Death and Human Frailty:  
Why Juror Perceptions Should Shape Capital Punishment Policy

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Introduction

The Sixth Amendment of the United States Constitution guarantees criminal defendants a trial “by an impartial jury.”¹ United States Supreme Court Justice Oliver Wendell Holmes famously elaborated, “The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”²

Despite the guarantee, recent studies have shown this constitutional right is difficult to protect.³ Of particular concern is how jurors perceive attorneys during trial and how these perceptions influence the outcome of a trial.⁴ Although improper influence is alarming at any level of the criminal justice system, it is most troubling in the context of capital cases.

This Article reviews how jurors perceive attorneys’ presentation styles, appearances, genders, and trial roles, with particular emphasis on specific events in a trial that can be perceived differently depending on who is involved—despite the same substance. It concludes that serious policy analysis about capital punishment must take these matters into consideration.

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¹ U.S. CONST. amend. VI.
² Patterson v. Colorado, 205 U.S. 454, 462 (1907).
⁴ Id. at iv.
I. Trial Influences

Various studies have shown that capital defendants face disadvantages at different phases of the trial process.\(^5\) Jurors can be especially impressionable during opening statements, cross-examinations, and upon the presentation of mitigating evidence.

A. Opening Statements

Evidence suggests between eighty and ninety percent of jurors reach their verdict during, or immediately after, opening statements, and, in such cases, “[e]verything in the trial which follows will be selectively perceived to reinforce decisions which have already been made.”\(^6\) Psychology calls this effect “confirmation bias,” which refers to “a bias—engaged by the brain that makes one actively seek information, interpretation, and memory to only observe and absorb that which affirms established beliefs while missing data that contradicts established beliefs.”\(^7\)

Juror susceptibility during opening statements thus makes it a powerful instrument in obtaining a guilty verdict in a capital trial:

In our death penalty tracking study, we examined juror verdict preferences at various points in the trial. The jurors in the tracking study gave their first

\(^5\) See id. at 4 (“Findings suggest that capital jurors are disproportionately predisposed to convict and vote for death regardless of the evidence.”); see also Shari Diamond et al., Juror Reactions to Attorneys at Trial, 87 J. CRIM. L. & CRIMINOLOGY 17, 21 (1996) (detailing the intricacies of a study conducted to gauge juror perceptions following key points during the trial process); Steve Wood et al., The Impact of Jurors’ Perceptions of Attorneys and Their Performance on Verdict, SSRN, 12 (June 1, 2010) https://ssrn.com/abstract=1633237 (referencing a study which argues that, in some instances, jurors give more weight and trust to evidence put on by the prosecution. The idea is that, because the prosecution must meet a burden of proof, jurors are more inclined to trust their presentation).


verdicts after the prosecutor’s opening statement, which presented an accurate and quite complete picture of the evidence his witnesses would later provide. At that point, approximately two-thirds of the jurors reached a verdict which remained constant for the rest of the trial.\footnote{See Diamond et al., \textit{supra} note 5, at 30 (detailing the results of the poll taken following opening statements as a part of the Death Penalty Tracking Survey indicating the substantial and often lasting impact opening statements have on the perception of capital jurors).}

Moreover, there is a correlation between the extensiveness of the prosecution’s opening statement and how early the jury reaches a verdict during trial.\footnote{Wood et al., \textit{supra} note 5, at 6.} For example, studies tracking jurors in mock criminal trials have revealed that, when the prosecution performs a particularly extensive opening statement, jurors tend to formulate robust verdicts early and maintain them throughout the rest of trial.\footnote{Id. (noting that, while jurors’ definitive verdicts generally remained constant post-opening statements, subsequent testimony “merely served to change the certainty of their decision”); \textit{see, e.g.}, Tom A. Pyszczynski & Lawrence S. Wrightsman, \textit{The Effects of Opening Statements on Mock Jurors’ Verdicts in a Simulated Criminal Trial}, 32 J. Personality \\& Social Psychol. 880-92 (1981) (providing the results of such a study in which evidence-heavy opening statements aided the jurors in making and maintaining a verdict throughout the rest of a mock trial).}

