

# How Do Jurors Decide to Sentence Someone to Death?

David R. Dow\*

ROBIN CONLEY, *CONFRONTING THE DEATH PENALTY: HOW LANGUAGE INFLUENCES JURORS IN CAPITAL CASES* (Oxford 2016)

## I. INTRODUCTION

Capital juries, like all juries in the American legal system, engage in two different varieties of inquiry. Some questions have answers as a matter of historical or scientific fact. Does cigarette smoking contribute to cardiovascular disease? Did Timothy McVeigh set off an explosion that destroyed the Alfred P. Murrah Federal Building in Oklahoma City? Did an accused murderer kill someone? Like problems of mathematics, these questions have certain and unequivocal answers. Obviously, just as we might err in adding up a column of numbers, the fact that a question has a correct and certain answer does not mean the jury or fact-finder always gets the answer right. In 1986, for example, Christine Morton was murdered in Williamson County, Texas, and a jury found her husband Michael guilty of committing that crime and sent him to prison. The jury was wrong; someone else was responsible for the murder.<sup>1</sup> To be sure, Morton was not sent to death row, but even (or perhaps especially) in the capital context, juries err; thus, at least 157 defendants later deemed to be innocent were convicted by a jury and sentenced to death.<sup>2</sup> Nevertheless, the possibility of error

---

\* Cullen Professor, University of Houston Law Center; Rorschach Visiting Professor of History, Rice University. Thanks to my capital team at the Law Center, Jeff Newberry and Ingrid Norbergs; to my colleague Joe Sanders; to Shari Diamond and Joshua Dressler; to Dean Leonard Baynes and Associate Dean Marcilynn Burke; and to the University of Houston Law Foundation for financial support.

<sup>1</sup> For a harrowing account of his ordeal of wrongful conviction and ultimate exoneration, see MICHAEL MORTON, *GETTING LIFE: AN INNOCENT MAN'S 25-YEAR JOURNEY FROM PRISON TO PEACE* (2014).

<sup>2</sup> See *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> [https://perma.cc/HL4U-E3GS] (last visited Feb. 25, 2017). Some scholars place the number much higher. In a rigorous analysis, Sam Gross and colleagues have calculated that slightly more than 4% of those sentenced to death are in fact actually innocent. See Samuel R. Gross, Barbara O'Brien, Chen Hu & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants who are Sentenced to Death*, 111 PROC. NAT'L ACAD. OF SCI. 7230 (2014).

does not alter the nature of the question. There is a right answer and a wrong answer.

Other questions, however, do not have clear and certain answers. Should a company that sold a dangerous product be compelled to pay punitive damages, and if so, how much? Should a robber receive a prison term or instead be placed on probation? Should a murderer be put to death? Hence, whereas all reasonable people would acknowledge (for example) that Anthony Graves, who spent nearly 13 years on death row,<sup>3</sup> was innocent, reasonable people will continue to disagree about whether Timothy McVeigh should have been executed, despite their agreement that he committed a crime.

It is perhaps useful to think of the former type of question as matters of physical fact—somebody or some entity did something or did not—and the latter type of question as normative or moral.<sup>4</sup> I will refer below to the former category as Type 1 questions, and to the latter as Type 2 questions. One obvious epistemic distinction between the two is that with Type 1 questions, a fact-finder can be shown to have gotten the wrong answer immediately, at the very moment the answer is given. In contrast, where Type 2 questions are involved, it may never be possible to demonstrate error. Recent attention to wrongful convictions has helped identify factors that can cause or contribute to juries getting the wrong answer to the former type of question.<sup>5</sup> More generally, many studies involving both actual juries and trial simulations have provided insight into juror decision-making.<sup>6</sup> But comparatively, little attention has been paid to factors that influence capital jurors in arriving at answers to Type 2 questions. Robin Conley's book, *Confronting the*

---

<sup>3</sup> A fine telling of Graves' story can be found in Pamela Colloff, *Innocence Found*, TEX. MONTHLY (Jan. 2011), <http://www.texasmonthly.com/articles/innocence-found/> [<https://perma.cc/T9RC-YDTD>].

<sup>4</sup> Other dichotomies, while perhaps similar or related to the distinction between these two different types of questions I discuss here, are nonetheless distinct. For example, these two types of questions do not turn on precisely the same difference between so-called objective and subjective matters. (Of course, as Willard Quine famously demonstrated, there is no coherent distinction between what we refer to as subjective versus objective truths. See WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW: 9 LOGICO-PHILOSOPHICAL ESSAYS 20 (2d ed. 2003).) Similarly, the two different types of questions juries address are not coterminous with the distinction between so-called questions of fact versus questions of law, and as many have demonstrated, it is not quite correct to say juries address the former while judges resolve the latter. See, e.g., Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966); Dale W. Broeder, *The Functions of the Jury Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954).

<sup>5</sup> See BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); see also SANDRA GUERRA THOMPSON, *COPS IN LAB COATS: CURBING WRONGFUL CONVICTIONS THROUGH INDEPENDENT FORENSIC LABORATORIES* (2015).

<sup>6</sup> The literature is vast, but it includes, e.g., REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (1983). The classic text, of course, is HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966). See also CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* (2002).

*Death Penalty*,<sup>7</sup> represents a welcome addition to the field.<sup>8</sup> Conley is interested specifically in examining how jurors in death penalty cases approach the Type 2 question germane to such proceedings and go about the process of sentencing someone to death.<sup>9</sup>

Capital trials offer an ideal legal venue for studying how jurors arrive at answers to this type of moral question, not only because the stakes in a death penalty trial are uniquely high, but also because the central focus of many capital cases is the choice the jury is asked to make between life and death. Often, the Type 1 question that triggers a death penalty case is hardly in dispute. Put another way, in many death penalty cases, exemplified perhaps most notably by the trial of Dzhokhar Tsarnaev, the Boston Marathon bomber, the difficult issue before the jury is not whether the defendant committed the crime, but simply how he should be punished. Indeed, Tsarnaev's prominent trial counsel, Judy Clarke, began her opening statement to the jury by acknowledging Tsarnaev's guilt.<sup>10</sup> Her strategy was precisely to have the trial be all about the second type of question.

Two distinct features of capital trials make it possible for Conley to gain specific insight into juror decision-making in the context of normative questions. One such feature pertains to the structure of the proceeding itself. Since the death penalty returned to the U.S. in 1976, with the Supreme Court's decision in *Gregg*

---

<sup>7</sup> ROBIN CONLEY, *CONFRONTING THE DEATH PENALTY: HOW LANGUAGE INFLUENCES JURORS IN CAPITAL CASES* (2016). References below to Conley's book will be to page number.

