Discourses of Death: The Influence of Language on Capital Jurors' Decisions

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Abstract

This paper explores the role that language plays in capital jurors' sentencing decisions. The research is based on ethnographic fieldwork in Texas death penalty trials, which included post-verdict interviews with jurors who served on those trials. A comparative linguistic analysis was conducted in which the language used in trial, including attorneys' and judges' talk in court and jurors' written instructions, was compared with the language of jurors' post-verdict interview responses. The paper explores how jurors negotiated the moral difficulty of sentencing another human being to death. The analysis reveals that jurors used language modeled for them in trial as a resource to deny empathy with defendants, thereby justifying sentencing them to death. The paper also illustrates that jurors used particular linguistic constructions to deny their own responsibility for defendants' sentences, placing the onus elsewhere, such as on the judge or the "law." The paper concludes with a summary of recommendations to defense attorneys for ways to incorporate the findings into death penalty practice.

Keywords

Death penalty, juries, language

Language is the stuff of law. This is not a new concept; legal scholars and practitioners continually reveal the linguistic makeup of law. Lawyers quibble over the precise verbiage to use in contracts, jury instructions, and closing arguments. Legal theorists recognize that a trial is constructed of multiple, fragmented narratives, none of them adding up to a singular truth. Critical legal scholarship attributes law's violence – its power over people – to the binding force behind its words.

What draws researchers to this topic and what, I argue, has been simultaneously (and ironically) under-examined is this latter point: the power behind legal words. We see in law and

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language studies the potential (read, perhaps, theoretical) implications of language forms for the lives of those entangled in the legal system. What we don't often see is the actual effect of those words on those lives. This essay attempts to uncover the connection between language and consequence in the context of criminal trials. I examine the language used in Texas capital trials and, by hearing from the jurors who served on those trials, investigate the effect of that language on their decisions for life or death.

My research shows that jurors struggle, often emotionally, with the conflict between literally facing defendants during trial and then having to distort, diminish, or negate these interactions in order to sentence those same defendants to death. This essay explores how jurors use language as a significant resource for negotiating such moral conflicts and thus for facilitating death sentences. Specifically, jurors must walk a fine line between the purported objectivity the law requires of them and the emotional, subjective nature of their decision-making experiences. They anchor themselves to particular forms of objective language to deny empathic and emotional connections with defendants during trial in order to be able to sentence them to death. Overall, the language of death penalty trials entails a variety of communicative distancing practices that ultimately ease jurors into the difficult act of sentencing someone to death.

Research Design

The data presented in this paper are drawn from my dissertation research, which involved 12 months of ethnographic fieldwork conducted from 2009 to 2010 in diverse counties across Texas.¹ This project was driven by my desire to try to understand how capital jurors make decisions about sentencing defendants to death. This seemed to me to be – and, I found out later, was for jurors themselves – an incredibly difficult thing to do. Jurors look for direction, for “lifelines,” one said, when grappling with such a difficult decision. Such direction often comes in the form of legal language.

The project sought specifically to investigate how the language used during death penalty trials – both spoken language used by attorneys, judges, and witnesses and written language in the form of instructions – affects jurors' sentencing decisions. Given the statutory prohibition against recording or observing jury deliberations in criminal cases (Recording, Listening to, or Observing Proceedings of Grand or Petit Juries While Deliberating or Voting, 2000), the project used a triangulated approach to provide the clearest window into jury decision making. I first observed and audio-recorded (when possible²) four capital trials in four different Texas counties. One of these trials resulted in a life verdict, the other three in death sentences. All four of the defendants were male, three were white (including the one who received a life sentence), and one was African American. The African American's trial was the only one that involved a non-White victim – an African American female.

Second, I conducted post-verdict interviews with jurors who served on the four trials I observed. These interviews often occurred only days or weeks after the trials had concluded. I also interviewed additional jurors who had served on prior capital cases. In total, I interviewed 21 jurors from nine capital cases. In the first parts of the interviews, I asked open-ended questions about

¹ A complete write-up of the findings of this project can be found in Conley (2016).

² I was permitted to audio-record one of the trials. I took notes during the others and obtained an official transcript of each from the court.

the jurors' experiences serving on capital trials in order to allow the jurors to "construct their responses in their own ways" (Fleury-Steiner, 2002, p. 555). The point of this open-ended question design was to avoid relying on a priori categories and instead to explore what experiences had meaning for the jurors in their own terms (Hollan, 2001, p. 48). The second part of the interviews involved more pointed questions, which focused on the jurors' understanding of their instructions.

