance that the death jurors placed on a defendant's perceived lack of remorse that the life jurors would have seen their defendants as having shown signs of remorse during the trial. Surprisingly, however, the above observations by the life jurors are largely interchangeable with the death jurors' descriptions of their defendant's demeanor. As the comments indi-

cate, the defendants who received life sentences generally presented to the jury the same emotionally flat demeanor as the defendants whom the jury sentenced to death.<sup>26</sup> The only noteworthy difference between the reflections of the two classes of jurors is that the life jurors did not pepper their descriptions with adjectives such as "arrogant" and "cocky" to the same extent as the death jurors.<sup>27</sup> Otherwise, the descriptions are strikingly similar.

Moreover, like the death jurors, life jurors were not particularly likely to believe that the defendant was sorry for his crime.

TABLE 2  
LIFE JURORS' PERCEPTIONS OF DEFENDANTS' REMORSE

When you were considering the punishment, did you believe that the defendant was truly sorry for the crime?

	Juror Response (n=70)	
	No. of jurors	% of jurors
Yes, sure he was sorry	13	19
Yes, I think he was sorry	8	11
Not sure, he acted sorry but it might have been just a show	9	13
No, he acted sorry, but it was a show	5	7
No, he didn't even pretend to be sorry	35	50

As the figures show, less than one-third of the life jurors thought that the defendant was remorseful, and only one-fifth were "sure" that he was sorry. On the other hand, 57% of the jurors expressed certainty that the defendant was *not* sorry, either because they felt he did not even pretend to be remorseful, or because they believed any indications of remorse were merely hollow acts for the jury's benefit. Addi-

<sup>26</sup> Like the death jurors, the life jurors' initial impressions of the defendants were generally positive:

"He seemed very well mannered. It was scary to look at him after hearing all of this and think that you would never look at that person and think they were capable of that. You look at the drunks on the street, the white trash, and you're afraid of those people—you're not afraid of this clean-cut eighteen year old." (F<sub>27</sub>L<sub>11</sub>).

"If I met him on the street and I didn't know anything about him, I'd say, yeah, he was likeable." (M<sub>20</sub>L<sub>3</sub>).

"When I first saw him, I didn't know it was a murder case. . . . I thought it must be a civil case . . . , he looked pretty clean-cut." (M<sub>9</sub>L<sub>3</sub>).

"Reminded me of my grandmother. I thought, 'how could your grandmother kill somebody!'" (F<sub>28</sub>L<sub>4</sub>).

"[He] could have been a college boy." (M<sub>21</sub>L<sub>7</sub>).

"[H]e looked very average, like a working man." (M<sub>22</sub>L<sub>12</sub>).

"[He] generally looked nice." (F<sub>29</sub>L<sub>6</sub>).

"You'd have to look at him and say, 'how could somebody that looks pretty normal just kill two people walking down the street?'" (F<sub>30</sub>L<sub>10</sub>).

<sup>27</sup> For a discussion of this difference, see *infra* text accompanying notes 78-82.

tionally, it should be noted that two of the seventeen life cases accounted almost entirely for the jurors who responded that they were "sure he was sorry"; the eight jurors interviewed from those cases (four from each case) all answered that they were "sure" that the defendant was sorry.

Those two cases—which we will call the "true remorse cases"—certainly underscore the notion that a jury that believes the defendant is truly remorseful is very likely to settle on a life sentence. Yet they also stand out as somewhat unique cases both in terms of their underlying facts<sup>28</sup> and in that they were the *only* cases in which every interviewed juror agreed that the defendant was truly sorry. In this light, it is worthwhile to consider the data without including these two true remorse cases.

TABLE 3

LIFE JURORS' PERCEPTIONS OF DEFENDANTS' REMORSE EXCLUDING  
"TRUE REMORSE" CASES

When you were considering the punishment, did you believe that the defendant was truly sorry for the crime?

	Juror Response (n=62)	
	No. of jurors	% of jurors
Yes, sure he was sorry	5	8
Yes, I think he was sorry	8	13
Not sure, he acted sorry but it might have been just a show	9	15
No, he acted sorry, but it was a show	5	8
No, he didn't even pretend to be sorry	35	56

Once the two true remorse cases are excluded, the number of jurors who thought or were certain that the defendant was remorseful drops from 30% of all life jurors to only one-fifth, and the percentage of life jurors who expressed certainty that the defendant lacked remorse rises to almost two-thirds of the total.

It also is revealing to compare the figures for life jurors to the figures for death jurors. As with the jurors' comments about demeanor, life and death jurors' beliefs about the defendant's remorse are not as different as one first might expect.

At a minimum, the figures indicate that attorneys representing remorseless defendants need not resign themselves to a verdict of death on that basis alone. Even though death jurors placed a great deal of importance on a defendant's lack of remorse when justifying their vote for death, less than one-third of the interviewed life jurors

<sup>28</sup> See *infra* text accompanying notes 34-38.

TABLE 4  
LIFE JURORS' AND DEATH JURORS' PERCEPTIONS OF  
DEFENDANTS' REMORSE

When you were considering the punishment, did you believe that the defendant was truly sorry for the crime?

	Death juror response ( <i>n</i> =78)		Life juror response (excluding true remorse cases) ( <i>n</i> =62)		Total life juror response ( <i>n</i> =70)	
	No. of jurors	% of jurors	No. of jurors	% of jurors	No. of jurors	% of jurors
Yes, sure he was sorry	3	4	5	8	13	19
Yes, I think he was sorry	4	5	8	13	8	11
Not sure, he acted sorry but it might have been just a show	3	4	9	15	9	13
No, he acted sorry, but it was a show	2	2	5	8	5	7
No, he didn't even pretend to be sorry	66	85	35	56	35	50

actually believed that their defendant was sorry for his crime. Moreover, that figure drops to less than one-fifth when the two true remorse cases are excluded from the analysis. Furthermore, while an astonishing 85% of death jurors believed that the defendant did not so much as "even pretend" to be sorry, 50% of the life jurors expressed the same view—a percentage that even includes the two true remorse cases. This figure for the life jurors who thought the defendant did not even pretend to be sorry rises to 56% when the true remorse cases are excluded, with an additional 8% saying that the defendant acted like he was sorry but that it was merely a show. The message is clear: while life jurors might be more inclined than death jurors to characterize defendants as remorseful, an expression of remorse is not a prerequisite for a life sentence.

Three categories of capital cases emerge, therefore, when the degree of remorse is viewed as a deliberative factor: (1) cases in which the jury relied, at least in part, on the defendant's lack of remorse to justify imposing the death penalty (the nineteen death cases); (2) cases in which the jury relied, at least in part, on the defendant's remorse to justify a life sentence (two cases); and (3) a puzzling but sizeable residual category of fifteen cases in which the jury gave a life sentence even though it generally perceived the defendant as not being sorry for his crime (fifteen cases). A fundamental question arises from these categories: if remorselessness is as significant a factor for imposing the death penalty as death jurors state, then what accounts for so many life cases that also involved defendants whom the jury did

not perceive as being sorry for their crimes? The next section begins to examine this question.

### III

#### PIECES FOR SOLVING THE REMORSE PUZZLE

##### A. The Rarity of the Remorseful Capital Defendant

A necessary starting point is to recognize that the California study's finding that only two of the thirty-seven jury panels perceived the defendant<sup>29</sup> as remorseful does not represent an aberrantly low figure. In fact, it may be on the high side. Richard Moran, a professor who has served as an expert witness and consultant for the defense in capital cases, recently observed:

I have testified for the defense in about 25 death penalty hearings and consulted in a dozen more, and in no case have I seen the defendant show any remorse. Most sit passively, staring into space, appearing not to care whether they live or die.

Even when finally given a chance to stand up and make a statement . . . that can't be cross-examined . . . [n]ot one has gotten up and said simply that he was sorry for what he had done, never mind ask[ ] for forgiveness or mercy, even to save his own life.<sup>30</sup>

Several factors might explain the rarity of a jury finding that a defendant is remorseful: capital defendants generally may be unremorseful,<sup>31</sup> or they may be disinclined to express remorse out of shame or fear that the courtroom will see them as insincere,<sup>32</sup> or, absent unusual circumstances, a prosecutor may not seek the death penalty when the defendant seems truly sorry for his actions. Whatever the explanation, the available data indicate that capital defendants whom the jury views as truly sorry are the exception rather than the rule.<sup>33</sup>

<sup>29</sup> Although the California segment interviewed jurors from 37 trials, only 36 defendants were involved because two of the hearings involved the same defendant. See *supra* notes 6-7 and accompanying text.

<sup>30</sup> *Why Killers Don't Show Emotion* (National Public Radio broadcast, June 18, 1997) (commentary of Richard Moran).

<sup>31</sup> See *id.* ("[M]ost murderers believe that they were justified in killing their victims. Too proud, or perhaps too stupid, they are not about to fake remorse and beg for their lives.").

<sup>32</sup> See WHITE, *supra* note 2, at 88; cf. James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 430-31 (1996) (describing difficulties that some defendants have because they feel vulnerable in the presence of authority). As Doyle points out, a defendant may feel this way because "[t]he illiterate, the mentally ill, the retarded, the abused, the poor, all the members of all of the outcast and stigmatized groups learn to depend on concealment, dissimulation, noncooperation." *Id.* at 431.

