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Violence, Representation, and Responsibility in Capital Trials: The View from the Jury[†]

AUSTIN SARAT*

"Let's do it."¹
—Gary Gilmore

"Let's get on with it."²
—William Rehnquist

INTRODUCTION

Writing about the continuing place of the death penalty in the apparatus of criminal justice in the United States, Justice Stevens once noted the essential role of the jury in both administering and legitimizing that punishment. "If the State wishes to execute a citizen," Stevens wrote, "it must persuade a jury of his peers that death is an appropriate punishment for his offense."³

If the prosecutor cannot convince a jury that the defendant deserves to die, there is an unjustifiable risk that the imposition of that punishment will not reflect the community's sense of the defendant's "moral guilt." . . . *Furman* and its progeny provide no warrant for—indeed do not tolerate—the exclusion from the capital sentencing process of the jury and the critical contribution only it can make toward linking the administration of capital punishment to community values.⁴

By highlighting the jury's place in the administration of capital punishment, Stevens called attention to a fact which is widely taken for granted but is nonetheless quite remarkable, namely that ordinary citizens are regularly enlisted as authorizing agents for the law's own lethal brand of violence. As Haney, Sontag, and Costanzo put it, "Capital trials are unique in American jurisprudence and, indeed, in human experience. Under no other circumstance does a group of ordinary citizens calmly and rationally contemplate taking the life of another, all the while acting under color of law."⁵ This kind of

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1. Bill Beecham, *Let's Do It*, L.A. TIMES, Jan. 11, 1987, § 1, at 2, 12 (quoting Gary Gilmore immediately prior to his execution).

2. Katherine Bishop, *After Night of Court Battles, a California Execution*, N.Y. TIMES, Apr. 22, 1992, at A1, A22 (quoting Chief Justice Rehnquist's plea to end delays in carrying out capital punishment).

3. *Spaziano v. Florida*, 468 U.S. 447, 490 (1984) (Stevens, J., concurring in part and dissenting in part).

4. *Id.* at 489-90.

5. Craig Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, J. SOC. ISSUES, Summer 1994, at 149, 149.

democratically administered death penalty is a reminder of a venerable yet enduring problem in social life, namely the question of how people come to participate in projects of violence, of how cultural inhibitions against the infliction of pain can be turned into cultural support for such projects by otherwise decent persons.⁶ In this Article, I investigate how jurors interpret the discourse and representational practices surrounding capital trials, thus lending themselves to the use of lethal violence.

In spite of the enthusiasm of persons as seemingly different as Gary Gilmore and William Rehnquist, and the substantial public support which the death penalty continues to garner,⁷ it is nonetheless unsettling that the United States clings tenaciously to such a policy long after almost all other democratic nations have abandoned it.⁸ It is unsettling because the conscious, deliberate taking of life as an instrument of state policy is always an evil, but never more so than in a democracy.⁹ "The death penalty," as Terry Aladjem writes, "strains an unspoken premise of the democratic state"¹⁰ that may variously be named respect for the equal moral worth or equal dignity of all persons.¹¹ Democratically administered capital punishment, punishment in which citizens act in an official capacity to approve the deliberate killing of other citizens, contradicts and diminishes the respect for the worth or dignity of all persons that is the enlivening value of democratic politics.¹² In addition, a death penalty that is democratically administered, a death penalty that enlists citizens to do the work of dealing death to other citizens, implicates us all as agents of law's violence.¹³

6. See generally HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963); STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974).

7. For an analysis of the nature and depth of public support for the death penalty, see William Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 *LAW & SOC'Y REV.* 157, 162 (1993); see also Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 *J. SOC. ISSUES*, Summer 1994, at 19, 19.

8. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 3-4 (1986).

9. Robert Burt has recently suggested that

[t]he retaliatory force justified by the criminal law . . . has the same place in democratic theory as majority rule. Each is a form of coercion and neither is legitimate as such. Criminal law penalties and majority rule are both rough expedients, tolerably consistent with the democratic equality principle only if all disputants (but most particularly, the dominant party) see their application of defensive coercion as a limited way station working ultimately toward the goal of a consensual relationship among acknowledged equals.

Robert A. Burt, *Democracy, Equality, and the Death Penalty*, in *THE RULE OF LAW: NOMOS XXXVI* 80, 89 (Ian Shapiro ed., 1994).

10. Terry Aladjem, *Revenge and Consent: The Death Penalty and Lockean Principals of Democracy* 2 (1990) (unpublished manuscript, on file with the *Indiana Law Journal*).

11. See A.I. Melden, *Dignity, Worth, and Rights*, in *THE CONSTITUTION OF RIGHTS* 29 (Michael J. Meyer & William A. Parent eds., 1992); Jordan I. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 *HOW. L.J.* 145, 150 (1984).

12. See *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring); Hugo A. Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS*, *supra* note 11, at 145.

13. An execution, Wendy Lesser argues, is "a killing carried out in all our names, an act of the state in which we by proxy participate, [and] it is also the only form of murder that directly implicates even the witnesses, the bystanders." WENDY LESSER, *PICTURES AT AN EXECUTION* 4 (1993).

Along with the right to make war,¹⁴ the death penalty is the ultimate measure of sovereignty and the ultimate test of political power. "Political power," John Locke wrote, ". . . [is] a right of making laws with penalties of death . . ." ¹⁵ Others note that "the state's power deliberately to destroy innocuous (though guilty) life is a manifestation of the hidden wish that the state be allowed to do anything it pleases with life."¹⁶

The right to dispose of human life through sovereign acts was traditionally thought to be a direct extension of the personal power of kings.¹⁷ With the transition from monarchical to democratic regimes, some theorists argued that the maintenance of capital punishment was essential to the demonstration that sovereignty could reside in the people. For such theorists, if the sovereignty of the people was to be genuine, it had to mimic the sovereign power and prerogatives of monarchy. Rather than seeing the true task of democracy as the transformation of sovereignty and its prerogatives in the hope of reconciling them with a commitment to respecting the dignity of all persons, the death penalty was miraculously transformed from an instrument of political terror used by "them" against "us," to "our" instrument wielded consensually by some of us against others.¹⁸ Thus, punishment became a key to understanding modern mechanisms of consent.¹⁹

And if the death penalty is, on this account, the ultimate measure of popular sovereignty, capital trials are the moment when that sovereignty is most vividly on display.²⁰ Indeed, capital trials have displaced execution itself as the venue for the display of sovereignty, since "[p]unishment . . . [by means of the death penalty has] become the most hidden part of the penal process."²¹ As Foucault argues:

This has several consequences: [punishment] leaves the domain of more or less everyday perception and enters that of abstract consciousness; its effectiveness is seen as resulting from its inevitability, not from its visible intensity; it is the certainty of being punished and not the horrifying spectacle of public punishment that must discourage crime As a result, justice no longer takes public responsibility for the violence that is bound up with its practice.²²

14. See Elaine Scarry, *The Declaration of War: Constitutional and Unconstitutional Violence, in LAW'S VIOLENCE* (Austin Sarat & Thomas R. Kearns eds., 1992).

15. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 4 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1952) (1690).

16. GEORGE KATEB, *THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE* 192 (William Connolly ed., 1992).

17. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 47-48 (Alan Sheridan trans., 1977).

18. See LOCKE, *supra* note 15, at 8.

19. Aladjem, *supra* note 10, at 2; see also THOMAS L. DUMM, *DEMOCRACY AND PUNISHMENT: DISCIPLINARY ORIGINS OF THE UNITED STATES* 6 (1987) (suggesting that the American system of self-rule paved the way for individuals to realize and internalize liberal and democratic values).

20. See Haney et al., *supra* note 5, at 149 ("Under no other circumstance does a group of ordinary citizens calmly and rationally contemplate taking the life of another, all the while acting under color of law."). On the significance of capital trials in general, see Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 *LAW & SOC'Y REV.* 19, 20 (1993).

21. FOUCAULT, *supra* note 17, at 9.

22. *Id.*

But "justice" (meaning "law") cannot completely or fully sever its responsibility for violence.

One particularly striking recent example, the much-publicized execution of Robert Alton Harris, is a telling reminder of the continuing linkage of law and violence. During the twelve-hour period immediately preceding Harris' execution, no less than four separate stays were issued by the Ninth Circuit Court of Appeals.²³ Ultimately, in an exasperated and unusually dramatic expression of Chief Justice Rehnquist's aphoristic response to the seemingly endless appeals in capital cases—"Let's get on with it"²⁴—the Supreme Court took the virtually unprecedented (and seemingly illegal) step of ordering that "[n]o further stays . . . shall be entered . . . except upon order of this Court."²⁵ With this order, the Court put a stop to the talk and took upon itself the responsibility for Harris' execution.

In contrast with Foucault's premise, seldom has the law's own role as a doer of death been so visible. Yet, just as the law's role was rendered unusually visible, Harris' death was, as Foucault would have it, rendered invisible. His execution was carried out, as is the modern custom, behind penitentiary walls, beyond public view.²⁶ In this way the penalty of death is linked to the privilege of viewing.²⁷

23. Bishop, *supra* note 2, at A1. A tangled maze of last minute legal maneuvers preceded Harris' death in California's gas chamber. Harris was the 169th person to be executed in the United States since the Supreme Court restored capital punishment in 1976. As with many previous executions, the hope for clemency or the possibility of a stay of execution was pursued until the last minute. *Id.*; see also Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992) (describing the events leading up to Harris' execution and critiquing the Ninth Circuit and Supreme Court responses to the case); Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205 (1992) (critiquing the manner in which the American legal system functioned in the case).

24. Bishop, *supra* note 2, at A22.

25. Vasquez v. Harris, 112 S. Ct. 1713, 1714 (1992). The Court scolded Harris' lawyers for "abusive delay which has been compounded by last minute attempts to manipulate the judicial process." Bishop, *supra* note 2, at A22. In so doing, the Court portrayed law as the victim of Harris and his manipulative lawyers, thus displacing Harris from his position as the soon-to-be victim of law. Defending the virtue of law required an assertion of the Court's supremacy against both the vexatious sympathies of other courts and the efforts of Harris and his lawyers to keep alive a dialogue about death. For a discussion of the role of lawyers in the death penalty process, see generally Austin Sarat, *Between (The Presence of) Violence and (The Possibility of) Justice: Lawyering Against Capital Punishment* (Jan. 1995) (unpublished manuscript, on file with the *Indiana Law Journal*).

26. "In a last macabre twist, the A.C.L.U., which opposes capital punishment in all cases, received last-minute permission . . . to videotape [Harris'] execution." Bishop, *supra* note 2, at A22. See generally Jeff I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 UCLA L. REV. 381 (1992) (noting the lack of television coverage of Harris' execution and presenting a constitutional rationale for allowing such coverage).

27. While executions must be witnessed to be lawful, witnessing is carefully monitored. Who will be allowed to see what is for most of us unseeable is an important question in every execution. See ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 102-04 (1990). Thus, capital punishment is a hidden reality; what we know about the way law carries out the death penalty comes in the most highly mediated way as a rumor, a report, an account of the voiceless expression of the body of the condemned. "According to several witnesses, Mr. Harris appeared to lose consciousness after about one and one-half minutes, although his body continued a series of convulsions and his head jerked backward several times." Bishop, *supra* note 2, at A22.