I then conducted a comparative linguistic analysis of trial transcripts and transcripts of jurors' post-verdict interviews. The analysis focused on the specific linguistic forms that attorneys, jurors, and witnesses used to refer to defendants, as well as the language jurors and others used to talk about sentencing decisions and about the death penalty in general. This analysis allowed me to identify language forms that jurors used when talking about their decisions and to link those forms with language used in trial.

The Texas Death Penalty Sentencing Scheme

The Supreme Court issued a nationwide moratorium against the death penalty in its 1972 decision in *Furman v. Georgia*, which held that capital punishment had been implemented so arbitrarily that it violated the Eighth Amendment's prohibition against cruel and unusual punishment. After a 4-year suspension, the death penalty was reinstated in 1976, with conditions. In an attempt to rectify the arbitrary implementation of the death penalty, *Gregg v. Georgia* (1976) and related decisions³ required that states develop capital sentencing formulas that included "objective" guidelines for jurors.

The unique response of Texas to this "guided discretion" requirement was its "special issue" question framework for sentencing. This sentencing scheme differs widely from most states' frameworks, which ask jurors to weigh aggravating versus mitigating evidence. At the time of my research, Texas jurors had to answer two special issue questions⁴ during their sentencing phase deliberations that would lead them to a sentence of life without parole or of death. The first, or "future danger question," reads as follows:

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?

If the jurors answer no to this question, the defendant receives a sentence of life without parole.⁵

If they answer yes to the first question, they then proceed to the second, or "mitigation," question:

Do you find from the evidence, 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, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

If the jurors answer no to question 2, the defendant receives a death sentence. Texas jurors are thus never explicitly asked to sentence a defendant either to death or to life without parole. As

³ Post-*Furman* statutes were evaluated by *Gregg* and its related cases, *Woodson v. North Carolina* (1976), *Jurek v. Texas* (1976), and *Lockett v. Ohio* (1978).

⁴ The original 1976 special issue questions included the current future danger question plus another that addressed the defendant's intent to kill. The mitigation, or current second question, was added later (*Penry v. Lynaugh*, 1989 and *Penry v. Johnson*, 2001).

will be argued below, the indirect structure of the Texas special issue questions allows jurors to mitigate their own responsibility for sentencing capital defendants.

In post-*Furman* capital cases, states are also required to use a bifurcated trial structure, in which the same jury hears essentially two separate trials – one to determine the defendant’s culpability and the other to determine his or her sentence. The sentencing phase allows a broader range of evidence, including that which speaks to the defendant’s character and background, and uses a jury charge different from the one used in the culpability phase. This bifurcation proved significant in my research. The decisions jurors are required to make in each phase are qualitatively different (Bowers, Fleury-Steiner, & Antonio, 2003). In the first phase, they are instructed, as is any fact-finding jury, to follow the evidence and to be objective. In the penalty phase, however, jurors must make individual, moral decisions (*Caldwell v. Mississippi*, 1985; *Penry v. Lynaugh*, 1989) about the character of the defendant. Many of the jurors I spoke with conflated their fact-finding duties in the culpability phase with the moral nature of their sentencing decisions, often to the detriment of the defendant. Importantly, as will be elaborated in the following section, jurors considered these distinct types of instructions to be mutually exclusive. “Objective” decision making, for which Texas jurors strove, meant forsaking the moral and often emotional aspects of their judgment when deciding on a sentence. The challenge for legal practitioners is to clarify to jurors that a moral decision, based on emotion and personal experience, can indeed be evidence-based and thus still follow the law.

Emotion, Jury Decision Making, and “Death Is Different”

A prevalent theme in my discussions with capital jurors was emotion. More specifically, jurors often struggled with what they perceived to be a conflict between their duty to exclude emotion from their decisions and the often unavoidable emotional potency of the trials they were a part of. Jurors felt pressured to be “objective” by their instructions, things that attorneys and judges told them in the courtroom, and widespread legal ideologies holding that emotion has no legitimate place in the law (e.g., Bandes, 1996, 1999; Madeira, 2012, pp. 136-138; Nussbaum, 2004). Although jurors recognized the degree to which “emotion pervades the law” (Bandes, 1999, p. 1), they asserted that the law tells them to eschew emotional considerations when making their decisions. The jurors I interviewed often used authoritative legal language, centered around talk of “evidence,” to counter the subjective, emotional moments they experienced during trial. This (mistaken) denial of emotion is a critical means by which jurors may suppress the moral aspects of their decisions and find a way to sentence defendants to death.