<sup>33</sup> This is not to rule out the class of defendants—sometimes called "the guilty but redeemed"—who become remorseful later. The Texas case of Karla Faye Tucker focused attention on the possibility that someone might act in an abhorrent fashion and yet later feel repentant. A teenager heavily involved in drugs, Tucker had participated in a grisly double murder and eventually received a death sentence. See *Tucker Executed as World*

A brief examination of the study's two true remorse cases reveals why they are somewhat unique as capital cases. In the first case, which was essentially a lovers' quarrel, the jury was more than willing to assign blame to the victim who was the defendant's girlfriend. She had taunted the defendant and, according to the jurors, had been "extremely cruel" and "pushed people further than most humans could ever go." (M<sub>23</sub>L<sub>13</sub>). One juror, who described the victim as "very selfish, . . . aggressive, [and] abusive," said that "the victim deserved what she got." (F<sub>31</sub>L<sub>13</sub>). By contrast, the jurors characterized the defendant in a markedly less harsh manner. They described him as "a simple guy that just got mixed up with the wrong person," (F<sub>32</sub>L<sub>13</sub>), and as "a very easygoing man that had been taken advantage of by this lady," (F<sub>33</sub>L<sub>13</sub>). According to the jurors, on the night of the killing, the defendant brought a gun with him "to scare her" because she had been so abusive, but she still "egged him on, and egged him on, [and] finally said, 'well, shoot me then,'" (F<sub>32</sub>L<sub>13</sub>), at which point the defendant shot her.

On these facts alone, the prosecution probably would not have sought the death penalty. After killing his girlfriend, however, the defendant then fatally shot the victim's brother, who also had been in the house at the time. The second murder constituted a "special circumstance" that, under California law, qualified the defendant for the death penalty.<sup>34</sup>

Despite the two killings, the jury quickly settled on a life sentence. While the jurors were troubled by the killing of the brother—"the brother just happened to be in the wrong place at the wrong time," (F<sub>33</sub>L<sub>13</sub>)—in the end, the jurors thought that the defendant had found himself trapped in a situation in which he made a tragic decision that he now deeply regretted. Given that the defendant did not have any prior criminal record and that he had confessed to his crime, the jury believed that he was remorseful and presented no future danger. Several jurors even expressed regret that he had to be sentenced to life without parole. One juror described him as "pathetic" and "pitiful," and stated that she felt "sorry for [him] as a human being." (F<sub>31</sub>L<sub>13</sub>). Indeed, in stark contrast to the sentiment that jurors usually expressed after having convicted a defendant of capital murder, one juror said the defendant "was kind of soft with me in my heart." (F<sub>33</sub>L<sub>13</sub>). In light of this unusual fact pattern for a capital case, the panel's opinion that the defendant was "truly sorry" for his crime is understandable.

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*Watches*, ARIZ. REPUBLIC, Feb. 4, 1998, at A1 (1998 WL 7749450). As a prisoner she became religious and remorseful for her acts, which led several religious leaders to seek clemency—unsuccessfully—on her behalf. *See id.* One of the true remorse cases discussed in this Article is best characterized as a guilty-but-redeemed case. *See infra* text accompanying notes 35-37.

<sup>34</sup> CAL. PENAL CODE § 190.2 (West Supp. 1998).



The facts underlying the second true remorse case, while still not entirely typical, are more in accord with what is thought of as a typical capital murder. The defendant, high on methamphetamine, raped an acquaintance's girlfriend. The acquaintance then returned home, and the defendant took the acquaintance and his girlfriend hostage, eventually killing the acquaintance without any provocation.

At his trial, the defendant admitted to the murder but testified that he was now sorry for his actions. In general, such statements of remorse at trial are infrequent and often viewed quite skeptically by the jury.<sup>35</sup> In this case, however, the jury believed the defendant's claim of remorse for two important reasons.

First, the defendant's testimony itself—both in substance and in terms of manner—was convincing. He fully admitted what he had done, although he said it was not premeditated, and he spoke in a manner that reinforced his purported remorse.<sup>36</sup>

Second, unlike most capital cases, a number of years had passed between the time of the arrest and the trial. During the interim, the defendant had become very religious, and the testimony of two prison ministers confirmed the defendant's religious transformation.<sup>37</sup> The unusually long delay between his arrest and trial, therefore, provided the defendant with a valuable opportunity to present a convincing "guilty but redeemed"<sup>38</sup> case, which is difficult to present credibly when less time has passed between the commission of the crime and the trial. True, the jury in this case still struggled over whether to impose the death penalty, but the defendant's remorse ultimately persuaded the jurors holding out for death to change their votes to life.

In sum, absent unusual factual patterns like these two cases, juries were unlikely to see a defendant as remorseful. At the same time, however, both the jurors' statements and frequent discussions about the defendant's lack of remorse strongly suggest that the defendant's perceived attitude plays a significant role in shaping the outcome of death penalty cases. And so the puzzle remains: if true remorse is rare, then what factors influence juries and account for their ultimate decision whether to impose capital punishment?

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<sup>35</sup> See *infra* Part III.D.

<sup>36</sup> One juror perceived the defendant's difficulty in testifying articulately as a sign of remorse: "Sometimes he found it difficult to speak, he was so remorseful." (M<sub>24</sub>L<sub>14</sub>). Others saw it as evidence of his mental impairment: "He was just not very intelligent, like a kid emotionally." (M<sub>25</sub>L<sub>14</sub>). Either way, it successfully elicited sympathy from the jurors: "Like I said, he wasn't very bright. They wanted us to see his lack of intelligence; they wanted us to pity him. That's why they put him on the stand, and it worked." (M<sub>25</sub>L<sub>14</sub>).

<sup>37</sup> See Sundby, *supra* note 6, at 1148-49 (discussing the preachers' testimony as an example of effective testimony by lay experts).

<sup>38</sup> See *supra* note 33.

To solve this puzzle, it is necessary to think of remorse in a somewhat different way than simply whether the defendant is truly sorry for his crime. For while both the life and the death jurors generally characterized a defendant as not sorry for his crime, the life and death cases did vary in two noticeable ways when it came to demeanor and remorse.

First, as noted earlier, whereas death jurors often described the defendant as being outright cocky and defiant, life jurors consistently described the defendant as emotionally flat but rarely as defiant.<sup>39</sup> That is, life jurors, while not inclined to perceive the defendant as being sorry for his crimes, generally did not share the death jurors' tendency to perceive the defendant as being insolent in his attitude toward the process.

Second, in addition to the life jurors' less hostile impressions of the defendant's demeanor, they also were less likely to have been unanimous as a jury in finding the defendant to be remorseless. For example, in thirteen of the nineteen death cases, the interviewed jurors unanimously agreed that the defendant was not sorry. By contrast, even though significantly more than a majority of the life jurors overall were convinced that the defendant was not sorry for the killing, interviewed jurors unanimously agreed that the defendant was remorseless in only four of the seventeen life cases. In most of the life cases, therefore, at least one juror was willing to express some uncertainty about whether or not the defendant was sorry for his actions. In other words, while life jurors as a whole were unlikely to see the defendant as being sorry for his crime, they were less monolithic and relentless than the death jurors when concluding in their case that the defendant lacked remorse.

These differences suggest that it may be helpful to think of the defendants' attitudes not only in terms of whether they were sorry for the crime, but also in terms of their reactions to the criminal prosecution itself. Are the defendants in life and death cases presenting different profiles to the juries of how they view the trial process? Might differences in trial strategy help explain why although both death and life jurors were unlikely to see the defendant as sorry for his crime, death jurors were more likely to see the defendant as defiant or cocky?

Thus far, this Article has focused on remorse as synonymous with the notion of being "sorry"—of defendants feeling guilt and grief over their actions. However, remorse also can be characterized from a more minimalist view that focuses not on whether the defendant wrings his hands with grief, but on whether he owns up to his actions in

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<sup>39</sup> See *supra* notes 26-27 and accompanying text.

some manner and accepts some responsibility for what he has done.<sup>40</sup> From this perspective, a defendant's degree of remorse is largely a reflection of whether the defendant is at least acknowledging the killing or whether he is refusing to accept any responsibility for the killing. Viewing remorse from this perspective begins to provide some pieces for solving the remorse puzzle.

## B. The "Denial Defense" Cases

### 1. *The Price of the Presumption of Innocence?*

The starting point for analyzing the defendant who does not accept responsibility for his killing is with those cases involving a defendant who altogether denies committing the murder. In seventeen of the thirty-seven trials included in the study, defendants presented "denial defenses" in which they maintained their innocence by denying involvement in the killing.<sup>41</sup> It is useful to compare the outcome of cases in which the defendant used a denial defense with the twenty "admission defense" cases in which the defendant admitted the killing but argued that it did not constitute capital murder (e.g., because the defendant lacked the requisite intent).<sup>42</sup>

TABLE 5  
THE EFFECTS OF THE DENIAL DEFENSE AS COMPARED TO THE  
ADMISSION DEFENSE

Sentence imposed	Denial defense: Denied the killing	Admission defense: Admits the killing
Death	11	8
Life	5	12
Hung	1	—

This initial comparison reveals that juries in denial defense cases imposed death sentences at a significantly more frequent rate than in

<sup>40</sup> The potential divergence between expressing sorrow for one's crime and merely being cooperative with a prosecution also has played a role in the federal sentencing guidelines. Under the "Acceptance of Responsibility" guidelines, some courts require defendants to demonstrate remorse in the sense of being sorry for what they have done before they will reduce a sentence, while other courts base their decision on whether the defendant has cooperated with the prosecution. See Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1507, 1508-42 (1997).

<sup>41</sup> Professor Goodpaster describes "denial defenses" as defenses that "assert either that the defendant did not commit the crimes charged or that it cannot be proven that she did. Alibi, mistaken identity, and reasonable doubt defenses fall into this category." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 330 (1983).

<sup>42</sup> See *id.* ("Provocation, self-defense, insanity, diminished capacity, and lack of specific intent are all examples of admission defenses.").

admission defense cases. Specifically, juries in denial defense cases imposed death sentences twice as often as they imposed life sentences, while juries in admission defense cases chose a life verdict over a death sentence by a three-to-two ratio.

Furthermore, as Table 6 illustrates, the negative impact that the denial defense has on a defendant's ability to avoid the death sentence is exacerbated when the defendant chooses to testify. By taking the stand on his own behalf during the guilt-innocence phase and testifying as to his innocence, the defendant presents the jury with the clearest instance of someone refusing to accept responsibility.