Silencing the condemned and limiting the visibility of lawfully imposed death is part of the modern bureaucratization of capital punishment,²⁸ and part of the strategy for transforming execution from an arousing public spectacle of vengeance to a soothing matter of mere administration.²⁹ In Foucault's words, it was "as if this rite that 'concluded the crime' was suspected of being in some undesirable way linked with it. It was as if the punishment was thought to equal, if not to exceed, in savagery the crime itself . . . to make the executioner resemble a criminal, [and] judges murderers"³⁰ The ferocity of death at the hands of the law as well as its premeditated quality arouse anxiety and fear; they suggest that law's violence bears substantial traces of the violence it is designed to deter and punish.³¹ The bloodletting signaled by executions strains against, and ultimately disrupts, all efforts to normalize or routinize them and cloak them in secrecy.

While execution itself is effectively hidden from public view, the spectacle of law's dealings in death is (re)located and made visible in capital trials.³² The formality, complexity, and ritual of capital trials displace, at least symbolically and analogically, execution itself as the site of law's violent majesty. Such trials provide one striking example of what Robert Cover called the "field of pain and death"³³ in which law acts. While their formality, complexity, and ritual seek to allay the fear of law's violence by exemplifying the way in which law differs from mere slaughter, in capital trials the violence of law is inscribed in struggles to put violence into discourse and to control its discursive representation.³⁴ In capital trials, the focus is on the case rather than the body of the "condemned."³⁵

28. The association of law and violence, though rendered invisible in the bureaucratization of capital punishment, is sometimes made visible elsewhere, for example, in the use of lethal force by police. Moreover, as Jacques Derrida observes, this relationship is present in the ease and comfort with which Americans speak about enforcing the law:

"[E]nforceability," is not an exterior or secondary possibility that may or may not be added as a supplement to law. . . . The word "enforceability" reminds us that there is no such thing as law (*droit*) that doesn't imply *in itself, a priori*, . . . the possibility of being "enforced," applied by force. There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic

Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 921, 925-27 (1990) (emphasis in original).

29. See FOUCAULT, *supra* note 17, at 7-17.

30. *Id.* at 9.

31. Cf. Thomas L. Dumm, *Fear of Law*, in 10 STUDIES IN LAW, POLITICS AND SOCIETY 29, 44-49 (Susan S. Silbey & Austin Sarat eds., 1990). As Dumm puts it,

In the face of the law that makes people persons, people need to fear. Yet people also need law to protect them Hence fear is a political value that is valuable because it is critical of value, a way of establishing difference that enables uncertainty in the face of danger.

Id. at 54.

32. Sarat, *supra* note 20, at 51-55.

33. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

34. Sarat, *supra* note 20, at 51-55.

35. Foucault suggests that "publicity has shifted to the trial, and to the sentence; the execution itself is like an additional shame that justice is ashamed to impose on the condemned man." FOUCAULT, *supra* note 17, at 9.

As a result, the Supreme Court has invested enormous effort in regulating the conduct of capital trials, insisting almost two decades ago that because "death is different,"³⁶ capital trials must be conducted according to procedures designed to insure their special reliability.³⁷ In these procedures, the jury plays a special role.³⁸ It provides the mechanism through which the death penalty is made an instrument of popular sovereignty,³⁹ and through which citizens are enlisted to authorize the ferocious, life-ending violence of law. The jury performs the complex deed of differentiating the violence of law from the violence to which law is opposed.⁴⁰ The jury's decision to impose a death sentence expresses public condemnation for the violence that exists just beyond law's boundary while simultaneously muting the violence of law, shading and toning it down, and rendering it acceptable, thus making the act of the executioner a kind of violence which can be approved and rationally dispensed.⁴¹ In capital trials, these two gestures co-exist, but their co-existence is always an uneasy one.

I. CAPITAL TRIALS AND LAW'S VIOLENCE

The uneasy linkage between law and violence is widely recognized, yet the ways in which law manages to "work its lethal will, to impose pain and death while remaining aloof and unstained by the deeds themselves, is still an unexplored and hardly noticed mystery in the life of the law."⁴² As pervasive as the relationship of law and violence is, it is, nonetheless, difficult to speak about that relationship, or to know precisely what one is talking about when one speaks about law's violence.⁴³ This difficulty arises because law is

36. *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("[D]eath is a punishment different from all other sanctions in kind rather than degree."); see also Margaret J. Radin, *Cruel Punishment and Super Due Process for Death*, in PUNISHMENT AND REHABILITATION (Jeffrie G. Murphy ed., 1985).

37. Recent Supreme Court decisions have retreated significantly from this effort. See, e.g., *Walton v. Arizona*, 497 U.S. 639 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

38. In *Witherspoon v. Illinois*, the Supreme Court held that the basic question of whether the death penalty is excessive in any particular crime must be answered by the decision-maker who is best able to "express the conscience of the community on the ultimate question of life or death." 391 U.S. 510, 519 (1968). But see *Spaziano v. Florida*, 468 U.S. 447, 449 (1984) (holding that "there is no constitutional requirement that the jury's recommendation . . . be final").

39. As Tocqueville put it, "The institution of the jury . . . invests the people . . . with the direction of society." ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 361 (Henry Reeve trans., 6th ed. 1876) (1835).

40. Some philosophers, of course, suggest that there is no difference between capital punishment and murder. See Albert Camus, *Réflexions sur la Guillotine [Reflections on the Guillotine]*, in RÉFLEXIONS SUR LA PEINE CAPITALE 123, 126 (1957).

41. "[T]he decision of whether or not someone should live or die is . . . a normative question for which there are not necessarily widely shared nor even easily accessible norms. Here is where the jury's role as the conscience of the community is raised (or lowered) to its most basic level." Haney et al., *supra* note 5, at 155 (emphasis in original).

42. Austin Sarat & Thomas R. Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in THE FATE OF LAW 209, 211 (Austin Sarat & Thomas R. Kearns eds., 1991).

43. As Ronald Dworkin argues,

Day in and day out we send people to jail, or take money away from them, or make them do things they do not want to do, under coercion of force, and we justify all this by speaking of such persons as having broken the law or having failed to meet their legal obligations . . .

violent in many ways—in the ways it uses language and in its representational practices,⁴⁴ in its silencing of perspectives and its denial of experience,⁴⁵ and in its objectifying epistemology.⁴⁶ It arises from the fact that the linguistic, representational violence of the law (as seen in capital trials) is inseparable from its literal, physical violence (capital punishment). As Peter Fitzpatrick suggests:

In its narrow perhaps popular sense, violence is equated with unrestrained physical violence A standard history of the West would connect a decline in violence with an increase in civility. Others would see civility itself as a transformed violence, as a constraining even if not immediately coercive discipline The dissipation of simple meaning is heightened in recent sensibilities where violence is discerned in the denial of the uniqueness or even existence of “the other” These expansions of the idea of violence import a transcendent ordering—an organizing, shaping force coming to bear on situations from outside of them and remaining essentially unaffected by them.⁴⁷

Violence, as both a linguistic and physical phenomenon, as fact and metaphor,⁴⁸ is integral to the constitution of modern law.⁴⁹ Modern law is

Even in clear cases . . . when we are confident that someone had a legal obligation and broke it, we are not able to give a satisfactory account of what that means, or why that entitles the state to punish or coerce him. We may feel confident that what we are doing is proper, but until we can identify the principles we are following we cannot be sure that they are sufficient In less clear cases . . . the pitch of these nagging questions rises, and our responsibility to find answers deepens.

RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 15 (1977).

Another version of this difficulty is described by Samuel Weber. According to Weber, To render impure, literally: to “touch with” (something foreign, alien), is also to *violate*. And to violate something, is to do violence to it. Inversely, it is difficult to conceive of violence without violation, so much so that the latter might well be a criterion of the former: no violence without violation, hence, no violence without a certain contamination.

Samuel Weber, *Deconstruction Before the Name: Some [Very] Preliminary Remarks on Deconstruction and Violence 2* (Sept. 26, 1990) (unpublished manuscript, on file with the *Indiana Law Journal*) (emphasis in original).

44. See generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987). For an interesting treatment of representation as violence in a non-legal context, see *THE VIOLENCE OF REPRESENTATION: LITERATURE AND THE HISTORY OF VIOLENCE* (Nancy Armstrong & Leonard Tennenhouse eds., 1989) [hereinafter *THE VIOLENCE OF REPRESENTATION*].

45. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990); Teresa de Lauretis, *The Violence of Rhetoric: Considerations on Representation and Gender*, in *THE VIOLENCE OF REPRESENTATION*, *supra* note 44, at 239; Joan W. Scott, *The Evidence of Experience*, 17 *CRITICAL INQUIRY* 773 (1991).

46. Robin West, *Disciplines, Subjectivity, and Law*, in *THE FATE OF LAW*, *supra* note 42, at 119.

47. Peter Fitzpatrick, *Violence and Legal Subjection 1* (1992) (unpublished manuscript, on file with the *Indiana Law Journal*); see also Robert P. Wolff, *Violence and the Law*, in *THE RULE OF LAW* 54 (Robert P. Wolff ed., 1971).

48. Drucilla Cornell suggests that the violent “foundation” of law is allegorical rather than metaphorical:

[T]he Law of Law is only “present” in its absolute absence. The “never has been” of an unrecoverable past is understood as the lack of origin “presentable” only as allegory. The Law of Law, in other words, is the figure of an initial fragmentation, the loss of the Good. But this allegory is inescapable because the lack of origin is the fundamental truth.

Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, 11 *CARDOZO L. REV.* 1687, 1689 (1990).

49. See WALTER BENJAMIN, *Critique of Violence*, in *REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITING* 277 (Peter Demetz ed. & Edmund Jephcott trans., Harcourt Brace Jovanovich 1978) (1955); THOMAS HOBBS, *LEVIATHAN* (Crawford B. MacPherson ed., 1985) (1651);

a creature of both a literal, life-threatening, body-crushing violence, and of imaginings and threats of force, disorder, and pain. In the absence of such imaginings and threats, there would be no law. Law is thus built on representations of aggression, force, and disruption.⁵⁰ It is, in this sense, dependent on the capacity of language to both represent violence and to contain violence by linguistic acts.

