

Vox Populi: Making Use of User Comments on Online News Stories in Virginia Capital Cases to Obtain Meaningful Voir Dire Examination of Prospective Jurors

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In recent years, Internet news outlets have become increasingly interactive, often offering readers the opportunity to comment on stories. In capital cases, these comments range from expressions of sympathy for victims to vitriolic condemnations of the accused and the justice system. As the authors of these anonymous posts presumably include potential members of jury pools, online comments provide a new way to document persistent and powerful biases held by the public, and represent a rich source of evidence defense attorneys can use in demonstrating the need for probing *voir dire* examination of prospective jurors.

In *Morgan v. Illinois*, the Supreme Court established that a capital defendant may challenge for cause any prospective juror who would vote for death in every case or would fail to consider in good faith both aggravating and mitigating circumstances.¹ A capital defendant is entitled to determine “whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”² “If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.”³ This research project collects and analyzes on-line comments on news stories in Virginia murder cases and points out the potentially disqualifying biases they exhibit. Although the collected statements may not categorically demonstrate attitudes that would prevent the writers from voting for a life sentence, they at least raise a question about “substantial

¹ *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

² *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

³ *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

impairment” under *Morgan*. The comments, therefore, may be able to be used by defense counsel to help obtain adequate *voir dire* questioning in capital cases.

Methodology

The project focused on Virginia state and federal murder cases from 2006 to 2011, roughly a five year sample. It included only cases where there was a capital indictment and some indication that prosecutors would seek the death penalty. A list of cases was culled from past VC3 client files along with other high profile cases in which VC3 was not involved. For each case identified, several methods were used to find internet user comments. The most useful tool was Google searches such as “[defendant name] capital murder” or “[defendant name] virginia.” Google searches frequently turned up coverage in both local and national news outlets. Searches of the archives of specific news outlets were also useful, but Google searches usually turned up the same results. The most common news sources used included local newspapers (Hampton Roads/Virginian-Pilot, Richmond Times-Dispatch, Roanoke Times, Newport News Daily Press, etc.), local television (WHSV, NBC 12 News, WAVY 10, WVIR, etc.), and national coverage where applicable (CNN, ABCNews, FoxNews, etc.).

Google searches usually also uncovered stories on “fringe” websites that obsessively track capital cases throughout the country and report on developments with a strong pro-capital-punishment slant. Examples of these “fringe” websites included The Death Penalty Discussion Board (<http://off2dr.com>), The Crime and Capital Punishment Forum (<http://cncpunishment.com/forums/>), and www.prodeathpenalty.com. The relevance of these websites for the purposes of this research is somewhat limited. They are less likely to represent jurors in an average jury pool; instead, they are populated by only the most pro-death-penalty commentators. Comments made on news stories are more representative in that they also

include people who oppose the death penalty. They are also more likely, especially in local newspapers, to be written by commenters who live in the same jurisdiction as the crime and the trial. For this reason, the sample of comments omitted these pro-capital-punishment forums and focused on stories from commercial news outlets, which are more likely to provide a representative sample of reader comments.

There are three particularly important time periods in a case during which online comments are most common: right after the defendant's arrest or indictment, as the trial begins or major developments occur, and after sentencing. Generally, right after arrest or indictment, there are only a few comments that appear relevant to demonstrating juror bias with respect to an eventual capital trial. There are, however, occasional comments regarding the appropriateness of the death penalty that show little regard for the facts of the case, so this stage is not entirely without relevant comments. Comments as the trial begins or as major developments occur can become more venomous, but they are still most often tame compared to what tends to appear at the end of trial. The most comments are made after sentencing, and at that stage, commenters seem most apt to reveal their true opinions. The most relevant comments come from stories about a defendant getting a life sentence either by proceeding to trial or through a plea; life sentences seem to cause a particularly vitriolic response from many online commenters. The comment collection, therefore, reflects all time periods in cases, but focuses on these three events, which tend to give rise to the most comments.

From these news stories identified, a sample was collected of comments that exhibited the possibility of a legally-cognizable bias. Each comment was recorded and categorized by one or more bias demonstrated. The biases into which the comments were categorized were:

- Comment’s author is not life-qualified, is an automatic death penalty juror, or views an “assembly line capital punishment system” as desirable, and may be excludable under *Morgan v. Illinois*.
- Comment’s author is not able to give the defendant individualized consideration and may be excludable under *Morgan v. Illinois*.
- Comment’s author is unwilling to consider mitigation and may be excludable under *Lockett v. Ohio*.
- Comment’s author believes that prison is not an appropriate punishment, is “too easy,” or is a waste of taxpayer money, and may be excludable under *Morgan v. Illinois*.
- Comment’s author demonstrates a refusal to believe that “life” really means life and may be excludable under *Simmons, v. South Carolina*, and *Yarbrough v. Commonwealth*.
- Comment’s author advocates outrageous penalties that would violate the Eighth Amendment and may be excludable under *Morgan v. Illinois*.
- Comment’s author demonstrates a possible racial bias, including bias against illegal aliens, and may be excludable under *Turner v. Murray* and *McClesky v. Kemp*.

Limitations

This project is, of course, not without its limitations. Access to news stories and comments can be difficult because some websites are subscription-only or retain stories for only a short period of time. Offensive comments are also frequently removed, so some of the most pertinent comments for purposes of this collection are likely removed almost as soon as they are posted. The effect of these removals on the representativeness of the comments likely varies by category of bias, with racial bias liable to be the most underrepresented. Websites frequently include messages such as “[c]omments have been disabled on this story due to excessive violations of PilotOnline.com’s posting guidelines.”⁴ As a result, collection of racist and violent comments is severely hampered. The comments collected are, therefore, necessarily only a subset of those that exist and most likely a rather tame subset.

⁴ Duane Bourne, *Man who killed woman in Hilltop parking lot gets 2 life terms*, PilotOnline.com (Oct. 15, 2008) <http://hamptonroads.com/2008/10/hilltop-murderer-sentenced-2-consecutive-life-terms>.