<sup>8</sup> Previous studies of jurors in capital cases have revealed that jurors form relatively firm opinions on the appropriate sentence before the sentencing phase of the trial has even begun, much less concluded. See, e.g., William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) (discussing Capital Jury Project's study of jurors from more than 20 capital trials across some 14 different states); see also William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003). A significant weakness of Conley's book, in my view, is that although she is well-aware of this literature, she does not situate her findings against these other studies. To be sure, the principal objective of the Capital Jury Project study differed from Conley's, yet there is some overlap between the two projects.

<sup>9</sup> Other studies of decision-making on capital juries generally have a broader focus—to examine the role of race, for example; or to understand how jurors understand a judge's instructions; or to gain insight into group dynamics. See, e.g., William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998); 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); Samuel R. Gross, *Race, Peremptories, and Capital Jury Deliberations*, 3 U. PA. J. CONST. L. 283 (2001).

<sup>10</sup> For a representative example of the coverage of Clarke's opening, see *Boston Marathon Bombing Suspect's Lawyer Admits His Guilt*, CBS NEWS (Mar. 4, 2015, 3:41 PM), <http://www.cbsnews.com/news/boston-marathon-bombing-trial-opening-statements/> [<https://perma.cc/M8H2-YXVB>].

*v. Georgia* and its companions,<sup>11</sup> death penalty trials have been bifurcated proceedings. At the initial part of the trial, typically referred to as the guilt phase, the jury determines whether somebody (the defendant) did something (committed murder); that is, the jury answers a question that has a clear and certain answer. At the next part, referred to as the punishment phase, the jury decides whether the convicted murderer ought to be sentenced to death. Consequently, the structure of the proceeding itself separates by days or sometimes weeks a jury's examination of the first type of question from its consideration of the second type.

Next, because the entire focus of the punishment phase is death versus life, and because the issue of the death penalty evokes powerful opinions or responses (in a way, for example, that the appropriateness of prison sentences or punitive damages do not), potential jurors in capital cases are questioned at some length about their own attitudes toward capital punishment. The process of this questioning is known as death-qualification,<sup>12</sup> and during the process, potential jurors answer questions from prosecutors, lawyers representing the defendant, and the presiding judge. There is thus a record of what they said, and in response to what, that can be returned to and scrutinized by someone like Conley once the jury has arrived at a verdict. She has, so to speak, a baseline of each juror, and can return to that baseline when interviewing the juror about details of the case and the process of the jury's decision-making.

Psychologists, cognitive scientists, economists, and certain philosophers have developed sophisticated understandings of how human beings answer Type 1 questions (including how human beings can get the wrong answer).<sup>13</sup> Study of moral reasoning, in contrast, from the ancient Greeks to the present, has yielded less clarity with respect to how exactly human beings arrive at answers to the

---

<sup>11</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976), was one of five cases the Court decided when it permitted the death penalty to return to the U.S. Three decisions upheld state death penalty laws; two others did not. These five in conjunction began to shape the contours of modern death penalty law. Compare *Gregg*, *Jurek v. Texas*, 428 U.S. 262 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976) (all upholding death penalty laws), with *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down law making death penalty mandatory for all first-degree murder convictions), and *Roberts v. Louisiana*, 428 U.S. 325 (1976) (same).

<sup>12</sup> *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Death-qualification is the process of insuring that a potential juror's moral views concerning capital punishment will not interfere with his or her ability to follow the instructions of the court.

<sup>13</sup> See, e.g., DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); Laurie R. Santos & Alexandra G. Rosati, *The Evolutionary Roots of Human Decision Making*, 66 ANN. REV. PSYCHOL. 321 (2015); Lily A. Gutnik et al., *The Role of Emotion in Decision-Making: A Cognitive Neuroeconomic Approach Towards Understanding Sexual Risk Behavior*, 39 J. BIOMEDICAL INFORMATICS 720 (2006) (and sources cited). Perhaps the most discussed explanation for how human beings can make irrational decisions even when confronted with thorough empirical evidence is the literature relating to confirmation bias. See, e.g., KAHNEMAN, *THINKING, FAST AND SLOW*; see also Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

second type of question.<sup>14</sup> Conley, an academic anthropologist, focuses on the language of capital trials—the language used by the prosecutors and defense lawyers in particular, but also by witnesses and the jurors themselves—to try to explain how jurors can arrive at the weighty decision to sentence a human being to die. I will save for the end of this review my thoughts as to whether she succeeds in articulating a persuasive general theory; what I will say here at the outset is that this is a rich and insightful book, profitably read by anyone interested in how juries address fundamental moral questions, and an indispensable resource for lawyers charged with representing defendants facing death.

In Part II, I briefly describe the legal landscape that makes Conley’s project important and compelling. In Part III, I summarize her methodology and central conclusions. I conclude in Part IV with some reflections on her larger aim.

## II. IS MORALITY RATIONAL?

Given that philosophers have been debating that question at least from the time of Kant, it would be unreasonable to expect Conley to be able to answer it in her book, or me to be able to answer it here. What we can say, however, is that the Supreme Court’s capital punishment jurisprudence unequivocally supposes morality is rational, or at least that it can be, particularly in the area of death penalty decision-making.

In 1987, the Supreme Court decided *California v. Brown*.<sup>15</sup> The jury that sentenced Brown to death had been instructed by the trial court not to be swayed by “mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.”<sup>16</sup> The California Supreme Court, relying on a line of cases beginning with *Lockett v. Ohio*,<sup>17</sup> ruled that this instruction violated the Eighth Amendment and that Brown’s death sentence therefore could not stand. By a vote of five-to-four, the U.S. Supreme Court reversed, reinstating the punishment. The case thus formally stands for the proposition that the Eighth Amendment is not offended by a so-called anti-sympathy instruction. But Justice O’Connor provided

---

<sup>14</sup> For interesting analyses, see, for example, R.J.R. Blair, *A Cognitive Developmental Approach to Morality: Investigating the Psychopath*, 57 COGNITION 1 (1995); and Jana Schach Borg et al., *Consequences, Action, and Intention as Factors in Moral Judgments: An fMRI Investigation*, 18 J. COGNITIVE NEUROSCIENCE 803 (2006). Even Lawrence Kohlberg’s well-known theory concerning the stages of moral development does not explain deeply how human beings actually arrive at judgments in the various stages. See 1 LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981).

<sup>15</sup> 479 U.S. 538 (1987).

<sup>16</sup> *Id.* at 539.

<sup>17</sup> 438 U.S. 586 (1978). *Lockett* was a plurality decision. It was subsequently embraced by a majority of the Court in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The principle is therefore sometimes known as the *Lockett-Eddings* principle.

the fifth vote for reversal, and in time, her concurring opinion came to overshadow the holding itself.