But law is built on more than metaphors, and the capital trial is a vivid reminder of that fact. Were it possible to respond adequately to violence with metaphors alone, law would be superfluous. Thus, were there to be no occasion or need for violence, there would be no occasion or need for law.⁵¹

Law's relationship to violence exists in the tangle of the literal and metaphorical; nowhere is this more vividly demonstrated than in capital trials.⁵² Yet law constantly appears and presents itself as a means of disentangling the literal from the metaphorical, of legislating in words, symbols, and metaphors, what counts as the real and what really counts.⁵³ Law seeks to be, or to define, the boundary between life and death, guilty killing and innocent execution, the real and the fictive, the possible and the unimaginable. Moreover, the continued existence of law and of capital trials stands as a monument to a precarious hope that words can contain and control violence, that unspeakable pain can be made to speak, and that aggression and desire can be tamed and be put to useful public purposes. If law is to succeed it must always conquer (or appear to conquer) force, and calm (or appear to calm) turmoil.⁵⁴

At the same time, legal violence must be domesticated. This domestication requires a reconciliation between violence and reason.⁵⁵ That reconciliation is always difficult, always precarious. Thus, the violence that is regularly spoken about in capital trials stands as the limit of law, and as a reminder of both law's continuing necessity and its ever-present failing. Without violence, law is unnecessary; yet in the presence of violence, law, like language and representation themselves, may be impossible.⁵⁶

Capital trials remind one that law's violent constitution does not end with the establishment of legal order. The law, constituted in part in response to

HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., 1961); Norberto Bobbio, *Law and Force*, 49 *MONIST* 321 (1965); Fitzpatrick, *supra* note 47, at 2.

50. Sarat & Kearns, *supra* note 42, at 222.

51. "If a law cannot exist apart from the exercise of force, then laws *must* desire transgressions. Since law *is* the resistance of transgression, law needs and yet cannot bear transgression. Transgressions, in turn, are not really lawless but are other laws that themselves desire transgressions." Mark C. Taylor, *Desire of Law—Law of Desire*, 11 *CARDOZO L. REV.* 1269, 1272 (1990) (emphases in original); see also Jan Narveson, *Force, Violence, and Law*, in *JUSTICE, LAW, AND VIOLENCE* 150 (James B. Brady & Newton Garver eds., 1991).

52. Lesser contends that all trials have a "fiction-like quality" that can "in part be attributed to the theatrical nature of the legal process itself." LESSER, *supra* note 13, at 125.

53. See Derrida, *supra* note 28.

54. See Carl Wellman, *Violence, Law, and Basic Rights*, in *JUSTICE, LAW, AND VIOLENCE*, *supra* note 51, at 170, 176-86.

55. On the general problem of violence and reason, see Sarat & Kearns, *supra* note 42, at 265-73.

56. See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985).

metaphorical violence, is a doer of literal violence; law as the peaceful alternative to the chaos and fury of a fictive state of nature inscribes itself on bodies.⁵⁷ As Cover so vividly put it, law “deal[s] pain and death,”⁵⁸ and calls the pain and death which it deals “peace.”⁵⁹ Once established, law maintains itself, at least in part, through force and as an apparatus of violence which disorders, disrupts, and repositions preexisting relations and practices all in the name of an allegedly superior order.⁶⁰ That order demonstrates its “superiority” in ferocious displays of force, and in subjugating, colonizing, and “civilizing” acts of violence.⁶¹ Violence thus constitutes law in three

57. See FOUCAULT, *supra* note 17, at 3-32; see also FRANZ KAFKA, *In the Penal Colony*, in *THE PENAL COLONY: STORIES AND SHORT PIECES* 191 (Willa & Edwin Muir trans., 1948). As Virginia Held puts it, “The legal rules of almost any legal system permit the use of violence to preserve and enforce the laws, whether these laws are just or not, but forbid most other uses of violence.” Virginia Held, *Violence, Terrorism, and Moral Inquiry*, in *ETHICAL THEORY AND SOCIAL ISSUES: HISTORICAL TEXTS AND CONTEMPORARY READINGS* 474 (David T. Goldberg ed., 1988).

58. Cover, *supra* note 33, at 1609. Cover insisted, even at the price of doing linguistic violence, that “the violence . . . [of law] is utterly real—in need of no interpretation, no critic to reveal it—a naive but immediate reality. Take a short trip to your local prison and see.” Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 818 (1986). The coercive character of law is central to law, systematic, and quite unlike the “psychoanalytic violence of literature or the metaphorical characterizations of literary critics and philosophers.” *Id.* at 818-19. Cover thus invited us to imagine and construct a jurisprudence of violence, and to theorize about law by attending to its pain-imposing, death-dealing acts.

Cover was both a critic of, and an apologist for, law’s violence. In his critical mode, he saw the fury of state law as a barrier to the achievement of a normatively rich, legally plural community, and he urged judges to go far in tolerating and respecting the normative claims of communities whose visions of the good did not comport with the commands and requirements of state law. He argued that unless judges could articulate normative arguments more compelling than those presented by such communities, a just legal order would respect and accommodate the latter rather than violently impose itself. It is never enough, in Cover’s view, for a judge to retreat to the positivist assertion that deference and obedience is required merely because state law commands it. *NARRATIVE VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* 151-55 (Martha Minow et al. eds., 1992).

Yet Cover recognized the need for law’s occasional violent impositions, and he attended carefully to the prerequisites for law’s successful use of violence. For law to achieve such success, its social organization would have to find resources to both overcome and regulate cultural and moral inhibitions against the use of physical force. To overcome those inhibitions, Cover suggested that strong justifications would have to be provided, and that such justifications, when combined with a well-articulated structure of roles and offices, might then assure relatively automatic compliance with the violence authorizing (or restraining) orders of judges. Thus, for law’s violent impositions to work in the world—for words to be translated into violent deeds—strong justifications would have to be provided. Here, Cover was more apologist than critic. Cover, *supra* note 33, at 1615.

There is, in essence, a two-fold message in Cover’s work: “Wherever possible, withhold violence; let new worlds flourish. But, for the sake of life, do not forget that law’s violence is sometimes necessary and that its availability is not automatic but must be provided for. . . . To do its job, then, law *must* be violent, but as little as possible.” Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in *LAW’S VIOLENCE*, *supra* note 14, at 211, 241 (emphasis in original).

59. Sarat & Kearns, *supra* note 58, at 232.

60. See BENJAMIN, *supra* note 49, at 287; see also KARL OLIVECRONA, *LAW AS FACT* 86-114 (1939); Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence* 13 (Mar. 1990) (unpublished manuscript, on file with the *Indiana Law Journal*). As Minow puts it, “Law is itself violent in its forms and methods. Official power effectuates itself in physical force.” *Id.*

61. Edgar Friedenberg contends:

The police often slay; but they are seldom socially defined as murderers. Students who block the entrances to buildings or occupy a vacant lot and attempt to build a park in it are defined

senses: (1) it provides the occasion and method for founding legal orders;⁶² (2) it gives law (as the regulator of force and coercion) a reason for being;⁶³ and (3) it provides a means through which law acts.⁶⁴

Yet, law denies the violence of its origins⁶⁵ by proclaiming the force it deploys to be "legitimate."⁶⁶ As Robert Paul Wolff argues, violence is, in the eyes of the law, "*the illegitimate or unauthorized use of force to effect decisions against the will or desire of others.* Thus, murder is an act of violence, but capital punishment *by a legitimate state* is not."⁶⁷ The capital trial is one particularly important event through which law seeks to distinguish the killings which it opposes from the force which expresses its opposition. In such trials, illegal violence is juxtaposed to the "legitimate" force that the state seeks to apply to its killer.

In and through its claims to legitimacy, what law does is privileged and distinguished from "the violence that one always deems unjust."⁶⁸ Legitimacy is thus one way of charting the boundaries of law's violence. It is also the minimal answer to skeptical questions about the ways in which law's violence differs from the turmoil and disorder that the law is allegedly brought into being to conquer.⁶⁹ But the need to legitimate law's violence is nagging and continuing, never fully resolved in any single gesture.⁷⁰ That need is satisfied

as not merely being disorderly but violent; the law enforcement officials who gas and club them into submission are perceived as restorers of order, as, indeed, they are of the *status quo ante* which was orderly by definition.

Edgar Z. Friedenberg, *The Side Effects of the Legal Process*, in *THE RULE OF LAW*, *supra* note 47, at 37, 43 (italics in original). As Fitzpatrick puts it, "[T]his association of law with order, security and regularity rapidly became general and obvious, the violence associated with the establishment of law and order assuming insignificance in the immeasurability of the violence and disorder of savagery." Fitzpatrick, *supra* note 47, at 15; *see also* TZVETAN TODOROV, *THE CONQUEST OF AMERICA: THE QUESTION OF THE OTHER* (Richard Howard trans., 1984).

62. Derrida, *supra* note 28, at 981.

63. HOBBS, *supra* note 49, at 185; *see also* Fitzpatrick, *supra* note 47, at 2.

64. Cover, *supra* note 33, at 1601.

65. Derrida, *supra* note 28, at 981.

66. *See* Wolff, *supra* note 47, at 55-62; *see also* Bernhard Waldenfels, *Limits of Legitimation and the Question of Violence*, in *JUSTICE, LAW, AND VIOLENCE*, *supra* note 51, at 99, 99. For a classic discussion of legitimacy, *see* MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., 1954). An important study of the production of legal legitimacy is provided by Douglas Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975).

67. Wolff, *supra* note 47, at 59 (emphases in original).

68. Derrida, *supra* note 28, at 927; *see also* Friedenberg, *supra* note 61, at 43. Friedenberg argues: If by violence one means injurious attacks on persons or destruction of valuable inanimate objects . . . then nearly all the violence done in the world is done by legitimate authority, or at least by the agents of legitimate authority engaged in official business . . . Yet their actions are not deemed to be violence . . .

Id.

69. *See* Wolff, *supra* note 47, at 59.

70. For a powerful example of different efforts to legitimate law's violence, compare the opinions of Justices Scalia and Blackmun in *Collins v. Collins*, 114 S. Ct. 1127, 1127 (1994) (mem.) (Scalia, J., concurring), *denying cert.* to 998 F.2d 269 (5th Cir. 1993); *id.* at 1128 (Blackmun, J., dissenting); *see also* Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, in *LAW'S VIOLENCE*, *supra* note 14, at 175, 175 (arguing that "the violence perpetrated by private individuals against each other[] represents an act of law-making or law enforcement for the perpetrator, and how it often serves as the operative law in his or her culture").

(to the extent it can be satisfied at all) in the representational practices and discursive modes which are deployed to speak about violence inside and outside law, and in the decisions of juries which, as Justice Stevens suggested, distinguish capital punishment from murder in the situated moments—capital trials—when both are spoken about at once.⁷¹

In such events, one witnesses the discursive constitution of law's violence as rational, controlled, and purposive, and the juxtaposition of the alleged rationality of legal coercion with the irrationality of a violence that knows no law.⁷² One encounters claims that law's violence is controlled through values, norms, procedures, and purposes external to violence itself. In capital trials, the force of law is represented as serving common purposes and advancing common aims as against the anomic or sectarian savagery beyond law's boundaries.⁷³ Capital trials are thus both the "field" of pain and death on which law plays and the "field" of its discursive representation. And as Robert Weisberg argues, such trials provide "a representational medium that . . . serves as a grammar of social symbols. . . . The criminal trial is a 'miracle play' of government in which we can carry out our inarticulate beliefs about crime and criminals within the reassuring formal structure of disinterested due process."⁷⁴

II. THE CENTRALITY OF THE JURY IN THE JURISPRUDENCE OF DEATH

In the context of contemporary death penalty jurisprudence, the jury is the literal manifestation of Weisberg's "we." It is the jury which represents the fullest actualization of popular sovereignty—the right of the people to

Walter Benjamin argues that

in the exercise of violence over life and death more than in any other legal act, law reaffirms itself. But in this very violence something rotten in law is revealed, above all to a finer sensibility, because the latter knows itself to be infinitely remote from conditions in which fate might imperiously have shown itself in such a sentence.