Looking ahead to how these comments can be utilized in a given capital case, a few other limitations arise. First, there is the obvious problem of proving that comment authors are not jurors who would reveal their disqualification through relatively limited *voir dire*. With some of the examined biases, this is a particularly difficult proposition. The “racial bias” group, for example, requires probing *voir dire*, as jurors tend to hide such prejudice. The “not life-qualified” group, however, demonstrates a bias that relatively limited capital *voir dire* can sometimes root out. Many judges are susceptible to the assumption that nonspecific and leading *voir dire* questions will adequately address this concern. Some other online comments, however, demonstrate that this is not necessarily the case. A few comment authors have clearly learned how the system works and know that they must appear fair in order to serve on a jury. These types of comments are helpful to show that some jurors are educated and must be questioned thoroughly to reveal their true views.

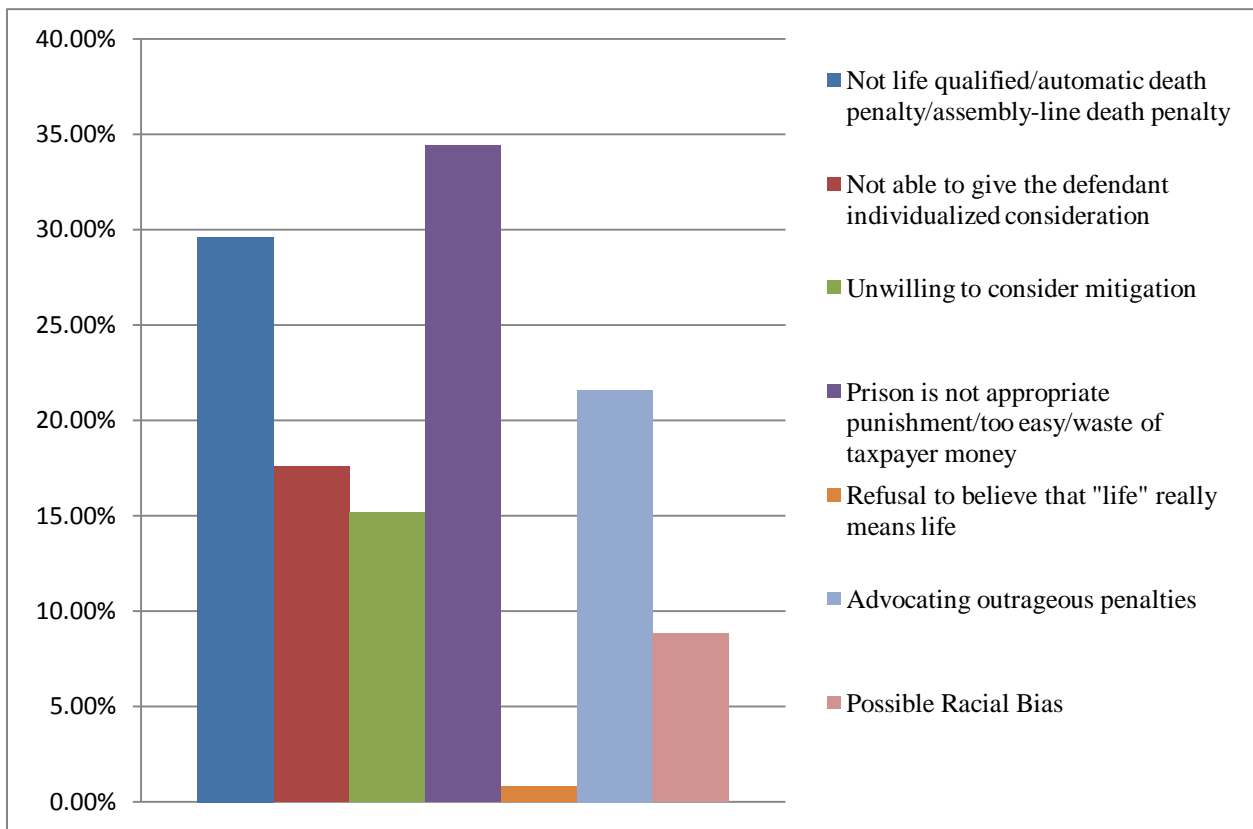
There is also a limit to the extent to which this methodology can be used to find relevant comments in the case currently being tried. Generally speaking, comments get more malicious and biased as a case progresses. Some potentially relevant comments may be available after a capital indictment is handed down, but the most pertinent comments will usually occur after the conclusion of a case, especially after a life sentence. This, while comments from the case that is being tried are likely the most compelling way to demonstrate possible bias, they will also be very difficult to find. Therefore, this collection of comments is best used to demonstrate biases that exist in society at large in order to argue for searching *voir dire* of a jury pool in any case.

Findings

The comments disclose seven categories of legally cognizable bias, each of which occurs with a differing frequency. The collection of comments is obviously not a scientific sampling

and does not support any claim as to representativeness of an average jury pool. It does not demonstrate how common these biases are in the general population or even in all online news comments. However, it does show that some biases occur particularly frequently in Internet comments. It may, therefore, be relevant to alert judges to the types of attitudes that exist among members of the public. Of the comments that demonstrate some potential bias, the breakdown of relative frequency by bias is represented in Figure 1.