Justice O'Connor began by identifying the fault-line dividing the majority from the minority. In her view (a view that would later be most vociferously championed by Justice Scalia),<sup>18</sup> death penalty jurisprudence embodied, at its very core, two utterly contradictory ideas. On one hand, the Court had repeatedly held that in order to avoid arbitrary and capricious death sentences (and presumably also to prevent discrimination on the basis of race and other impermissible factors), juries could not be given free rein as they had in the days prior to *Furman v. Georgia*,<sup>19</sup> in which the Court struck down then-existing death penalty statutes. If there was a single defect that doomed death penalty statutes in place at the time of *Furman*, it is that the death sentences they produced appeared to be arbitrary—inexplicable by any permissible theory<sup>20</sup>—and this arbitrariness resulted from giving juries too much power. Consequently, to prevent this insidious arbitrariness, the jury's power had to be limited; its discretion had to be guided. Four years after *Furman*, when the death penalty was reinstated by *Gregg v. Georgia*<sup>21</sup> and its companions, the statutes that were upheld survived precisely because the Court concluded those statutes successfully cabined arbitrariness.

On the other hand, as Justice O'Connor observed in *Brown*, a mere two years after the Court decided *Gregg*, it issued an opinion in an equally foundational case, *Lockett v. Ohio*,<sup>22</sup> that reintroduced potential arbitrariness into the nascent death penalty jurisprudence. Lockett had driven the getaway vehicle in connection with the robbery of a pawnshop, during the course of which a murder occurred.<sup>23</sup> At Lockett's trial, under then-existing Ohio law, the sentencer was not permitted to take a variety of factors into account in assessing Lockett's sentence, including her character, age, prior record, lack of specific intent to take a life, and relatively small role in the crime.<sup>24</sup> The Court set the death sentence aside, and *Lockett* holds that a capital defendant has a right to have the jury consider any relevant mitigating evidence, including evidence relating to the defendant's personal character or background.<sup>25</sup>

Thus, as Justice O'Connor observed in *Brown*, *Gregg* requires that jury discretion be circumscribed to prevent (or minimize) arbitrariness; *Lockett*-

---

<sup>18</sup> See, e.g., *Buchanan v. Angelone*, 522 U.S. 269, 279 (1998) (Scalia, J., concurring).

<sup>19</sup> 408 U.S. 238 (1972).

<sup>20</sup> This idea is best captured in Justice Stewart's famous metaphor that being sentenced to death was akin to being struck by lightning. See *id.* at 309 (Stewart, J., concurring).

<sup>21</sup> 428 U.S. 153 (1976).

<sup>22</sup> 438 U.S. 586 (1978).

<sup>23</sup> *Id.* at 591.

<sup>24</sup> *Id.* at 597.

<sup>25</sup> See *California v. Brown*, 479 U.S. at 544 (O'Connor, J., concurring).

*Eddings*<sup>26</sup> demands that the jury be free to consider all mitigating evidence in assessing the sentence—a freedom that makes arbitrariness more likely.<sup>27</sup> The tension between these two principles, if not inherent, is nonetheless frequent.

The Court in *California v. Brown* deemed the state’s instruction permissible because it simply told the jury not to base a decision on “extraneous emotional factors.”<sup>28</sup> From the standpoint of the dissenters, however, the instruction was problematic because it prohibited the jury from acting on the basis of sympathy for the defendant, thus meaning that the jury was precluded from showing compassion elicited by the defendant’s mitigating evidence or showing mercy by eschewing a sentence of death.<sup>29</sup> Whereas the majority viewed the instruction as guiding the jury’s discretion as a means to avoid arbitrariness, the dissent (as well as the court below) saw it as precluding the jury from basing a decision on empathic concerns, which violated the spirit of *Lockett*.

Justice O’Connor appreciated the merit in both positions, and therefore attempted to steer a middle course. She did so by introducing a phrase that, by my count, has been cited by the Supreme Court in twenty-three death penalty decisions since (*i.e.*, approximately once every term) and by the courts of appeals on more than seventy occasions. That phrase is “reasoned moral response.” This is what Justice O’Connor said:

In my view, evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in *Eddings*, the common law has struggled with the problem of developing a capital punishment system that is “sensible to the uniqueness of the individual.” *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant’s background, character, and crime rather than mere sympathy or emotion.<sup>30</sup>

---

<sup>26</sup> See cases cited *supra* note 17.

<sup>27</sup> I have elsewhere argued that it is in fact a mistake to view these two strands of doctrine as logically inconsistent with one another. See David R. Dow, *The Third Dimension of Death Penalty Jurisprudence*, 22 AM. J. CRIM. L. 151 (1994). But notwithstanding my suggestion, the conventional wisdom, certainly among the justices, remains that the very basis of contemporary death penalty law is riven by a conflict between basic principles.

<sup>28</sup> 479 U.S. at 543.

<sup>29</sup> See *id.* at 548–51 (Brennan, J., dissenting); *id.* at 561–62 (Blackmun, J., dissenting).

<sup>30</sup> *Id.* at 545 (O’Connor, J., concurring) (citations omitted).

The problem with this paragraph, of course, is that although it is historically accurate, the prescription it offers makes no obvious sense. We know what reasoning is, and we know what morality is, but what is reasoned morality? Justice O'Connor doesn't really say. Instead, she begs the question, insisting that "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence."<sup>31</sup> In point of fact, to the extent Justice O'Connor was suggesting a chasm between emotion and morality, her suggestion is at odds with the academic consensus, which views emotion as integral in forming moral judgments.<sup>32</sup>

Subsequent Supreme Court cases and decisions from the courts of appeals do not offer much by way of clarification, often repeating the "reasoned moral response" mantra without exactly saying what it means or how a jury is to go about the process of issuing such a response. For example, the Fifth Circuit has indicated that if a jury believes a defendant is not sufficiently morally culpable to be sentenced to death, but is unable to dispense a less severe punishment, then the "reasoned moral response" requirement is abridged.<sup>33</sup> This conclusion, while perfectly consistent with language in other Supreme Court cases,<sup>34</sup> seems to regard the word "reasoned" as meaningless. Yet elsewhere, the same court of appeals observes that the "reasoned moral response" requirement aims to achieve a "reliable" sentence<sup>35</sup>—a formulation that powerfully evokes the word "reasoned" while pushing the word "moral" into the background. Similarly, the Ninth Circuit has tried to give meaning to this curious phrase by italicizing the word "moral,"<sup>36</sup> suggesting it should receive greater emphasis than the word "reasoned," although precisely what that means is hard to say.

At the center, therefore, of this core requirement of modern death penalty law—that the sentence be a "reasoned moral response"—is a reflection of the incommensurable values underlying the death penalty itself.

---

<sup>31</sup> *Id.*

<sup>32</sup> The academic literature overwhelmingly indicates that emotion plays a crucial if not central role in forming moral judgments. *See, e.g.*, Jean Decety & Stephanie Cacioppo, *The Speed of Morality: A High-Density Electrical Neuroimaging Study*, 108 J. NEUROPHYSIOLOGY 3068 (2012); Travis Riddle, *How Your Moral Decisions are Shaped by a Bad Mood*, SCI. AM. (Mar. 12, 2013), <http://www.scientificamerican.com/article/how-your-moral-decisions-shaped-by-mood/> [https://perma.cc/JA3L-B6RY]; Yana R. Avramova & Yoel Inbar, *Emotion and Moral Judgment*, 4 WIREs COGNITIVE SCI. 169 (2013).