BENJAMIN, *supra* note 49, at 286; *see also* Camus, *supra* note 40.

The imperatives of violence may be so overwhelming as to distort and destroy prevailing normative commitments. Two powerful examples are provided by Chief Justice Rehnquist in *Payne v. Tennessee*, and by Justice Powell in *McCleskey v. Kemp*. *Payne*, 501 U.S. 808 (1991) (devising a new understanding of the binding nature of precedent to overturn two decisions forbidding the use of victim impact information in death penalty litigation); *McCleskey*, 481 U.S. 279 (1987) (holding that statistical evidence of racial discrimination may not be used to establish a prima facie case of discrimination in death penalty cases).

Unfortunately, except in the utopian imagination, there is no symmetry in the relation of law and violence. Law never similarly threatens violence. Even when we realize the way law itself often exaggerates the threat of violence *outside* law, we can never ourselves imagine that law could ever finally conquer and undo force, coercion, and disorder; its best promise is a promise to substitute one kind of force—legitimate force—for another.

71. *See supra* note 3 and accompanying text.

72. *See* Sarat, *supra* note 20, at 54.

73. *See* SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* 291-93 (1983); *see also* Jonathan Rieder, *The Social Organization of Vengeance*, in *TOWARD A GENERAL THEORY OF SOCIAL CONTROL* 131 (Donald Black ed., 1984) (discussing vengeance as a form of social control in simple societies).

74. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 385.

exercise power over life and death.⁷⁵ Judge Patrick Higginbotham believes that the histories of the death penalty and the jury are entangled. This, he says,

should not be a surprise. The choice between a sentence of life or death is uniquely laden with expressions of anger and retribution. . . . By its nature, it is a decision that we instinctively believe is best made by a group of citizens, because a group better represents community values and because responsibility for such a decision is best shared. Equally, the ultimate call is visceral. The decision must occur past the point to which legalistic reasoning can carry; it necessarily reflects a gut-level hunch as to what is just.⁷⁶

The jury, in Higginbotham's view, represents the vengeful anger of the democratic community,⁷⁷ which is the truest expression of community values.⁷⁸ The jury's justice is a kind of violent transgression of both reason and law. Because of the gravity and uniqueness of the decision to sentence someone to death, the juror voting whether to authorize a killing by the state, Higginbotham argues, knows no law.⁷⁹ As Justice Stevens has observed, "[I]n the final analysis, capital punishment rests on not a legal but an ethical judgment And . . . the decision that capital punishment is the appropriate sanction in extreme cases is justified because it expresses the community's moral sensibility—its demand that a given affront to humanity requires retribution."⁸⁰

Because the juror gives voice to the community's instincts, he helps to diffuse responsibility for the punishment of death when it is authorized. Here, then, is an important reformulation of the problem of popular sovereignty and the death penalty. On the one hand, the juror speaks in the powerful, angry, retributive tones of a sovereign assaulted; on the other hand, the juror speaks

75. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968). According to Justice Stevens, "[T]he jury is central to the link between capital punishment and the standards of decency contained in the Eighth Amendment" *Spaziano v. Florida*, 468 U.S. 447, 483 (1984) (Stevens, J., concurring in part and dissenting in part).

76. Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1048-49 (1991). Similarly, Justice Stevens argues: "The authors of our federal and state constitutional guarantees uniformly recognized the special function of the jury in any exercise of plenary power over the life and liberty of the citizen." *Spaziano*, 468 U.S. at 481; see also Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980) (discussing procedures for determining who makes death penalty sentencing decisions).

77. As Justice Blackmun, writing for the *Spaziano* majority, stated, "The imposition of the death penalty . . . is an expression of community outrage." *Spaziano*, 468 U.S. at 461.

78. This view of the jury as a representative body, imagines sovereignty to lie in the community. As the Supreme Court suggests, "[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." *Witherspoon*, 391 U.S. at 519.

79. Higginbotham, *supra* note 76, at 1051. As Justice Stewart noted, "American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict." *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

80. *Spaziano*, 468 U.S. at 481 (Stevens, J., concurring in part and dissenting in part). In his opinion, Justice Stevens argued that because of the uniqueness of the death penalty, "it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules." *Id.* at 468-69.

in the muted, timid tones of someone whose sovereignty exists as an act of displaced blame.

Beginning with *McGautha v. California*,⁸¹ the Supreme Court has struggled to come to terms with this contradictory image of the jury in capital cases. During the last two decades, the Court has alternatively expressed expansive faith in (and support for) the jury as a reliable, trustworthy repository of the sovereign right over the lives of citizens, and doubt (and concern) about the jury's capacity to exercise that power responsibly.⁸² Throughout, the Court has struggled to define the jury's role as the crucial decision-maker in the capital punishment process.⁸³

McGautha provided the framework for the constitutional struggle which was to follow. In that case, the defendant alleged that a California statute that left the "decision whether the defendant should live or die . . . to the absolute discretion of the jury" violated due process of law.⁸⁴ This claim evoked two very different responses: one, from Justice Harlan, embraced the California scheme and with it, expansive power for the jury in capital cases, while the other, from Justice Brennan, rejected that scheme in the hope of encouraging legislatures to provide standards or guidelines to limit jury power.⁸⁵ Both Harlan and Brennan, however, used the language of sovereignty and consent to speak about the jury's role in capital cases, and both recognized the jury, not the legislature, as the locus of law's death-dealing power.

For Harlan, the comparison between legislature and jury was distinctly favorable to the latter. In capital cases the final decision, if it was to be acceptable, had to be based on a highly individualized assessment of a myriad of factors peculiar to each crime and criminal.⁸⁶ This detailed judgment was, in Harlan's view, precisely the kind that legislative assemblies were incapable of making. Unbridled jury discretion to choose who shall die from among all those who commit capital offenses was both just and necessary, given what Harlan saw as legislative disability. As Harlan stated: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."⁸⁷

81. 402 U.S. 183 (1971).

82. See Vivian Berger, 'Black Box Decisions' on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 CASE W. RES. L. REV. 1067, 1067-70 (1991).

83. In *Spaziano*, the Court rejected a due process claim that the defendants were constitutionally entitled to have a jury make sentencing determinations in capital cases. However, 30 of the 37 states authorizing capital punishment at that time left the life or death decision exclusively to the jury. *Spaziano*, 468 U.S. at 449, 463.

84. *McGautha*, 402 U.S. at 185.

85. See *id.* at 199 (Harlan, J., writing for the majority); *id.* at 249 (Brennan, J., dissenting). These two responses have been a persistent feature of the Supreme Court's death penalty decisions. For a critique of the Court's inability to choose definitively between them, see *Walton v. Arizona*, 497 U.S. 639, 657-69 (1990) (Scalia, J., concurring).

86. *McGautha*, 402 U.S. at 204.

87. *Id.*

In Harlan's view, words are unable to contain and convey the authorizing requisites for capital punishment. Language fails in the face of death. As a result, legal authority must respond to linguistic inadequacy. If legislatures are unable to speak about the pain and death which the law dispenses, then there is no choice but to legitimate the de facto discretion of the jury.

But the impossibility of specifying, in advance, standards to determine the particular criminals who should be executed was, for Harlan, not enough to justify a sovereign role for the jury. What was needed, in addition, was an image of how the jury would use its sovereign power. Here, the best Harlan could do was to engage in a Tocquevillian imagining of the jury ennobled by the responsibility given to it.⁸⁸ In this imagining,

jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration. . . . The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.⁸⁹

In Brennan's view, there was neither persuasive evidence of legislative inability to provide structuring guidelines nor reason to assume that unbridled discretion would not, like all exercises of such unfettered power, produce arbitrariness and discrimination rather than reason and responsibility. Brennan countered Harlan's theory of linguistic failure by surveying a variety of means and mechanisms which legislatures might employ to communicate with the jury and to guide it in its interpretive task.⁹⁰ "A legislature," Brennan argued,

that has determined that the State should kill some but not all of the persons whom it has convicted of certain crimes must inevitably determine how the State is to distinguish those who are to be killed from those who are not. Depending ultimately on the legislature's notion of wise penological policy, that distinction may be hard or easy to make. But capital sentencing is not the only difficult question with which legislatures have ever been faced.⁹¹

In addition, Brennan rejected Harlan's Tocquevillian optimism regarding jury sovereignty and substituted a hardheaded type of due process realism. Brennan believed the power and responsibility that Harlan saw as ennobling to be fraught with the danger of abuse. As he put it, "[T]he Due Process Clause of the Fourteenth Amendment[] is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting

88. TOCQUEVILLE, *supra* note 39, at 364.

89. *McGautha*, 402 U.S. at 208.

90. *Id.* at 250-51 (Brennan, J., dissenting).

91. *Id.* at 271 (footnote omitted).

merely random or arbitrary choice.⁹² Brennan suggested that Harlan framed the issue as a choice between “the rule of law and the power of the States to kill” and resolved the conflict “in favor of the States’ power to kill.”⁹³

Two years after *McGautha*, this choice was repudiated and undone by the Supreme Court’s decision in *Furman v. Georgia*.⁹⁴ The Court in *Furman* held that the unbridled discretion which Harlan had embraced in *McGautha* was, as Brennan suggested it should be, constitutionally unacceptable.⁹⁵ Yet, the Justices in *Furman* continued to wrestle with the problem of defining the jury’s proper role in capital trials. Like Brennan, Justice Douglas feared that leaving juries with the untrammelled discretion to decide who should live and who should die insured “selective and irregular use” of the death penalty and allowed the punishment of death to be reserved for “minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer.”⁹⁶ Instead of Tocquevillian responsibility, Douglas suggested that jury sovereignty meant that “[p]eople live or die, dependent on the whim of one man or of 12.”⁹⁷

Against Douglas’ doubt, Chief Justice Burger took up Harlan’s defense of jury sovereignty in capital cases. Burger suggested that “trust in lay jurors . . . [is] the keystone of our system of criminal justice”⁹⁸ and that “as ‘the conscience of the community,’ juries are entrusted to determine in individual cases that the ultimate punishment is warranted.”⁹⁹ Jurors in capital cases, facing the awesome decision about whether one of their fellow citizens should live or die, are, on Burger’s account, “meticulous” in their decisions,¹⁰⁰ and “cautious and discriminating [in their] reservation of . . . [the death] penalty for the most extreme cases.”¹⁰¹

The Harlan/Burger advocacy of complete jury sovereignty was finally put to rest by the Court when, in *Gregg v. Georgia*,¹⁰² it upheld a Georgia statute whose purpose was to provide guidance to jurors in selecting those who should actually receive the death penalty from among the class of convicted capital murderers. Justice Stewart wrote that jury discretion “on a matter so grave as the determination of whether a human life should be taken or spared . . . must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”¹⁰³ Absent such direction he

92. *Id.* at 248.