Figure 1



The most common bias revealed in online comments is the belief that prison is not an appropriate punishment for a defendant because it is “too easy” or would be a waste of taxpayer dollars. Typical comments include:

- “What was the judge thinking? Now we have to house, feed, and support this murderer for the rest of his life.”⁵
- “Give him the lethal injection and save our tax dollars on people who deserve it.”⁶
- “I don’t want another tax dollar used to house such slime in prison. There is NO rehabilitating career criminals. I’ve got a feeling that their mugshots already existed in the system prior to this incident. Let’s bring back ‘sparky’, I’ll be glad to hit the switch for these two.”⁷
- “How much money has the government spent on this case? These ppl [sic] have been given 3 hots and cot for long enough!”⁸
- “So it’s fair to the citizens that we have to work hard to pay more taxes to feed, and give shelter & clothing for this dirtbag for life? You tell me what did the citizens do to deserve that?”⁹
- “Feeding this SOB for the next 20 or 30 years is another waste of my tax dollars!!!! He should be put in front of a firing squad.”¹⁰
- “Just pointing out to the rest of the tax payers how fat this F#&k piece of S@#* has gotten since he has been in jail. I’m just saying putting him in a \$5.00 hole would be sooo [sic] much cheaper then [sic] life in prison. Looking in his eyes as they pump the poison in his veins would be priceless [sic]”¹¹
- “[H]e is in a country that is going to take care of hem [sic], his family, and give him free social security, medical, and housing assistance. Oh, and get him a job even though he is not qualified for it.”¹²
- “I dont [sic] know hwy [sic] these people who commit these crimes and addmit [sic] to it they aren't given the DEATH sentence instead of costing the txpayers [sic] more money to house them when the economy is down enough. I think they sometimes do this kind of thing because they know they can get 3 Hots and a Cot.”¹³

⁵ Shawn Day, *Man sentenced to life for killings in Va. Beach*, PilotOnline.com, (Oct. 21, 2009)

<http://hamptonroads.com/2009/10/man-sentenced-life-killings-va-beach>.

⁶ Kristin Davis, *Man gets life sentence in murder of Virginia Beach detective*, PilotOnline.com (Feb. 17, 2011)

<http://hamptonroads.com/2011/02/man-gets-life-sentence-murder-virginia-beach-detective>.

⁷ Aaron Applegate & Shawn Day, *Shooting of officer 'was very quick, totally unexpected'*, PilotOnline.com (Aug. 9, 2008) <http://hamptonroads.com/2008/08/virginia-beach-police-officer-shot-and-killed-green-run?page=3#comments>.

⁸ *Federal Grand Jury Indicts Couple for Mathias Triple Murder*, WHSV.com (Feb. 17, 2011)

http://www.wHSV.com/home/headlines/Federal_Grand_Jury_Indicts_Couple_for_Mathias_Triple_Murder_116424844.html?storySection=comments.

⁹ Davis, *supra* note 6.

¹⁰ Amanda Stewart, *Park ranger pleads guilty to killing family*, InsideNOVA.com (Dec. 28, 2010)

<http://www2.insidenova.com/news/2010/dec/28/4/park-ranger-pleads-guilty-killing-family-ar-740315/>.

¹¹ Tara Morgan & Terry Alexander, *People in Farmville react to Richard McCroskey guilty plea*, NBC12.com (Sep. 20, 2010) <http://www.nbc12.com/Global/story.asp?S=13187783>.

¹² MaryKay Mallonee, *Dad fears accused killer will go free*, WAVY.com (June 23, 2010)

http://www.wavy.com/dpp/news/local_news/dad-fears-accused-killer-will-go-free.

¹³ Liz Palka, *Guilty Plea in Jayne McGowan Murder Case Surprises Family*, Newsplex.com (Jan. 28, 2010)

<http://www.newsplex.com/home/headlines/82958502.html?storySection=comments>.

- “It’s a pity that prison today is a life of leisure vice [sic] a life of hard labor. Maybe we would help rehabilitate prisoners by making prison life a little harder. Such as no tv, no entertainment, no computer, only educational and children books and for lands sakes why on earth do we have bodybuilding equipment in prisons?”¹⁴

The frequency with which people dismiss life in prison as a viable option because of their tax dollars or its “ease” should give pause to any judge in a capital case.

Almost as common are comments that could disqualify a juror because he or she would automatically impose the death penalty or expresses a belief that capital punishment should be executed in an “assembly-line-like fashion,” thus making him or her potentially excludable under *Morgan v. Illinois*.¹⁵ Typical comments include:

- “If they are found guilty, they should be executed.”¹⁶
- “He killed a fellow human being in cold blood. He deserves the same.”¹⁷
- “[M]ay the guilty swing on a short rope and too the ones that were going to buy the drugs.”¹⁸
- “I am a firm believer in capital punishment for murder, rape and crimes against children...”¹⁹
- “The only time I’m against the death penalty for murder is when there is doubt if the person did the crime (thank God for groups that spend time and effort exonerating those who are wrongly accused) - in this case, there was no doubt.”²⁰
- “When there is absolutely no doubt who did the killing there is no reason to waste time on appeal after appeal. Get it done and let everyone that has suffered too long already move on with their lives.”²¹
- “If sound evidence links the criminal to the crime, he should be executed. The penalty for death is death and I will always support that.”²²

¹⁴ Shawn Day, *Retrial to begin in killing of two women in 2005*, PilotOnline.com (Oct. 13, 2009) <http://hamptonroads.com/2009/10/retrial-begin-killing-two-women-2005>.

¹⁵ *Morgan v. Illinois*, 504 U.S. 719 (1992); see also *Wainwright v. Witt*, 469 U.S. 412 (1985).

¹⁶ Applegate & Day, *supra* note 7.

¹⁷ Davis, *supra* note 6.

¹⁸ Applegate & Day, *supra* note 7.

¹⁹ *Id.*

²⁰ Ariane De Vogue & Michael S. James, *Teresa Lewis Appeared Fearful as She Entered Virginia's Death Chamber*, ABCNews (Sep. 24, 2010) <http://abcnews.go.com/Politics/teresa-lewis-looked-frightened-entered-death-chamber/comments?type=story&id=11718082>.

²¹ Day, *Man sentenced to life* *supra* note 5.

²² *N.C. Man Charged in Va. Triple Homicide*, WRAL.com (Jan. 27, 2008) <http://www.wral.com/golo/page/1896337/?id=2360690>.