<sup>33</sup> *See, e.g.*, *Nelson v. Quarterman*, 472 F.3d 287, 293 (5th Cir. 2006).

<sup>34</sup> *See*, most notably, *Penry v. Lynaugh*, 492 U.S. 302 (1989).

<sup>35</sup> *Nelson*, 472 F.3d at 300.

<sup>36</sup> *See Doe v. Ayers*, 782 F.3d 425, 450 (9th Cir. 2015).



When the Supreme Court revived the death penalty in *Gregg v. Georgia*,<sup>37</sup> the plurality opinion identified two distinct values as being permissible bases for capital punishment: deterrence and retribution. Deterrence, of course, is measurable (at least in theory); retribution is not. The tension embedded in the phrase “reasoned moral response” is therefore already present at the dawn of contemporary capital punishment. It is one thing, however, to observe this jurisprudential fact; it is another thing entirely to seek to understand how individual jurors faced with the awesome task of arriving at a sentence in a capital case go about the process of doing so. It is that very understanding Robin Conley is after.

### III. DECIDING FOR DEATH

Conley is interested in exploring a specific question. She announces in the Introduction she will be asking “how can human beings sentence another person to die.”<sup>38</sup> In fact, her book has a somewhat narrower and more manageable focus: she examines the role that language plays in a juror’s decision to sentence someone to death. Over a one-year period, Conley attended four capital murder trials. She made her own recording of one of them, and obtained official transcripts from three. She also reports that she worked closely with defense counsel, including meeting with witnesses, assisting in jury selection, and even drafting pleadings.<sup>39</sup> Of the four trials she considered, three resulted in death sentences and one did not.

Conley reports that she interviewed twenty-one jurors; these jurors were scattered across nine trials, not just the four she studied at length.<sup>40</sup> At least as reflected in this volume, Conley did not delve deeply into the religious or philosophical belief systems of the jurors who are the data points for her conclusions. Instead, to gain insight into their decision-making, she relies on interviews. Unfortunately, she does not report how long the typical interview lasted, how many hours in the aggregate she spent with her sample, or even the questions she asked. There are thus some obvious and significant limitations to her study and conclusions. The trials she studied most thoroughly took place in a single year (although we do not know when the other trials occurred). Conley

---

<sup>37</sup> 428 U.S. at 155. The Court had previously struck down the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>38</sup> P. 4 (“This book asks one essential question: how can human beings sentence another person to die?”). (Citations to Conley refer to the page or pages in the volume under review.)

<sup>39</sup> P. 39. I am not sure it matters to the credibility of her conclusions, such as they are, that Conley aligned herself with the defense in these cases, although it does strike me as raising a concern.

<sup>40</sup> Pp. 42–43. Conley does not provide a more specific breakdown, *i.e.*, how many of the jurors from the four trials with which she was most familiar she was able to interview. She also interviewed lawyers, judges, and prison officials, although those interviews are less central to her project. She also does not indicate how many of the other five trials, if any, resulted in life sentences.

indicates she travelled to six counties, in central, east, and west Texas,<sup>41</sup> but she does not say which counties, or for how long, or for what purpose, nor does she say whether the trials occurred in these counties or whether her travel was for some reason other than observing the courtroom proceedings (*e.g.*, locating witnesses). As a result, it is impossible to say whether her sample is representative ethnically, politically, culturally, or even temporally. Moreover, Conley does not say how many of the twenty-one jurors interviewed participated in the trials with which Conley was most familiar; she either never learned or elected not to reveal biographical facts about the jurors—*e.g.*, their religion, their race, and in most cases their gender—that might also be useful to understanding how they process the question of whether a given defendant ought to be sentenced to death.<sup>42</sup> These limitations, and others I will mention, along with the various lacunae in germane background details, strike me as imposing significant caveats on whatever conclusions one might otherwise draw from Conley’s research. Nevertheless, caveats notwithstanding, this is a rich, interesting, and revealing book.

The book comprises seven chapters. The first, which Conley calls an Introduction, is essentially a description of her project coupled with several eye-raising assertions. She refers, for example, to the dehumanization of a defendant—the process by which his humanity is questioned—and she characterizes the guidance given capital jurors as “meager.”<sup>43</sup> These are incendiary observations, and at the point she offers them, she says little about what exactly she means, and offers nothing by way of support. Fortunately, she returns to these and other provocative suggestions in later chapters.

---

<sup>41</sup> P. 38. It is not clear to me why Conley does not provide detailed and specific information about which trials she attended or studied, where they took place, and how many jurors interviewed sat on a trial she did not study or attend. Having this information would not compromise the identity of the jurors interviewed, and it would make it possible for me to say something more specific about how (un)representative her data are. But alas, all we can say with certainty is that her conclusions may not apply specifically to the Rio Grand Valley, a vast swath of south Texas she states she did not get to. P. 38.

<sup>42</sup> For example, the school of thought associated with Carol Gilligan’s work could explain how even in the face of the same language, women and men have different empathic reactions. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1998). And the very different experience blacks and other racial minorities have with law enforcement, as compared to whites, could help explain how ethnicity as well could affect one’s empathic reaction to certain language. *See, e.g.*, Aliya Saperstein, Andrew M. Penner & Jessica M. Kizer, *The Criminal Justice System and the Racialization of Perceptions*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2014); David L. Neumann, Gregory J. Boyle & Raymond C.K. Chan, *Empathy Towards Individuals of the Same and Different Ethnicity When Depicted in Negative and Positive Contexts*, 55 PERSONALITY & INDIVIDUAL DIFFERENCES 8 (2013); Paolo Albiero & Giada Matricardi, *Empathy Towards People of Different Race and Ethnicity: Further Empirical Evidence for the Scale of Ethnocultural Empathy*, 37 INT’L J. INTERCULTURAL REL. 648 (2013). Conley briefly alludes to the influence of gender but does not examine it at any length. *See pp.* 76–78.

<sup>43</sup> Pp. 6, 8.

Chapter 2 is a general description of a death penalty trial, with specific attention paid to how the process works in Texas. Here, Conley also refers briefly to several major legal issues, including *Witherspoon*<sup>44</sup> and *Batson*<sup>45</sup> claims; but the most important aspect of this chapter is the description of how she acquired her data. Chapter 7 provides a brief conclusion, and also includes advice for practitioners (some of which I return to below in Part III). The core of the book, therefore, consists of chapters 3, 4, 5, and 6. These four chapters do not divide clearly on the basis of content; nevertheless, Conley has a slightly different focus in each of them.