93. *Id.* at 249. Brennan was prophetic in framing the debate about capital punishment as a debate about the rule of law itself. For an elaboration of his prophesy, see Justice Marshall’s dissent in *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

94. 408 U.S. 238 (1972) (per curiam).

95. *Id.*

96. *Furman*, 408 U.S. at 245 (Douglas, J., concurring).

97. *Id.* at 253.

98. *Id.* at 402 (Burger, C.J., dissenting).

99. *Id.* at 388 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

100. *Id.* For empirical evidence on this point, see Haney et al., *supra* note 5.

101. *Furman*, 408 U.S. at 402 (Burger, C.J., dissenting).

102. 428 U.S. 153 (1976) (plurality opinion).

103. *Id.* at 189 (joint opinion of Stewart, Powell, and Stevens, JJ.).

claimed that "juries imposed the death sentence in a way that could only be called freakish."¹⁰⁴

Justice Stewart, finally completing the work that Brennan began in *McGautha*,¹⁰⁵ rejected Harlan's arguments regarding the linguistic impossibility of formulating standards to provide such direction: "While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed."¹⁰⁶ He argued that it was particularly important to provide such standards for a jury because "members of a jury will have had little, if any, previous experience in sentencing."¹⁰⁷ Standards that direct the jury's attention to the specific circumstances of the crime and of the person who committed the crime would, in Stewart's view, be sufficient to "produce non-discriminatory application" of the death penalty.¹⁰⁸

Yet, despite Stewart's apparent confidence in the efficacy of legislative standards in insuring the rationality of life and death decisions made by ordinary citizens, how those decisions are made—how jurors interpret issues of violence and responsibility that are present in capital trials, as well as how they understand their own responsibility and the violence they are asked to authorize—remains a mystery.¹⁰⁹ As Justice Powell has written:

Individual jurors bring to their deliberations "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain.¹¹⁰

III. AUTHORIZING DEATH

In seeking to understand the relationship between law and violence as well as that between democracy and the death penalty, one wonders how ordinary citizens, in their role as jurors, could allow themselves—almost inexplicably—to use their sovereign power to authorize death. This bewilderment arises because "[t]o any person endowed with the normal inhibitions against the

104. *Id.* at 206.

105. *McGautha*, 402 U.S. at 271 (Brennan, J., dissenting).

106. *Gregg*, 428 U.S. at 193 (joint opinion of Stewart, Powell, and Stevens, JJ.) (footnote omitted).

107. *Id.* at 192.

108. *Id.* at 198 (footnote omitted) (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)).

109. "Despite the impressive amount and quality of legal scholarship on capital sentencing, there is woefully little empirical evidence about how the jury actually goes about its task." Valerie P. Hans, *Death by Jury*, in *CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES* 149, 150 (Kenneth C. Hans & James A. Inciardi eds., 1988). As Robin West put it in her discussion of recent death penalty cases dealing with the responsibility of jurors, "What is missing . . . is a robust discussion of the *nature* of the responsibility the juror ought to possess, to which the defendant should be constitutionally entitled: what it means for a juror to engage in morally responsible decisionmaking . . ." Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 87 (1990) (emphasis in original).

110. *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (footnote omitted) (quoting *Peters v. Kiff*, 407 U.S. 493, 503 (1972)).

imposition of pain and death, the deed of capital punishment entails a special measure of reluctance and abhorrence"¹¹¹ Some insight into both the nature of that reluctance and how it is overcome is provided by the work of Robert Cover.

Cover noted that while for most people "evolutionary, psychological, cultural and moral considerations inhibit the infliction of pain on other people . . . in almost all people social cues may overcome or suppress the revulsion to violence under certain circumstances."¹¹² Providing such cues, Cover contended, is the peculiar work of law. Cover thus called attention to features of the "organization of the legal system [itself that] operate[] . . . to facilitate overcoming inhibitions against . . . violence."¹¹³

Two features of that organization have special relevance for understanding how ordinary citizens become the authorizing agents of law's violence in capital trials. First, those jurors who authorize violence (*i.e.*, the death penalty) do not personally carry out the deed which their words authorize. The juror is asked only to say the words which will activate a process that *may* eventually lead to the defendant's death.¹¹⁴ The juror's act is purely linguistic. Yet, were jurors required to pull the switch on those whom they condemn to death, the ability of law to engage their authorizing decisions would be radically diminished.¹¹⁵ As Cover put it, "The most elementary understanding of our social practice of violence ensures that a judge know that she herself cannot actually pull the switch. This is not a trivial convention. For it means that someone else will have the duty and opportunity to pass upon what the judge has done."¹¹⁶ What Cover says about the judge is surely no less true of jurors.

The second aspect of the legal system which helps jurors overcome their inhibitions against doing violence is, in fact, suggested by the first: namely that jury decisions are subject to review on appeal. This means that the judge or juror who initially authorizes execution is able to transfer responsibility for his authorizing act, and, in so doing, to deny the very authority of that act.¹¹⁷ For example, Cover noted that "[p]ersons who act within social organizations that exercise authority act violently without experiencing . . . the normal degree of inhibition which regulates the behavior of those who act autonomously."¹¹⁸

The consequences of this ability to transfer responsibility have been well documented in the jurisprudence of death. They are, in fact, detailed by the

111. Cover, *supra* note 33, at 1622.

112. *Id.* at 1613.

113. *Id.* at 1614.

114. JOHNSON, *supra* note 27, at 28-29.

115. *But see* MILGRAM, *supra* note 6.

116. Cover, *supra* note 33, at 1626.

117. Haney, Sontag, and Costanzo report that "there was a tendency among jurors . . . to shift or abdicate responsibility for the ultimate decision—to 'the law,' to the judge, or to the legal instructions—rather than to grapple personally with the life and death consequences of the verdicts they were called upon to render." Haney et al., *supra* note 5, at 160.

118. Cover, *supra* note 33, at 1615.

Supreme Court's opinion in *Caldwell v. Mississippi*.¹¹⁹ In *Caldwell*, the question was whether comments by a prosecutor to the effect that a jury should not view itself as finally determining whether the defendant should die, because a death sentence would automatically be reviewed by the state supreme court, violated the Eighth Amendment. Reviewing those comments in light of its prior holdings, the Court found it 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.¹²⁰

Justice Marshall, writing for the majority in *Caldwell*, explained:

[T]his Court's Eighth Amendment jurisprudence has taken it as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. . . . Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case."¹²¹

The question of how juries sentence, in Marshall's view, is therefore central to the question of whether they may constitutionally exercise the sovereign power to make life and death decisions.

Marshall then went on to paint a picture of the capital sentencing jury as

made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.¹²²

Marshall, echoing the insights of Cover, suggested that anything which encouraged the sentencing jury to believe that it was not responsible for authorizing death would encourage the jury to provide such authorization. A jury thus unburdened might indeed use a death sentence, even when it is "unconvinced that death is the appropriate punishment," to "send a message" of extreme disapproval for the defendant's acts.¹²³

From Marshall's opinion in *Caldwell*, one can glean the suggestion that the less responsible a jury feels for the actual decision to execute, the more likely

119. 472 U.S. 320 (1985), *rev'g in part* 443 So. 2d 806 (Miss. 1983).

120. *Id.* at 341. *But see* *Sawyer v. Smith*, 497 U.S. 227 (1990) (upholding a death sentence even though the jury had been told explicitly that it was not ultimately responsible for the sentence it imposed).

121. *Caldwell*, 472 U.S. at 329-30 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

122. *Id.* at 333 (citations omitted).

123. *Id.* at 331.

it is to authorize death as a punishment. Yet the mystery of how jurors are enlisted as agents of state violence remains. This mystery is, as previously suggested, in one sense an issue of popular sovereignty and in another sense a problem of understanding the way humans relate to the imposition of pain and violence on other humans. It is a mystery which can only be explored by carefully attending to what jurors actually do in, and say about, capital trials.

IV. VIOLENCE, REPRESENTATION, AND RESPONSIBILITY IN THE CASE OF JOHN HENRY CONNORS

Despite their reassuring, welcoming name, convenience stores are some of the most dangerous places in America. Late at night these stores provide, as much as anything else, convenient settings for robbery and murder. This situation is as true in small towns like Bowling, Georgia,¹²⁴ as it is in big cities throughout the United States. The case of John Henry Connors provides an apt illustration of that fact.

At 10:30 p.m. on July 23, 1986, John Henry Connors was picked up by two friends from his modest home on the outskirts of Bowling. Connors, who was then twenty-six years old, worked in a local auto body shop. He had been married for seven years but was having serious marital problems. As a result, he frequently sought the company of his friends to escape his troubled domestic life. On the night of the twenty-third, Connors and his friends spent several hours driving around, smoking marijuana, and drinking. Each of the men had a gun with him.

There was, however, nothing unusual in any of this. It had become a regular leisure activity for these men to drive along back country roads, get high, and fire shots into the night until they got bored, sick, or sleepy. And there was nothing on the night of the twenty-third to suggest that anything would be any different than it had been before.

Three hours after they initially set out, Connors and his friends stopped at the local convenience store—The Jiffy Store—to buy one of Jiffy's advertised "Do-It-Yourself Microwave Meals" and some beer. The two friends went to the back of the store while John Henry waited for them near the counter where Andy Donaldson was working as a cashier. After Donaldson finished ringing up the friends' purchases and opened the cash register to make change, Connors suddenly pulled out the .357 Magnum pistol that he had brought with him and shot Donaldson in the chest.

Connors' friends—who would later be granted immunity from prosecution in return for their testimony against him—were, by their own account, taken totally by surprise. At the sound of the shot, they ducked and then ran for the door. In the meantime, Donaldson fell to the floor in a bloody heap, moaning and writhing in pain while Connors took ten one-dollar bills and some food stamps from the register. Connors then leaned over the counter and fired a

124. This is a pseudonym. In what follows I have also used a pseudonym for the case described and for the jurors whose views I discuss. See *infra* note 126.

second shot which hit Donaldson above the left eye. After firing the second shot, Connors joined his friends in their car and escaped into the night.

Eight days later, Connors was arrested after his two friends turned themselves in to the police. At the time of his arrest, the gun which had been used to kill Andy Donaldson was found in Connors' home along with the food stamps and nine of the one-dollar bills he had taken from the Jiffy Store.¹²⁵ Connors was charged with, and subsequently convicted of, robbery and malice murder in the death of Andy Donaldson. He was later sentenced to death.

In what follows, I recount what the jurors in Connors' trial said about that case, and explore how they arrived at the decision that John Henry Connors should be sentenced to die.¹²⁶

A. Imagining Violence

One of the crucial tasks of the prosecution in a capital case is to answer two questions: who did what to whom, and why the killer deserves to die. To answer these questions, the prosecutor must portray, in a vivid and compelling way, the circumstances and nature of the killing.¹²⁷ He has to make what is for most people quite unreal—namely a scene of violent death—real. He has to put violence and pain into discourse.¹²⁸ However, the problems confronted in putting violence into discourse would seem, at first glance, to be the opposite of those confronted in representing pain.

