

A Shortcut to Death: How the Texas Death-Penalty Statute Engages the Jury's Cognitive Heuristics in Favor of Death*

Introduction

It is no secret that the leveling of death sentences and the administration of the death penalty in the United States has rapidly declined in recent years.¹ In fact, the number of United States jurisdictions imposing a death sentence has declined by 55.7% in the last four years.² Notably, however, the state of Texas still leads the nation in executions,³ which necessarily require the issuance of a death sentence. Texas has executed 543 inmates since 1976; for comparison, the nation's second-leading state, Virginia, has executed 113 inmates in that time period.⁴ But even Texas's propensity to issue death sentences has dramatically declined.⁵ In 2016, Texas issued only four death sentences,⁶ compared with its apex of forty-eight death sentences in 1999.⁷

This decline in death sentences and resultant executions, however, is no reason to ignore the administration of the death penalty altogether. To the extent that the Texas death-penalty statute has increased the number of death sentences (and this Note argues that it has), the statute is partly responsible for the inmates *currently* on death row. And even in an era of dwindling death sentences, Texas in particular continues to lead the nation, issuing the second-most death sentences in 2016,⁸ second only to California, a state long

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1. See *Death Sentences in 2016*, DEATH PENALTY INFO. CTR. (2017), <https://deathpenaltyinfo.org/2016-sentencing> [http://perma.cc/8LJN-WV4Z] (describing the significant decline in death sentences in the United States); *The Death Penalty in 2016*, DEATH PENALTY INFO. CTR. (2017), <https://deathpenaltyinfo.org/YearEnd2016#graphic> [http://perma.cc/NW84-EHZR] (illustrating the recent notable decline in executions in the United States).

2. *The Death Penalty in 2016*, *supra* note 1.

3. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Apr. 21, 2017), <https://deathpenaltyinfo.org/documents/FactSheet.pdf> [http://perma.cc/HKJ3-252G].

4. *Id.*

5. *Texas Death Penalty Fact Sheet*, TEX. COALITION TO ABOLISH DEATH PENALTY (Jan. 1, 2011), <http://www.tcadp.org/wp-content/uploads/2011/01/TXDPPFactSheet01-11.pdf> [https://perma.cc/C6LL-QMX3].

6. *Death Sentences in 2016*, *supra* note 1.

7. *Texas Death Penalty Fact Sheet*, *supra* note 5.

8. *Death Sentences in 2016*, *supra* note 1.

hailed as a “symbolic death-penalty state.”⁹ (California has not executed an inmate in over a decade.)¹⁰ Many factors have contributed to Texas’s long-standing propensity to issue and carry out death sentences: zealous prosecutors,¹¹ right-leaning politics,¹² and a tough stance on crime.¹³ But Texas’s disproportionate use of the death penalty may have an additional, unsuspected culprit—the Texas death-penalty statute itself. Enacted in a “hurried and somewhat confused process,”¹⁴ the statute centers the jury’s deliberations on considerations of the defendant’s future dangerousness—with a nod to mitigation.¹⁵

This Note argues that the Texas death-penalty statute skews the sentencing decision toward death. In particular, the structure of Texas’s statute encourages juries to return a death verdict by engaging two cognitive heuristics: the representativeness heuristic and the anchoring-and-adjustment heuristic. Part I begins with a brief background of the Texas death-penalty statute and the corresponding constitutional jurisprudence. Part II summarizes various empirical findings regarding death-penalty juries, namely, their perception that death is required, their inaccurate predictions of future dangerousness, their disregard for mitigating evidence, and their moral distance from the life-or-death decision. Part III offers an explanation for these empirical findings, arguing that the Texas statute draws on the representativeness and anchoring-and-adjustment heuristics to bias the jury in favor of death. Finally, this Note concludes by asserting that Texas should abandon its haphazardly adopted statute. Texas should reverse the anchoring effect of the statute—tying the anchor to mitigation instead of future dangerousness.

9. *California Could Finally Resume Executions Next Year*, L.A. TIMES (Apr. 23, 2017), <http://www.latimes.com/local/lanow/la-me-california-executions-20170423-story.html> [<https://perma.cc/F7DJ-FA7A>].

10. *Id.*

11. *America’s Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty*, FAIR PUNISHMENT PROJECT 3 (June 2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf [<https://perma.cc/DY3B-76WA>] (featuring Harris County prosecutor Johnny Holmes, who oversaw the imposition of death sentences against 201 people during his term).

12. See Ross Ramsey, *Analysis: The Blue Dots in Texas’ Red Political Sea*, TEX. TRIB. (Nov. 11, 2016), <https://www.texastribune.org/2016/11/11/analysis-blue-dots-texas-red-political-sea/> [<https://perma.cc/883N-DKQE>] (describing the Republican Party’s winning streak in state and federal elections in Texas since 1994).

13. Christian McPhate, *10 Notorious Unsolved Texas Murders*, DALL. OBSERVER (May 17, 2016), <http://www.dallasobserver.com/content/printView/8305930n> [<https://perma.cc/8EQT-N27N>].

14. Eric Citron, Note, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 YALE L. & POL’Y REV. 143, 163 (2006).

15. See TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 2016) (calling the jury to consider the “probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”).