Chapter 3 deals most directly with the distinction between the two types of questions I identified previously.<sup>46</sup> Conley calls it a paradox: the idea that jurors are told to be unbiased and objective, yet are also told that their sentencing decision is subjective and moral. Although she relies on only a single excerpt from a juror interview to support the claim, Conley observes, and her juror emphatically confirms, that emotion and reason are distinct mental processes. Moreover, and significantly, the juror who epitomizes this idea of two types of questions also intimates that emotions and feelings are a distraction to the task the jurors are required to carry out. Conley reports that jurors felt frustrated by the tension between these two sets of values. Conley's jurors therefore appear to embody the same problematic idea in Justice O'Connor's "reasoned moral judgment" phrase: that they must put their emotions aside when deciding a defendant's punishment.

What is perhaps the most significant element of this chapter is Conley's conclusion that capital jurors equated the idea of "impartiality" with that of "objectivity." Conflating these two very different ideas may be commonplace in our quotidian discourse, but it is still imprecise,<sup>47</sup> and that imprecision can have life-and-death impact in the context of a capital trial. For at least one juror Conley quotes on this issue, objectivity is achieved by something akin to the law of large numbers:<sup>48</sup> that is, any individual juror's bias is cancelled out by the absence of that bias in the jury as a whole. Of course, among the problems with this approach to the proper sentence is that what Conley's juror means by "bias" is a point of view tethered to that juror's individual perspective. Put another way, and again with the

---

<sup>44</sup> *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Witherspoon* pertains generally to which jurors may be struck for cause on the grounds their philosophical or religious attitude toward the death penalty makes it impossible for them to faithfully adhere to a state's law.

<sup>45</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* precludes parties (typically the prosecution) from removing potential jurors from the venire on the basis of the venire-person's race.

<sup>46</sup> Indeed, in this chapter, Conley talks specifically about *California v. Brown*. See pp. 52–56 & nn.3–4.

<sup>47</sup> For a superb treatment, see THOMAS L. HASKELL, OBJECTIVITY IS NOT NEUTRALITY: EXPLANATORY SCHEMES IN HISTORY (2000). Conley herself does not make this mistake. See, e.g., p. 61.

<sup>48</sup> See, e.g., Philip B. Stark, *The Law of Large Numbers*, <http://www.stat.berkeley.edu/~stark/Java/Html/lln.htm> [<https://perma.cc/4CAJ-7CQT>] (last visited Feb. 25, 2017).

caveat that our sample size here is exceedingly small, Conley's juror views an objective decision as one that is untethered from the individual perspectives of each juror. Unfortunately, this definition of objective is not only impossible to achieve, but it also wrongly assumes that the choice between life and death should have nothing to do with a juror's individual experience. Conley indicates, moreover, that this juror's understanding was not idiosyncratic, and "many jurors," Conley writes, believed they were obligated to disregard emotion not only when deciding innocence versus guilty, but also when assessing punishment.<sup>49</sup>

If Chapter 3 is mostly about how capital jurors try to approach Type 2 questions the same way they approach Type 1 questions, chapters 4 and 5 address how the language of capital trials gets filtered through that singular approach, and these two chapters examine whether other nonlinguistic modes of communication affect a juror's decision-making.

Chapter 4 is in some respects the most important in the book, because it suggests that Conley's jurors relied, to a substantial degree, on their assessment of a defendant's demeanor to arrive at the answer to the appropriate punishment. It is now a cliché of social science—and perhaps an erroneous one—that most communication is nonverbal,<sup>50</sup> but Conley's point is more subtle. She quotes the rule that allowable demeanor evidence is presumably limited to a witness's demeanor while testifying,<sup>51</sup> but her interviews reveal that her jurors drew conclusions about a defendant's remorse, for example, from whether he appeared remorseful, *regardless of whether the observation of the defendant's demeanor occurred while he was testifying*. One juror concludes a defendant is "cold as a snake"—that is, emotionless—based on the juror's belief, gleaned from nothing more than observing the defendant during someone else's testimony, that the defendant was not interested in what the witness was saying.<sup>52</sup> Jurors wanted to have some contact with or hear from the defendant, and when they did not, they lacked what they needed to have a concrete indication of the defendant's humanity.<sup>53</sup>

This viewpoint entails that a defendant's decision not to testify increases the likelihood of a death sentence, because the choice to remain silent is viewed as an

---

<sup>49</sup> Pp. 71–76.

<sup>50</sup> The so-called 7% rule—that communication is based on 7% of what someone says, 38% on how the person says it, and 55% on the person's posture—is attributed to Albert Mehrabian and his colleagues. See ALBERT MEHRABIAN, *SILENT MESSAGES* (1971). The conclusion is based on a rather limited study, and has been criticized. See, e.g., Philip Yaffe, *The 7% Rule: Fact, Fiction, or Misunderstanding*, *UBIQUITY* (Oct. 2011), <http://ubiquity.acm.org/article.cfm?id=2043156> [https://perma.cc/6HKD-5R98].

<sup>51</sup> Pp. 90–91. Texas cases addressing the salience of a defendant's demeanor are not limited to demeanor while testifying. See, e.g., *Dickinson v. State*, 685 S.W.2d 320, 323 (Tex. Crim. App. 1984).

<sup>52</sup> Pp. 104–05.

<sup>53</sup> P. 110.

absence of remorse. Particularly in the context of this chapter, it is important to stress the small and potentially unrepresentative sample providing the data. At the same time, all the jurors Conley interviewed participated in a death penalty trial, and so their beliefs and expectations had concrete impact on an individual's life.

Chapter 5 is best understood as a revealing look at how prosecutors skillfully exploit the role that nonlinguistic cues play in influencing a juror's answer to the question of life or death. Thus, where chapter 4 reveals how jurors form opinion about defendants based not on what they say but simply on how they appear, chapter 5 demonstrates how a prosecutor's characterization of the defendant (or the defendant's victim) can validate or reinforce the juror's opinion.

Conley notes that prosecutors refer to the individual facing death as "that guy" or "that defendant"—terms that create emotional distance between the jurors and the defendant. When Conley talks about how a defendant is dehumanized, she is talking specifically about the process of using language to blunt any empathy jurors might have toward the accused. Defense counsel obviously employ a different approach; they do refer to their clients by name, and thereby attempt to create familiarity between the accused and the jurors that will make the emotional task of sentencing him to death more challenging. Conley does not surmise why the prosecutors tend to succeed, but her interviews reflect that they do, and that the jurors continue to refer to the defendant, even after having sentenced him to die, in distant and distancing language, rather than by his given name.<sup>54</sup>

Throughout the book I was frustrated by the absence of details concerning the jurors Conley interviewed, but that frustration perhaps reached its zenith in chapter 5. Thus, for example, recall that one of the defendants in the trials Conley studied was sentenced to life rather than death; it certainly would be helpful and at least a little bit informative to know whether the jurors in that case referred to the defendant by name, or whether they too referred to him abstractly.<sup>55</sup> In the absence of that information, it is hard to know precisely what to make of Conley's observation that jurors eschew calling a defendant by his name. She does cite other research showing that denominating someone as not human makes it easier to justify killing that person,<sup>56</sup> and Conley herself uses the word "dehumanization" to characterize this process, but what is missing is any reason to think that the linguistic distancing comes first. That is, a juror who has voted to sentence a

---

<sup>54</sup> *E.g.*, pp. 135–41.