- “The U.S. needs to repeal the 8th Amendment, withdraw from the international Convention Against Torture, and have the state legislatures pass summary execution laws so miscreants like him will always be tortured to death properly. The lives of the guilty are valueless, and they must be destroyed as painfully as possible. Justice requires this - it’s the right thing to do.”²³

Online comments clearly reveal a substantial number of members of the public who are not life-qualified. Again, normal *voir dire* may reveal these disqualifications. But some comments are more nuanced in the belief systems they espouse. For instance:

- “I say bring back public hanging for hideous crimes like this. Have it in the center of town so everyone who wants to see what will happen if you commit a crime. Maybe it will deter the other thugs who might be thinking of doing the same thing.”²⁴
- “Public Hanging is the best deterrent for these types of crimes. The ACLU, & any other pantywaist individual or party would agree if something like this happened to one of their loved ones. There should be no rehabilitation or correctional facility to waste our tax dollars on this type of waste. That,s [sic] what he is, waste; lower than SEWAGE !”²⁵
- “[H]ang him in the morning ..and put it on the front page.. the death penalty [sic] does work.. if only it were used...”²⁶

The authors of these comments demonstrate a belief that capital punishment should be used more frequently and executed summarily. This is not strictly a disqualifying factor, but it could lead to *Morgan* disqualification if investigated further. These people would undoubtedly require more probing *voir dire* questioning to fully understand the juror’s point of view.

Another common disqualifying bias revealed in online comments is an inability to judge the defendant as an individual. Comment authors reveal this bias in various ways, most commonly by dismissing the defendant as simply a “monster,” an “animal,” or as “just evil.”

²³ Day, *Man sentenced to life supra* note 5.

²⁴ Raul Rivero, *Four People Arrested in Lansdowne Brutal Attack*, WUSA9.com (Apr. 26, 2009) <http://www.wusa9.com/comments/84862/158/Four-People-Arrested-in-Lansdowne-Brutal-Attack>.

²⁵ Davis, *supra* note 6.

²⁶ Dena Potter, *Inmate Who Wanted Death Penalty Linked to New Slaying*, AOLNews (Aug. 1, 2010) <http://www.aolnews.com/discuss/2010/08/01/inmate-who-wanted-death-penalty-linked-to-prison-slaying#gcpDiscussPageUrlAnchor>.

Comment authors also tend to categorize all criminals as similar, rather than judging each as an individual. Typical comments include:

- “If his father committed [sic] the same crime of murder isn’t it at least arguable that, this man is crazy?”²⁷ (This commenter, while prone to associating the defendant with his criminal-father, does at least appear open to the possibility of mitigation.)
- “Don’t let his sob story fool you. His dad is a murder [sic] too and is in jail for life for killing a Wachovia bank manager in College Park about 5 years ago. Like father like son.”²⁸
- “Saw him in court. 100% evil.”²⁹
- “Why are we giving this MONSTER all these trials??? He has RAPED, KIDNAPPED, TORTURED, KILLED more than six that we are being told about!! . . . Shame on the nuns that testified for him, he has no care for anyone! If he had the chance he would kill these nuns!”³⁰
- “We put down rabid animals, why not rabid humans? It’s not about vengeance, it’s about removing evil people from society, forever.”³¹

Depending on how inflexibly a juror holds these attitudes, he or she may be disqualified under *Lockett v. Ohio*.³² Probing *voir dire* is, therefore, necessary to identify any juror who has already inwardly categorized all convicted murderers as “monsters” while outwardly claiming to be able to judge the defendant as an individual.

Somewhat similarly, several online comments demonstrate their author’s unwillingness to consider mitigation evidence. Internet postings reveal that many internet users view legitimate

²⁷ Davis, *supra* note 6.

²⁸ *Id.*

²⁹ Alfredo Prieto the Fairfax County serial killer, Fairfax Underground (Nov. 7, 2010) <http://www.fairfaxunderground.com/forum/read/2/443568/444010.html>.

³⁰ John Henrehan, *Prosecutors Make Third Death Penalty Attempt in Prieto Case*, MyFoxDC.com (Sep. 28, 2010) <http://www.myfoxdc.com/dpp/news/local/prosecutors-make-third-death-penalty-attempt-in-prieto-case-092810>.

³¹ Tom Jackman, *Lawlor gets death sentence in 2008 Fairfax slaying*, The Washington Post (Mar. 16, 2011) http://www.washingtonpost.com/local/lawlor-gets-death-sentence-in-2008-fairfax-slaying/2011/03/16/ABqDdAh_allComments.html?ctab=all_&#comments.

³² *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). See also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

mitigation evidence as “excuses” and would refuse to consider it. These biases could arguably be disqualifying under the *Lockett v. Ohio* line of cases.³³ Typical comments include:

- “A lot of people who aren’t bright don’t kill. Hopefully this will be a deterrent to those who PLAN to get off from a crime because they’re dumb.”³⁴
- “You can only make so many excuses for someone. I am VERY sympathetic to people with mentall [sic] illness but that does not excuse murder. You are still responsible for your actions.”³⁵
- “[I] personally knew both boys they were abused growing up but no excuse for this behavior”³⁶
- “Whats [sic] awesome, is that he thinks that being high and drunk is an excuse.”³⁷
- “They may have been on drugs that night, but that is no excuse for any person to kill a helpless older woman.”³⁸
- “He has been a druggie all his life so him being on drugs when he killed these two women is no excuse!!! All i have to say is burn baby burn!!!!”³⁹
- “[H]is kids want him to get life so they can continue to visit him in prison. I have to ask how often they ‘visited’ dear old dad while he WASN’T in prison.... the kids can continue to visit him up until it’s lights out. I noticed everyone giving a statement, especially the mother, blamed his wonderful personality on everything but his own screwed up self.”⁴⁰
- “I don’t care that he had a ‘hard life’. A lot of people have had that and they didn’t grow up to be murder rapists. What goes around comes around, and good riddance to bad rubbish.”⁴¹

³³ *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). See also *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (stating that “the ‘Eighth Amendment requires that the jury be able to consider and give effect to’ a capital defendant’s mitigating evidence,” which consisted of evidence of mental retardation and childhood abuse) (citations omitted); *Smith v. Texas*, 543 U.S. 37, 44 (2004) (finding that a jury must be able to consider relevant mitigation evidence, including evidence of learning disabilities, low IQ, and adverse childhood); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (finding reversible error in refusal to consider mitigation evidence of the defendant’s difficult childhood and gasoline inhalation); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (“the sentencer may not refuse to consider or be precluded from considering ‘any relevant mitigating evidence’”).