I. Background of the Texas Death-Penalty Statute

In the modern death-penalty era—that is, the years following the Supreme Court’s landmark decision in *Furman*¹⁶—the Texas death-penalty statute has centered upon a series of Special Issues.¹⁷ The pre-1991 Texas statute included two Special Issues:¹⁸ a question of the defendant’s future dangerousness and a question of the defendant’s deliberate commission of the killing.¹⁹ The pre-1991 statute—which largely remains the framework for the current Texas capital-sentencing statute—was passed in a “hurried and somewhat confused process,” spanning mere weeks.²⁰

One scholar “summarized” the “legislative history of the future dangerousness standard” as follows:

Beginning in January 1973, committees and subcommittees began hearing testimony and thinking about a new death penalty in Texas. On May 10th, the House gave its best interpretation of *Furman* and passed a mandatory death penalty bill. Two weeks later, the Senate debated between that mandatory bill and a more discretionary approach, finally opting for the latter. With only Memorial Day weekend to go before adjournment, the House called a conference committee to resolve the differences between the two bills. On the very last day, the conferees presented a scheme which appeared in neither the House nor the Senate bill, along with newly minted language about “a probability” that the defendant would be a “continuing threat.” That same day, both houses passed the committee report by huge margins without specifically considering the new language on future dangerousness.²¹

And seemingly overnight, the Texas death-sentencing statute came to fruition. In a “hurried and somewhat confused” process, the Texas Legislature centered the question of a defendant’s life or death around future dangerousness—a standard that seems plucked out of thin air—for the indefinite future. The Texas statute now revolves around a precarious prediction of the future, rather than the defendant’s moral blameworthiness.

The Supreme Court upheld the constitutionality of the Texas statute (and the corresponding Special Issues) against a facial challenge in *Jurek v.*

16. *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that carrying out the death penalty in the cases before the Court would violate the Eighth Amendment to the Constitution).

17. TEX. CODE CRIM. PROC. ANN. art. 37.071.

18. The Texas statute also included a third Special Issue, regarding provocation, but that instruction is only given in select cases. JON SORENSON & ROCKY LEANN PILGRIM, *LETHAL INJECTION: CAPITAL PUNISHMENT IN TEXAS DURING THE MODERN ERA* 53 (2006).

19. TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 1973), *amended by* TEX. CODE CRIM. PROC. ANN. art. 37.071 (2016).

20. Citron, *supra* note 14, at 162–63.

21. *Id.* at 162–63.

Texas.²² The Court subsequently decided several cases that elaborated on the essential role of mitigation evidence in capital-sentencing proceedings.²³ Unsurprisingly, the effect of the Texas statute's lack of reference to mitigating evidence was well-documented.²⁴ In *Penry v. Lynaugh*,²⁵ the Court declared the Texas Special Issues constitutionally inadequate where they failed to offer jurors an opportunity to express a "reasoned moral response" to mitigating evidence.²⁶

In response, the Texas Legislature abandoned the Special Issue on deliberateness—and replaced it with a Special Issue regarding mitigation.²⁷ While the Texas statute's new Special Issue on mitigation was a step in the right direction, the amendment did not eliminate serious problems embedded in the Texas statute. The centerpiece of the statute remains the future-dangerousness inquiry.²⁸ The original focus on future dangerousness created a sort of path dependence—and this focus remains problematic for many of the reasons discussed below.²⁹ Moreover, the statute still lacks guidance on the specific mitigating evidence that the jury should consider, "a critical failure of the statute."³⁰ Regrettably, many of the empirical problems inherent in the pre-1991 statute persist in the amended Texas regime.³¹

II. Empirical Findings Regarding Death-Penalty Juries

Despite the "black box" of the jury room, Texas death-penalty juries—to the extent possible—have been studied at great length, both before and

22. 428 U.S. 262, 276 (1976).

23. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 105–06, 109 (1982) (reviewing an Oklahoma death sentence and the trial judge's refusal to consider certain mitigating circumstances); *Lockett v. Ohio*, 438 U.S. 586, 589 (1978) (reviewing the constitutionality of the range of mitigating circumstances that may be considered under Ohio's death-penalty statute).

24. See, e.g., Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1032 (2001) (suggesting that, due to the statute's lack of reference to mitigating evidence, jurors perceived that death was the mandatory sentence under certain circumstances).

25. 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia* 536 U.S. 304 (2002). The *Penry* court sanctioned the death penalty for intellectually disabled offenders but nonetheless held the Texas death penalty constitutionally inadequate because the statute did not allow a full "reasoned moral response" to mitigation. *Id.* at 328. But the *Atkins* court later held that executions of the intellectually disabled constituted impermissible cruel and unusual punishment. 536 U.S. at 321.

26. *Penry*, 492 U.S. at 328.

27. Elizabeth S. Vartkessian, *Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to Be Unreceptive to Mitigation Evidence*, 29 QUINNIPIAC L. REV. 237, 246 (2011).

28. *Id.* at 247; see also Citron, *supra* note 14, at 155–56 (lamenting the centrality of future dangerousness in the Texas statute).

29. See *infra* Part II.

30. Vartkessian, *supra* note 27, at 247.

31. Some findings discussed in Part II, *infra*, are based on interviews conducted before the Texas statute was amended. But, given the focus of the Texas statute on future dangerousness and the lack of clarity regarding mitigation, these problems persist in the amended version.

after the 1991 amendment. Many of the empirical findings come from the Capital Jury Project, which has conducted personal interviews with 1,198 jurors from 353 capital trials in 14 states.³² These findings, combined with other studies, have established a number of conclusions about jury beliefs and behavior. Several patterns emerge: many jurors perceive that death is required,³³ they often make inaccurate predictions of defendants' future dangerousness,³⁴ they often give limited consideration to mitigating factors,³⁵ and they often perceive moral distance between themselves and the life-or-death decision.³⁶

A. *Inaccurate Predictions of Future Dangerousness*

First, jurors often predict the defendant's future dangerousness with little-to-no accuracy. This notion is hardly surprising, given that experts in the field of psychology are themselves ill-equipped to make an accurate future-dangerousness prediction. For example, in a study of 155 capital cases in which expert witnesses predicted that the defendant would be a future danger to society, the witnesses were wrong 95% of the time.³⁷ Only 8 of the 155 inmates later engaged in seriously assaultive behavior.³⁸ Moreover, the American Psychiatric Association has asserted that the "unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession."³⁹ Given the professional community's difficulty with the future-dangerousness question, it is no surprise that juries also struggle to make an accurate determination.⁴⁰

Nevertheless, expert testimony regarding future dangerousness in capital-sentencing proceedings is ubiquitous, both in the form of clinical and actuarial predictions.⁴¹ Juries' reliance on expert testimony is well-

32. *What Is the Capital Jury Project?*, U. ALB.: SCH. CRIM. JUST., <http://www.albany.edu/scj/13189.php> [<https://perma.cc/Y2PQ-E3MP>]. For an overview of the Capital Jury Project's methodology, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1044 (1995).