<sup>55</sup> Although Conley did interview jurors who participated in a trial where the defendant was sentenced to death, she reports that the jurors who agreed to be interviewed by her for her research had preferred death. Conley recognizes and acknowledges the limited utility of her data on this issue. *See* pp. 152–53. She does suggest that other research supports the conclusion that jurors who express greater empathy for a defendant also refer to that defendant in a more familiar manner. BENJAMIN FLEURY-STEINER, *JURORS' STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY* (2004).

<sup>56</sup> P. 141 (citing DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* (2009)).

defendant to death might well refer to him post-verdict in distancing terms as a form of emotional self-protection. Consequently, given the small sample, coupled with the absence of any information as to whether the jurors from the non-death case used different terminology, we simply cannot say whether a juror's linguistic characterization of the accused ("that guy," "the defendant," etc.) is what permitted the juror to sentence the defendant to death or whether, in contrast, the jurors who sentence a defendant to death begin to use these distancing characterizations only in retrospect.

Even after digesting all Conley has offered—that jurors believe their decision must be rational, not emotional; that they nevertheless form emotional if unacknowledged reactions based in large part on the defendant's demeanor; that they have these reactions reinforced by the prosecutor's language and indeed their own linguistic characterization of the defendant—even after all that parsing and analysis, we are still left with the profound question of how a group of human beings is able to arrive at a decision that another human being should be killed by the state.

This decision is quite unlike most other decisions to kill a society makes. In warfare, for example, at both the strategic and tactical levels, the killing is justified by the rationale that if we do not act, the decision not to kill will result in the taking of other human lives. Of course, there are some deterrence theorists who would like to justify the death penalty on precisely these grounds,<sup>57</sup> but apart from the fact that no reliable data support the existence of a deterrent effect,<sup>58</sup> capital jurors do not make their decisions in individual cases on the basis of general deterrence. How then, as a sheer cognitive matter, do jurors arrive at the awesome decision that another individual ought to be killed?

The answer, Conley suggests in Chapter 6, is precisely that the jurors do not believe in a deep and meaningful way that they are in fact making the fatal decision. Whether her conclusion here is applicable to other states, where the technical aspects of the capital trial vary from those in Texas, her observations about the jurors she interviewed are important.

She focuses on three different features of the trial, one of which is unique to Texas but two others of which are present in all death penalty jurisdictions. The first common element is the process of death-qualification. At this stage of the proceeding, a potential juror, in order to be eligible to be seated on the panel, must expressly acknowledge her or his ability to return a death sentence if warranted by the evidence. Conley notes that jurors are asked whether they would individually

---

<sup>57</sup> E.g., Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required?: Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (finding recent evidence of deterrent effect impressive).

<sup>58</sup> See generally Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255 (2006) (reviewing recent evidence). For a somewhat dated but useful overview, see Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 ANN. REV. L. & SOC. SCI. 151 (2005).

be able to sentence the defendant to death, that is, they effectively make a personal commitment—not to do it, but to be open to the possibility of doing it. Death-qualification thereby primes potential jurors to be able to say that someone should die.

Next, when it comes time to actually make the fateful decision, the jurors are no longer individuals; they are instead a part of a collective, where their power, but also their responsibility, is diluted by the simple fact of being one out of twelve.<sup>59</sup> Initially, therefore, they promise that they, as individuals, could sentence someone to death; and then, once in the position of deliberating punishment, they are able to avoid the emotional toll of taking such dramatic action, because the sentence of death is imposed not by them alone, but by the group of which they are only a small part.<sup>60</sup>

Conley, of course, is an anthropologist, not a psychologist, and it is not part of either her expertise or her project to explore these psychological questions more exhaustively. Yet she has uncovered the way in which jury behavior may well be at odds with an important strand of death penalty jurisprudence. In *Caldwell v. Mississippi*,<sup>61</sup> the Supreme Court considered a case where the prosecutor had told the sentencing jury that, for all intents and purposes, its decision was not final because others (namely the appellate courts) were going to review it. A divided Court reversed the death sentence. Writing for the plurality, Justice Marshall “conclude[d] that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”<sup>62</sup> For the plurality, a death sentence is problematic when the jury does not feel the full weight of its “awesome responsibility.”<sup>63</sup>

---

<sup>59</sup> I make a similar point in *The Autobiography of an Execution*:

[O]ur system of capital punishment survives because it is built on an evasion. . . . A juror is one of twelve, and therefore the decision is not hers. A judge who imposes a jury’s sentence is implementing someone else’s will, and therefore the decision is not his. A judge on the court of appeals is one of three, or one of nine, and professes to be constrained by the decision of the finder of fact, and therefore it is someone else’s call. Federal judges say it is the state court’s decision. The Supreme Court justices simply say nothing, content to permit the machinery of death to grind on with their tacit acquiescence.

DAVID R. DOW, *THE AUTOBIOGRAPHY OF AN EXECUTION* 218–19 (2010)

<sup>60</sup> In a sense, what Conley has identified is how the well-known operation of group dynamics operates in the decision to arrive at a death sentence. On group dynamics generally, see DONELSON R. FORSYTH, *GROUP DYNAMICS* (6th ed. 2013); on the more specific issue of how individuals will do something as part of a group they would not do alone, see PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007).

<sup>61</sup> 472 U.S. 320 (1985).

<sup>62</sup> *Id.* at 329.

<sup>63</sup> *Id.* at 341.

Justice O'Connor provided the fifth vote for reversal in *Caldwell*. Anticipating the attempt to merge rationality and morality she would embrace two years later in *California v. Brown*, Justice O'Connor focused on how the prosecutor's remarks had been *intellectually* misleading.<sup>64</sup> For O'Connor, the problem was not that the prosecutor sought to minimize the emotional weight the jurors felt in deliberating punishment, but rather that the prosecutor had misinformed the jury about how the appellate process worked and how searchingly its own sentencing decision would be reviewed.<sup>65</sup>

Predictably, the courts of appeals have drawn two different lessons from *Caldwell*. Some have stressed that a reliable death sentence requires that the sentencing jury feel the responsibility for its decision, a reading of *Caldwell* that stresses its emotional dimension.<sup>66</sup> Others have homed in on O'Connor's notion that a death sentence is reliable as long as the prosecutor does not mislead the jury about its precise role in the system.<sup>67</sup> Regardless, what remains only poorly understood is precisely how the weightiness of the moral responsibility operates on a juror's decision-making and how the fact that a juror is a member of a group may produce exactly the effect the Court in *Caldwell* was worried about.