TABLE 6  
THE EFFECTS OF THE DENIAL DEFENSE WHEN DEFENDANT TESTIFIES

Sentence imposed	Defendant testified & claimed innocence
Death	5
Life	1

From this small sample of cases, it appears that juries tend to view such testimony as an aggravated abdication of responsibility, a finding reinforced by the jurors' comments in those cases. The jurors expressed almost universal disfavor toward the defendant's testimony, in terms of both their belief that the defendant was lying—"I kept thinking, why not tell the truth, almost like it was an insult to the jury's intelligence," (F<sub>1</sub>D<sub>2</sub>)—and their dislike of the defendant's attitude on the stand.

"He was on the stand for about four or five days. He was very relaxed and unconcerned, like he was, it's hard to say, to use the right word, like he was 'king of the hill.' He thought he was the top dog or whatever you want to call it. In other words, he thought everything he did was right and others should adhere to what he says. Nothing seemed to bother him." (M<sub>26</sub>D<sub>12</sub>).

"His testimony gave the impression that he was very cold, that he was bothered, inconvenienced by the trial. It seemed that the defendant's attorneys regretted putting the defendant on the stand because he made such a bad impression. They pulled him off very quickly." (M<sub>13</sub>D<sub>11</sub>).

"He was lying right through his teeth. Every time they got into some kind of tricky spot [on cross-examination] he'd start speaking in Spanish instead of English and we'd have to go to an interpreter. We knew he could speak English well enough, he was just trying to make more of a hassle or something." (M<sub>27</sub>D<sub>12</sub>);

"He was lying most of the time." (F<sub>34</sub>D<sub>13</sub>).

A number of the jurors also reported that the defendant's testimony itself was what clinched their belief that he was guilty. The following commentary vividly portrays one juror's reaction to the defendant's testimony and also reveals how jurors absorb the details of every occurrence in the courtroom:

I was very curious as to how [the defendant], how his side was going to react to one solid case [for the prosecution]. My thinking was that he was just going to get up and say, "sorry, we rest." This is funny; this was very obvious to me. [The defendant] was called as a witness. You could tell it was an ad hoc decision because the attorneys themselves were almost in disagreement—they looked at each other and [the defendant] was nodding his head and the attorneys had these very, almost like frowns on their faces. They kind of looked at each other and said okay. It was very clear to me, or anybody else that picked this up, that [the defendant] insisted that he was going to tell his side of the story. And the attorneys were either disappointed in that decision or were surprised. But anyhow, he told about the wildest story you've ever heard in your life. From that point on, actually, I think people felt real relieved, because it was such a story full of false thinking or, you know, just excuses or what have you, that even though I was certain I would have felt the same way, it was almost a relief to know that it was, that my feelings were so sure that he was guilty [after he testified]. (M<sub>28</sub>D<sub>2</sub>).<sup>43</sup>

Intriguingly, the jurors also disbelieved the defendant's testimony in the one denial defense case in which the defendant testified but still received a life sentence. From their reports, however, the jurors did not appear to harbor as much antagonism toward this defendant as the jurors in the other cases in which the defendant testified.

"[He was] neither polite, condescending, or arrogant. He did a credible job; the testimony was the best he could offer." (M<sub>21</sub>L<sub>7</sub>).

Juror: "He talked very well; he was very intelligent."

Interviewer: "Did that surprise you?"

Juror: "Yes, it did. He impressed me with his confidence. He was not like a wild man at all; I can't really describe the impression." (F<sub>35</sub>L<sub>7</sub>).

Several factors might account for the willingness of the jurors in this case to overlook their disbelief of the defendant's testimony when choosing the sentence. First, the defendant appears to have been more articulate when he testified and more appealing in demeanor than the other defendants who testified. Second, the case involved a

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<sup>43</sup> In one case, a juror stated that she had harbored a reasonable doubt until the defendant took the stand: "I became convinced of the defendant's guilt after his testimony, during the cross-examination. He didn't understand the truth versus a lie." (M<sub>29</sub>D<sub>7</sub>). In another case, a juror stated that "the guy kind of convicted himself; he hurt his own case by testifying. If he hadn't testified he probably would have gotten off easier." (M<sub>27</sub>D<sub>12</sub>).

victim who had participated in the criminal activity—the killing resulted from internal prison gang warfare—a factor that usually influences jurors toward imposing a life sentence. Finally, the case was the only one with a testifying defendant that also involved a factor shared by almost all of the other cases in which the defendant mounted a denial defense and still received a life verdict: the jury expressed a lingering doubt about the level of guilt among multiple defendants in the case. The next section addresses this last tendency in detail.

## 2. *Lingering Doubt: The Difference Between Complete Innocence and Level of Participation*

Past studies have found that a jury's residual doubt about a defendant's guilt can be potentially decisive in swaying the jury's decision toward a life sentence.<sup>44</sup> Indeed, an attorney may be tempted to mount a denial defense in the hope that even if the jury does not find a reasonable doubt, just enough doubt will linger to cause the jury to impose a life sentence out of a concern that the defendant may be innocent. The Project's cases, however, indicate that this type of strategy may actually increase the likelihood that the jury will reach a sentence of death with one significant exception: those cases that involve multiple criminal actors and only circumstantial evidence as to which of the participants acted as the ringleader.<sup>45</sup>

In only one of the seventeen denial defense cases did interviewed jurors harbor residual doubt as to whether the defendant actually had participated in the murder. Despite frequent attempts by defense at-

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<sup>44</sup> See Geimer & Amsterdam, *supra* note 2, at 27-34; see also Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 357 n.236 (noting that lingering doubt about a defendant's guilt is sometimes the strongest factor in a jury's decision to impose a life sentence (citing Telephone interview with Millard Farmer, attorney in Atlanta, Ga. (Feb. 25, 1992))).

<sup>45</sup> In an impressive and thoughtful look at the effect of guilt-phase strategy on the penalty phase, Professor Goodpaster suggests that a "reasonable doubt defense"—that is, defending by arguing that the prosecution has not met its burden of proof—is "usually [of] some value . . . even in . . . [the face of] overwhelming evidence." Goodpaster, *supra* note 41, at 331. A careful reading of his position, with its important qualifiers, clarifies that he is primarily concerned with pleading guilty in lieu of presenting any defense case during the guilt phase. See *id.* at 331-32. This Article's findings do not dispute his point, but actually support the position that a vigorous guilt-phase defense may benefit the defendant. See *infra* Part IV. This Article's findings, however, do suggest that the assertion of a reasonable doubt defense, without any regard for whether it will undermine the case in mitigation by denying responsibility for the killing, might jeopardize the possibility of a life verdict. See *infra* Part IV. Again, these findings are not inconsistent with Professor Goodpaster's position, which admonishes that the defense must align a reasonable doubt defense with the penalty phase. See Goodpaster, *supra* note 41, at 332. They only suggest that serious risks attach to a reasonable doubt defense focused on whether the defendant committed the killing as compared to a reasonable doubt based on an admission defense, such as whether the defendant intended to kill the victim. See *infra* Part IV.

torneys to argue "lingering doubt" during the penalty phase,<sup>46</sup> this lack of residual doubt existed even when the prosecution based its case on circumstantial evidence and the jury struggled—sometimes deliberating for several days—over the question of the defendant's guilt. But after having decided that the defendant was guilty of murder, jurors in these cases seemed to put aside any earlier doubts and to proceed on the basis that the defendant undoubtedly had participated in the murder.<sup>47</sup>

Indeed, some jurors expressed indignation during the interview when asked whether they had entertained the possibility during the penalty phase that the defendant "might be altogether innocent." Generally, the jurors forcefully responded that they would not have convicted the defendant in the first place had any such doubt existed.<sup>48</sup> One exchange between a juror and the interviewer captures this widely shared view and the trouble that jurors had even with conceptualizing the notion of lingering doubt about the defendant's actual innocence:

Juror: "If I had lingering doubts, then we probably would have had to stop it back in the verdict."

Interviewer: "But if you didn't. Say you came down with a verdict of guilty of capital murder, but then by the time you got to the sentencing phase you still had, maybe you didn't have a reasonable doubt, but you still had some lingering doubts."

Juror: "See in this case I would've thrown it out. I would've had to if I had lingering, if I had any doubt. I think given the severity of this kind of punishment, the guilty verdict wouldn't have been able to come out. There would have been a hung jury if I'd had any doubt—I didn't have room for any doubts. In this case, in the sentencing part, if I'd had doubts, they probably would have thrown it out."

Interviewer: "On the death penalty?"

Juror: "On his guilt."

Interviewer: "Right, okay. But assume that twelve people voted guilty, okay, but say you had enough evidence in your mind that he was guilty beyond a reasonable doubt, but there might have been

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<sup>46</sup> In California, although the defense generally is not entitled to an instruction on residual doubt, the defendant can argue residual doubt to the jury. See *People v. Johnson*, 842 P.2d 1, 40-41 (Cal. 1992); cf. *Franklin v. Lynaugh*, 487 U.S. 164, 173-75 (1988) (holding that a defendant does not have a federal constitutional right to a jury instruction on residual doubt).

<sup>47</sup> The jurors' strong certainty of guilt after an initial uncertainty seemed to parallel somewhat the perspective of eyewitnesses who are initially unsure of an identification but become convinced of its accuracy once they settle on an identification. See Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 985 (1977).

<sup>48</sup> Only 5% of the interviewed jurors responded that they had even entertained the "thought" during the penalty phase that the defendant might be altogether innocent.

some doubt still, or some nagging doubt, but you didn't find it reasonable to find him not guilty."

Juror: "So then would I have been more likely to go for the life or the death? More likely for the life. But I really would have done what I said. But in this one, no one was more surprised than I about this one unfolding. I thought it would just be this long soul-searching thing—but he did it. No doubt."<sup>49</sup> (F<sub>7</sub>D<sub>8</sub>).