33. *See infra* subpart II(B).

34. *See infra* subpart II(A).

35. *See infra* subpart II(C).

36. *See infra* subpart II(D).

37. *Future Dangerousness Predictions Wrong 95% of the Time: New Study on Capital Trials Exposes Widespread Unreliable Testimony*, DEATH PENALTY INFO. CTR. (2004), <https://deathpenaltyinfo.org/node/1099> [<https://perma.cc/93WM-GBEE>].

38. *Id.*

39. ROGER J.R. LEVESQUE, *THE PSYCHOLOGY AND LAW OF CRIMINAL JUSTICE PROCESSES* 500 (2006).

40. *See* Brian Sites, *The Danger of Future Dangerousness in Death Penalty Use*, 34 FLA. ST. U. L. REV. 959, 970 (2007) ("[J]urors spend more time discussing future dangerousness than any other factor save the facts of the crime.").

41. Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 362 (2003).

documented⁴²—and hardly surprising.⁴³ But in the context of future dangerousness, perhaps this reliance is misplaced. Clinical and actuarial expert witnesses often ignore sample sizes and base rates.⁴⁴ Moreover, ignoring base rates is “a particular problem in predicting [future] violence when the base rate of violent behavior is low overall and varies among different population subgroups.”⁴⁵ Regardless of the appropriate calculations, however, focus on the accuracy of predicting future dangerousness distracts jurors from the grave, life-or-death decision at hand.

Furthermore, the Texas statute itself gives relatively little guidance on what constitutes a sufficient finding of future dangerousness. The Texas statute simply asks the jury to evaluate “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”⁴⁶ The statute does not define what probability is required: is it 10%, 51%, or 90%? Nor does the statute define dangerousness: is a defendant dangerous if he commits a felony? Shoplifts? Drives recklessly? Such questions are left for each individual jury to deliberate.⁴⁷

But despite the confusion surrounding the future-dangerousness question, jurors still center their focus largely on the future-dangerousness

42. See, e.g., Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1538–39 (1998).

43. Stanley Milgram’s electric-shock studies in the 1960s demonstrated that reliance on authority can lead people to obey “even the most abhorrent of orders.” See Cari Romm, *Rethinking One of Psychology’s Most Infamous Experiments*, ATLANTIC (Jan. 28, 2015), <https://www.theatlantic.com/health/archive/2015/01/rethinking-one-of-psychologys-most-infamous-experiments/384913/> [https://perma.cc/A7UU-P7PH].

44. See Beecher-Monas, *supra* note 41, at 362.

45. *Id.*

46. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West Supp. 2016).

47. Citron, *supra* note 14, at 158 (“[I]t also offers absolutely no guidance as to the level of certainty required for an answer of ‘yes.’ We might consider 10% a reasonably high probability, but we might also require 51% (i.e., more likely than not) or 95% (something like ‘beyond a reasonable doubt’). As it stands, that question . . . is left to the jury, and the evidence suggests that they are as confused about it as everybody else.”). In *Jurek v. State*, Judge Odom of the Texas Court of Criminal Appeals expressed similar dissatisfaction with the ambiguity of “probability” in the Texas statute:

What did the Legislature mean when it provided that a man’s life or death shall rest upon whether there exists a “probability” that he will perform certain acts in the future? Did it mean, as the words read, is there a probability, some probability, any probability? We may say there is a twenty percent probability that it will rain tomorrow, or a ten or five percent probability. Though this be a small probability, yet it is some probability, a probability, and no one would say it is no probability or not a probability. It has been written: “It is probable that many things will happen contrary to probability,” and “A thousand probabilities do not make one fact.” The statute does not require a particular degree of probability but only directs that some probability need be found. The absence of a specification as to what degree of probability is required is itself a vagueness inherent in the term as used in this issue. Our common sense understanding of the term leaves the statute too vague to pass constitutional muster.

522 S.W.2d 934, 945 (Tex. Crim. App. 1975) (Odom, J., concurring in part and dissenting in part).

inquiry. Even in South Carolina, a state whose capital-sentencing statute is not centered exclusively upon future dangerousness, data shows that the “defendant’s dangerousness should he ever return to society (including the possibility and timing of such a return) are second only to the crime itself in the attention they receive during the jury’s penalty phase deliberations.”⁴⁸ Moreover, prosecutors often guide what constitutes a probability of future dangerousness—and prosecutors are “consistently clear about the fact that they [do] not have to prove that the defendant [will] kill again.”⁴⁹ For example, one prosecutor in a Texas capital-sentencing proceeding argued:

I never have to prove to you he would kill again or that he would rape somebody or that he would stab somebody. It could be setting a fire in a prison cell. It could be threatening to assault a guard over and over. It could be tearing up the cell or tearing up facilities.⁵⁰

Furthermore, given prosecutors’ guidance, coupled with the misleading nature of the Texas statute, it is no wonder that Texas juries often inaccurately predict a defendant’s future dangerousness. But, since future dangerousness is the central inquiry in Texas capital-sentencing proceedings, an accurate prediction of future dangerousness is essential to the legitimacy of the Texas capital-sentencing scheme.

B. *Perception that Death Is Required*

Second, empirical evidence suggests that the Texas statute fosters the perception among jurors that death is required. The Texas statute does not *require* the imposition of death for any offender convicted of capital murder;⁵¹ in fact, the Supreme Court rejected the idea of a mandatory death penalty in *Woodson v. North Carolina*⁵² as constitutionally problematic.⁵³ Empirical evidence suggests that as many as a third of jurors in capital proceedings nationwide believe that a showing of future dangerousness

48. John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always “At Issue”*, 86 CORNELL L. REV. 397, 404 (2001).

49. Vartkessian, *supra* note 27, at 261.

50. *Id.*

51. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (stating that life imprisonment without parole is an alternative sentence for capital offenses).