³⁴ De Vogue & James, *supra* note 20.

³⁵ *Military Releases Marine’s Cause of Death; Sister Speaks To WITN*, WITN.com (Nov. 6, 2009) <http://www.witn.com/home/headlines/69368877.html?storySection=comments>.

³⁶ Palka, *supra* note 13.

³⁷ Jason Marks, *Man found guilty of Capital Murder*, WAVY.com (Oct. 13, 2009) http://www.wavy.com/dpp/news/local_news/Local_Virginia_Beach_Trial_Captial_murder_Carl_Walton_Ewing_Smith_20091013.

³⁸ **BREAKING!! : URGENT!! : Two Arrested In Opal Page Murder Case**, Nelson County Life (May 11, 2009) <http://www.nelsoncountylife.com/2009/05/11/breaking-urgent-two-arrested-in-opal-page-murder-case-51109-628-pm-edt/#comments>.

³⁹ Day, *Retrial to begin in killing of two women*, *supra* note 14.

⁴⁰ Day, *Man sentenced to life* *supra* note 5.

⁴¹ Jackman, *Lawlor gets death sentence*, *supra* note 31.

- “Not having the greatest life is irrelevant. I had more than my share of harassment through grade school but I do not use it as an excuse to take an innocent mans [sic] life. He did wrong against society therefore it is time to face the music.”⁴²
- “Nuts or not, thumbs down!”⁴³
- “Yeah. [Defendant] is a serial rapist and murderer, because he grew up in a war-torn country where he didn’t get enough broccoli as a little boy.”⁴⁴
- “We do not judge a man by what he thinks. We do not judge a man because of what he feels. We judge a man by what he DOES. . . . If you want to walk a mile in someone’s shoes, walk in the shoes of the victims or of the victim’s families. This human, possibly through no fault of his own, is defective and dangerous and we the people of Virginia need to be protected from him.”⁴⁵

The authors of these comments would likely not give a defendant’s mitigation case a fair hearing. Admittedly, some comments betray a simple misunderstanding of how capital punishment law works. For instance, one online commenter observed “[s]o the Judge has to do what ‘he thinks’ is right under the law???? This is a travesty of justice and this Judge is a JOKE.”⁴⁶ This type of comment conveys that the author does not understand the purpose of the penalty phase in capital trials. These misunderstandings can be corrected during capital *voir dire*. These comments, however, still demonstrate that while potential jurors may be successfully educated on their task in a penalty phase, they might still disagree with that task. Probing, specific *voir dire* is, therefore, necessary to ensure that jurors understand penalty phase law and will truly agree to follow it.

A few comments reveal possible racial bias. As already noted, this bias is likely underrepresented in the sample of comments because overtly racist comments are usually

⁴² Dena Potter, *Va. high court overturns man's death sentence*, PilotOnline.com (Sep. 16, 2010) <http://hamptonroads.com/2010/09/va-high-court-overturns-mans-death-sentence>.

⁴³ Davis, *supra* note 6.

⁴⁴ Tom Jackman, *Convicted killer Alfredo Prieto returning to Fairfax County court for resentencing*, The Washington Post (Sep. 6, 2010) http://www.washingtonpost.com/wp-dyn/content/article/2010/09/05/AR2010090503155_Comments.html.

⁴⁵ *Virginia Supreme Court hears death row appeal*, PilotOnline.com (June 8, 2010) <http://hamptonroads.com/2010/06/virginia-supreme-court-hears-death-row-appeal>.

⁴⁶ Davis, *supra* note 6.

removed from websites fairly quickly. It also appears that bias against African Americans is usually removed, while bias against illegal immigrants is less frequently eliminated. Even though the most overtly racist comments are unavailable, the authors of these posts could arguably be disqualified under *Turner v. Murray*⁴⁷ and *McCleskey v. Kemp*.⁴⁸ Typical comments include:

- “Another violent black man. Glad he is off of the streets. Hope us tax payers won’t have to support him for the rest of his life”⁴⁹
- “[L]atinos, hispanics, whatever their nom du jour is, have brought this upon themselves with the huge, illegal influx... if they obeyed our laws and entered the country legally they would be regarded more highly...”⁵⁰
- “Another stellar example of people from El Salvador being pillars of the local community”⁵¹
- “Load them ALL up (they cost us WAY TOO Much Money) put them in a skydiving airplane, fly off coast and let them enjoy a parachute ride for ‘free; [sic]”⁵²
- “Yep, keep allowing these illegals into our schools, hospitals, neighborhoods and we’ll continue to have more crimes and killings. Look at what has happened to Mexico. We aren’t far from the same.”⁵³
- “We ought to remove all these turd [sic] world scum from out [sic] country.I blame L.B.J and Ted Kennedy for this.They were the ones who gave us the Immigration Act of 1965.Because of them two the white race will become a minority”⁵⁴
- “MS-13 = Many Salvadorians. Let the beaner fri[sic]. = Re-fried beans.”⁵⁵

⁴⁷ *Turner v. Murray*, 476 U.S. 28, 35 (1986)

⁴⁸ *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (recognizing that “it is the jury that is a criminal defendant’s fundamental ‘protection of life and liberty against race or color prejudice’”) (citations omitted).

⁴⁹ Marks, *supra* note 37.