There is an ambiguity within death penalty law and practice that complicates jurors’ understanding of emotion. Capital jurors are presented with two models of decision making that they simultaneously find contradictory and difficult to disassociate. The first model is based on their duties during the culpability phase, in which capital jurors are urged, as they would be in any trial, to remain unbiased and objective. This recommendation is reinforced indirectly in their sentencing charge, as evidenced by the following two excerpts from Texas capital sentencing instructions:

You are to deliberate only on the evidence that is properly before you in this trial and to give this case individual deliberation based on only the evidence admitted before you.

You are ... not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all of the evidence before you.

The latter of these, the so-called “no-sympathy clause,” was especially influential in that it convinced many jurors that they were not to consider any emotional responses they or others experienced during trial. Although this clause was often included at the request of defense attorneys to protect against undue sympathy for the *victims*, most jurors who spoke of it used it as a justification for not sympathizing with the *defendants* and their families.

In addition to being explicated in jury instructions, this first model of decision making was echoed by judges and attorneys at other points during the trial. One judge addressed the jury panel before individual voir dire questioning began, emphasizing the need for objective decision making:

Judge: The first thing we know is juries in the state of Texas do not go out and deliberate and subjectively determine, we'll give this defendant life in this case. We'll give that defendant death in that case. Instead, what we do is we have juries make objective findings as to what the evidence is.

Attorneys' questioning of individual venire persons during voir dire reiterated the privileging of fact over emotion in jurors' decisions. As one prosecutor said to a potential juror during his individual questioning:

Prosecutor: We're not telling people they can't have emotion, but you make your call based on the facts.

Juror: Whatever the law dictates.

The cumulative effect of these messages is that jurors were convinced that their decision-making process could not include their own emotional reactions to testimony and evidence. Jurors were led to believe that “following the law” required them to eschew the experiential, often affective components of a capital trial when making their sentencing decisions.

The second model of decision making presented to capital jurors is based on the notion that death is different. During the sentencing phase of capital trials, jurors are told that they must make individual, moral decisions when deciding whether to sentence a defendant to life or death. In an order on a motion in limine addressing the appropriateness of the reasonable doubt standard in capital sentencing, a federal trial judge stated that “the sentencing decision in a capital case is, in its most important respects, fundamentally different than any other task that a jury is called upon to perform” (*U.S. v. Sampson*, 2016). A capital jury's sentencing decision is, the judge concluded, “not something that is capable of proof in the traditional sense” (*U.S. v. Sampson*, 2016⁵). In a recent Supreme Court decision (quoted in *Sampson*), Justice Scalia asserted in the majority opinion that “the ultimate question whether mitigating circumstance outweigh aggravating circumstances is mostly a question of mercy. ... It would mean nothing ... to tell the jury that the defendants must deserve mercy beyond a reasonable doubt” (*Kansas v. Carr*, 2016). Scalia clarified that it is permissible to instruct jurors that the facts by which they establish sufficient mitigating circumstances must be proved according to a particular standard of proof, but that mercy is, in the end, a question of what an individual juror deems “appropriate.”

⁵ In this post-trial opinion, Judge Wolf was essentially disagreeing with his own trial decision to instruct jurors that they must use the reasonable doubt standard when weighing aggravating and mitigating evidence in the sentencing phase.

A district judge's reading of the Federal Death Penalty Act of 1994 (FDPA) echoes this notion that death is different:

[T]he weighing process of the FDPA governs a unique role of any jury: determining whether a defendant should be sentenced to death. This is not a matter that is either true or not true. Rather, each juror must make a moral judgment about whether a defendant should be executed. To require the Government to prove the defendant should be sentenced to death beyond a reasonable doubt is illogical and conflates truth-seeking with balancing moral values. (*U.S. v. Wilson*, 2013)

Although Texas jurors do not balance aggravating against mitigating evidence in their sentencing decisions, this same argument applies, arguably with more force, in Texas. Jurors are instructed in the sentencing phase that they may consider "evidence that a juror might regard as reducing the defendant's moral blameworthiness," and the second special issue question asks them to consider the "personal moral culpability of the defendant" in determining his or her sentence. They also may be instructed explicitly that they can consider mercy in their decisions.