52. 428 U.S. 280 (1976).

53. *Id.* at 305 (“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

requires a sentence of death.⁵⁴ This problem is probably exacerbated in the Texas scheme, which centers upon the future-dangerousness inquiry.⁵⁵

But the Texas capital-sentencing scheme furthers the perception that death is required in another crucial way: through the 10–2 rule. The Texas capital-sentencing statute requires the judge to instruct the jury that, in answering the Texas Special Issues (including the defendant’s future dangerousness), the jury “may not answer the issue ‘no’ unless it agrees unanimously and may not answer the issue ‘yes’ unless 10 or more jurors agree.”⁵⁶ Further, the statute adopts a so-called “gag rule,” which mandates that the judge may not instruct the jury regarding the consequences of a deadlock.⁵⁷ Thus, a Texas capital-sentencing jury is commonly instructed: “The jury may not answer Special Issues Numbers 1 and 2 ‘No’ unless ten or more jurors agree. . . . The jury may not discuss or consider the effect of failure of the jury to agree on the answer to an issue.”⁵⁸ While the jury may not answer “no” to future dangerousness unless ten jurors or more agree, the statute also prohibits the jury from answering “yes” to mitigation unless ten or more jurors agree.⁵⁹ As a result, jurors are, in effect, instructed that the law requires a consensus of ten or more jurors to issue a life sentence. But the effect of a holdout juror is the same as a consensus of ten jurors under Texas law:

If the jury returns an affirmative finding on each issue submitted under Subsection (b) and a negative finding on an issue submitted under

54. Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 7 (1993); see also William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 221–22 (1996) (“Four out of 10 capital jurors wrongly believed that they were ‘required’ to impose the death penalty if they found that the crime was heinous, vile, or depraved, and nearly as many mistakenly thought the death penalty was ‘required’ if they found that the defendant would be dangerous in the future.”).

55. Bentele & Bowers, *supra* note 24, at 1032 (“Not surprisingly, in light of the structure of its statute, the perception that death was the mandatory sentence under certain circumstances, particularly if jurors thought the defendant would be dangerous in the future, was most prominent under the directed statute in Texas.”).

56. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f)(2).

57. *Id.* § 2(a)(1); *Sorto v. State*, 173 S.W.3d 469, 492 (Tex. Crim. App. 2005) (“We have repeatedly upheld the constitutionality of Article 37.071, Section 2(a)(1), which prohibits informing jurors of the effects of their failure to agree on the special issues.”). Although the Supreme Court has held that the failure to instruct jurors on the consequences of their deadlock does not violate the Eighth Amendment, *Jones v. United States*, 527 U.S. 373, 381–82 (1999), some have argued that the Due Process Clause requires such a disclosure. See Robert Clary, *Texas’s Capital-Sentencing Procedure Has a Simmons Problem: Its Gag Statute and 12-10 Rule Distort the Jury’s Assessment of the Defendant’s “Future Dangerousness”*, 54 AM. CRIM. L. REV. 57, 110–11 (2016) (“[T]he fact that the defendant will automatically receive a sentence of life in prison without possibility of parole if a Texas capital jury fails to achieve the consensus required by the 12-10 Rule is directly relevant to the jury’s assessment of the defendant’s future dangerousness.”).

58. See, e.g., Court’s Charge on Punishment at 2, *State v. Storey*, No. 1042204D (Crim. Dist. Ct. 3, Tarrant Cty., Tex. Sept. 11, 2008), 2008 WL 8188280, at *1 (providing typical capital-sentencing jury instructions).

59. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)(2), (f)(2).

Subsection (e)(1), the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) *or is unable to answer any issue submitted under Subsection (b) or (e)*, the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole.⁶⁰

Based on the Texas statute, as the Fifth Circuit has acknowledged, “[a] single juror thus has the power to prevent a death sentence based on his personal view of the mitigation evidence.”⁶¹

The mandated Texas jury instructions lead jurors who favor a life sentence to believe that they must convince nine other jurors to vote for life to avoid issuing a death sentence—but one holdout juror produces the same effect. This misunderstanding is corroborated not only by empirical evidence⁶² but also by powerful anecdotal evidence. For example, Sven Berger, who served as a juror in a 2008 capital murder trial, recently spoke out regarding his own misunderstanding of the Texas capital jury instructions.⁶³ Berger did not want to sentence the defendant to death—based on his impression that the defendant would not be “a future danger to society”—but a majority of the jury voted for death.⁶⁴ Believing that he could not sway the other jurors’ votes, Berger reluctantly assented to the death sentence.⁶⁵ But what he didn’t realize “in part because of the language in the jury instructions . . . was that his vote alone could have blocked the jury from handing down a death sentence and given [the defendant] life in prison without the possibility of parole.”⁶⁶ Although Berger’s “haunt[ing]” experience with the Texas death-penalty statute inspired him to speak out (which in turn inspired two Texas legislators to file bills to change the statute),⁶⁷ most jurors remain unaware of their misunderstanding.

In reality, death is not required in Texas—and neither is unanimity for life. Such a capital-sentencing structure would violate the Eighth Amendment prohibition of mandatory death-penalty statutes.⁶⁸ But most jurors are never informed of the consequences of their dissent.

60. *Id.* § (2)(g) (emphasis added).

61. *Allen v. Stephens*, 805 F.3d 617, 631 (5th Cir. 2015).

62. *See supra* notes 54–55 and accompanying text.

63. Jolie McCullough, *Texas Death Penalty Juror Hopes to Change Law as Execution Looms*, TEX. TRIB. (Mar. 28, 2017), <https://www.texastribune.org/2017/03/28/texas-death-penalty-juror-hopes-change-law-execution-looms/> [<https://perma.cc/DY8K-W4M4>].