\section*{B. Cross-Examination}

Generally, jurors instinctively follow a cultural “rule” that lets an attorney attack a witness on cross-examination up to a certain point.\footnote{Lynn A. Kappelman & Dawn R. Solowey, \textit{How to Alienate a Jury (Without Even Trying)}, \textit{Massachusetts Lawyers Weekly} (June 4, 2013), http://masslawyersweekly.com/2013/06/04/how-to-alienate-a-jury-without-even-trying (“There is a fine line in cross-examination between being appropriately assertive and acting like a bully. If you cross that line, you may lose your jury’s respect and trust.”).} If the attorney does not cross this line, jurors will look favorably on the attorney conducting the cross-examination.\footnote{Id.} On the other hand, there is a chance that if the attorney goes too far in attacking a witness, sympathy will be elicited for the witness and the jurors will begin to have negative feelings toward the examining attorney.\footnote{James Rasicot, \textit{New Techniques for Winning Jury Trials} 39-40 (1990).} Although this cultural
norm applies generally to all cross-examinations, jurors do not necessarily apply it equally, particularly depending on which side of the case the attorney represents.\textsuperscript{14} Jurors may allow prosecutors to be far more aggressive towards adverse witnesses than attorneys for the defense.\textsuperscript{15}

Specifically, jurors may form negative impressions when a defense attorney attacks a prosecution’s witness on a personal level, but those same jurors can form positive impressions of the prosecution when they attack adverse witnesses in the same way.\textsuperscript{16} For example, in one survey that asked jurors about the hostility displayed by a prosecuting attorney, participants explained that they believed the prosecutor was “just doing their job by chastising the defendants,”\textsuperscript{17} that aggressiveness is an acceptable trait for the government’s attorneys, and that such an approach to cross-examination was the “mark of a good prosecutor.”\textsuperscript{18} Despite the attorneys for the defense and the prosecution displaying approximately the same level of aggressiveness during cross-examinations, jurors tend to garner positive impressions of prosecutors, while penalizing the defense.\textsuperscript{19} More specifically, when a defense attorney conducts a strong cross-examination against an expert witness testifying to the probability a capital defendant is likely to commit future violence, the effect on the juror’s ultimate verdict is minimal.\textsuperscript{20}

\textit{[A]lthough the expert was the chief witness for the prosecution in this case—providing evidence about the defendant’s future dangerousness and predicting 100\% likelihood of a further killing if he was not sentenced to die—the strong cross-examination did not affect the verdict preferences of the jurors. Fifty-two percent favored a verdict of death following a weak}

\begin{footnotesize}
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\item See Trahan, \textit{supra} note 3, at 95 (“The findings also indicate that capital jurors hold the prosecutors and defense attorneys to different standards. They often formed different perceptions of the same type of behavior depending on whether it was exhibited by the defense or prosecution.”).
\item Id.
\item Id. at 96.
\item Id.
\item Id.
\item See \textit{id.} (examining the double standards prosecutors and the defense face for the same type of behaviors, and arguing that juries tend to give more latitude to prosecutors).
\item Diamond et al., \textit{supra} note 5, at 39.
\end{enumerate}
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cross-examination and 52% favored death following a strong cross-examination.\textsuperscript{21}

This survey indicates that jurors in capital cases tend to accept the testimony of government expert witnesses even in the face of strong defense attorney cross-examination.\textsuperscript{22}

\section*{\textbf{C. Mitigation Evidence}}

Mitigation evidence is presented for the purpose of showing circumstances that justify reducing a death penalty sentence to a life sentence.\textsuperscript{23} Some survey results suggest, however, that jurors do not fully consider mitigation evidence presented by defense attorneys.\textsuperscript{24} A juror’s aversion to the presentation of mitigation evidence has also shown to sometimes impact his perceptions of the defense attorney; that is, sometimes, “jurors not only rejected the mitigation presented at trial, but the defense attorneys for presenting it.”\textsuperscript{25}

Of course, whether or not it will be rejected by jurors, defense attorneys are compelled by law to present mitigation evidence in capital trials.\textsuperscript{26} Indeed, under the Supreme Court’s holding in \textit{Wiggins v. Smith},\textsuperscript{27} a defense attorney who fails to adequately investigate and present mitigating evidence, such as personal and social history, can be deemed

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\item Id. at 40.
\item See id. (showing cross-examination had little to no effect on how jurors would rule).
\item Mitigation in Capital Cases, \textit{CAPITAL PUNISHMENT IN CONTEXT}, http://www.capitalpunishmentincontext.org/issues/mitigation (“Mitigating factors frequently address the defendant background, including a history of mental illness or intellectual disability, previous trauma suffered by the defendant, or the absence of a prior criminal record. A defendant who has faced life with physical or emotional handicaps maybe deemed less fully responsible for his criminal actions.”).
\item See Trahan, supra note 3, at 99-100; see also Stephen P. Garvey, \textit{Aggravation and Mitigation in Capital Cases: What Do Jurors Think?}, 98 COLUM. L. REV. 1538, 1539 (1998) (The study showed jurors tend to give limited effect to mitigating factors presented by a defense attorney in a capital case.).
\item Trahan, supra note 3 at 99-100.
\item Id. at 100.
\item 539 U.S. 510 (2003).
\end{enumerate}
\end{footnotesize}
ineffective and in violation of the defendant’s Sixth Amendment rights.\textsuperscript{28} The resulting “Catch-22” for defense counsel is particularly troubling.