My jury interviews revealed that even though death is different, and despite the instructions to consider mercy and to render a moral judgment, jurors largely understood their duty – during both phases of trial – as one of objective fact finding, in which subjective considerations should play no part. In the following example from a juror's interview, a foreman explained to me his conviction that a defendant's father's emotional plea for his son's life could not factor into the jury's sentencing decision:

Juror: As you can imagine, any case like this deals a lot with emotion. In other words, I am fairly unemotional, but it is very difficult to sit there and listen to someone's gray-haired old daddy beg you not to kill their boy. And try to take blame for the way he turned out and you know he may be right. However, the charge specif – that we as jurors, every one of us, swore to, on the oa – on the day of our oath, the charge said that we would only let evidence guide us. We would not let supposition, emotion, prejudice, I forget the other term but something like that, okay. So, you you must try to put your emotion aside as much as you can and only go on what is presented as evidence. Either from the stand or physical evidence.

This juror's recollection of mitigating testimony in the sentencing phase reveals the trouble jurors have with making a personal, moral judgment in the context of a trial. Despite the fact that the defendant's father's emotional plea was in itself evidence, this juror believed that his instructions required him to deny such a plea in making his sentencing decision because of its emotional character.

Another juror's ruminations reveal his belief that the law asks jurors to keep emotional considerations out of their decisions:

Juror: Some of the feelings that people had on both sides were **strictly emotional type feelings**. Because when you'd be questioned on it, they'd realize well, **I don't really have a reason**. I mean there's not anything in the evidence that I can point to that says, here's the reason I believe this. This is **just kind of a feeling I have**. They start looking back through the evidence and they realize that, well, maybe this is **just an emotional feeling** and **I really don't have anything to base**

it on. And judging by the evidence, because you read the charge, it said you can't use sympathy or compassion, intuition, or any of these other things. Well, we're all made of all that stuff. You're gonna use it. You can't not use it. And it's hard to get that analytical about a man's life.⁶

This juror's discussion about how those on his jury sorted through evidence and other considerations in making their decision exposes an underlying belief – an ideology of law – that the law desires analytic decision making and privileges reason over emotion. The qualifier “just” used in the clauses about emotion highlights the juror's stance that emotion is an irrelevant consideration in the context of the law. In the end, however, this juror understood that it is impossible to eliminate emotion entirely from deciding about life and death.

It is clear that the jurors with whom I spoke were using generalized language about “evidence,” as well as specific parts of their instructions, such as the no-sympathy clause, to make a case that emotion should not factor into their decision making. Capital jurors need to be reminded again and again that the character of their decision during the sentencing phase is qualitatively different from that of the decision they make during the culpability phase. The question is whether the notion of a decision that is both moral and legally permissible can penetrate the pervasive ideology – expressed by many of the jurors I interviewed – that there is no place for emotion or subjectivity in law. Post-*Furman* decisions have ruled that capital sentences should be individual, moral decisions, and therefore jurors must engage in both objective fact finding and personal, subjective, and moral deliberation. It is the duty of defense lawyers to explain and reinforce this paradoxical legal obligation.

Linguistic Proximity and Dehumanization

In accordance with their ideas of what legal reasoning should look like, jurors seek “objectivity” by using legal language to maintain emotional distance between themselves and defendants. Psychologist Craig Haney (2004) found that capital jurors work to establish an “empathic divide” between themselves and defendants; doing so provides the moral leeway necessary to commit another person to death (Garvey, 2000). According to this logic, empathy and distance are inversely related. In any act of killing, the closer you are physically to your potential victim, the more capacity for empathy and, thus, the harder it is to kill (Grossman, 2009; Kelman, 1973; Lifton, 1986).

Just as physical distance can influence empathic experiences between people (e.g., Milgram, 1974), the subtle process of managing linguistic distance can also play a role in creating or diminishing empathy. The term *deixis* refers to the use of language to denote a speaker's spatial proximity to things or people being talked about. Deictic terms such as *this* or *that* and *here* or *there* place an object closer to or farther away from the participants in a conversation. Linguists have expanded the category of deictic relationships from simple spatial proximity to include other dimensions, such as social, affective, emotional, and empathetic distance (Duranti, 1984; Lakoff, 1974; Lyons, 1977; Ostman, 1995). Calling someone “that man,” for instance, can display a lack of empathy or a negative affect toward the person being referred to (cf. Duranti, 1984).