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

C. *Limited Consideration of Mitigating Factors*

Third, empirical evidence suggests that, despite the mitigation Special Issue in the Texas statute, capital-sentencing juries fail to give much weight to mitigating circumstances in their deliberations. In order for a capital-sentencing statute to survive Eighth Amendment scrutiny,⁶⁹ the statute must provide for consideration of mitigating factors that may persuade a jury to sentence the defendant with less than death.⁷⁰ In fact, the statute must allow for the consideration of “as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”⁷¹ Moreover, the sentence must give *at least some* weight to each mitigating factor.⁷² The Texas statute in particular asks the jury to consider

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.⁷³

Empirical evidence suggests that jurors fail to give much weight to these constitutionally mandated mitigating factors. In particular, Capital Jury Project “interviews reflect a pattern in which mitigating factors play a disturbingly minor role in jurors’ deliberations about whether a defendant should be sentenced to death.”⁷⁴ Moreover, “[e]ven when jurors do report a discussion of mitigating factors, their understanding of what the law defines as mitigation is extremely limited.”⁷⁵ Admittedly, this lack of attention to

69. Under prevailing Eighth Amendment doctrine, the words of the Eighth Amendment are “not precise, and . . . their scope is not static.” *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). Instead, “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 101.

70. See *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (“To meet constitutional requirements, a death-penalty statute must not preclude consideration of relevant mitigating factors.”); *Woodson*, 428 U.S. at 305 (striking down North Carolina’s mandatory death-penalty statute as unconstitutional).

71. *Lockett*, 438 U.S. at 604. In *Lockett*, the Supreme Court struck down an Ohio capital-sentencing statute that limited the sentence to consideration of three enumerated mitigating factors. *Id.* at 608–09. Such a statute that prohibited “consideration of a defendant’s comparatively minor role in the offense, or age” was constitutionally impermissible. *Id.* at 608.

72. *Eddings v. Oklahoma*, 455 U.S. 104, 112–14 (1982) (“By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency. . . . Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.”).

73. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (West Supp. 2016).

74. Bentele & Bowers, *supra* note 24, at 1041.

75. *Id.* at 1042.

mitigation could be partly attributed to jurors' misunderstanding of the niche term "mitigation." In one California study, for example:

[L]ess than one-half of . . . subjects could provide even a partially correct definition for the term 'mitigation,' almost one-third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in ten was still so mystified by the concept that he or she was unable to venture a guess about its meaning.⁷⁶

The inattention to mitigation is likely also attributable to jury instructions. The presumption of death is included in *the mitigation question itself*: does the mitigation evidence warrant that a life sentence is imposed "rather than a death sentence"?⁷⁷ Empirical evidence suggests that jurors pick up on this "death default": one juror interviewed by the Capital Jury Project recalled that the jury "had no instructions or didn't ask as to what role childhood should play."⁷⁸ The juror thus "[d]idn't know if defendant's childhood was [a] valid" mitigating factor and later lamented that he "[s]hould have asked [the] judge if that was [a] valid reason to deny death."⁷⁹

This is hardly surprising: the Texas statute asks a very specific, concrete question regarding future dangerousness. But the question regarding mitigation is open-ended: there is no guidance from the law, and there are no enumerated mitigating factors. This scheme "encourages the dismissal of mitigation evidence as being irrelevant to jurors' sentencing decision."⁸⁰ In particular, scholars have argued that the Texas statute allows prosecutors to "dismantle and reframe" the sentencing scheme to focus purely on future dangerousness and encourage jurors to largely ignore mitigating evidence.⁸¹

The tendency of juries to downplay mitigating evidence is particularly troubling. The Supreme Court has mandated that virtually *all* mitigating factors be considered in capital-sentencing proceedings.⁸² In fact, the Court has asserted that, "in capital cases[,] the fundamental respect for humanity underlying the Eighth Amendment *requires* consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the

76. Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1223, 1229 (1995).

77. See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1).

78. Bentele & Bowers, *supra* note 24, at 1044.

79. *Id.*

80. Vartkessian, *supra* note 27, at 240.

81. See, e.g., *id.* ("Due to the statute's focus on the defendant's future dangerousness and the ambiguity of the mitigation instruction, legal actors are able to dismantle and reframe the sentencing scheme in a way which advances the dismissal of much mitigating evidence.").

82. See *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) ("Thus, a State cannot bar 'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death.'").

penalty of death.”⁸³ If juries fail to consider such evidence, however, the result falls short of the required “reasoned moral response.”⁸⁴

D. Moral Distance Between the Decision Maker and the Decision Itself

Fourth, empirical evidence suggests that the structure of the Texas death-penalty statute creates moral distance between the decision maker and the decision itself. In a Capital Jury Project interview, one juror admitted that the life-versus-death decision was “easier” than she suspected and that she “thought it would be harder than just answering questions.”⁸⁵ Another Texas juror recounted how the judge explained that the jury was *not* charged with the life-or-death inquiry:

[The judge] said that he wanted us to understand that we were not choosing whether somebody should get the death penalty or not as far as being responsible if he ends up dying as a result of getting the death penalty. That it was up to us to answer yes or no to, I think it was three, questions. And based on the way we answered those questions. The death penalty would be assigned or not assigned, according to Texas law. The defense tried to make us feel as though we would be responsible for [the defendant] dying if we gave him the death penalty so I think that the judge maybe took some of that sting away.⁸⁶

In fact, in live interviews of 153 capital jurors, only 28% of jurors agreed that determining whether the defendant lived or died was “strictly the jury’s responsibility and no one else’s”—and only 21% of jurors who gave a death sentence agreed with that proposition.⁸⁷

It is unsurprising that the Texas statute discourages jurors from taking responsibility for the life-or-death decision. Texas jurors are *never* explicitly instructed to consider whether the defendant should be given a death sentence or life in prison without parole; instead, they are asked to answer a series of “yes” or “no” questions.⁸⁸ In most cases (when the defendant was not found guilty by the law of parties), the jury considers only two such questions: future dangerousness and mitigation.⁸⁹ But those questions do, in fact, make a life-or-death determination.

83. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (emphasis added) (citations omitted).

84. *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988) (O’Connor, J., concurring); *see also id.* at 194 (Stevens, J., dissenting) (concluding that “the risk that the jury did not give full consideration to the mitigating evidence petitioner introduced” required the death sentence to be vacated).