II. Characteristics of Counsel

As discussed previously, jurors may treat prosecutors and defense attorneys differently as to perceived hostility during cross-examinations. However, aggressiveness is not the only characteristic on which jurors often judge attorneys for the prosecution and defense differently. Jurors have shown to judge attorneys differently based on their mannerisms and physical characteristics. For example, studies have shown that jurors may develop positive impressions of government attorneys who are theatrical, confident, and well-dressed, while they may chastise defense attorneys for displaying indistinguishable characteristics.\textsuperscript{29} The use of theatrics by the defense is often interpreted as an attempt to manipulate the jury,\textsuperscript{30} and confidence may cast the attorney as arrogant.\textsuperscript{31} The defense lawyer’s appearance prompts criticism before the attorney even speaks, whether the attorney dresses humbly, indicating that they may not be confident, or formally, indicating, likely incorrectly, to jurors that they may be too confident or even cocky.\textsuperscript{32}

A. Theatrics

Generally, jurors appreciate when government attorneys display a high level of emotion and dramatize the evidence they are presenting.\textsuperscript{33} The use of theatrics may be well-received because of a pre-existing high level

\textsuperscript{28} See \textit{Wiggins}, 539 U.S. at 534-35. \textit{Wiggins} is an example of a case in which a capital defendant who had been convicted of murder and sentenced to death was deemed to have had ineffective counsel at his trial because his attorney failed to properly research, discover, and present mitigating evidence.

\textsuperscript{29} See \textit{Trahan}, supra note 3, at 46-49, 68-70 (analyzing juror reactions to the same theatric displays by both prosecutors and defense attorneys).

\textsuperscript{30} \textit{Id.} at 46-48.

\textsuperscript{31} \textit{Id.} at 49.

\textsuperscript{32} \textit{Id.} at 48-49.

\textsuperscript{33} \textit{Id.} at 68-70.
of trust toward the prosecution.\textsuperscript{34} Jurors do not tend to perceive the government’s use of theatrics as an attempt to manipulate them or cover up bad facts of their case; rather, well-spoken prosecutors are often seen as “charismatic individuals who [are] naturally and justifiably outraged by the defendants and their crimes.”\textsuperscript{35}

On the other hand, defense attorneys using high emotion, dramatization, and theatrics during trial can garner negative impressions from the jury, with jurors feeling as if “the defense attorney’s theatrics [are] an attempt to distract them from the facts and evidence.”\textsuperscript{36} Such jurors feel manipulated on an emotional level, which leads to a loss of credibility for the counselor.\textsuperscript{37}

Like mitigation evidence, these advocacy techniques are required of defense attorneys under the Model Rules of Professional Conduct: “These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests . . . .”\textsuperscript{38} Despite the legal obligation to zealously advocate on a capital defendant’s behalf, many jurors penalize defense attorneys for charismatically pursuing their client’s interests not knowing that the attorney is doing all he can to advocate on behalf of the client.

\textbf{B. Self-Esteem}

Similar to aggressiveness and theatrics, jurors may perceive an obvious high level of self-esteem differently depending on whether it is being exhibited by the prosecution or the defense attorney.\textsuperscript{39} Specifically, when the government attorney displays heightened levels of self-esteem, some jurors describe the prosecutor as “confident” others described them as “cocky,” however, nearly all jurors still had positive impressions of

\textsuperscript{34} See id. at 68 (finding generally that jurors find prosecutors to be more easily trusted than defense lawyers).
\textsuperscript{35} Trahan, supra note 3, at 96.
\textsuperscript{36} Id. at 95.
\textsuperscript{37} Id.
\textsuperscript{38} MODEL RULES OF PROF’L CONDUCT Preamble (AM. BAR ASS’N 1983).
\textsuperscript{39} Adam Trahan & Daniel Stewart, Examining Capital Jurors’ Impressions of Attorneys’ Personal Characteristics and Their Impact on Sentencing Outcomes, 7 APPLIED PSYCHOL. IN CRIM. JUST. 93, 102 (2011).
the prosecutor. On the other hand, when the defense counsel displays similar levels of self-esteem, surveyed jurors had negative impressions, describing the attorney as “arrogant, ego maniacal individuals whose sense of self was unfounded and counterproductive to their efforts.” A paradox can arise if those same jurors are equally critical of defense attorneys who appear to lack self-confidence.