As noted, in only a single case did a lingering doubt about the defendant's complete innocence appear to factor into the jury's decision to impose a life sentence.<sup>50</sup> The jury was initially split over whether to convict, and it took five days of deliberating before the jury finally agreed to convict the defendant on the basis of circumstantial evidence. One of the five interviewed jurors seemed particularly troubled by lingering doubt. This juror said that the possibility that the defendant might be innocent played a "very important" role in reaching a sentencing decision. In fact, this juror when asked at the outset of the interview, "Is there anything about this case that sticks in your mind, or that you keep thinking about?" replied, "I guess, probably just that I never will know if she was really guilty! It was really hard on me; it was really hard on everyone." (F<sub>28</sub>L<sub>4</sub>). This juror was one of the few who was able to distinguish between a reasonable doubt and a lingering doubt.

Even given the strength of this juror's lingering doubt, however, it is unclear how important a role lingering doubt played with the overall jury. Though one other juror in this same case responded that lingering doubt had been "fairly important" to her decision, each of the other three jurors from the case who were interviewed stated that lingering doubt had been "not important at all." These three jurors also responded that they had not considered the possibility that the defendant "might be altogether innocent" during the penalty phase.

Because the jury in this case quickly agreed to a life sentence without extended deliberations, it is difficult to predict exactly how the jurors who harbored lingering doubts about the defendant's guilt

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<sup>49</sup> Another juror simply refused to answer any questions relating to lingering doubt, adding that "if there are lingering doubts, it would not get to the sentencing phase." (M<sub>30</sub>D<sub>14</sub>). Similarly, another juror answered, "If I had any doubts, I wouldn't have voted that way." (F<sub>36</sub>D<sub>9</sub>).

It is important to note that jurors who had lingering doubt might find it difficult to admit, "yes, I had some lingering doubt that the defendant was involved, but we still voted to sentence him to death." That is, jurors might feel that there is a right answer to questions that involve lingering doubt, just as they might feel that it would be viewed as wrong if they stated that the defendant's race entered their decision. On the other hand, jurors regularly expressed lingering doubt about whether the defendant intended to kill or was the triggerman. See *infra* text accompanying notes 53-54, 64-65.

<sup>50</sup> This case also was the only trial from the California segment of the Project that involved a female defendant.



would have used them in deliberations. Interestingly, the defense attorney did raise the possibility of lingering doubt as a factor during the penalty phase, but he did so in a way that offended much of the jury:

There was one comment by the defense attorney that many of the jurors took to heart. He was ridiculing us for coming up with the guilty decision and saying he doesn't know how we could have done that. We, especially myself, felt it was inappropriate at that time to make comments like that. The decision had already been made; we were there to do the sentencing. But he felt it appropriate or necessary to get it off his chest or something. But when we went into the jury room to decide, that was the first thing on quite a few of our minds—like, how dare he chastise us. He doesn't know what we went through in this deliberation room—the agony and pain and everything of making the decision, and he just comes out and says, "You guys made the wrong decision." He lost a lot of credibility in our eyes from those comments that he made, but it didn't affect us as far as deciding what penalty to recommend. (M<sub>31</sub>L<sub>4</sub>).<sup>51</sup>

Fortunately for the defendant, any offense that the jury felt did not carry over into its sentencing decision, perhaps in part because it did not need to consider lingering doubt to be convinced that a life sentence was appropriate. Instead, the jury reached a quick consensus for life because the defendant neither had a criminal record nor appeared to pose any significant threat of future dangerousness.<sup>52</sup> The case nevertheless stands out as the only case among the denial defense cases in which lingering doubt about the defendant's actual guilt played any role in shaping the penalty decision.

Before dismissing lingering doubt as an insignificant factor, however, an important qualifier must be added. While lingering doubt concerning the defendant's actual innocence appeared to play a very infrequent role in influencing the jury's penalty decision, lingering doubt seemed to play a far more significant role when the doubt involved the defendant's level of participation in the murder. A shared characteristic leaps out from four of the five denial defense cases that resulted in life sentences:<sup>53</sup> in each case, more than one individual

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<sup>51</sup> The juror who had been particularly concerned with lingering doubt described the incident similarly: "The defense attorney yelled at the jury for finding her guilty because he couldn't imagine that there was enough evidence to do that. That's what he started out with, bitching about the fact that we even found her guilty." (F<sub>28</sub>L<sub>4</sub>).

<sup>52</sup> The defense also was helped by the fact that the prosecutor did not pursue the death penalty vigorously. The prosecution did not introduce any evidence at the penalty phase and was perceived by the jurors as "not terribly invested in what the punishment would be." (F<sub>28</sub>L<sub>4</sub>).

<sup>53</sup> The only other life case in the denial defense category is the just discussed case in which some jurors harbored a lingering doubt about the defendant's actual innocence. See *supra* text accompanying notes 50-52.

carried out the homicide, and in each case, the prosecution presented a largely circumstantial case. And as a result, although the jurors in these cases rejected the defendant's claim of complete innocence, they remained uncertain about the level of the defendant's participation or intent. As the jurors' comments indicate, although California does not limit the death penalty to the defendant who actually did the killing,<sup>54</sup> many jurors felt that the death penalty was best reserved for the killer or the ringleader:

"[The single most important factor] was his guilt by conspiracy rather than absolute evidence that he was the killer. We weren't sure enough to take his life. This made the death decision not right and unfair." (M<sub>32</sub>L<sub>1</sub>).

Interviewer: "What did you folks who voted for life give as your reasons?"

Juror: "The fact that we weren't 100% sure if he pulled the trigger. I mean we were sure he's guilty—when the crime took place, he was there." (F<sub>37</sub>L<sub>5</sub>).

"What probably saved his life was his partner's DNA test found his partner's sperm in her body. Had his [sperm] been found there, he would have been in a much different situation. Had he assaulted her, [the DNA test] would have proved it, but we didn't have that proof so we didn't feel he was the principal." (M<sub>32</sub>L<sub>5</sub>).

Juror: "It was all about the two punishments which he should get. One juror would say, 'Well, I think he should [get] death because I believe he did it and that's all there is to it, and look at how it was calculated murder, in cold blood—he stabbed him twenty times.' On the other hand, another person would say, 'Yeah, but there was another person involved who could have possibly been the principal killer.' That was the main topic."

Interviewer: "So it was really a disagreement as to who was the principal killer?"

Juror: "Yeah, if there were witnesses, it would have been so much easier. I was stressed out during this case—big time." (F<sub>37</sub>L<sub>9</sub>).

In one multiple-actor case with an especially bewildering array of witnesses, including some inmates who claimed responsibility for the killing for which the defendant was on trial, one juror concluded that a life sentence would, in light of such Byzantine evidence, "allow for the possibility that we made a mistake." (M<sub>33</sub>L<sub>7</sub>).

The key to understanding these cases is to recognize that the denial defense in multiple-actor situations does not necessarily operate fully as an all-or-nothing defense. A prosecution case founded on circumstantial evidence that only indirectly establishes the roles of the various defendants allows jurors to conclude that while they believe

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<sup>54</sup> See CAL. PENAL CODE § 190.2(c)-(d) (West Supp. 1998).

that the defendant was criminally involved, they also are uncertain that he was the ringleader or the triggerman. As a result, unlike single-defendant cases in which the jury must either hold the defendant completely responsible for the crime or acquit, prosecutions involving multiple actors may allow jurors an opportunity to find the defendant guilty of capital murder while still having lingering doubts about the extent of the defendant's role.

Perhaps unsurprisingly then, it appears that the denial defense strategy is not as effective in multiple-actor cases that involve strong evidence leaving little room for lingering doubt about the defendant's role as the triggerman or ringleader. For example, two of the denial defense cases that resulted in a death sentence involved multiple actors. In both cases, however, the prosecution's case and evidence focused entirely on the defendant's role as the actual killer. In this context, the juries' decisions paralleled the all-or-nothing choice that jurors faced in the single-defendant cases—accepting the prosecution's evidence inherently required them to find that the defendant acted as the ringleader.

The trials of Timothy McVeigh and Terry Nichols, the two defendants in the Oklahoma City bombing prosecutions, illustrate this difference among multiple-actor cases. Even though the two defendants were tried separately (as also was true of all but two of the study's multiple-actor cases), each trial had implications for the other. Because the Government's evidence identified McVeigh as the bomber, even in light of other possible co-conspirators,<sup>55</sup> his jury had to choose between the Government's theory that McVeigh had masterminded the bombing and the defense's claim that McVeigh was completely innocent. Because the Government had argued that McVeigh was the bomber, however, Nichols both could maintain his complete innocence and still vigorously contend that the Government's largely circumstantial evidence did not tie him to the bombing as a fully knowing participant.<sup>56</sup> This strategy created a gray area that enabled the jury to find that Nichols had been involved but to a lesser extent than McVeigh, which the jury believed did not justify the death penalty.<sup>57</sup>

The following table summarizes the three denial defense scenarios that have been discussed.

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<sup>55</sup> See, e.g., Richard A. Serrano, *McVeigh Case Hinges on the Circumstantial*, L.A. TIMES, Mar. 31, 1997, at A1 (explaining the circumstantial nature of the prosecution's case coupled with the defense's coconspirator theory).

<sup>56</sup> See David Josar, *Nichols' Trial Strategy: I'm Not McVeigh*, DETROIT NEWS, Sept. 22, 1997, at A1.

<sup>57</sup> See Lynda Gorov, *No Nichols Death Penalty: Jurors Deadlock; Judge Will Sentence*, BOSTON GLOBE, Jan. 8, 1998, at A1.