85. Bentele & Bowers, *supra* note 24, at 1039.

86. *Id.* at 1040.

87. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 350, 353 tbl.1 (1996).

88. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(c), (f)(1) (West Supp. 2016).

89. *See id.* § 2(b)(1) (requiring the jury to consider “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”); *id.* § 2(d)(1) (requiring the jury to consider “evidence of the defendant’s background or

The Supreme Court has mandated that jurors must be able express their “reasoned moral response”⁹⁰ to the evidence. But if jurors do not feel responsible for the life-or-death decision, the question arises: are their yes-or-no answers truly indicative of a “reasoned moral response”?

III. How the Framing of the Texas Statute Affects Juror Decision Making

Several theories have been advanced to explain the foregoing empirical capital-jury findings. These include the Story Model,⁹¹ the groupthink model,⁹² and agentic shift.⁹³ Moreover, scholars have repeatedly noted the tendency of jurors to vastly underestimate the time a defendant sentenced to life in prison will actually serve in prison.⁹⁴ Such misperceptions undoubtedly contribute to a greater likelihood that a jury will return a death sentence.

But this Note advances an additional consideration that may increase the likelihood of a death sentence: the structure of the Texas statute itself. Specifically, the format and language of the Texas statute invokes two cognitive heuristics—the representativeness heuristic and the anchoring-and-adjustment heuristic—that arguably increase the likelihood that any given jury will return a death sentence.

A. *Representativeness Heuristic*

One plausible explanation for why jurors assume that death is default⁹⁵ and inaccurately predict future dangerousness⁹⁶ is the Texas statute’s tendency to play into the representativeness heuristic. The representativeness heuristic, first articulated by Amos Tversky and Daniel Kahneman, centers upon the question: “What is the probability that object A belongs to class

character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty”); *id.* § 2(f)(4) (requiring the jury to “consider mitigating evidence to be evidence that a juror might regard as reducing the defendant’s moral blameworthiness”).

90. *Franklin v. Lynaugh*, 487 U.S. 164, 184–85 (1988) (O’Connor, J., concurring).

91. REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 22–23 (2d prt. 2004) (“The Story Model provides a complete psychological account of cognitive processing in juror decision making, and it receives support from jury research, political science analysis, jurors’ accounts of their experiences during trials, and other work.”).

92. *See* Bentele & Bowers, *supra* note 24, at 1056 (“Irving Janis’s ‘groupthink’ model of group decision making helps to account for the reluctance of jurors to switch gears when they move from the guilt to the penalty phase of the trial—to explain why jurors become fixated on guilt and aggravation while paying little attention to mitigation.”).

93. *Id.* at 1058–59 (“A juror making a life or death sentencing decision is in the kind of situation that might well be expected to induce an agentic shift.”).

94. *See, e.g.*, William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 *TEXAS L. REV.* 605, 670 (1999) (“In every state examined here, capital jurors vastly underestimate the time that convicted first-degree murderers not given the death penalty will stay in prison.”).

95. *See supra* subpart II(B).

96. *See supra* subpart II(A).

B?”⁹⁷ When individuals rely on the representativeness heuristic, they assess the degree to which object A is “representative of, or similar to, the stereotype of a” member of class B.⁹⁸ Tversky and Kahneman provide the following example:

“Steve is very shy and withdrawn, invariably helpful, but with little interest in people, or in the world of reality. A meek and tidy soul, he has a need for order and structure, and a passion for detail.” How do people assess the probability that Steve is engaged in a particular occupation from a list of possibilities (for example, farmer, salesman, airline pilot, librarian, or physician)? How do people order these occupations from most to least likely? In the representativeness heuristic, the probability that Steve is a librarian, for example, is assessed by the degree to which he is representative of, or similar to, the stereotype of a librarian.⁹⁹

This method of categorizing objects—or, in this case, people—“leads to serious errors, because similarity, or representativeness, is not influenced by several factors that should affect judgments of probability.”¹⁰⁰ These factors include insensitivity to the prior probability of outcomes, sample size, and predictability, as well as the illusion of validity and misconceptions of regression.¹⁰¹ Moreover, relying on representativeness is problematic because “humans simply cannot assign optimal weights to variables, and they are not consistent in applying their own weights.”¹⁰²

As a result, many have warned against overreliance on expert testimony—specifically in the context of a defendant’s dangerousness—due to the distorting effects of heuristics.¹⁰³ The representativeness bias in particular “causes the clinicians to compare the individuals they are assessing for dangerousness with their stereotypical conceptualization of a dangerous individual and construct a prediction on the basis of similarity.”¹⁰⁴ But unfortunately, these stereotypes “are likely to be inaccurate and contain many attributes that are not linked to future violence,” and thus clinicians’

97. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1124–26.

102. William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL., PUB. POL’Y & L. 293, 315 (1996).

103. See, e.g., GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 301 (3d ed. 2007) (arguing that “[c]linicians’ judgments may also be affected by cognitive heuristics that influence the selection and weighting given to particular predictor variables”).

104. Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL., PUB. POL’Y & L. 267, 280 (2001).