⁵⁰ *3 Shot to Death in Woodbridge; Suspect Arrested in Pa.*, WTOP.com (Dec. 10, 2007) <http://www.wtop.com/?hpage=63&nid=730&sid=1307152>.

⁵¹ *Alfredo Prieto the Fairfax County serial killer*, *supra* note 29

⁵² John Henrehan, *Illegal Immigrant Charged with 1st-Degree Murder in Manassas, Va. Crimes*, MyFoxDC.com (Feb. 11, 2011) <http://www.myfoxdc.com/dpp/news/local/illegal-immigrant-charged-with-1st-degree-murder-in-manassas-021111>.

⁵³ *Illegal Immigrant Charged In Deadly VA Shootings*, WTVR.com (Feb. 11, 2011) <http://discussions.wtvr.com/20/wtvr/wtvr-illegal-immigrant-charged-in-deadly-va-shootings-20110211/10>.

⁵⁴ Henrehan, *Illegal Immigrant Charged with 1st-Degree Murder*, *supra* note 52.

⁵⁵ *Alfredo Prieto the Fairfax County serial killer*, *supra* note 29

These comments range from explicitly racist to relatively tame, and some are not overtly racist but become so with an inferential step. Even a non-racially-specific bias against illegal immigrants, however, could be a basis for exclusion of a juror.

A surprisingly underrepresented view in online comments is the belief that “life in prison without the possibility of parole” does not really mean what it says. Comments indicate that their authors assume that appeals and parole will always allow murderers back on the street in a few short years. For example, one person said “I am always concerned that criminals with ‘life with parole’ will be released, just as soon as they are ‘rehabilitated.’”⁵⁶ Evidence of the prevalence of this “myth of early release” is legion.⁵⁷ Yet this view is not as common in online comments as one might expect. This may be in part due to the fact that posters seem to espouse that belief only in response to another commenter arguing for a life sentence. Very few comment authors raise this concern on their own, so it is difficult to determine how many truly labor under this belief. However, the myth of early release is clearly an assumption of at least some members of the public. Therefore, extensive *voir dire* must be available to educate jurors and disabuse them of this incorrect preconception.

Finally, the collection contained a catchall category for comments that advocated such an outrageously cruel penalty—and one that would clearly violate the Eighth Amendment—that their authors seem unqualified to serve as jurors in a capital case. The desire for an outrageous penalty is evident in comments such as:

- “[T]orture, bamboo under the finger nails, drops of water on the forehead [sic] while they are tied to a chair, electric shock to the finger tips and toes..I could go on!!!”⁵⁸

⁵⁶ *Id.*

⁵⁷ See generally William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999).

⁵⁸ *Federal Grand Jury Indicts Couple for Mathias Triple Murder*, *supra* note 8.

- “The justice system needs to create a punishment similar to what happens to the character in the movie ‘Awake’. The person has an operation and is completely awake for the whole procedure--but has no way to make a sound or move a single muscle to let the surgeon know, and the patient is in sheer agony. There needs to be a punishment like this. Operate on them so they feel EVERY single slice into their body, let them heal--then do it again, over and over and over for the rest of their pathetic lives. This would be worse than just a plain life in prison. Another idea, tattoo their victims [sic] faces on every square inch of their bodies so they will always have to look them in the eyes.”⁵⁹
- “Bring back ol’ Sparky.”⁶⁰
- “He should be hung, brought back to life , then shot.”⁶¹
- “Waterboarding, ripping fingernails out, thats [sic] a good start as long as the end result was his death for the lives he took.”⁶²
- “Murder your family for insurance money?Feet first through a wood chipper.”⁶³
- “Better yet, they should kill the person the way that he murdered the people. If they use a knife, stab them.”⁶⁴
- “Lethal injection is too humane for a sub-human. This vile piece of humanity should be bludgeoned to death.”⁶⁵
- “Lethal injection or the electric chair would be too kind. I think a public stoning in the town square until he meets his maker would be most appropriate.”⁶⁶
- “What possible use to society is this piece of garbage?! We should harvest his viable organs and then execute him-pronto!”⁶⁷
- “Why can’t they be caged and used by pharmaceutical companies for testing purposes?? The poor animals they use now never harmed anyone, besides the drugs will be used on humans, not animals.”⁶⁸
- “When will they start hanging people again? I would enjoy a public execution every now and then!”⁶⁹
- “[I] think it was the Soviets that excuted [sic] people with a bullet in the head and than [sic] billed the family for the bullet! better than \$500,000 to keep him locked up! but if we have to keep him in prison for life why not make his family pay the \$500,000?”⁷⁰

⁵⁹ *Id.*

⁶⁰ Davis, *supra* note 6.

⁶¹ Alfredo Prieto the Fairfax County serial killer, *supra* note 29

⁶² Day, *Man sentenced to life* *supra* note 5.

⁶³ De Vogue & James, *supra* note 20.

⁶⁴ Day, *Man sentenced to life* *supra* note 5.

⁶⁵ Jackman, *Lawlor gets death sentence*, *supra* note 31.

⁶⁶ *Man arrested in Colonial Heights double-murder case*, Richmond Times Dispatch (Jan. 28, 2011) <http://www2.timesdispatch.com/news/2011/jan/28/man-arrested-colonial-heights-double-murder-case-ar-806581/>.

⁶⁷ Tom Jackman, *Fairfax death penalty deliberations enter third day*, The Washington Post (Mar. 16, 2011) http://www.washingtonpost.com/blogs/crime-scene/post/fairfax-death-penalty-deliberations-enter-third-day/2011/03/15/ABGheNd_blog.html.

⁶⁸ Davis, *supra* note 6.

⁶⁹ Jackman, *Lawlor gets death sentence*, *supra* note 31.