Violence is visible and vivid. It speaks loudly, arouses indignation, and as a result, its representation threatens to overwhelm reason. Therefore, the problem of representing violence would seem to be one of taming and disciplining its seemingly unruly representations. Pain, on the other hand, is

125. One of the jurors in the Connors case explained how the police were able to link the money to the defendant:

In convenience stores they have several different kinds of detection devices that let them know that they're being robbed, or going to be robbed, or are in the process of being robbed. They have . . . I call it a panic button, a red button. You mash it and all these sirens go off. Some of them are silent, some of them send a signal directly to the police. In some they have the cash drawer arranged with ones, fives, tens, and they have a spot for what they call, not fake money, but mad money. They reach in and may grab this mad money. It is marked so they know when it is recovered. It's got a little sensor on the bottom and when the mad money is taken off it that goes off automatically signaling the police.

126. The Connors case is one of thirty Georgia cases which I am examining as part of a national study of jurors and the death penalty. One objective of the Capital Jury Project study is to understand how jurors interpret the discourse and representational practices of capital trials and how they come to be effectively enlisted as agents of law's violence. In each of the Georgia cases, four jurors are randomly selected and interviewed about the case, with interviews lasting from two to five hours.

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

128. Sarat, *supra* note 20, at 22-23, 30-38.

invisible.¹²⁹ It defies language and representation, and is, as a result, a largely silent and unshareable part of our lives.

Yet, violence and its linguistic representation is inseparable from pain and its representation. One can know the full measure of violence only through the pain it inflicts; the indignation which people experience in the presence of violence is, in large part, a function of their imaginings of the pain it inflicts. In this sense, the problem of putting violence and pain into discourse is one problem rather than two.

It is the business of law in general and capital trials in particular to make violence and pain knowable, and to find the means of overcoming their differing resistances to language and representation. Elaine Scarry suggests that the courtroom and the discourse of the trial provide one particularly important site to observe the way in which violence and pain "enter language."¹³⁰ In that discourse, the problem of putting violence and pain into language is compounded by the fact that

it is not immediately apparent in exactly what way the verbal act of expressing pain . . . helps to eliminate the physical fact of pain. Furthermore, built into the very structure of the case is a dispute about the correspondence between language and material reality: the accuracy of the descriptions of suffering given by the plaintiff's lawyer may be contested by the defendant's lawyer For the moment it is enough to simply notice that, whatever else is true, . . . [a trial] provides a situation that once again requires that the impediments to expressing pain be overcome. Under the pressure of this requirement, the lawyer, too, becomes an inventor of language, one who speaks *on behalf* of another person . . . and attempts to communicate the reality of that person's physical pain to people who are not themselves in pain (the jurors).¹³¹

Scarry invites us to consider the way in which jurors interpret and imagine the violence and pain they are called upon to judge. She suggests, however, that in law, as elsewhere, the language which can be invented to facilitate that imagining is quite limited.¹³² "As physical pain is monolithically consistent in its assault on language, so the verbal strategies for overcoming the assault

129. As Elaine Scarry argues,

Physical pain has no voice When one hears about another person's physical pain, the events happening within the interior of that person's body may seem to have the remote character of some deep subterranean fact, belonging to an invisible geography that, however portentous, has no reality because it has not yet manifested itself on the visible surface of the earth.

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 . . . [Pain is v]aguely alarming yet unreal, laden with consequence yet evaporating before the mind because not available to sensory confirmation, unseeable classes of objects such as subterranean plates, Seyfert galaxies, and the pains occurring in other people's bodies flicker before the mind, then disappear. . . . [Pain] achieves its aversiveness in part by bringing about, even within the radius of several feet, this absolute split between one's sense of one's own reality and the reality of other persons. . . . Whatever pain achieves, it achieves in part through its unsharability, and it ensures this unsharability through its resistance to language.

SCARRY, *supra* note 56, at 3-4.

130. *Id.* at 10.

131. *Id.* (emphasis in original).

132. *Id.* at 13.

are very small in number and reappear consistently as one looks at the words of patient, physician, Amnesty worker, lawyer, artist."¹³³ Those verbal strategies, Scarry suggests, "revolve [first] around the verbal sign of the weapon."¹³⁴ Here, one knows violence and pain through its instrumentalities. Second, one knows them through their effects. Here, violence and pain are represented in the "wound," that is, the "bodily damage that is pictured as accompanying the pain."¹³⁵

As the Connors jurors discussed the case, weapons and wounds, instrumentalities and effects, loomed large in what were vivid recollections of the scene of death and the violence that surrounded it. This is the payoff of the enormous effort that is put into the graphic presentation of the murder, as well as the actions which led to death and its consequences. Words and photographs were used in the Connors case, as they are in most other capital trials, to bring to life the violence outside law.¹³⁶ It is important to note, however, that there was no comparable effort made to enable jurors to imagine the scene of violence and death that they were being asked to authorize. Jurors were presented with no images of the scene of the prospective execution, of the violence of electrocution. No such images were admissible or available for the juror eager to understand what he was being asked to authorize.¹³⁷

In the Connors case, weapons and wounds made the violence which Connors had visited on Donaldson real and pressing. As Joseph Rane, one of the jurors, put it:

Connors shot the man—I don't remember the man's name, I can see his face, I don't remember his name—he shot him. If I'm not mistaken it went into his chest and came out by his shoulder blade, with a .357 magnum, if I remember correctly. He leaned over, got some money out of the cash register. The clerk of the store was laying on the ground, moaning and

133. *Id.*

134. *Id.*

135. *Id.* at 15. As violence and pain are put into language, one may be tempted to forget that their metaphorical representation as weapons and wounds cannot truly capture the meaning of violence and pain themselves. And, in the process of putting those things into language, some types of violence and pain—those engendered by particular weapons and those which leave visible marks on the body—may be more easily available. See Sara Cobb, *The Domestication of Violence in Mediation: The Social Construction of Disciplinary Power in Law* 20 (1992) (unpublished manuscript, on file with the *Indiana Law Journal*). See generally Kristin Bumiller, *Real Violence/Body Fictions* (June, 1991) (unpublished manuscript, on file with the *Indiana Law Journal*) (discussing how photographs are used to represent the injuries done to rape victims). Whereas more diffuse, systemic violence which leaves no visible marks or scars—the violence of racism, poverty, and despair—will be less easily represented and understood as violence and pain. "A great deal . . . is at stake," Scarry herself suggests, "in the attempt to invent linguistic structures that will reach and accommodate this area of experience normally so inaccessible to language." SCARRY, *supra* note 56, at 6.

136. For a comparable analysis in another context, see Bumiller, *supra* note 135, at 5-17. Luc Sante argues that photographic evidence of crime scenes is used "to prove that the crime was committed in the county or municipality where the body was found and the trial scheduled; to give proof of the corpus delicti . . . and its venue; to help establish a motive, by means, for example, of the position of the body; . . . and to clarify the relationship of the body to the weapon and other properties." See LUC SANTE, *EVIDENCE* 90 (1992).

137. Recent court decisions have upheld legislative and administrative prohibitions on televising executions. See *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978); *KQED, Inc. v. Vasquez*, 18 Media L. Rep. (BNA) 2323 (N.D. Cal. 1991).

moving around from . . . you figure a maximum of three feet with a high-powered weapon like that. It had knocked him against the back . . . he was on the floor bleeding. And he reached over the counter as he was retrieving the money and shot him again. It went in, if I'm not mistaken, over his eye and out behind his ear on the opposite side.¹³⁸

Like other jurors, Rane was able to speak in a detailed way about the murder weapon as well as about the entry wounds and exit wounds which it caused, and about its ballistics and bullet trajectories. When asked if there was anything specific about the case that stuck out in his mind, Rane, a twenty-eight-year-old salesman, said,

What I remember is seeing the pictures of the man laying behind the counter, laying in a puddle of blood probably bigger than this table. And the pictures—the other jurors and I had to . . . it was difficult for some of them to look at the pictures. They'd take them up so close and they'd show the clear shots and all. Then we handled the weapon and a lot of them really didn't want to do that.

Q: Do you still think about those pictures and the gun?

A: Surely.

Another juror in the Connors case, a seventy-three-year-old retired grandmother, Belle Givens, recalled the violence that Connors had done in terms of "a big gun. Right that's it. He used a big gun." According to her own account, confronting the instrument of death was a horrifying experience. In fact, she confronted it unwillingly. She described herself as an unwilling victim of a process that would not respect her squeamishness in the face of violence: "Reason I say big gun is because they passed it around and made me look at it and touch it, and I didn't want to. They made me look at it and touch it." The image of the violence done by the "big gun" "followed us into the jury room and it bothered me very much."

For her, like Rane, the image of violence was fixed in the photographic evidence of the crime scene. Luc Sante argues that

these photographs lack the functions that are usually attached to images of death. They do not memorialize, or ennoble, or declare triumph, or cry for vengeance. As evidence, they are mere affectless records, concerned with details, as they themselves become details in the wider scope of police philosophy, which is far less concerned with the value of life than with the value of order. They are bookkeeping entries, with no transfiguring mission, and so serve death up raw and unmediated.¹³⁹

Belle Givens was a reluctant viewer of death served up "raw and unmediated"; however, once seen, the image of death was deeply imprinted on her.

But what did this idiot do. As the guy fell down behind the counter he hit the shelves right in back of him, and John Henry took the gun and leaned over the counter, put the gun behind the guy's ear—bam—and another shot killed him. And they showed a picture of the man to the jury. I didn't want to look. They insisted I had to look. If I don't look, what they decide, well.

138. See *supra* notes 124-26 and accompanying text for discussion of the Connors case. Note that "Joseph Rane" and the names of other jurors are pseudonyms.

139. SANTE, *supra* note 136, at 60.

I didn't want not to look and then have to have another trial. So I had to look, and that's still following me into that deliberating room.

In the system of capital punishment, while the execution is hidden, while the violence jurors are asked to authorize has no image, and while no one can claim an entitlement to view an execution,¹⁴⁰ jurors *must* view the violence to which they are asked to respond. The law compels the juror to view such graphic representations and to grasp the death-producing instrumentalities which are given special evidentiary value in the state's case against the accused. To refuse to participate in the spectacle of seeing and touching those representations and instrumentalities is, in essence, to refuse to consider all the evidence and is, thus, to defy one's oath as a juror. Because the gaze cannot be legitimately averted, the juror becomes a victim of viewing.

Images and instrumentalities, in their evidentiary guise, engender a vivid and immediate confrontation with illegal violence and its consequences. They focus attention by their own particularized focus. As another juror, Charlotte Howles, explained, "The only thing we saw were pictures they had taken of the scene and they were just from the head up. You know, of where the gunshot wounds were at. That's all we saw of him." The victim is presented only in the violent images of the wounds which ended his life. And no one has a right to refuse to see those images.