“predictions of violence are likely to be based on poor correlates of future violent behavior.”¹⁰⁵ In fact, “[a] steadily growing body of peer-reviewed literature directly undercuts the legitimacy of future dangerousness diagnoses”¹⁰⁶—so much so that the American Psychiatric Association has asserted that “[p]sychiatrists should not be permitted to offer a prediction concerning the long-term future dangerousness of a defendant in a capital case.”¹⁰⁷ Despite these warnings, “Texas routinely allows such testimony.”¹⁰⁸

Although prior research has centered upon clinical assessments of future dangerousness, there is no reason to believe that jurors do not fall prey to the same cognitive shortcuts as clinicians. In fact, the structure of Texas capital proceedings tees up juries to focus on a representativeness question: that is, “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”¹⁰⁹ The capital-sentencing jury is the same trial jury that found the defendant guilty of capital murder—often immediately beforehand.¹¹⁰ Then, the Texas scheme requires the same jury to consider the future dangerousness of the convicted defendant, the primary consideration in the capital-sentencing determination.¹¹¹ Unsurprisingly, given that the Texas statute focuses on “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society,”¹¹² many jurors continue to dwell on guilt.¹¹³ The Texas statute merely underscores this preoccupation with death by *requiring* jurors to focus on the future-dangerousness inquiry, a concept intertwined with the guilt determination.¹¹⁴ In fact, findings from the Capital Jury Project suggest that many jurors begin “taking a stand on what the defendant’s punishment should be well before they [are] exposed to the statutory guidelines for making this decision”—an almost predictable result.¹¹⁵

In effect, the Texas scheme requires jurors to ask whether object A—a defendant who the same jury convicted of capital murder—belongs in class B—a class of defendants that “would commit criminal acts of violence.” The likelihood that such a defendant would be incongruent with

105. *Id.*

106. Meghan Shapiro, *An Overdose of Dangerousness: How “Future Dangerousness” Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 160–61 (2008).

107. Amicus Brief of American Psychiatric Ass’n for Petitioner at *3, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080).

108. Shapiro, *supra* note 106, at 160 n.64.

109. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West Supp. 2016).

110. *Id.* § 2(a)(1).

111. *Id.* § 2(b)(1).

112. *Id.*

113. Bentele & Bowers, *supra* note 24, at 1021.

114. *Id.*

115. Bowers, *supra* note 54, at 221.

the jurors' stereotypes of those who "would commit criminal acts of violence" is slim, and we see the result of that inquiry in jury verdicts themselves.¹¹⁶

B. Anchoring & Adjustment Heuristic

A second cognitive shortcut that affects jurors' assessment of a defendant's future dangerousness is the anchoring-and-adjustment heuristic. This heuristic, also articulated by Tversky and Kahneman, relies on the hypothesis that "people make estimates by starting from an initial value that is adjusted to yield the final answer."¹¹⁷ Typically, this heuristic is triggered when a numeric value is in play; the initial value, known as the anchor, is a number that is adjusted upward or downward based on a set of variables.¹¹⁸ For example, Judge Mark Bennett has argued that, despite the advisory nature of the Federal Sentencing Guidelines, the Guidelines create a numeric anchor that subconsciously affects judicial sentencing.¹¹⁹

But new evidence suggests that the anchoring-and-adjustment heuristic can be triggered by phenomena other than numeric figures, specifically by the order and format in which information is presented. Research suggests that the initial information presented can create a sort of "anchor" that constrains individuals' adjustments in response.¹²⁰ For example, some researchers have shown that the order in which information is presented on an exam affects students' evaluation of their own performance.¹²¹ The initial questions presented create a sort of anchor, and the students adjust their perception of performance based on that anchor.¹²² If information is presented in a different order, then a different self-evaluation results.¹²³ This phenomenon is known as belief persistence.¹²⁴

116. *See supra* notes 54–55 and accompanying text.

117. Tversky & Kahneman, *supra* note 97, at 1128.

118. *See id.* ("The initial value, or starting point, may be suggested by the formulation of the problem, or it may be the result of a partial computation. . . . [D]ifferent starting points yield different estimates, which are biased toward the initial values. We call this phenomenon anchoring.").

119. Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 491 (2014).

120. *See, e.g.*, Yana Weinstein & Henry L. Roediger III, *The Effect of Question Order on Evaluations of Test Performance: How Does This Bias Evolve?*, 40 MEMORY & COGNITION 727, 728 (2012) ("One possibility is that the difficulty of the questions at the beginning of a test sets an anchor that constrains participants in their evaluations of performance throughout the remainder of the test.").

121. *Id.* at 727–28.

122. *Id.*

123. *Id.*

124. Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 144 (D. Kahneman, P. Slovic & A. Tversky eds., 1982).

In the legal context, scholars have argued that the anchoring-and-adjustment heuristic plays a role in plea-bargaining discussions,¹²⁵ damage calculations,¹²⁶ and divorce negotiations.¹²⁷ In the criminal context, researchers have used the anchoring-and-adjustment heuristic and belief persistence to explain varied outcomes in analyzing offender profiles.¹²⁸ In particular, in a study identifying the decision-making mechanisms employed by participants analyzing offender profiles, participants were first presented with either a description of the suspect or a description of the stereotypical profile of an offender.¹²⁹ The order of information presented impacted the participant's likelihood of a guilt determination, which the researchers attributed in part to a confirmation bias.¹³⁰

Reliance on an anchor, however, can be problematic in decision making. First, the selection of the anchor is often biased and self-serving.¹³¹ Second, anchoring “depends not so much on relevance as on recency,” and “[e]xperiment subjects are most influenced by information that they receive just before they make judgments, even if that information is obviously useless.”¹³² Third, and perhaps most importantly, “people usually do not adjust away from their anchors enough,” leading to skewed decision making.¹³³

The structure of the Texas statute, however, encourages reliance on an anchor—namely, the anchor of future dangerousness. The Texas capital-sentencing jury instruction is presented as a series of questions to which the jury must answer “yes” or “no.”¹³⁴ The future-dangerousness inquiry is often

125. See Stephanie Bibas, *Plea Bargaining Outside the Shadow of the Trial*, 117 HARV. L. REV. 2463, 2515–17 (2004) (“Anchoring also helps to explain the course of negotiation. Bargainers who lack inside information about an opponent’s payoff matrix are more influenced by the opponent’s initial offer than by later concessions.”). See generally Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667 (2013) (noting that “[i]n the majority of [plea bargains], the prosecutor makes the initial plea offer, which is typically high” and proposing that judges be involved in plea discussions to reduce this anchoring effect).

126. See Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695, 706 (2015) (“Anchoring can influence a wide variety of judgments in legal contexts, especially civil damage awards and criminal sentences.”).

127. Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Dynamics of Divorce Bargaining*, 26 LAW & INEQ. 109, 127 (2008).