⁶ Emphasis (text in bold) was added by the author to highlight areas of interest in the example. The same approach is taken at other points in the manuscript.

While analyzing the language of capital trials, I realized that defendants were constantly being referred to as “this/that guy” or “this/that defendant,” a reference pattern that was widespread in trials as well as in jurors’ interviews. These demonstrative reference forms (*this/that* plus *generic noun* – a particular kind of deictic) deny a defendant’s identity as a unique, identifiable person, thereby dehumanizing him or her and helping to disable the speaker’s capacity for empathy. These forms were most commonly used by jurors, attorneys, and witnesses in contexts of apparent dehumanization, in which the speakers placed social distance between themselves and a defendant by minimizing the latter’s status as a particular human being. Jurors often used these forms in the specific context of attempting to justify imposing a death sentence. At the other end of the spectrum, using a defendant’s name (especially his or her first name) invites empathy and intimacy. The Supreme Court has required capital jurors to consider the individuality of each defendant in their sentencing decisions, but the use of distancing reference forms such as these demonstrative forms can make it hard for jurors to carry out this task. When judges and lawyers use distancing reference forms, jurors may be dissuaded from empathizing with an individual defendant; when jurors themselves do so, it becomes easier for them to ignore a defendant’s humanity.

Attorneys’ talk during trial can serve as an authoritative model for jurors’ perception of defendants. As might be expected, prosecutors’ language reflects an effort to dehumanize defendants in order to promote the death sentence. The following texts are drawn from one prosecutor’s sentencing phase closing argument. In this case, the defendant murdered almost an entire family; one female child was the only survivor.

Prosecutor:

The person that did this scares the hell out of her.

The person that killed like this is extremely dangerous.

That kind of person would be capable of doing all of this again.

She’s [the child] still traumatized by what **that defendant** did to her.

Rather than employing a personalized reference form, such as a name, which would denote affinity with the defendant, each reference form in these examples characterizes the defendant as a token of a type, according to the crime he committed and his status as a defendant. The last example, “that defendant,” comes the closest to identifying the defendant individually, but the use of the demonstrative pronoun *that* creates a relationship of distance, hindering any sense of intimacy or empathy with the defendant. In addition to using the heightened distancing form *that*, the descriptor *defendant*, in contrast to *person* or *guy*, further severs the link between the defendant and his individualized human identity.

Jurors also used these distancing forms when talking about defendants. In the following interview excerpt, I had asked a juror when she first considered a death sentence for the defendant.

Juror: The girl was pregnant. And uh, to me he didn’t care. Cause the first thing he did he shot her in the stomach. And then we did the, that he was guilty, the – **this guy** doesn’t have a heart. So, that’s when I thought because he killed an in-an infant in somebody’s [body⁷].

⁷ This word is within brackets because it is closest to what I think the juror said. I could not hear the word exactly on the recording.

This juror changed her initial form of reference to the defendant – *he* – to the demonstrative form *this guy* at the very point at which she literally dehumanized him: “this guy doesn’t have a heart.” Using the demonstrative reference form dissociated the juror from the defendant, whom she depicted as nonhuman and distinguished from other, normal persons. This may be a moral dissociation, in that she did not want to associate herself with such a being, or it may be a cognitive dissociation, in that she could not comprehend a person committing such an act. In either case, it probably becomes easier to sentence that defendant to death.

Another juror demonstrated a similar use of a demonstrative reference when questioning the defendant’s humanity:

Juror: I mean **he** just looked like, like a **normal** ol’ guy to me. You know. In the back of your mind you keep thinking, **this guy’s** just killed six people. You know?

This juror explained the evolution of her thinking about the defendant during trial. Her initial impression was that he looked like a “normal ol’ guy,” but as she contemplated the crime he committed, she questioned his classification as a normal person. It is in this moment that she switched to the demonstrative form, *this guy*, to refer to him.

Demonstrative reference forms can contribute to linguistic acts of dehumanization, facilitating jurors’ decisions to end a defendant’s life. The following juror’s proclamation exemplifies this logic:

Juror: You think, well **that person**, you know, they just need to be eliminated.