Being forced to confront those images has dramatic consequences in enlisting jurors to authorize execution. Those images ensure that the victim will often be remembered as nothing other than the wounds which ended his life. As Sante says,

If photographs are supposed to freeze time, these crystallize what is already frozen, the aftermath of violence, like a voice-print of a scream. If photographs extend life, in memory and imagination, these extend death, not as a permanent condition the way tombstones do, but as a stage, an active moment of inactivity. Their subjects are constantly in the process of moving toward obliteration.¹⁴¹

Kristin Bumiller has argued, referring to similar evidence in a rape trial, that the principle which insures that the images of violence have such an effect is one of "maximum visifiability."¹⁴² This principle, Bumiller argues,

is applied by using the techniques of close-ups and editing made possible by staged film production to orient the spectator in the most ideal position for viewing pleasure. In the courtroom, the prosecutor and expert master [the] body as technique rather than art; they make use of photographs . . . to stage repetitive viewings of parts of [the] body. This technique fetishizes the wound.¹⁴³

Indeed, so powerful are those images that Charlotte Howles, when asked if she could remember what Donaldson looked like, said, "No, because to be

140. See *Garrett v. Estelle*, 424 F. Supp. 468 (N.D. Tex.), *rev'd*, 556 F.2d 1274 (5th Cir. 1974), *cert. denied*, 438 U.S. 914 (1978); see also *Vasquez*, 18 Media L. Rep. (BNA) 2323.

141. Sante, *supra* note 136, at 60.

142. Bumiller, *supra* note 135, at 9.

143. *Id.*

honest I didn't look directly at the picture of his face because we were looking at where the bullets went in and came out. I didn't really look in his face." Or as Ms. Givens put it,

Normally I consider myself a liberal easterner transplanted here to Georgia and against capital punishment—always was—but after I saw that picture of that man, something popped. I saw the pictures of him slumped down behind the counter and he was shot at somewhere around here and behind the ear, that was terrible. . . . I think about it even now and it bothers me very much.

B. Assigning Responsibility and Explaining Motivation

But the juxtaposition of images of murder made vivid and the virtual invisibility of law's own violence does not, in itself, explain how jurors read the discourse and representational practices of capital trials in ways that allow them to be enlisted as authorizing agents of capital punishment. The testimony of Connors' jurors suggests that two other factors are crucial. The first of those factors is the "compulsion" to assign responsibility and explain motivation.

The origin and force of this "compulsion" in the case of John Henry Connors can perhaps be appreciated if one first understands that the story of his killing of Andy Donaldson is a garden variety episode of what Robin West labels "post-modern murders."¹⁴⁴ Such murders, West argues, are

chance encounters between strangers, in which what . . . [is] casually exchanged happens to be death. . . . The radical disjunction, or discontinuity, between the immeasurably great value of what is being destroyed . . . and the minuscule, trivial, "perceived gain" that prompted the murder . . . leaves . . . a palpable, profound and almost physical need to reestablish sense and meaning in the universe. . . . [Such murders] strip the natural world of its hierarchy of values—life, love, nurture, work, care, play, sorrow, grief—and they do so for *no* reason, not even to satisfy the misguided pseudo-Nietzschean desire of a Loeb or Leopold to effectuate precisely that deconstruction. They are meaningless murders.¹⁴⁵

Events like the killing of Andy Donaldson in the context of a ten-dollar robbery produce an intense effort to restore meaning, to answer the kind of question put by juror Howles when she asked, "Why? Why did he do it? Why, for such a small amount of money? I would love to have confronted him, face-to-face, and asked him why he committed such a senseless thing, it is so stupid to me to take another human life." Howles' questions express

a simple primal fear that our collective attempt to reassert meaning and value in a world deconstructed by random violence . . . will be . . . fleeting and unsuccessful [The juror] is swamped by a physical as well as psychic need not to succumb, not to be drawn, not to be sucked under, not to be *seduced* by the meaninglessness of such murders, into the falsely

144. Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 171 (1990).

145. *Id.* at 170-71 (emphasis in original) (footnotes omitted).

sophisticated, David Lynch-ian belief in the meaninglessness of the particular lives ended.¹⁴⁶

The response, West suggests, is a virtually overwhelming desire to “assign personal responsibility for the murder and its consequences—including the arrest, trial and its outcome—imposition of the death penalty—squarely and irrevocably on the defendant.”¹⁴⁷

Connors’ jurors responded quite as West would have predicted when they voiced a strong desire to fix personal responsibility on the defendant, to make him a moral agent capable of being held to account for what otherwise seemed unaccountable actions. For each of those jurors the capital trial was a drama in which the question of Connors’ agency was at the fore. As Rane said,

There really wasn’t much of a question about Connors’ guilt. He was there. He never denied that. His gun fired the shot; he never denied that. There was just a lot of talk as if, you know, the fact he was drinking, as if the bottle left Connors behind, got out of the car, went into the Jiffy, and fired the shots.

As Howles explained,

They [the defense] said that alcohol had taken hold of his mind at the moment and that, if he had not been under the influence of alcohol, he wouldn’t have been where he was at. They were blaming it on the alcohol because that’s when they were questioning us as jurors . . . that was the one question they asked us, did we think that alcohol could make you do things that you normally wouldn’t do. It was one of the questions that the defense asked when they were selecting the jurors.

Another juror, Sylvia Mann, a forty-nine-year-old high school social studies teacher, rejected the argument that alcohol could provide a sufficient explanation of why Connors killed Donaldson or that it should somehow diminish his responsibility:

It did come up that he was under the influence of alcohol and drugs even though they told us from the beginning that that was not a defense. I felt that the defense really pushed it a lot. They kept talking about it a lot even though they said it was not a defense. When we deliberated it was brought up fairly often that the person was under the influence. But so what? I mean a lot of people get drunk, but they don’t take guns and go shoot up the Jiffy Store. I don’t think anybody really ever felt it was much of a defense. . . . He shot someone because he wanted money. Like lots of people want money but they don’t kill other people to get it. And he knew what he was doing. Because he’d already shot the man and the man was on the floor and unconscious and there was no need to shoot him a second time. Apparently he intentionally intended for the man to die.

For this juror, Connors was, despite his alcohol problems, still a moral agent, fully capable of knowing what he was about—one whose actions suggest an

146. *Id.* at 171 (emphasis in original).

147. *Id.*

inexcusable intention to kill.¹⁴⁸ "Bottles," Mann continued, "don't kill people. Only people, people like Connors, kill people." By insisting that Connors was both legally guilty and morally responsible for the murder of Donaldson, this juror and her colleagues refused to accept the picture of a social world of events governed by causes beyond human control; instead, they constructed a moral world of free agents making choices for which they should be held to account.¹⁴⁹

As Joseph Rane saw it,

[T]here is a simple explanation for why he [Connors] did it. . . . He made a really bad choice. He valued human life for ten dollars. And whether he was under the influence of alcohol or drugs or whatever, he's still responsible for what he does and that's something that was brought out. . . . He wanted money though if you are familiar with convenience stores you know that after eleven o'clock they don't even carry twenties in the drawer. And being under the influence of drugs and alcohol, there's no telling what it'll make you do. But you still do it. I think he just saw an opportunity to get some money to go get whatever and he just took that opportunity. . . . There was no reason in the world why somebody under the influence of alcohol or drugs should take anybody else's life. Why should he be any different from the rest of us?¹⁵⁰

In these narratives, one sees jurors confronting what Rane himself called "just one of them whimsical things" and needing to "reassert responsibility and human agency for a momentous act and momentous deprivation; so that we can again feel in control of destiny."¹⁵¹ To his jurors, Connors appeared to be enough like them that he could justly be subject to their judgment. Yet, at the same time, he was different enough that his "cold blooded," "vicious" act could be seen as deserving the most severe, and thus unusual, punishment.

But as the jurors in the Connors case contemplated the question of whether to authorize such a punishment, another question of responsibility arose: their own status as agents and their own responsibility as jurors. As West argues:

The juror's responsibility for his fellow citizen, and responsibility to reach the morally right decision, is precisely what defines the juror as citizen That capacity gives the juror a stake in the affairs of others and makes him care about the consequences of his decision. The juror's capacity for doing so, his duty to engage this capacity, and his responsibility for the outcome are all necessary contributions . . . to the vitality of a liberal, participatory, and non-apathetic society.¹⁵²

If Marshall's speculations in *Caldwell* are correct, the responsible juror, the juror who sees himself directly and personally responsible for the execution his decision might authorize would be less likely to lend himself to the project of law's violence, whereas those who can convince themselves that the

148. See Herbert Morris, *Persons and Punishment*, in HUMAN RIGHTS 111 (Abraham I. Meldren ed., 1970).

149. *Id.*

150. See also West, *supra* note 144, at 168 (describing the ways in which the law insists on treating individuals as responsible agents).

151. *Id.* at 171.

152. West, *supra* note 109, at 91.

responsibility lies elsewhere would be more likely to do so. Three jurors in the Connors case conform to Marshall's expectation; even as they insisted on Connors' agency, they refused to see themselves in a similar light.

Jurors Mann, Givens, and Rane all talked about their decision to condemn Connors to death as if that decision were somehow made elsewhere, as if they were not really making choices or authorizing anything. Each of them echoed an argument made by Herbert Morris, namely that the person who is truly responsible for the punishment is the defendant himself.¹⁵³ In this view the murderer, by his own acts, actually determines the death sentence. Thus, the juror who votes for such a punishment is merely the agent of the defendant.

However, the efforts of Mann, Givens, and Rane to avoid responsibility for their authorizing act of violence did not end there. Each of them was implicitly aware of a point made by Cover:

[The] social organization of violence manifests itself in the secondary rules and principles which generally ensure that no single mind and no single will can generate the violent outcomes that follow from interpretive commitments. No single individual can render any interpretation operative as law—as authority for the violent act.¹⁵⁴

This is, of course, readily apparent from the group character of jury decision-making, but it is also apparent to jurors from the hierarchical nature of the legal system.

All of the jurors in the Connors case knew, or believed, that their decision was not the last word.¹⁵⁵ Each knew or believed that it would be reviewed by the judge who presided over the trial and/or by an appellate court. All four thought that the appellate courts were as likely to reject the death penalty imposed on Connors as they were to accept it, and Mann, Givens, and Rane all said that the fact that their death sentence would be reviewed by other actors in the legal process meant that, should Connors actually be executed, they would not have his death on their consciences. For them, the very structure of "super due process,"¹⁵⁶ and of extended review and appeal, which had been put in place to assure heightened reliability in capital cases, made it easier to impose the death penalty.

Only Charlotte Howles saw herself as directly and personally responsible for the death sentence for which she voted. As she put it:

I was really surprised when I could go in and vote for death because really and truly, before I was on this jury I had never given it a lot of thought. And I didn't have any strong convictions one way or the other. It is a big responsibility, and hard to accept, but I think that's why they have juries so people like me have to make those hard decisions. I felt from the beginning that it would be my call, and I thought that if the facts are there and for certain things I would have no problem going in and finding somebody guilty and giving them the death penalty. I think that if it's a

153. See Morris, *supra* note 148, at 111.

154. Cover, *supra* note 33, at 1628.

155. See Haney et al., *supra* note 5, at 160 (discussing the tendency of most capital jurors to shift responsibility for their ultimate decision to the law, the judge, or the jury instructions).