C. Appearance

In addition to how an attorney acts, his or her physical appearance can also exert compelling influence over jurors and how they make decisions. Relevant factors that jurors either consciously or subconsciously consider include race, gender, dress, jewelry, body build, hairstyle, facial hair, makeup, posture, and demeanor, among numerous other characteristics. Similar to other verbal or mechanical characteristics, a defense attorney can be disadvantaged by juror sentiment about his or her physical attributes.

As to attire, there is often little defense attorneys can do to win points with the jury through their dress. In one study in particular, when defense attorneys dressed conservatively, jurors tended to characterize the attorney’s dress as outdated and cheap. In mild instances, surveyed jurors reported the defense attorneys appeared to be unprofessional. However, in more severe cases, jurors described the defense attorney, based entirely off his physical appearance, as looking like the “thug of the world,” an “alcoholic,” and an “undertaker.” One juror surveyed

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40 Id. at 99-100.
41 Id. at 102.
42 Id.
43 See id. at 97-99 (providing a non-extensive list of factors that jurors participating in the survey considered).
44 Id. at 97.
45 Trahan & Stewart, supra note 39, at 98.
46 Id. at 98.
47 Id. at 97.
48 Id. at 98.
49 Id. at 98.
stated that, “[i]t was astonishing that [the lawyer] had a family at all.”

At the same time, defense attorneys dressed in more expensive clothing were considered “flashy,” said to “exhibit inflated egos,” and labeled as “sleaze bags.”

In contrast, the prosecution’s appearance can have a significant positive influence over the jury, with surveyed jurors in the same study explicitly stating that the prosecutor’s appearance influenced their ultimate impression of the prosecution’s case. For instance, one juror stated the prosecutor was “[v]ery cute, handsome and dresses very nicely. He won the jurors.” Similarly, another juror was overwhelmed by the prosecutor’s attractiveness, exclaiming that the attorney was “wonderful, dressed wonderful, gorgeous eyes. Oh, beautiful man.”

It is important to note there is no evidence that government attorneys purposely use physical appearance, attractiveness, or attire to purposefully coerce juries. Although the studies reviewed do indicate physical appearance and dress can influence how jurors construe information and, ultimately, their decision-making, that is likely not purposeful on the part of the benefactor prosecutors. Yet, the effect is measurable, and is a potential influence on a capital jury.

**D. Gender**

In 1873, the United States Supreme Court held, in *Bradwell v. Illinois*, that a state could constitutionally deny law licenses to women. Justice Bradley infamously concurred, “The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.” Today, however, women have

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51 *Id.* at 102.
52 *Id.*
53 *Id.* at 98.
54 *Id.* at 99.
55 *Id.*
57 83 U.S. 130 (1872).
58 *Bradwell*, 83 U.S. at 132.
59 *Id.* at 141.
exceeded well beyond Justice Bradley’s archaic method of thinking. But while invidious sexism or belief in traditional gender roles may be less apparent to the public, the history of male chauvinism is alive and well in the United States in the subconscious minds of many jurors. Because of this, unfortunately the credibility of a lawyer may be perceived differently depending on his or her gender, regardless of the content or quality of what he or she is saying.

Jurors can view female attorneys as “less competent, less friendly, and less powerful in their presentation style than their male counterparts.” Specifically, females are often unfairly labeled as being part of one of two different concepts—the “bitch” concept and the “poor little woman” concept. In the first, jurors tend to assume women attorneys are “aggressive, unreasonable, emotional, and volatile.” Women who take a combative style, can be penalized by the jury for coming across as too harsh and too abrasive. In the second view, female attorneys are presumed to be “helpless, subservient, and lacking authority and direction.” Women who are affable in their style will be seen as powerless in their effort to advocate on their client’s behalf.

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60 See, e.g., Dr. Ken Broda-Bahm, Female Attorneys: Expect (But Don’t Accept) a Subtle Bias in the Courtroom, PERSUASIVE LITIGATOR (Feb. 23, 2012), http://www.persuasivelitigator.com/2012/02/female-attorneys-expect-a-subtle-bias.html (The author discusses a study conducted by DecisionQuest in 2011 of several hundred jury-eligible individuals regarding sexism in the courtroom. The survey showed that overt sexism is rarely seen anymore, particularly in larger municipalities, but there may still be prevailing subconscious gender bias throughout juries, and that bias may be impacting case outcomes.).