- “The U.S. needs to repeal the 8th Amendment, withdraw from the international Convention Against Torture, and have the state legislatures pass summary execution laws so miscreants like him will always be tortured to death properly.”⁷¹

These comments’ authors clearly would not be free to impose the punishments they want, but their mere desire to do so may provide a strong argument that they would not be life-qualified. The desire to impose penalties such as organ-harvesting may demonstrate the number of people who truly cannot fairly consider life as an alternative to death as required by *Morgan*.⁷²

Although the various biases revealed by these comments occur with widely differing frequency, they are all serious concerns and online comments can be used to great effect in proving that these biases are real problems that must be rooted out. Because posts are anonymous, the comments sections of online news sources foster atmospheres in which people reveal true feelings that might never come out in courtrooms. The collection of comments can be used, therefore, as a basis for extrapolating possible biases in jury pools and arguing for extensive *voir dire* to reveal those biases.

Application: Using this Internet Trend to your Voir dire Advantage

The utility of these comments is two-fold. First, a defense team may be able to conduct their own investigation into comments about their client’s case. The methodology explained above may turn up comments that demonstrate a “virtual lynch mob” for the client or at least enough cause for concern to convince the judge to allow extensive *voir dire*. While this step is relatively easy to perform,⁷³ its usefulness will depend somewhat on how extensive the media

⁷⁰ Davis, *supra* note 6.

⁷¹ Day, *Man sentenced to life* *supra* note 5.

⁷² *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

⁷³ The best way to stay on top of comments about your client is to set up Google Alerts. Go to www.google.com/alerts and set up searches for things like “[client’s name] capital murder” and “[client’s name] Virginia.”

coverage of a case has been and, correspondingly, how many comments already exist about the client's case. Furthermore, several previously-noted problems limit the effectiveness of this effort. The most revealing statements of bias are frequently removed, so if a racist or violent comment does appear about a client, the defense team must take care to document it before it is removed. Moreover, the chances that extremely biased comments will appear before the start of *voir dire* are relatively small, given the trend toward the most biased statements appearing only after sentencing.

These comments are likely more relevant for a capital defense team in helping to demonstrate the types of bias that exist. With these examples, counsel can argue that wide discretion in *voir dire* is necessary to expose jurors' true opinions, lest someone like these commenters end up on a jury. Comments from previous cases can show the range of biases that exist and the real people who hold them. This collection of online comments, therefore, may demonstrate to a judge how crucial it is to ensure that not one juror who has a view similar to the comment authors sits on a capital jury.

Sample Motion

What follows is a sample of how online comments can be incorporated into a motion. It would be most useful when incorporated into existing motions on VC3.org, most likely the *Voir dire* Memo,⁷⁴ the Motion for Individual and Sequestered *Voir dire*,⁷⁵ or the Defense

⁷⁴ See *Voir dire* Memo, VC3.org, <http://www.vc3.org/deptimages/Motions%20Bank/VC3.org%20Motion%20-%20Vair%20Dire%20Memo%20final.doc>.

⁷⁵ See Motion for Individual and Sequestered *Voir dire*, VC3.org, <http://www.vc3.org/deptimages/Motions%20Bank/VC3.org%20Motion%2020%20-%20Motion%20for%20Individual%20and%20Sequestered%20Vair%20Dire.doc>.

Memorandum of Law Regarding the Permissible Scope of *Voir dire* by the Defense.⁷⁶ It could be used as a standalone section of any of these motions, most likely near the conclusion as a way of backing up the claims made in the motion with concrete examples of potential biases. It could also be used when split up by topic and incorporated into a motion section-by-section. This piecemeal incorporation would break down roughly by bias, including life-qualification, consideration of mitigation, racial bias, and so forth.

Comments posted by anonymous authors to Internet news stories demonstrate the genuine biases that capital *voir dire* is intended to discover. A large number of online comments reveal, for example, that members of the public hold attitudes that would warrant their disqualification from jury service under *Morgan v. Illinois*.⁷⁷ Comment authors frequently express the view that the death penalty should be imposed automatically for certain crimes, including crimes that are not death penalty eligible. Comment writers say, for example:

- “He killed a fellow human being in cold blood. He deserves the same”⁷⁸
- “The only time I’m against the death penalty for murder is when there is doubt if the person did the crime”⁷⁹ and
- “I am a firm believer in capital punishment for murder, rape and crimes against children.”⁸⁰

Some commenters categorize defendants and refuse to give them the individual consideration required by *Lockett v. Ohio*,⁸¹ saying, for example, “[h]is dad is a murder [sic] too and is in jail for life . . . Like father like son.”⁸²

Other comments demonstrate that members of the public hold disqualifying beliefs regarding the appropriate punishment for capital cases. Some believe that prison is “too easy” or a waste of taxpayer money, saying:

- “[i]t’s a pity that prison today is a life of leisure vice [sic] a life of hard labor. Maybe we would help rehabilitate prisoners by making prison life a little harder”⁸³

⁷⁶ See Defense Memorandum of Law Regarding the Permissible Scope of *Voir dire* by the Defense, *VC3.org*, <http://www.vc3.org/deptimages/Motions%20Bank/VC3.org%20Motion%2083%20-%20%20Memo%20re%20Scope%20of%20Permissible%20Vair%20Dire%20by%20the%20Defense.doc>.

⁷⁷ *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

⁷⁸ Davis, *supra* note 6.

⁷⁹ De Vogue & James, *supra* note 20.

⁸⁰ Applegate & Day, *supra* note 7.

⁸¹ *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

⁸² Davis, *supra* note 6.

⁸³ Day, *Retrial to begin in killing of two women*, *supra* note 14.