156. See Radin, *supra* note 36, at 139 (discussing the structure and impact of "super due process").

heinous thing and if it warrants it, then I would certainly vote again for the death penalty. . . . My opinion was that, hey, I'm not going to let this guy [Connors] out. I would feel the same way if he was guilty, electrocuted later on, and they found him innocent. I'd feel bad, but not as bad as if I didn't give him the death penalty and he somehow got out and killed again. For me, my job was to make sure that that didn't happen again.

The responsibility that Howles felt most acutely was that the death penalty seemed to be the morally responsible answer to a social crisis engendered by the kind of random, valueless violence perpetrated by people such as Connors. In contrast to the meaningless act for which Howles was prepared to hold Connors responsible, Howles saw the law's violence, and her participation in the authorization of death itself, as meaningful, purposive, and necessary to protect innocent others from him.

C. When "Life Doesn't Mean Life," "Death Doesn't Mean Death," and "Yes' Means Maybe, but Probably Not"

When people such as Charlotte Howles accept responsibility for imposing the death penalty, what is the meaning of the penalty they are voting to impose? When jurors lend their voices and votes to capital punishment, how do they understand the act that they are authorizing? Here, conversations with the jurors in the Connors case suggest that substantive inadequacies in the arsenal of criminal punishment, as well as the processes of review and appeal that automatically follow a death sentence, combine to push the jurors to authorize such a sentence. This occurred in the Connors case even though most jurors were neither deeply enthusiastic about their decision, nor convinced that Connors would ever be executed.

Those inadequacies and those processes make the violence of the death penalty seem both a necessary and, at the same time, a highly improbable event. The former make a death sentence more immediate, while the latter make execution all the more remote. Those inadequacies and those processes allowed jurors in the Connors case to decide one thing: that Connors should be sentenced to death as a way of achieving something else—that he should spend the rest of his life in jail. While Connors' violent act could not be denied, the jury's violent gesture would likely be a gesture whose efficacy would not reside in its being taken literally.

The jurors in the Connors case were overwhelmingly concerned with incapacitation as a goal of criminal punishment.¹⁵⁷ None of them believed that executions deterred others, and none embraced a retributivist rationale for capital punishment.¹⁵⁸ Each of them was, however, deeply concerned with

157. For a discussion of the nature and meaning of incapacitation in criminal sentences, see ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

158. *Contra* *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (holding that the exclusion of jurors who objected to capital punishment, but who did not state that they would automatically vote against imposing such punishment regardless of the evidence introduced at trial, violates the accused's right to an impartial jury under the Sixth and Fourteenth Amendments).

the possibility that Connors might someday be back on the streets of Bowling. Each seemed convinced that Connors' vicious, bloody acts qualified him to die under the laws of Georgia, yet each believed that what was necessary to achieve justice was something less than his death at the hands of the state.

Because Georgia law at the time of the Connors trial did not provide for a sentence of life without parole,¹⁵⁹ each was persuaded that unless he voted for death, John Henry Connors would soon be out of prison posing a threat to other innocent people. For these jurors, then, sentencing someone to die was the only way of insuring that he would live the rest of his life in prison. As juror Howles explained,

If he had not been found guilty of capital murder he would have gotten life. But that doesn't mean that he would have served a life term. It means he would have gotten out in however many years it is you have to serve before you get out on parole: Isn't it something like seven years? I think I'm just going by what I hear on TV, you know.

Like the other jurors, Howles embraced death as a punishment as insurance against the possibility that "if we didn't give him the death penalty, if he did get back out into society, he would hurt someone else. And I really didn't want that."

Jurors Rane and Mann stated that they would have preferred an alternative to the stark choice between death and a life sentence that did not really mean life in prison. Both said that they would have preferred to have been able to vote for a sentence of life in prison without the possibility of parole. Both suggested that they chose death because this alternative (life without parole) was not available to them.

In fact, Rane reported that a substantial part of the jury's initial deliberations about Connors' fate focused on the meaning of life in prison:

We were concerned that if he got life in prison he would serve only a few years and then be turned loose. There was one woman who was particularly adamant that she didn't want that, only problem was she said that she couldn't vote for death. So that's when the question of life in prison without the possibility of parole came up and that's when we sent a note to the judge asking if we could give that. And he called us back out and had us in the jury box again and he read the question and then told us that we couldn't, that that was not one of the options given. It would either be the death penalty or life in prison which means he would have a possibility of parole.

This turned out to be a decisive moment in the Connors case. As Sylvia Mann said,

I was truly amazed because many of the people that were on the jury did not really seem to understand that life does not mean life. And I was astonished that a good number did not realize that when they started it.

159. For a discussion of the meaning and significance of life without parole, see William H. Wood III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605 (1989); see also Julian A. Wright, Jr., Note, *Life-Without-Parole: An Alternative to Death or Not Much Life at All?*, 43 VAND. L. REV. 529 (1990).

Those of us who did understand that, it took us to explain it to them because they really did not understand that. A lot of them would have liked to have given John Henry Connors life if it had really meant life, you know, that he was going to go to jail and stay there forever. When the judge told us it was either life that didn't mean life or death, that changed things for most of us. But there were still a couple who didn't want Connors to die. . . . That meant that we had to talk about the fact that this, just for the reason that we voted for death, did not necessarily mean that Connors would die at the hands of the state. And I think we talked a good bit about the fact that this would go to the Georgia Supreme Court and it would be reviewed and that if anything was out of the ordinary then it would be thrown out, and that even after then the man would have many opportunities to appeal. And I think that probably that discussion helped more than anything to persuade the two that was reluctant. Just because we voted death didn't mean he would die.

Life that does not mean life and death that does not mean death: given these alternatives, jurors in the Connors case struggled to find a way to express what seems to have been the consensual view that the appropriate response to the killing of Donaldson would be to put Connors away and to throw away the proverbial key. Indeed, no one—not Ms. Howles, Ms. Mann, Mr. Givens, or Mr. Rane—believed that execution was a likely result of a death sentence. As Howles put it, “We all pretty much knew that when you vote for death you don't necessarily or even usually get death. Ninety-nine percent of the time they don't put you to death. You sit on death row and get old.”

In Georgia, where capital punishment is concerned, saying “yes” does not necessarily mean yes. To the jurors in the Connors case, saying yes to the death penalty meant both more and less than it seemed. It was a way of expressing their moral horror and revulsion at the violent and “whimsical” killing of Andy Donaldson and of insuring, as best they were able, that Connors would himself never be an agent of such violence again.

CONCLUSION

Jurors in capital trials are asked to participate in a set of complex rituals through which law seeks to gain the right to exercise the ultimate power of sovereignty: the power over life itself. They are asked to cast the weight of citizenship on the side of law's violence. It is a remarkable and troubling aspect of democratic politics that jurors so regularly do so. The Connors case helps us to understand how and why this happens.

In the Connors case, and in most other capital trials, the representation of violence is as difficult and uncertain as it is anywhere else. Yet, the representational practices of capital trials make some kinds of violence vivid and visible, while effectively hiding others and rendering them invisible.¹⁶⁰ The violence made visible is the murderous violence of people like John Henry Connors, whose acts are graphically displayed and the consequences of which are eagerly implanted in the consciousness of jurors. Great efforts

160. See Sarat, *supra* note 20, at 21-25.

are made to persuade jurors that such violence is unnecessary, irrational, indiscriminant, gruesome, and useless. Law's violence, however, is described as rational, purposive, and controlled through values, norms, and procedures external to violence itself. In capital trials, the force of law is represented as serving common purposes and aims as against the anomic savagery lurking just beyond law's boundaries.¹⁶¹

Yet, in all capital trials, the juxtaposition of two different representations of violence is disquieting, if not destabilizing. This is especially true of the juxtaposition of the narratives of violence outside law with the linguistic representation, or nonrepresentation, of law's own violence. In these moments, putting law's violence into discourse threatens to expose law as essentially similar to the antisocial violence it is supposed to deter and punish. Benjamin argues that

in the exercise of violence over life and death more than in any other legal act, law reaffirms itself. But, in this very violence something rotten in law is revealed, above all to a finer sensibility, because the latter knows itself to be infinitely remote from conditions in which fate might imperiously have shown itself in such a sentence.¹⁶²

As a result,

Anglo-American law has traditionally suffered a serious identity crisis over its awkward relation to violence. . . . Our system assumes that law is to hold a monopoly on violence, but this is a monopoly viewed as both necessary and discomfiting. It is necessary because it is viewed as the alternative to something worse—unrestrained private vengeance—and it is discomfiting because those who make and enforce the law would like to believe that, though they may be required to use force, force is somehow categorically distinguishable from violence. . . .

. . . .
[T]he efforts of modern jurisprudence to finesse or deny the role of violence have not ceased.¹⁶³

These efforts put enormous pressure on events such as the capital trial to demonstrate and affirm the difference between the violence of law and the violence that law condemns. The jury's verdict, the spoken truth of the community as it embraces capital punishment, is the ultimate affirmation of the meaningfulness of that difference. Thus death sentences, some might assume, speak for themselves. They convey the authority and the desire that someone should be put to death by the state. They represent the ultimate public embrace of law's special brand of violence.

But in the Connors case, while the death sentence did authorize the state to extinguish the life of John Henry Connors, it is by no means clear that such a result was, for the jurors who authorized it, the desired result. In this case,

161. As Justice Stewart noted, "The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law." *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

162. BENJAMIN, *supra* note 49, at 286.

163. Weisberg, *supra* note 70, at 175-76.

and probably in others, the death sentence was not simply a linguistic command whose integrity depended on the materialization of punishment on the body of the condemned. In this case, and in many others, the death sentence pronounced was, at best, plural, if not indeterminate, in its meanings. It was at once a powerful condemnation of Connors for his vicious crime, an expression of frustration at the incompleteness of a sentencing system that did not provide life without parole, and a way of insuring that Connors would be imprisoned for life.

Finally, the law, with its elaborate structure of rules, reviews, and appeals in capital cases, diffuses responsibility for the violence which jurors are asked to authorize.¹⁶⁴ The greater the protections provided for defendants in capital cases, the greater this diffusion of responsibility will typically be. And, in the case of the Connors jurors, this greater diffusion of responsibility itself invited a death verdict.

Law may prize juror sovereignty in death cases, but jurors themselves do not seem eager to claim their sovereign prerogative. This suggests an interesting possibility, namely that the greater the protections which are afforded capital defendants and those convicted of capital crimes, and the fewer the resulting executions, the more willing jurors may be to lend their authorizing voice to the death penalty. However, as protections are stripped away, as they were in the case of Robert Alton Harris and as they have been in a whole host of recent Supreme Court cases, as law's eager impatience to get on with the business of turning death sentences into executions is revealed, and as the frequency of execution increases, law may find itself less well able to enlist ordinary citizens in the project of authorizing its life-destroying violence.¹⁶⁵ In this way, the law's eager appetite to respond to violence with violence may evoke the disciplining scrupulousness of its citizen sovereigns.

164. See Cover, *supra* note 33, at 1628.

165. A similar possibility is suggested by Samuel R. Gross, *The Romance of Revenge: Capital Punishment in the United States*, 13 *STUD. L. POL. & SOC'Y* 71 (1993).