TABLE 7  
DENIAL DEFENSE CASES

	Single actor killing	Multiple actor killing	
		Strong evidence defendant was leader/triggerman	Circumstantial case as to leader/triggerman
Death	9	2	—
Life	1	—	4
Hung	1	—	—

Though caution must be exercised when drawing conclusions from a sample of thirteen cases, the imbalance in outcomes is hard to ignore when one looks at the cases in which the prosecution essentially presented the jury with an all-or-nothing choice between accepting the prosecution's argument and the defendant's position (i.e., single-actor cases or multiple-actor cases with strong evidence that the defendant was the leader). The jury returned a death verdict in eleven cases and a life sentence in only one. (In one additional case, the jury hung on the sentence, and the retrial resulted in a death sentence.) Nor did the outcomes for this subset of cases appear to depend on whether the defendant actively presented evidence to prove his innocence (eight cases)<sup>58</sup> or only argued that the prosecution's evidence did not prove beyond a reasonable doubt that he had participated in the murder (five cases).<sup>59</sup>

In sum, only in those cases in which the prosecution asked the jury to deduce from ambiguous circumstantial evidence that the defendant had acted as the ringleader from among several participants did a denial defense appear not to skew the jury heavily toward imposing a death sentence. Thus, it may very well be that lingering doubt about actual innocence is the "strongest possible mitigating evidence,"<sup>60</sup> but the cases included in this study suggest that creating such a lingering doubt is very difficult. In this light, the defense carefully and realistically should assess the likelihood that it can create doubt before pursuing a denial defense strategy.<sup>61</sup>

<sup>58</sup> Of the eight cases in which the defense presented evidence, six resulted in a death sentence, one in a life sentence, and one in a hung jury on the sentence. In six of the eight cases, the defendant testified that he was innocent. See *supra* text accompanying notes 41-43.

<sup>59</sup> All five cases resulted in a death sentence.

<sup>60</sup> White, *supra* note 44, at 357 n.236. Indeed, the only case included in this study that created a lingering doubt among some jurors about the defendant's actual guilt was the one life case in the single-actor category. In that case, several of the jurors based their decision to seek a life sentence in part on their lingering doubt. See *supra* text accompanying notes 50-52.

<sup>61</sup> On the other hand, in at least two of the five Florida life cases that they studied, Geimer and Amsterdam identified lingering doubt as to actual innocence as a factor. See Geimer & Amsterdam, *supra* note 2, at 27-30. They found lingering doubt as to participa-

### C. The "Admission Defense" Cases: Confession Is Good for More Than Just the Soul

The outcomes of the denial defense cases make evident that defendants who invoke the presumption of innocence and put the state's evidence to the test generally increase their risk of receiving a death sentence. By contrast, the admission defense cases—in which defendants contest an element of the crime (e.g., premeditation) or challenge the existence of a special circumstance (e.g., the killing was intentionally carried out for financial gain)<sup>62</sup> rather than deny their participation in the crime—present a different profile of outcomes. Twelve of the twenty admission defense cases included in the study resulted in life sentences, and eight resulted in death sentences.

The difference between the outcomes in denial and admission cases is not surprising if the cases are analyzed with a focus on acceptance of responsibility. Importantly, the defendants in the admission defense cases at least have acknowledged responsibility for the deaths even if claiming that their crimes do not rise to the level of capital murder. The significance of accepting responsibility as a theme becomes even more evident once the admission defense cases are further parsed based on factors bearing on acceptance of responsibility.

One would expect that if a defendant's acceptance of responsibility truly does influence the jury's decision making, a defendant's verbal acknowledgment of his killing would increase the likelihood of receiving a life sentence. The pool of admission defense cases largely bears out this expectation.

The confession cases further underscore the role of a defendant's acceptance of responsibility when one focuses on how the confessions came about. In five of the twelve pretrial confession cases, the defendant either had voluntarily turned himself in to the authorities or had been arrested on unrelated charges and then brought up the killing on his own. In all five cases, jurors responded very favorably to the defendant's actions, and all five cases resulted in life sentences.<sup>63</sup> By contrast, the jurors perceived confessions in two of the three death

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tion and intent in the other three life cases. *See id.* Their finding of lingering doubt about actual innocence in two cases (compared to only one in this Study) from a much smaller sample suggests that the ability to create a lingering doubt successfully may depend on various factors that vary by state and locality, such as the local prosecutor's policy on what cases are pursued as capital cases and on the use of accomplice testimony.

<sup>62</sup> Because defenses that challenge the existence of special circumstances both admit the crime and deny the special circumstance, Professor Goodpaster classifies them in a mixed category of "admission and denial" defenses. Goodpaster, *supra* note 41, at 332. Because this Article focuses on admission of the underlying killing, it treats these types of defenses—which admit the defendant did the killing—as admission defense cases.

<sup>63</sup> In one case, for instance, jurors focused not on the crime spree that culminated in the defendant's arrest, but on the fact that when arrested, "he voluntarily confessed to an unsolved murder. In the absence of a confession, it would have been a very difficult case

TABLE 8  
ADMISSION DEFENSE CASES AND VERBAL ADMISSIONS

Time of confession	Resulting sentence	
	Life	Death
Defendant made pre-trial confession of killing	9	3
Defendant first verbally admitted killing in guilt-phase testimony	1	—
Defendant first verbally admitted killing at penalty phase	—	1
Defendant never verbally acknowledged killing	2	4

cases not as voluntary admissions of guilt, but rather as attempts by the defendants to deny their crimes until the police confronted them with sufficient evidence to break them down and effectively force them to confess (though this was equally true for two of the nine confessions in the life cases). Importantly, the life jurors did not seem to require confessions that were spill-the-soul statements along the lines of "I intended to kill the victim and now deeply regret it." Instead, the statements often left room for the defense later to argue that the killing did not rise to the level of capital murder.

Unlike the denial defense cases, therefore, a defense asserting that the defendant had participated in the killing but that his involvement did not rise to the level of capital murder did not appear to invite a backlash if the defense was plausible based upon the facts. Defendants in life cases frequently used three admission defenses: (1) they lacked a culpable mental state because, for example, the killing was unintentional or not premeditated (ten cases); (2) their commission of the killing did not qualify as a felony-murder special circumstance (three); and (3) they either had been provoked by the victim or had acted out of self-defense (three cases).<sup>64</sup> Moreover, in seven of the twelve life cases, the strategy produced a lingering doubt among some jurors over whether the defendant had intended the killing or in some way had been provoked by the victim. As one would expect, these doubts pushed jurors in the direction of a life sentence.<sup>65</sup>

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because there was nothing to place him there. If he had denied it, it would have been difficult." (M<sub>34</sub>L<sub>3</sub>).

<sup>64</sup> Because some cases involved more than one of the defenses, the total number of cases is more than 12.

<sup>65</sup> Jurors had doubts about the defendant's intent far more often than they questioned whether the defendant was not involved with the killing. Although only 5% of all jurors had even entertained the "thought" that the defendant might be completely innocent when they ultimately decided the punishment, *see supra* note 48, 49% had contemplated the "thought" during sentencing deliberations that the defendant "definitely killed the victim, but might not have planned, intended, or wanted to do so." These perceptions are also the type of lingering doubts that Geimer and Amsterdam generally found in the life cases included in their study. *See Geimer & Amsterdam, supra* note 2, at 28-34.

## D. Statements Expressing Regret at the Penalty Phase

The final category of cases to examine encompasses the eight cases from both the denial and the admission defense categories in which the defendant either testified during the penalty phase and expressed remorse or communicated his remorse through a psychologist, family member, or other intermediary.

TABLE 9  
DEFENDANTS EXPRESSING REGRET DURING THE PENALTY PHASE

	Life	Death
Admission defense cases		
Defendant admitted killing prior to penalty phase through confession or guilt testimony	3	1
Although defendant did not contest killing at guilt phase, first time defendant personally admitted to the killing was at penalty phase	—	1
Denial defense cases		
Defendant first admitted killing at penalty phase	—	3

Again, while recognizing that small samples make generalizations difficult, the data reinforce the notion that the earlier the defendant personally expresses some type of acceptance of responsibility for the killing, the greater the likelihood that the jury will be receptive to later claims of regret. Simply put, when it comes to accepting responsibility, the sooner the better. Indeed, where the evidence supports the sincerity of a defendant's purported regret, many jurors identified the defendant's testimony as securing the life sentence.

"His remorse and his sincerity [in testifying] made everything else more believable—because if you don't express remorse, then you wonder if he has just been putting you on about that religious thing." (M<sub>25</sub>L<sub>14</sub>).

"We got into watching him and his expressions. We were trying to see if he was remorseful. He didn't really show it that much until it got to the penalty phase. That's when he really came across as remorseful. A lot of us had questions and were watching his facial expressions." (M<sub>35</sub>L<sub>15</sub>)<sup>66</sup>.

On the other hand, it appears that statements of remorse and acceptance of responsibility that first come at the penalty phase generally do not persuade the jury to grant mercy. Without any prior acceptance, jurors often view statements of regret that are first made

<sup>66</sup> The defendant in this case, however, did not convince all the jurors of his remorse. Some jurors "really debated" whether the defendant's testimony "was staged and whether he had been coached." (F<sub>38</sub>L<sub>15</sub>).

during the penalty phase as disingenuous attempts to avoid a death sentence after the jury already has convicted him of capital murder.

Particularly telling were the three denial defense cases in which the defendant had argued during the guilt phase that the prosecution had not proven guilt beyond a reasonable doubt, but then later conceded his guilt during the penalty phase and expressed regret over the killing. In these cases, the jurors reacted unfavorably to the change in position.

“[He] testified and said he was sorry, but he didn’t *show* it by his actions.” (M<sub>11</sub>D<sub>14</sub>).

“He said he deserved to die, but it came across as fake; we got the impression he was trying to use reverse psychology on us.” (F<sub>13</sub>D<sub>8</sub>).