This juror used the more distant of the demonstrative pronouns – *that* – when claiming that another human being needed to be eliminated. These examples illustrate that particular linguistic choices, by allowing speakers to manage their social or affective proximity to defendants, can aid in dehumanizing defendants, stymying empathy with them and helping to justify death sentences. Reference forms, in that they always convey something about a speaker’s stance toward the person being referred to, reveal much about how jurors and attorneys linguistically – and actually – determine the course of defendants’ lives.

Agency and Distance

This last analytic section addresses the degree to which jurors recognize and admit that they are directly involved in a process in which a person may die. My research reveals that many jurors do not take individual responsibility for sentencing defendants to death and that they are guided to this stance by language used in court – both what they hear from attorneys and judges and what is written in their instructions.

Linguistic constructions of agency in particular contribute to jurors’ eschewal of responsibility for their sentencing decisions. In linguistics, a grammatical agent is an entity that carries out the action of a verb (e.g., Dixon, 1994). Where an agent is placed in a sentence can highlight or reduce a person or entity’s responsibility for an action. Take, for instance, the following sentences:

1. The judge sentenced the defendant.
2. The defendant was sentenced by the judge.

By placing the agent, or the doer of the action (the judge) at the end of the sentence, sentence 2 downgrades the judge’s role in sentencing the defendant. Certain constructions, such as “The defendant was sentenced,” delete the agent entirely, thus allowing an event caused by a human actor to be framed as if it were not.

The Supreme Court has found that it is unconstitutional for capital jurors to believe that the responsibility for a defendant’s death rests anywhere other than within themselves (*Caldwell v.*

Mississippi, 1985). The language of the Texas special issue questions sets up a framework that minimizes jurors' role in their sentencing decisions, thus arguably violating the principle of *Caldwell*. Again, the second special issue question asks:

Do you find ... that there is a sufficient mitigating circumstance or **circumstances to warrant** that a sentence of life imprisonment rather than a death sentence **be imposed**?

In this excerpt, *circumstances* are positioned as the agent of *warranting* a death sentence, with the juror unmentioned at that critical point. The passive voice is also used ("a death sentence **be imposed**"), which is a strategy in English that allows an action to be described without any identified agent (Ehrlich, 2001, pp. 39–40; Henley, Miller, and Beazly, 1995; LaFrance and Hahn, 1994). The overall depiction of agency in this example, then, is that circumstances warrant a sentence and that the sentence is ultimately imposed by no human being in particular.

Jurors' instructions beyond the special issue questions reinforce this perspective that jurors are not the responsible sentencing agents. In the following excerpt from a sentencing charge in one of the cases I observed, jurors were instructed as follows:

You have found the Defendant guilty of the offense of capital murder. As a result of that finding of guilt, and **in order for the Court to assess a proper punishment**, it is now necessary for **you to determine ... the answers to certain questions**.

Here, *the Court* is placed as the agent of assessing the punishment, while the jurors are relegated to answering certain questions. The causal chain depicted here is that jurors find guilt and answer questions, after which the judge determines a sentence.

This model of sentencing that minimizes juror responsibility was reiterated during voir dire. In the following example, a prosecutor was individually questioning a venire person. He explained,

You feel a little more comfortable after the judge explained these issues and the process you go through. **It's not just a yes or no where you decide**. What you're doing is **you're basically answering the question**.

The prosecutor assured this potential juror that he would not have to state directly whether he sentenced the defendant to death or life, but merely answer the special issue questions.

In his individual questioning of a venire person, a defense attorney in the same case presented a contradictory picture of sentencing:

Defense attorney: You know that if you answer that question no, there is no mitigation, the defendant is going to get the death penalty from the judge.

Juror: That's right.

Defense attorney: Just as sure as you signed death on the line.

Juror: That's right.

This attorney presented juror responsibility in a way that is more consistent with *Caldwell*, making the potential juror aware that a defendant's life or death is in his own hands. Allowing jurors to dodge this responsibility calls into question the legitimacy of the sentences they impose, given that many of them may be issuing death sentences only because they feel the ultimate responsibility for a defendant's death is in the hands of someone or something else. The trouble with confronting them with this reality is that venire persons often respond that they could not in any circumstance render a death sentence and are therefore disqualified. The dilemma, if we wish jurors to remain aware of their responsibility for defendants' deaths, is how to ask them to face this responsibility without leading them to disqualify themselves.