Finally, Conley points to an important and unique feature of the Texas statute that may well dilute even further the moral responsibility the jurors feel for their decision. It is by no means certain, of course, that the uniqueness of the Texas law plays any role at all, much less a significant role, in the fact that Texas has carried out by far the greatest number of executions in the modern era;<sup>68</sup> but the statute still merits comment, and Conley parses it succinctly and well.

In most death penalty states, jurors are asked specifically whether they vote to sentence the defendant to death. In Texas, a jury arrives at a death verdict more circuitously. Texas capital juries answer two questions (known as special issues). The first, commonly referred to as the "future dangerousness" question, asks jurors whether they believe there is a reasonable probability that the defendant will commit future acts of violence that will represent a continuing threat to society.<sup>69</sup>

---

<sup>64</sup> *Id.* at 342 (O'Connor, J., concurring).

<sup>65</sup> *Id.* at 342-43.

<sup>66</sup> *E.g.*, *Farina v. Fla. Dep't of Corr.*, 536 F. App'x. 966 (11th Cir. 2013).

<sup>67</sup> *E.g.*, *Littlejohn v. Trammell*, 704 F.3d 817, 840 (10th Cir. 2013); *see also* *Black v. Workman*, 682 F.3d 880, 911 (10th Cir. 2012) (noting that later Supreme Court cases have stressed Justice O'Connor's focus on accuracy over Justice Marshall's focus on responsibility (citing *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994))).

<sup>68</sup> Of the more than 1,400 executions nationwide since 1976, more than one third that total (*i.e.*, 540 executions since 1976) have been carried out in Texas. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> [<https://perma.cc/5RF2-DMC8>] (last visited Mar. 4, 2017).

<sup>69</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(1) (West 2013). The difficulty of achieving a precise understanding of what it means for the government to prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that



If they answer that question negatively, the defendant automatically receives a sentence of life in prison. If they answer yes to the future danger question, however, the result is a presumption in favor of the death penalty, and the jury then proceeds to answer a second question: namely, whether, in view of all the evidence, a sentence of life rather than death is warranted.<sup>70</sup> If, in other words, the answer to the future dangerousness question is yes, then there is a presumption in favor of death that can be overcome with an affirmative answer to the mitigation question, but the jurors do not ever actually have to say that the defendant ought to die.

Four factors therefore come into play in the actual sentencing decision in Texas (two of which operate in all death penalty jurisdictions). First, each juror had to individually acknowledge during voir dire that she or he could in fact sentence someone to death if the evidence so warranted.

Second, the evidence that matters most to that determination in Texas is the evidence germane to the future dangerousness inquiry. Juries rarely answer the future dangerousness question negatively, and that is not surprising, in view of the fact the same jury has already found the defendant guilty of capital murder.<sup>71</sup>

Third, as Conley's interviews revealed, jurors see themselves as part of a group. The psychological literature is filled with illustrations and explanations of how and why individuals will act as part of a group in a way they would not act as individuals, and Conley does not break new ground (or attempt to) in addressing that phenomenon. What she does show, however, is that the phenomenon may be operating in the jury room.

Fourth and finally, a juror who tilts against a death verdict notwithstanding the affirmative answer to the future dangerousness question must therefore answer the mitigation question affirmatively, but the jury is instructed that it cannot answer the mitigation question in the affirmative unless 10 jurors agree to that

---

would constitute a continuing threat to society" is beyond the scope of either Conley's book or this essay. *Id.* Moreover, in a purely linguistic sense, the answer to this question is always yes, unless the defendant is dead, because there is always a probability someone will do something dangerous. The probability the Pope will assassinate the President approaches zero, but it is not zero.

<sup>70</sup> *Id.* at § 2(e)(1). Jury must determine whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." *Id.* As is clear from the language of the issue, the defendant bears the burden of proof, which is why the consequence of an affirmative answer to the future dangerousness question is to create a presumption in favor of death.

<sup>71</sup> See James W. Marquart, Sheldon Eklund-Olson & Jonathan R. Sorensen, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC'Y REV. 449 (1989) (jurors answering future danger question in the negative in only 15 out of 56 cases studied); see also David R. Dow & Safa Ansari-Bayegan, *How Many People Have Been Unconstitutionally Executed in Texas?* (Mar. 1, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2228311](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228311) (examining cases where juries answered the future dangerousness question as well as mitigation question in the affirmative).

answer.<sup>72</sup> So a juror favoring life, aside from now being part of a group, is able to effectively sentence a defendant to death by acquiescence simply by recognizing he or she will not be able to persuade nine other jurors to his or her position. Ultimately, Conley reveals, death sentences happen because it is easier for jurors to allow them to happen than to stand in their way.

#### IV. CONCLUSION: DIGGING BENEATH THE JARGON FOR GUIDANCE

This book has limitations. As I have suggested, the sample size is small; we do not know how representative it is; and Conley relies primarily on interviews with jurors—an investigative technique that is problematic not only because it occurs after the fact, but also because by the time jurors are interviewed, they have already reached a decision, and it may be impossible to disentangle the effect of that decision on their answers to Conley’s questions.

In addition, and perhaps most challenging to a non-expert reader, Conley brought not only the tools of her discipline, anthropology, to her inquiry; she also brought her jargon. She talks about “paralinguistic ideologies”<sup>73</sup> and “depoliticized surface.”<sup>74</sup> She uses “polysemy” as an adjective to modify a defendant’s identity.<sup>75</sup> She writes of “deixis”<sup>76</sup> and “deictic reference forms.”<sup>77</sup> In one doozy of a sentence, she says “[e]mpathy and deixis both entail relationships within space, whether physical or metaphorical” and immediately quotes another anthropologist who claims “empathy relies on the ‘visceral and emotional *emplacement* of our being in [various] contexts.’”<sup>78</sup> I lost count of how many times the jargon made me want to scream out loud, but it was a big number.

---

<sup>72</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(2). In point of fact, this instruction is false because Texas law provides that if the jury is hung at the sentencing phase, meaning that if even a single juror holds out for an affirmative answer to the mitigation question, the defendant is automatically sentenced to life. Despite this incorrect instruction, both the state and federal courts have repeatedly refused to view it as a constitutional violation. *See, e.g.*, *Prystash v. State*, 3 S.W.3d 522, 536–37 (Tex. Crim. App. 1999); *Parr v. Thaler*, 481 F. App’x 872, 878 (5th Cir. 2012); *Davila v. Davis*, No. 15-70013, 2016 WL 3171870, at \*8 (5th Cir. 2016).

<sup>73</sup> P. 85.

<sup>74</sup> P. 94 (quoting Linda Mulcahy, *Architects of Justice: The Politics of Courtroom Design*, 16 SOC. & LEGAL STUD. 383, 384 (2007)).