“His testimony emphasized how out of control he was; he had no remorse.” (F<sub>11</sub>D<sub>13</sub>).<sup>67</sup>

Interestingly, in none of the three cases did the defense affirmatively present evidence during the guilt-innocence stage to prove the defendant’s innocence. Instead, the defense merely had argued to the jury that the prosecution had failed to prove that the defendant was the killer beyond a reasonable doubt. These cases suggest that even a barebones “reasonable doubt” denial defense may not leave room for defendants to later admit their guilt and express regret during the penalty phase, at least without appearing to deceptively shift positions.<sup>68</sup>

Thus, while jurors often expressed exasperation that a defendant had not testified during the penalty phase,<sup>69</sup> the cases suggest that unless the defense had laid the groundwork earlier for the defendant’s statement of remorse, the jurors likely would have perceived

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<sup>67</sup> Even when the defendant did not express regret at the penalty phase, but the defense appeared to at least tacitly acknowledge the defendant’s guilt, jurors tended to react negatively. For example, a juror in one case thought the change in position showed that the defense at the guilt phase had been “just a trick to put doubt in our minds,” (M<sub>10</sub>D<sub>11</sub>), while another juror in a different case thought that making the jury decide guilt only to then admit guilt at the penalty stage “reflect[ed] badly on the defendant,” (M<sub>15</sub>D<sub>16</sub>).

<sup>68</sup> Similarly, Professor Goodpaster has suggested that if the prosecution’s case-in-chief turns out to be very strong, then it might be strategically prudent for the defendant to admit guilt instead of allowing the reasonable doubt defense to go to the jury. See Goodpaster, *supra* note 41, at 332.

<sup>69</sup> As one juror said, “[T]here was a lot of why the hell didn’t he get his butt up there and say something. Beg!” (M<sub>6</sub>D<sub>6</sub>). Some jurors, however, recognized not only that a defendant might not have made a credible witness (“He gave me the impression that he wasn’t too eloquent. I guess he didn’t want to take the chance of giving the wrong impression.”), but also that the jury would view his testimony skeptically (“Then I brought up [to the jury], even if he were to testify that he was remorseful, would you have believed him? Because wouldn’t anyone to save their lives?”). (M<sub>34</sub>L<sub>3</sub>). This juror also suggested that the prosecutor would have “chewed [the defendant] up” if given the opportunity to ask presumptively phrased questions on cross-examination like, “now, when you picked up the knife while you were holding his hair and slitting his throat . . .”



any such testimony as manipulative. Indeed, actions that jurors usually perceive sympathetically—such as a defendant reacting emotionally to a family member's testimony—often were viewed negatively when they contrasted sharply with the defendant's other behavior before and during the trial: "He didn't have any remorse; he didn't cry. Actually, I think he probably cried when his mom testified, but some of those things are coached in order to extract some kind of sympathy from the jury." (M<sub>14</sub>D<sub>15</sub>).

#### IV

#### PIECING TOGETHER THE REMORSE PUZZLE: THE GUILT AND PENALTY PHASE TANGO

In 1976 the Supreme Court heralded the movement to a bifurcated trial for capital cases as a major advancement in procedural fairness from the unitary system that some states previously had used.<sup>70</sup> The Court believed that by separating the guilt and penalty phases, bifurcated trials would alleviate the pressure on defendants to waive their Fifth Amendment privilege against self-incrimination and their Sixth Amendment right to a jury trial on the issue of guilt.<sup>71</sup> Under the bifurcated system, defendants theoretically can contest their guilt without incurring the risk that the jury will hear prejudicial sentencing information (e.g., prior crimes) and still preserve their opportunity to argue against the death penalty if ultimately convicted.

While the bifurcated trial certainly provides valuable procedural safeguards, it also has the potentially perilous allure of lulling defense counsel into thinking of the guilt and penalty phases as independent and distinct productions, rather than as two acts of a play before the same audience. This allure tends to be particularly great for defense attorneys who do not have prior experience in capital cases and therefore concentrate more on the familiar guilt phase at the expense of preparation for the penalty phase. That is, they overlook the impact that the defense strategy during the guilt phase will have on the penalty phase.<sup>72</sup> Yet if the defense does not approach a capital case, even though it is bifurcated, as a unified presentation, it greatly increases

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<sup>70</sup> See *Gregg v. Georgia*, 428 U.S. 153, 190-91 (1976).

<sup>71</sup> See *id.* at 190-92 & n.41. In the earlier case of *McGautha v. California*, 402 U.S. 183 (1971), the Court rejected a challenge to a unitary sentencing scheme based on the Fifth Amendment privilege against self-incrimination. See *id.* at 217.

<sup>72</sup> This observation is based in part on the author's experiences with the Virginia Capital Case Clearinghouse, a law school clinic that provides assistance to attorneys appointed to represent capital defendants.

the risk that the guilt-phase presentation will doom the case in mitigation during the penalty phase.<sup>73</sup>

This danger is precisely why experts on capital litigation stress the importance of harmonizing the guilt and penalty phases, and why they urge defense attorneys to exercise caution before advancing a denial defense of complete innocence.<sup>74</sup> This Article's findings add strong empirical emphasis to these admonishments—in the study, twice as many denial defense cases resulted in death sentences (eleven) than life sentences (five). Moreover, four of those five life cases fell into the specialized category of killings which involved multiple actors and uncertain circumstantial evidence concerning the defendant's precise role in the killing. Indeed, in the single-defendant cases, the figures for the denial defense cases that reached a verdict are particularly stark—nine death sentences compared to one life sentence.<sup>75</sup> This data indicate that absent a marginal case in prosecution, a defendant is essentially playing lottery odds by relying on an all-or-nothing guilt phase strategy that challenges the prosecution in the hope of producing a lingering doubt that will secure a life sentence.

But while the usual explanation for the danger of a denial defense is that it undermines a later ability to express remorse convincingly during the penalty stage, the fact is that most defendants do not even try to express remorse. And even if they do, the jury is unlikely to believe them. In this light, it might be more useful to conceptualize the problem in terms of juries applying their own rough "acceptance of responsibility" guidelines.<sup>76</sup> That is, capital juries do not necessarily insist that defendants show that they are "truly sorry" for their crimes. If that were the case, after all, then the overwhelming majority of life cases should have resulted in death sentences.<sup>77</sup> Instead, jurors tend to react favorably to actions or strategies that communicate some acknowledgment of the defendant's responsibility for the crime.

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<sup>73</sup> For an overview of the penalty phase and the role of mitigating evidence, see generally Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

<sup>74</sup> See, e.g., Bowers, *supra* note 5, at 1054 (suggesting that a "vigorous denial of guilt" will "nullify a convincing demonstration of remorse" at the penalty phase); Doyle, *supra* note 32, at 423 (noting the "tension between the strategic goals" of the guilt and penalty phases); Goodpaster, *supra* note 41, at 329-30 (discussing dangers created by the denial defense); White, *supra* note 44, at 356-58 (stressing the need to develop an overall strategy for the guilt and penalty phases).

<sup>75</sup> One of the nine death cases was a retrial before a separate jury after the first trial ended with a hung jury on the sentence. See *supra* note 7.

<sup>76</sup> Cf. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (1998) (providing that judges may consider a defendant's acceptance of responsibility for his offense as a mitigating factor).

<sup>77</sup> See *supra* text accompanying notes 26-28.

By conceptualizing remorse in terms of acceptance of responsibility, one can begin to make sense of its marked influence on the jury's decision in at least two important ways. First, as the Project repeatedly has found, a defendant's potential future dangerousness looms over the entire decision-making process.<sup>78</sup> Even in California, where the only alternative to a death sentence in capital cases is life without parole,<sup>79</sup> jurors expressed concern that the defendant might eventually be released.<sup>80</sup> Jurors are inclined to view a defendant that makes no attempt to acknowledge complicity—especially in the face of strong evidence against him—as someone likely to use every future opportunity to manipulate the system. Putting the prosecution's evidence to the test, therefore, may cause jurors to perceive the defendant as not simply exercising his due process rights, but rather as once again trying to “beat the system.”

He just acted like he didn't do it—so why would he be remorseful or bitter or anything? He was very confident that he was going to get off. His demeanor gave me the impression that “I didn't do anything wrong, so I don't need to worry about it.” Even when the verdict was handed down, he still was the same. It was real strange. Once I was convinced that he did it, I was convinced that he was kind of cold blooded and didn't have any feelings, basically. I didn't think he was crazy or anything. I just felt he'd do anything to get what he wanted. (F<sub>5</sub>D<sub>5</sub>).<sup>81</sup>

Indeed, this perception of the defendant as manipulative and confident of “getting off” may help explain why death jurors' descriptions of the defendant's demeanor—while sharing the life jurors' descriptions of the defendant as emotionally flat—are also more heavily laden with adjectives like “cocky,” “arrogant,” and “nonchalant.”<sup>82</sup>

Second, when the defendant has not made any prior indication that he accepts responsibility for the killing, a jury is likely to view cynically a case in mitigation that centers on influences beyond the defendant's control—such as child abuse—as nothing more than a final attempt to deny responsibility. Yet, as one commentator has ob-

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<sup>78</sup> See Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 4-6 (1993) (finding that jurors are most concerned with a defendant's future dangerousness).

<sup>79</sup> See CAL. PENAL CODE § 190.3 (West 1988).

<sup>80</sup> See Sundby, *supra* note 6, at 1166 n.119 (noting that 50% of the California jurors expressed some level of concern that the defendant would be released upon parole); William J. Bowers & Benjamin Steiner, *Death by False Choice and Forced Choice: Empirical Evidence of Misguided Discretion in Capital Sentencing*, 31-32 (unpublished manuscript, on file with author).

<sup>81</sup> “He showed no regret, no remorse—he was acting like he wasn't there.” (F<sub>17</sub>D<sub>3</sub>). A strategy that involved denying guilt during the guilt-innocence phase and later admitting it during the penalty phase struck jurors as “reflecting badly on the defendant,” (M<sub>15</sub>D<sub>16</sub>), and as “grasping at straws,” (F<sub>39</sub>D<sub>3</sub>).