61 See Peter W. Hahn & Susan D. Clayton, The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions, 20 L. & HUM. BEHAV. 533, 533-54 (1996) (discussing the significant impact of how effectively an attorney presents evidence to jurors on subsequent juror decision-making).

62 Wood et al., supra note 5, at 5 (citations omitted).


64 Id.

65 Id. at 181.

66 Id. at 180.

67 Id. at 180-81.
personally, are less flexible in their dealings with others, and are unwilling to take risks during trial.68

One example of this lose-lose situation is how jurors perceive the seriousness of the crime at issue. When a female attorney speaks with an aggressive style, juries can perceive the crime at issue as “significantly more serious . . . than when the attorney was male” and using the same delivery.69 Additionally, “[f]emale attorneys who adopt . . . verbal aggression are generally perceived negatively by a jury because a jury no longer views the female attorney as having goodwill or fairness.”70 Yet, when women employ a less aggressive style, they are perceived as “[overly] emotional and caring too much.”71

When male attorneys use the same aggressive style, they are often perceived favorably.72 A potent example of this double standard is found in a study that was done by Shari Hodgson and Burt Pryor in 1984.73 Their study required that two attorneys of opposite sexes present the same closing argument to two different jury pools.74 Contextually the summation was identical.75 However, for the first group of participants the attorney was male and for the second group, female.76 Despite the indistinguishable content of the arguments, women were rated “significantly less intelligent, less friendly, less pleasant, less capable, less expert, less experienced and less trained than her male counterpart.”77 Also, the female attorney’s client was less successful, receiving more guilty “verdicts” than the male attorney.78

68 Id. at 180.
69 Nelson, supra note 63, at 186 (quoting Hahn & Clayton, supra note 61, at 544).
70 Id.
71 Id. (quoting Bryna Bogoch, Courtroom Discourse and the Gendered Construction of Professional Identity, 24 LAW & SOC. INQUIRY 329, 332 (1999)).
72 Id.
74 Id. at 7.
75 Id.
76 Id.
77 Id.
78 Id. at 8.
The gender of the attorney does not only potentially affect how jurors perceive the credibility of the attorney presenting information, but also how the jurors form their ultimate decision.\(^7\) “Generally, male attorneys are considered more credible than female attorneys, regardless of whether [the] female attorneys perform better” at trial or demonstrate a higher aptitude.\(^8\) Consequently, these baseless perceptions of female attorneys may in turn adversely affect the juror’s receptivity to the attorney’s arguments.\(^9\)

**Conclusion**

Policy arguments for capital punishment usually turn on two main points—its unique power to deter crime, and its unique ability to achieve retribution for particularly heinous offenses. Both of those policy arguments necessarily assume that the system is applying capital punishment to the correct offenders. A “mismatch” between capital sentence and the criminal defendant means that retribution is not being achieved at all, and, any deterrent effect arises only from the sheer magnitude of the sentence rather than its relationship to a specific crime. This is why, as noted at the beginning of the Article, the right to an impartial trial—free of extraneous influence—is constitutionally protected and meticulously applied in capital cases.

However, the research reviewed in this article suggests that jury verdicts in capital cases are not reached exclusively on the evidence presented at trial. Albeit, these extraneous influences are not always material. That is, they will not always change the outcome of the case, or sentence an innocent man to death. However, whether the extraneous influence occurs consciously or subconsciously, materially or immaterially, the disturbing truth is that it is a factor that may affect capital defendants’ rights to an impartial jury. As one study reported starkly: “Jurors who formed negative impressions of the defense attorneys were

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\(^7\) See Nelson, *supra* note 63, at 182 (finding gender to have an affect jurors’ decision making).

\(^8\) *Id.*

\(^9\) *Id.*
more likely to sentence their clients to death than those who reacted favorable toward the defense counsel.82

This Article does not make a wholesale challenge to jury trials—indeed, the same Constitution that guarantees the right to an impartial trial also guarantees a defendant’s right to trial before a jury of his peers. The issues identified in the referenced studies may, or may not, be present in any given trial, and there are many tools available to minimize their potentially pernicious effects.

For the special situation of capital punishment, which uniquely depends on the accuracy of its application to justify its use, these issues must be part of the policy discussion. Advocates for the use of capital punishment must reckon with them and offer explanations for how to address them, or their other policy arguments for the death penalty simply do not ring true.

82 Trahan & Stewart, supra note 39, at 102.