- “Feeding this SOB for the next 20 or 30 years is another waste of my tax dollars!!!! He should be put in front of a firing squad”⁸⁴ and
- “How much money has the government spent on this case? These ppl [sic] have been given 3 hots and cot for long enough!!”⁸⁵

Such views demonstrate that a juror would overvalue irrelevant factors and could not give the defendant the fair hearing required by *Morgan*. Other individuals express their belief online that defendants will be released despite a sentence of “life in prison without parole.” One comment author explained, “I am always concerned that criminals with ‘life with parole’ will be released, just as soon as they are ‘rehabilitated.’”⁸⁶ People like this must be educated during *voir dire* and excused if there is any doubt as to their ability and willingness to credit the court’s instructions concerning the unavailability of parole.⁸⁷ Still other comment authors indicate that they would like to impose cruel and unusual punishments on defendants who have not yet been found guilty. Suggestions include:

- “[T]attoo their victims faces on every square inch of their bodies so they will always have to look them in the eyes”⁸⁸
- “[T]orture, bamboo under the finger nails, drops of water on the forehead [sic] while they are tied to a chair, electric shock to the finger tips and toes”⁸⁹
- “[P]ublic stoning in the town square”⁹⁰
- “[H]arvest his viable organs and then execute him-pronto!”⁹¹ and
- “[C]aged and used by pharmaceutical companies for testing purposes.”⁹²

One Internet user even commented, “[t]he U.S. needs to repeal the 8th Amendment, withdraw from the international Convention Against Torture, and have the state legislatures pass summary execution laws so miscreants like him will always be tortured to death properly.”⁹³ Such commenters often believe that even death is “too easy” a punishment for anyone convicted of murder, and that life imprisonment is invariably insufficient. When faced with the choice of death or life in prison, they would likely always impose a death sentence in violation of *Morgan*.

Other disqualifying biases are legion in online comments. Several comment authors demonstrate a racial bias that, if discovered during *voir dire*, would almost

⁸⁴ Stewart, *supra* note 10.

⁸⁵ *Federal Grand Jury Indicts Couple for Mathias Triple Murder*, *supra* note 8.

⁸⁶ Davis, *supra* note 6.

⁸⁷ *Simmons v. S. Carolina*, 512 U.S. 154, 162(1994); *Yarbrough v. Commonwealth*, 258 Va. 347, 374, 519 S.E.2d 602, 616 (1999).

⁸⁸ *Federal Grand Jury Indicts Couple for Mathias Triple Murder*, *supra* note 8.

⁸⁹ *Id.*

⁹⁰ *Man arrested in Colonial Heights double-murder case*, *supra* note 66.

⁹¹ Jackman, *Fairfax death penalty deliberations enter third day*, *supra* note 67.

⁹² Davis, *supra* note 6.

⁹³ Day, *Man sentenced to life* *supra* note 5.

certainly excuse them for cause under *Turner v. Murray*.⁹⁴ For example, one commenter posted: “Another violent black man. Glad he is off of the streets. Hope us tax payers won’t have to support him for the rest of his life.”⁹⁵ Racial bias is not, however, limited to African Americans; South and Central American immigrants are targets of particularly intense language online, such as “MS-13 = Many Salvadorians. Let the beaner fri.= Re-fried beans.”⁹⁶ Some people also make it clear that they will not consider legitimate evidence in mitigation, making comments such as:

- “I don’t care that he had a ‘hard life’. A lot of people have had that and they didn’t grow up to be murder rapists. What goes around comes around, and good riddance to bad rubbish”⁹⁷ and
- “Yeah. [Defendant] is a serial rapist and murderer, because he grew up in a war-torn country where he didn’t get enough broccoli as a little boy.”⁹⁸

If called to be jurors, these people would require extensive *voir dire* to uncover these views and educate on the dual phases of a capital trial. If they were then unable to consider mitigation, they would have to be excused for cause.⁹⁹

Any or all of the authors of these comments may be jurors in this case, but it is hard to imagine any of them readily making the same comments on juror questionnaires. Identifying potential jurors who hold views like these will be difficult if not impossible without thorough, searching *voir dire*. Virginia law provides that “counsel for either party shall have the right to examine under oath any person who is called a juror therein and shall have the right to ask such person or juror directly *any relevant questions* to ascertain whether he is related to either party, or has any interest in the cause, *or has expressed or formed any opinion, or is sensible of any bias or prejudice therein.*”¹⁰⁰ “If an answer to [a] question would necessarily disclose, or clearly lead to the disclosure of . . . [an] opinion[] or prejudice, it must be permitted.”¹⁰¹ Thorough, probing *voir dire* of each prospective juror is, therefore, required to uncover any opinions or biases similar to those expressed above.

Jurors may report for jury duty and appear to be reasonable, unbiased people. Lurking beneath this polished exterior, however, may be opinions and prejudices that will deny the defendant a fair hearing and may not appear until it is too late, if ever. Indeed,

⁹⁴ *Turner v. Murray*, 476 U.S. 28, 35 (1986). See also *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (recognizing that “it is the jury that is a criminal defendant’s fundamental ‘protection of life and liberty against race or color prejudice’”) (citations omitted).

⁹⁵ Marks, *supra* note 37.

⁹⁶ *Alfredo Prieto the Fairfax County serial killer*, *supra* note 29

⁹⁷ Jackman, *Lawlor gets death sentence*, *supra* note 31.

⁹⁸ Jackman, *Convicted killer Alfredo Prieto returning to Fairfax County court for resentencing*, *supra* note 44.

⁹⁹ See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); See also *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986).

¹⁰⁰ Va. Code Ann. § 8.01-358 (2008) (emphasis added).

¹⁰¹ *Commonwealth v. Hill*, 264 Va. 315, 319, 568 S.E.2d 673 (2002).

the most extreme biases often appear after sentencing. For instance, one commenter declared after a life verdict “[I] think it was the Soviets that excuted [sic] people with a bullet in the head and than [sic] billed the family for the bullet! better than \$500,000 to keep him locked up! but if we have to keep him in prison for life why not make his family pay the \$500,000?”¹⁰² As the United States Supreme Court has said, “[i]f *even one such juror* is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.”¹⁰³

¹⁰² Davis, *supra* note 6.

¹⁰³ Morgan v. Illinois, 504 U.S. 719, 729 (1992) (emphasis added).