<sup>82</sup> See *supra* text accompanying notes 23-27.

served: "Everything is lost if the jury (having just convicted the defendant of murder) interprets the use of mitigating material as an attempt to excuse the murder or evade responsibility."<sup>83</sup>

In presenting its case in mitigation, therefore, the defense walks a tightrope. At the same time that the defense tries to help the jury understand how factors beyond the defendant's control influenced him, it must minimize the appearance of placing the blame on everyone but the defendant himself. Walking this tightrope is not easy, especially when the defendant did not make any substantial attempt to accept responsibility before the penalty phase. The following jurors' comments are typical of jurors in cases in which the defendant maintained a denial defense at the guilt phase and then presented mitigating evidence at the penalty phase.

"I thought it would have been a better move for him to make a plea because we saw no remorse—almost a cocky attitude. He wanted to blame others for the crime because other people sold him drugs and stuff." (F<sub>19</sub>D<sub>15</sub>).

"I don't think he was capable of being sorry. How can you be sorry for what you can't take responsibility for? I don't think he had accepted responsibility for the killing, honestly. I think he put the blame on society." (F<sub>40</sub>D<sub>15</sub>).

"He was arrogant. He showed no remorse in his testimony [at the guilt stage], and he didn't even show any at the penalty phase. It was like, 'This is why I'm like I am. I'm a poor little boy that didn't have any proper upbringing and I've been beat and abused all my life.'" (F<sub>9</sub>D<sub>12</sub>).

"I had a sense that he was mad, and like, this is not my fault, society did this to me, everybody else did this to me. That was his general demeanor. Because, see, he testified on his own behalf [and denied guilt], so I have a basis for the impression that I have of him and the reason why he felt that everybody else had done him wrong." (F<sub>15</sub>D<sub>2</sub>).

"At the sentencing stage, the impression I got was that he still didn't understand what had happened, that he couldn't keep blaming other people, that he had to take responsibility for what he had done." (M<sub>15</sub>D<sub>16</sub>).

In short, unless the defendant demonstrates acceptance of responsibility prior to the penalty phase, the jury likely will see mitigation evidence bearing on the defendant's upbringing and mental capabilities through a jaundiced perspective along the lines of "there he goes again, placing blame on everyone but himself."

By contrast, jurors were more receptive to mitigation cases when the defendant previously had expressed some acceptance of responsi-

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<sup>83</sup> Doyle, *supra* note 32, at 439.

bility for the killing. This tendency was especially true in cases in which the defendant acknowledged from the outset of the trial that he had done the killing.<sup>84</sup> Although many jurors initially seemed surprised that the defendant did not contest his guilt vigorously, they usually understood his strategy by the start of the penalty stage:

[The defendant] anticipated the guilty verdict. It was my belief up to that point in time that many of the things that had been said in foundation were leading up to what I think was the real intent of the defense attorney, and that was not so much to find [the defendant] not guilty of the crime as charged, because he admitted it, but to mitigate the reasons for his crime due to his background and hopefully get life in prison without possibility of parole. (M<sub>20</sub>L<sub>3</sub>).

Indeed, in this particular defendant's case, his confession to the crime, together with his minimal defense during the guilt stage, led some jurors to conclude that the trial had instilled "peace of mind" in the defendant. (M<sub>37</sub>L<sub>3</sub>).<sup>85</sup> One juror described the defendant as "looking resolved—but not in a bitter sort of way, just accepting." (M<sub>34</sub>L<sub>3</sub>). And while the jurors disagreed over whether his admission of guilt reflected remorse,<sup>86</sup> every one of the interviewed jurors viewed his acceptance of responsibility as a positive sign that he would behave well in prison.

Jurors similarly were impressed with another defendant who took the stand during the guilt phase and acknowledged responsibility for the killing, even when the prosecutor challenged him:

When he was testifying, I had the feeling that he was not very bright, that he was socially immature, that he was very awkward. He was very sorry—felt real remorse. He did not make any excuses for himself. Interestingly, he was able to handle the prosecution fairly well. He didn't break down—he *stuck to his story and his responsibility for what happened*. He really did not let the prosecutor intimidate him that much. (F<sub>38</sub>L<sub>15</sub>).

As with the prior case, not all of the jurors agreed that the defendant was sorry.<sup>87</sup> Nonetheless, his admission of guilt helped lay the foundation for evidence introduced during the mitigation case, such as testi-

<sup>84</sup> In one case, a juror recalled that the defense attorney in his opening statement had admitted that the defendant was the killer, saying, "This is not a who-done-it,' those were his words, 'this is not a who-done-it.'" (F<sub>41</sub>L<sub>14</sub>).

<sup>85</sup> "His attorneys were more apologetic than they were anything else during the guilt phase." (M<sub>37</sub>L<sub>3</sub>).

<sup>86</sup> One juror, for instance, stated that the defendant "requested right away to be sentenced—he demonstrated remorse," (M<sub>38</sub>L<sub>3</sub>), while another maintained that "I never saw any signs of being sorry," (F<sub>21</sub>L<sub>3</sub>).

<sup>87</sup> "He was a frightened kid begging for mercy—he didn't know how to be sorry or to show he was sorry." (F<sub>42</sub>L<sub>15</sub>). Another juror noted that "we really debated, there were some that questioned whether [his testimony] was staged and all, whether he had been coached." (F<sub>38</sub>L<sub>15</sub>).

mony from a prison guard that he had been cooperative and had adjusted well to prison.

As noted earlier, even a vigorously pursued admission defense, as long as the defendant based it on a plausible set of facts, did not appear to undermine confessions and other acts of acceptance of responsibility.<sup>88</sup> Unlike the denial defense cases, the jurors generally did not perceive as manipulative or deceptive the defense's argument that the prosecution had failed to prove that the killing arose to capital murder: "It was almost like, well if you guys vote second-degree murder, then thanks a lot kind of thing, but we're not really shooting for that because it's just the preponderance of the evidence is so overwhelming." (M<sub>39</sub>L<sub>2</sub>).<sup>89</sup>

These cases indicate that denial and admission defenses send significantly different messages to the jury when the defense introduces mitigation evidence bearing on the defendant's responsibility (e.g.,

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<sup>88</sup> See *supra* Part III.C.

<sup>89</sup> One juror's description in a different case reflects a remarkable understanding of the defense attorney's approach:

The defense argument was solely that he did murder someone, however it was not premeditated murder; it was something less than murder in the first degree. It was manslaughter, it was voluntary manslaughter, involuntary manslaughter, it was something other than capital murder. The defense case focused on, I think from day one, on "maybe I can get this guy less than life without parole or the death penalty." That was the focus and [the attorney] did as good a job as he could with respect to the facts he had. I think [the attorney] didn't have necessarily a plan going forward when the trial started, and I think that was intentional. He wanted to hear the evidence that the prosecution would put on and then would establish what his defense was. If the prosecutor put on a real good, terrific case, he then would proceed accordingly, and his cross-examinations kind of indicated that. He focused, for example, on some questions: "could it have been an accident?" For example, [with] the forensic people [the attorney asked]—I hope I've used that term correctly, the people that were testifying in regard to the physical evidence—"Could it have occurred another way? Could [the defendant] have been frightened?" And the answers he was getting back from these prosecution witnesses wasn't enough for him to help him to try to make a case of accident, mistake, [or] error. Big example—three bullets or four bullets were done at close range in the guy's head, and he asked questions: "Is there any possibility that they weren't done at close range, that they were from a distance?" Because what he tried to do, he tried to maintain that the victim picked up a rock, which the guy probably did, and that they shot him out of fright—they were afraid of him. Which is kind of ludicrous, but the facts just didn't turn the way he wanted them to, so there wasn't any, ever any doubt that they shot him. So the issue then became what degree. He was fun to watch; he really is terrific. [You should] read some of his transcript of the testimony, his closing argument. He set forth, you know, "ladies and gentlemen of the jury, this murder, this occurred, could have occurred in one of four ways," and he said four. He said, "I leave it to you to judge which way it occurred. But I do have an opinion." His opinion was it certainly was not murder in the first degree, maybe second degree or manslaughter. What he tried to do was convince the jury that the facts constituted this crime as opposed to this crime, not that a crime hadn't occurred. And he did an excellent job at it. (M<sub>40</sub>L<sub>6</sub>).

mental impairment or child abuse). After a denial defense, jurors are likely to characterize this type of mitigation evidence as the defense saying, "We tried to convince you that the defendant was not responsible for the killing, but since you found him guilty, let us explain to you why he is not fully responsible for becoming the killer that we claimed he wasn't." This shift in the defense's message inevitably will contrast sharply with the prosecution's relentlessly consistent stance from the guilt phase onward that the defendant is a cold-blooded, remorseless killer.

On the other hand, a strategically presented admission defense can set the stage for mitigation evidence to fit seamlessly into an overall story rather than require a dramatic shift in the storyline. Consider, for instance, the very different message a defendant sends to the jury during the penalty phase when he acknowledges responsibility for the killing but argues that he acted in self-defense during a drug deal gone awry (a defense that, if accepted by the jury, would have resulted in an acquittal). The defense attorney now can argue, "Although you have found that the circumstances surrounding the drug deal did not amount to self-defense, we should explain to you how the defendant became involved in such dealings in the first place, how his mother was a prostitute, how she started using Joe when he was but in the third grade to go buy drugs for her and her tricks . . . ." If presented in this way, the mitigation evidence no longer represents an inconsistent change in the overall story. Rather, it becomes an effective tool to help the jury understand more fully the context of the crime about which they already have heard.

Moreover, an admission defense sometimes was an effective mechanism for raising matters during the guilt phase that mitigated the defendant's culpability, such as showing that the defendant had played a lesser role in the crime or that the victim had been engaged in drug dealing or other high-risk behavior. Raising these issues at the guilt stage often helped prepare the jury for the defense's later argument against a death sentence at the penalty phase. The jury's perception that the defendant had not been a leader or that the killing had not been premeditated, for example, were influential factors in many life cases, even though they did not necessarily disqualify the defendant from the death penalty.<sup>90</sup> Consider one juror's comment that typifies this effect:

The reason that we lightened the sentence up on him was the fact that he seemed to have been drug along, that he was easily influenced. He was not really that aggressive in this whole act. And his

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<sup>90</sup> See *supra* note 54 and accompanying text.

whole participation in it seemed to involve holding her while [the other defendant] stabbed her. (M<sub>41</sub>L<sub>16</sub>).<sup>91</sup>

The defense often developed this type of evidence at the guilt stage through cross-examination of the prosecution's witnesses and experts, setting the stage for an argument at the penalty phase that the defendant did not deserve the death penalty.