<sup>75</sup> P. 100. I’m still not entirely clear on how polysemy, meaning a word with multiple meanings (from the Greek for many (*poly*) + signs (*sema*)), can describe a juror’s view of a defendant’s identity, but that is perhaps a quibble.

<sup>76</sup> P. 121.

<sup>77</sup> P. 122 (“[D]eictic reference forms enable jurors to dehumanize defendants, thereby legitimizing sentences to end their lives.”).

<sup>78</sup> P. 122 (emphasis and brackets in Conley’s original) (quoting Jason C. Throop, *Latitudes of Loss: On the Vicissitudes of Empathy*, 37 AM. ETHNOLOGIST 771 (2010)).

All that said, the lessons contained in this book justify the pain of slogging through the language. Conley's conclusions are certainly limited by her sample size, and by the somewhat peculiar operation of the death penalty in Texas, but there are nevertheless many insights as to how the machinery of death operates in America, and those insights lead to both advice to defense lawyers as well as to those interested in improving the fairness of the criminal justice system. I will briefly mention two potential improvements.

The first potential area of reform suggested by Conley's research involves capital jury selection. The legal literature has long indicated that death-qualified juries are more inclined to convict,<sup>79</sup> but Conley's study reveals that death qualification has other pernicious consequences as well. In particular, the dilution of empathy toward the defendant begins before the jury is seated. All of which is to say that the process of death-qualification produces not only a conviction-prone jury, but a death-prone jury to boot. One solution would be to do away entirely with the process of death-qualification.

To be sure, the state has a legitimate interest in insuring that potential jurors can follow state law, but ascertaining that panel members are so able requires asking a single question: Will your personal views toward capital punishment, if any, interfere with your ability to follow the instructions of the court? Asking any questions beyond that one not only condition jurors to return a death verdict, but also produce a jury that does not fairly represent the diversity of views toward capital punishment held by the defendant's peers. When a prosecutor can strike not only a potential juror who is categorically opposed to the death penalty, but also one who takes the moral gravity of the punishment seriously,<sup>80</sup> the state is impaneling a jury that is more than inclined to convict; it is also inclined to execute.

A second aspect of death penalty trials that Conley's research highlights is the role played by factors that are not even part of the trial proceeding. I've been representing death row inmates for more than a quarter of a century. After all that time, I still have no confidence whatsoever I could tell whether somebody is remorseful by watching him sit between his lawyers during a trial at which his counsel has told him what to wear and how to sit and which facial expressions are allowed. It is perhaps predictable that Conley's jurors made life or death decisions

---

<sup>79</sup> To be sure, the Supreme Court rejected a claim brought precisely on the basis of this fact. See *Lockhart v. McCree*, 476 U.S. 162 (1986). Nevertheless, the social science data are overwhelming in support of the proposition, and the Court's decision in *McCree* assumed the validity of the conviction-prone thesis in its ruling. See *id.* at 178. For a review of the literature, see Jane M. Byrne, *Lockhart v. McCree: Conviction Proneness and the Constitutionality of Death-Qualified Juries*, 36 CATH. U. L. REV. 287, 289–93 & nn.20–27 (1986); and *Capital Punishment*, 45 GEO. L.J. ANN. REV. CRIM. PROC. 902, 927 n.2473 (2016).

<sup>80</sup> Such a juror will not be *Witherspoon*-excludable, but the prosecutor, having learned the potential juror's philosophical views during the process of death qualification, will be able to exercise a peremptory challenge to remove him or her.

based, at least in part, on factors so gauzy as these, but the fact it comes as no surprise does not make these juror interviews any less disturbing or problematic. If a defendant's demeanor plays any role at all, even a marginal one, in a sentencing decision, it is difficult to imagine that factors like racism and other bias do not also enter the calculus.<sup>81</sup> How, though, can we hope to control the potency of these influences?

In 1997, President Bill Clinton nominated Richard C. Casey to sit on the United States District Court for the Southern District of New York. Several years earlier, New York Senator Alfonse D'Amato had encouraged the administration of George H.W. Bush to name Casey to the federal bench. At that time, *The New York Times* was skeptical. Why? Because Casey was blind. As the *Times* editorialized, in federal trials, "[f]ederal judges do most of the questioning of prospective jurors and routinely weigh the credibility of witnesses in non-jury cases. The ability to make eye contact has almost universally been assumed indispensable for the task of trial judging."<sup>82</sup> Finally confirmed in 1997, Casey served on the district court for nearly ten years.

What the *Times* editorial did not appreciate is that the ability to see the witness might be overvalued. Hence, one solution to the problem of jurors' judging defendants based on the defendants' appearance would be to shield them from the jury's view. The jury would not know whether the defendant is white or black, tall or short, fat or thin, with or without tattoos, smiling or stone-faced. There would be opportunities for jurors to learn some facts about the defendant's appearance, anyway. If his parents or children were to testify, their ethnicity would tend to reveal that of the defendant. If the defendant were to testify and speak with a Spanish accent, that too would reveal a biographical detail. And it is not clear whether not being able to see the defendant would make him seem even less human, and thereby increase the probability of a death verdict. Still, Conley's data suggest this is an issue worthy of additional study, and it seems plausible to conclude that at least some potential harm could be reduced by having the defendant hidden from the jury's view. Perhaps the net detriment of shrouding the defendant from the jury's view outweighs any potential benefit.<sup>83</sup> But the problem

---

<sup>81</sup> Others in addition to Conley have addressed the role of demeanor in juror decision-making, although the stakes involved in the cases Conley examines are obviously uniquely high. See generally Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573 (2008); Mary R. Rose & Shari S. Diamond, *Offstage Behavior: Real Jurors' Scrutiny of Non-Testimonial Conduct*, 58 DEPAUL L. REV. 311 (2009); Mary R. Rose, Shari S. Diamond & Kimberly M. Baker, *Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trials*, 34 LAW & HUM. BEHAV. 310 (2010). Conley's bibliography reveals a deep familiarity with this area of research.

<sup>82</sup> Opinion, *A Blind Judge?*, N.Y. TIMES (Feb. 6, 1992), <http://www.nytimes.com/1992/02/06/opinion/a-blind-judge.html> [<https://perma.cc/C6YW-85NT>].

<sup>83</sup> Whether hiding the defendant from the jury would dilute the negative inferences jurors draw from demeanor alone is certainly amenable to controlled study by conducting trial simulations. I am not aware of any such studies.

of judgments based on demeanor is a serious one that imperils the idea of a just and fair sentencing decision.

Conley closes by reminding us that a trial is a story, and that stories are told with language. The best chance defense lawyers have to save the lives of their clients facing death is to cause the jurors to see the defendant as a sympathetic figure, a human being who warrants a chance to live. Facts alone will not accomplish the objective. The facts must forge an emotional connection with the jurors. Language and narrative are the tools of that forging. To know the lesson is not enough to learn it, but it's a start.