128. Benjamin C. Marshall & Lawrence J. Alison, *Stereotyping, Congruence and Presentation Order: Interpretive Biases in Utilizing Offender Profiles*, 13 PSYCHOL., CRIME & L. 285, 285–87 (2007).

129. *Id.* at 288–91.

130. *Id.* at 291, 296–97.

131. See Bibas, *supra* note 125, at 2516 (“Because assessments of fairness are self-serving, each side may choose a different anchor.”).

132. *Id.*

133. *Id.*

134. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f)(1) (West Supp. 2016).

the only aggravating Special Issue presented to a Texas capital-sentencing jury.¹³⁵ For example, a Texas capital-sentencing jury is often instructed:

You are instructed that a sentence of imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life imprisonment without parole, or a sentence of death is mandatory upon conviction of capital murder. In order for the Court to assess the proper punishment, certain special issues are submitted to you. . . .

SPECIAL ISSUE NUMBER 1:

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?
ANSWER “YES” OR “NO” in the space provided. . . .

SPECIAL ISSUE NUMBER 3:

Taking into consideration all of the evidence, including the circumstances of the offense, the Defendant’s character and background, and the personal moral culpability of the Defendant, do you find from the evidence that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed?
ANSWER “YES” OR “NO” in the space provided.¹³⁶

Given the structure of the Texas statute and jury instructions, it is not surprising that jurors view their role as “just answering questions.”¹³⁷ But more importantly, the framing of the statute creates a future-dangerousness anchor, leading to deliberations that are tied to future dangerousness—and future dangerousness only.

The statute creates this effect not only by placing future dangerousness first, as an anchor, but also by giving jurors a specific concept (i.e., future dangerousness) to reference in deliberations. The mitigation question, however, is much more open-ended. Such an amorphous instruction, especially given jurors’ misunderstanding of the term mitigation,¹³⁸ does not give jurors a second anchor from which to adjust. “Due to the statute’s focus on the defendant’s future dangerousness and the ambiguity of the mitigation instruction, legal actors”—that is, prosecutors—“are able to dismantle and

135. See *id.* § 2(b) (listing only two aggravating Special Issues, one of which is only presented to the jury when “the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party”). When a jury was permitted to find the defendant guilty as a party, then the jury is also asked to consider “whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.” *Id.*

136. Court’s Charge on Punishment at 2–3, *State v. Storey*, No. 1042204D, 2008 WL 8185556 (Crim. Dist. Ct. 3, Tarrant County, Tex. Sept. 15, 2008), 2008 WL 8188280, at *1–2 (providing typical capital-sentencing jury instructions).

137. See *supra* notes 85–86 and accompanying text.

138. Haney, *supra* note 76, at 1229.

reframe the sentencing scheme in a way which advances the dismissal of much mitigating evidence.”¹³⁹ Thus, jurors are anchored to the future-dangerousness question—a consideration prescribed by the law—and left to adjust for open-ended mitigation factors on their own.

This anchoring phenomenon helps explain several of the empirical findings regarding capital juries. First, anchoring to the future dangerousness helps explain juries’ inaccurate predictions of defendants’ future dangerousness.¹⁴⁰ Certainly, if clinicians are prone to inaccurate predictions because of this heuristic, capital jurors are as well. Second, the anchoring effect helps explain jurors’ tendency to ignore mitigation evidence.¹⁴¹ Because the future-dangerousness question is both first and specific, jurors anchor their discussions to that question—and largely ignore mitigation. Finally, the tendency of jurors to cling to the series of yes-or-no questions as a sort of checklist creates moral distance between the decision and the decision makers. This helps explain why juries may not feel responsible for the death sentence at all.¹⁴²

Conclusion

The current Texas death-penalty scheme is problematic—based on a hastily adopted statute that harmfully plays on jurors’ cognitive heuristics. And even in a time of dwindling death sentences, this problem should be corrected. When so few offenders are sentenced to the ultimate penalty, they should not be sentenced based on a statute that clouds the ability of jurors to express their reasoned moral response.

But what can be done to correct the problems caused by the Texas statute? Texas could proceed in one of two ways. First, Texas could simply abandon the future-dangerousness, Special Issue framework and revert to the country’s mean. After all, Texas is one of only two states (joined by Oregon) that centers the inquiry on the future-dangerousness question.¹⁴³ Second, and perhaps more effectively, given the argument advanced in Part III, Texas could alter the Special Issue framework. Instead of anchoring the jury’s

139. Vartkessian, *supra* note 27, at 240.

140. *See supra* subpart II(A).

141. *See supra* subpart II(C).

142. *See supra* subpart II(D).

143. Williams W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 894 (2010). In fact, other states do not even embrace the Special Issues framework, instead focusing on enumerated mitigating factors—and thus requiring the jury to engage with the moral culpability of the defendant. *See, e.g.*, J. Michael Brown, *Eighth Amendment—Capital Sentencing Instructions*, 84 J. CRIM. L. & CRIMINOLOGY 854, 872 (1994) (“In thirty of the thirty-six states that provide for the death penalty, the legislature has adopted a sentencing statute that enumerates certain mitigating circumstances which the sentencer must consider in making its determination. While the states vary greatly on the type of mitigating circumstances deemed important, each of the thirty state statutes requires the sentencer to consider the moral culpability of the defendant.”).

attention on future dangerousness (and compromising the jury's reasoning based on the representativeness and anchoring-and-adjustment heuristics), simply anchor the question on mitigation. Ask the mitigation question first—and preferably with more specificity. Further, Texas could require that the jury make an independent life-or-death determination, with a bifurcated sentencing proceeding, *before* the jury answers the future-dangerousness question; then, the jury would proceed to future dangerousness only if it deems a death sentence appropriate. Finally, Texas could abandon the 10–2 rule and instead instruct the jury of the effect of a failure to reach an agreement. Whatever the solution, however, Texas should abandon its confusing, biased, and haphazardly drafted death-penalty statute in favor of a statute that allows the jury to express its reasoned moral response—as free from cognitive biases as possible.

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