In fact, although it may initially sound inconsistent with the acceptance of responsibility theme, one can make a convincing argument that it is often strategically unwise to enter a guilty plea during the guilt-innocence phase and thereby move the trial directly into the penalty phase.<sup>92</sup> As Professor Goodpaster has observed, a guilty plea concentrates all of the aggravating evidence into the penalty phase rather than allowing the jury to hear at least the crime evidence at the guilt stage, which may help diminish its impact by the time the penalty phase takes place.<sup>93</sup> A guilt-innocence trial also may enable the defense to introduce mitigating evidence, such as the defendant's mental impairment, earlier in the proceeding. Introducing mitigating evidence early adds an additional humanizing dimension to the image of the defendant as a two-dimensional, cold-hearted killer—an image the jurors are otherwise likely to form prior to the penalty phase.<sup>94</sup>

Not pleading guilty, therefore, does not necessarily mean that the defendant's acceptance of responsibility will be undermined as with a denial defense. Depending on the nature of the evidence, the most effective defense at the guilt-innocence phase might be as simple as a tacit guilty plea that expressly establishes a theme of accepting responsibility.<sup>95</sup> Alternatively, the defendant may find it best to use a more forceful defense that raises doubts about his intent or role. In short, the key is for the defense to structure the guilt-innocence presenta-

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<sup>91</sup> When asked the defendant's occupation, this juror replied, "scapegoat." (M<sub>41</sub>L<sub>16</sub>).

<sup>92</sup> In some states, such as Virginia, defendants who plead guilty also waive their right to have a jury decide the sentencing issue. See VA. S. CT. RULE 3A:13; Pruet v. Commonwealth, 351 S.E.2d 1, 8 (Va. 1986) (ruling that waiver of jury under Rule 3A:13 by pleading guilty also applies to capital cases).

<sup>93</sup> See Goodpaster, *supra* note 41, at 331-32.

<sup>94</sup> The Susan Smith case illustrates how the defense can soften the jury's image of the defendant by placing its mitigation case into evidence during the guilt-innocence stage. In the Smith case, the prosecution inserted the defendant's motive into issue during the guilt-innocence phase by stating that Smith had killed the boys for selfish reasons. See *Agent Testifies Smith Was "Remorseful, Suicidal,"* CHARLESTON GAZETTE, July 21, 1995, at 2A. Doing so provided the defense with an opportunity to introduce rebuttal evidence, such as evidence of Smith's severe depression. See *id.* This allowed the defense to help the jury appreciate, prior to the penalty phase, that the crime was not simply a cold-blooded, remorseless killing.

<sup>95</sup> Recall a juror's description of the one attorney's defense as merely "apologetic." See *supra* note 85.



tion in a way that harmonizes with the mitigation theme during the penalty stage.

FINAL OBSERVATIONS: THE ETHICS OF TRIAL STRATEGY  
IN CAPITAL CASES

This Article's findings suggest that when capital jurors consider the defendant's degree of remorse in their decision making, it is not solely in the narrow sense of the defendant expressing sorrow for the killing. Though jurors undoubtedly place a great deal of weight on a sincere expression of sorrow, the reality is that such expressions are not only rare but also rarely believed even when made. By no means, however, is this to say that the defendant's attitude, toward both the killing and the trial, does not play a significant role in the jury's decision-making process. Rather, capital trials are situations to which the old saying—actions speak louder than words—truly does apply. The more evidence that the jury can find indicating the defendant's acceptance of responsibility for the killing, the more likely the jury will return a life sentence. The reasons are simple: an acknowledgment of responsibility by the defendant tends to soften any appearance that he is dangerously manipulative while also diminishing the jury's tendency to dismiss mitigation evidence as merely another hollow attempt by the defendant to place the blame somewhere else.

The most difficult situation for a defense attorney in a capital case, therefore, arises when a client wants to contest fully his guilt and argue that he was not the killer. In some cases, the lawyer will be ethically obligated to present a denial defense despite the possible increased risks of a death sentence—the most obvious situation occurring when the defendant is in fact innocent of the crime. The more troubling case is when the defendant insists on pursuing a claim of complete innocence despite strong prosecution evidence to the contrary. Now, the attorney is faced with a situation in which the defendant desires to undertake a defense strategy that may prove to be not only unwise but deadly.

The decision of whether to pursue a claim of innocence rightfully belongs to the defendant.<sup>96</sup> This Article's findings, however, strongly suggest that attorneys have an obligation to explain fully to the defen-

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<sup>96</sup> The underlying tension over which decisions the defendant should make and which belong to the defense attorney often is brought out in high relief during capital representation. The recent Unabomber prosecution vividly illustrates this tension at work. The defendant, Theodore Kaczynski, vigorously objected to any defenses that suggested he was mentally ill. See Emelyn Cruz Lat, *Kaczynski Plea Deal: Guilty Unabomber Suspect Couldn't Represent Self, Judge Had Ruled*, S.F. EXAMINER, Jan. 22, 1998, at A1. Yet his attorneys argued that evidence of his mental illness might dissuade the jury from a death sentence during the penalty phase. See *id.* This tension eased only when the defendant agreed to plead guilty, and the Government agreed not to pursue the death penalty. See *id.*

dant the possible impact that a denial defense strategy will have on the penalty phase. Even a defendant who has been involved with the criminal justice system in the past is unlikely to understand a capital trial's dynamics and the potential ramifications of a guilt-phase strategy on the penalty phase.<sup>97</sup> Yet the data presented in this Article indicate that few factors may have as great an influence on the jury's ultimate decision of whether to impose the death penalty as the presentation of a denial defense in the face of strong evidence that the defendant was indeed the killer. An attorney's failure to inform fully the defendant of these potential consequences of a guilt-phase strategy might even raise a "reasonable probability that, but for [the] unprofessional error[ ], the result of the proceeding would have been different,"<sup>98</sup> constituting grounds for a charge of ineffective assistance of counsel.<sup>99</sup>

To suggest that defense attorneys may be constitutionally and ethically obligated to inform their clients of the potential consequences of a denial defense is not to ignore the possible negative impact this advice may have on the attorney-client relationship. When the defendant is maintaining that he is in fact innocent, an attorney legitimately may be concerned that raising the possibility of admitting the killing will undermine any sense of trust. This possibility certainly argues for waiting until a relationship with the defendant has developed before broaching the subject and for laying out the strengths and weaknesses of the prosecution's case in a nonjudgmental and clear-eyed fashion. If done in this manner, the defendant is more likely to understand that the attorney is speaking to him out of a concern for the defendant's best interests.<sup>100</sup>

At a minimum, defense counsel would be greatly remiss to pursue a run-of-the-mill strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt before weighing carefully the potential impact such a strategy will have on the penalty phase. The hope of creating a lingering doubt as to the defendant's guilt appears likely to succeed only in very limited and specific situations—cases in which the prosecution is relying on circumstantial evi-

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<sup>97</sup> Cf. *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1962). *Gideon* overruled *Betts v. Brady*, 316 U.S. 455 (1942), a case in which the Court had justified denial of counsel, in part, on grounds that the defendant's prior conviction ensured that he was "not wholly unfamiliar with criminal procedure." *Id.* at 472.

<sup>98</sup> *Strickland v. Washington*, 466 U.S. 688, 694 (1984).

<sup>99</sup> Cf. *United States v. Day*, 969 F.2d 39, 43-44 (3d Cir. 1992) (holding that a claim of ineffective assistance existed when counsel's inadequate advice regarding a plea offer undermined defendant's ability to make an intelligent decision about whether to accept it).

<sup>100</sup> When an attorney and client have an ongoing relationship, counsel may be able to convince the client not to pursue a claim of innocence in the face of a strong prosecution case. See *White*, *supra* note 44, at 357 n.235 (citing Andrea Lyon, Director, Illinois Capital Resource Ctr., Evanston, Ill. (Mar. 22, 1992)).

dence and the defendant is one of several criminal actors.<sup>101</sup> A capital case clearly is one situation in which blindly relying on the presumption of innocence and putting the prosecution's evidence "to the test" may prove to be fatal.

Even a defense attorney that pursues an admission defense strategy must carefully ensure that it does not undercut the jury's sense that the defendant accepts responsibility for the killing on some level. Some factors, such as whether the defendant has confessed, inevitably will be beyond counsel's control by the onset of the trial. The guilt-phase presentation itself, however, will send an influential message to the jury, and the attorney must harmonize that message with the one sent during the penalty phase. Thus, while juries seem more receptive to admission defense challenges—including arguments that the prosecution failed to prove culpable intent, that the killing did not qualify as felony-murder, or that the defendant acted in self-defense—than denial defenses, the presentation must be plausible and not undermine the defendant's basic acknowledgment of the killing.

In the end, it seems that once capital juries reach the penalty phase, they act more as risk-and-blame assessors than as absolvers. Only rarely will a defendant convince a jury that he is truly sorry to the point that the jury will vote for a life sentence as some form of absolution. In most capital cases, defendants will present far murkier, bleaker, and less convincing pictures of their remorse. Even in those cases, however, all is not lost. Although jurors are certainly more inclined to impose a death verdict on a remorseless figure who sits emotionless throughout the trial, they do not demand full atonement before giving a life sentence. Jurors seem willing to settle for signs that the defendant at least acknowledges some responsibility for the killing—signs that dampen the jurors' concerns over the defendant's dangerousness and make them more receptive to mitigation evidence as to why the defendant does not deserve to be sentenced to death.

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101 See *supra* Part III.B.2.