Jurors' interview responses revealed that they indeed placed the onus of sentencing the defendant elsewhere. One juror identified the state as ultimately responsible for his decision.

Juror: I determined going into this that I was going to do exactly **what the state asked me to do**. At the end of the day that would be the only way I would feel good about it ... **whatever the state asks**, I'm going to rigidly abide by it.

This juror endowed the state, a nonhuman, institutional manifestation of the laws of Texas, with the responsibility for his decision. Another juror thought, more specifically, that the judge had ultimate authority over the sentencing decision.

Juror: Whether we're the final authority or not, **I think the judge can overrule sentence** guide – excuse me, sentencing, at some point, but **I think the jury decides guilt or innocence**, and then at least **makes the recommendation for penalty**.

What is astonishing about this comment is that Texas judges have no authority to override jurors' sentencing decisions in capital cases.⁸ What, then, led this juror to his assumption that all he was doing was making a recommendation for sentencing? I argue that it is the language of jurors' instructions, including the special issue questions, in conjunction with how attorneys and judges talk about jurors' sentencing decisions in trial, that leads jurors to deny their personal responsibility for sentencing defendants. In particular, the constructions of agency that are used – by judges, lawyers, and ultimately jurors themselves – in characterizing sentencing decisions provide jurors with an “emotional shield” (Haney, Sontag, & Costanzo, 1994) against the consequences of their decisions, thereby potentially enabling death sentences.

Implications and Recommendations

The forms of communicative distancing previously outlined – between jurors and defendants and between jurors and their own decisions for death – render the death penalty a “kind of violence ... which can be approved of and rationally dispensed” (Sarat, 1995, p. 41). It is worth interrogating the legitimacy of a process that encourages those who administer it to distance themselves from its nature and consequences. By providing a framework for the dehumanization of defendants, the language of capital trials becomes itself a form of violence. In that the Supreme Court has emphasized the need for jurors to consider seriously both the individual humanity of each defendant and their responsibility for the death that may result from their decisions, it is crucial to examine the language that enables jurors to avoid such considerations.

Linguistic research such as that presented here confirms the centrality of language to our conceptualizations of persons and the degree of humanity we are willing to allow them. Those working on capital trials should thus be aware of the effect seemingly minute linguistic formulations can have on jurors' ability to render just decisions. Specifically, attorneys need to clarify for jurors their different duties in the culpability and punishment phases of a trial. Jurors need to be aware that the decision they make when determining the defendant's sentence is qualitatively different from the one they made when determining his or her guilt. Jurors should also be informed that factoring emotion and other subjective considerations into their decisions does not mean that they are not following the law. In fact, the Supreme Court holds that jurors should make individually informed, moral decisions. It is important to repeat this message

⁸ The judge can override capital sentencing decisions in only three states: Alabama, Florida, and Delaware.

throughout voir dire and the remainder of a trial in order to overcome the prominence of certain language in jurors' instructions, such as the no-sympathy clause and the repetition of the words *evidence* and *objective*.

Attorneys should also be careful and strategic about how they refer to a defendant during trial. The repetition of dehumanizing reference forms can make it harder for jurors to humanize and thus empathize with defendants. Lastly, attorneys should reiterate the fact that individual jurors are indeed responsible for the result of their sentencing decisions, whether it be life without parole or death. Jurors are confronted repeatedly throughout trial with the details and reality of the violence perpetrated by the defendant. They should be made equally aware of the reality of the result of a sentence of death – an execution. Especially given the language used in jury sentencing charges, it is crucial to inform jurors that they, and they alone, determine the fate of the defendant.

Declaration of Conflicting Interests

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References

- Bandes, S. (1996). Empathy, narrative, and victim impact statements. *University of Chicago Law Review*, 63, 361–412.
- Bandes, S. (1999). Introduction. In S. Bandes (Ed.), *The passions of law* (pp. 1–15). New York, NY: New York University Press.
- Bowers, W., Fleury-Steiner, B., & Antonio, M. E. (2003). The capital sentencing decision: Guided discretion, reasoned moral judgment, or legal fiction. In J. R. Acker, R. M. Bohm, & C. S. Lanier (Eds.), *America's experiment with capital punishment: Reflections on the past, present, and future of the ultimate penal sanction* (2nd ed., pp. 413–468). Durham, NC: Carolina Academic Press.
- Conley, R. (2016). *Confronting the death penalty: How language influences jurors in capital cases*. Oxford, UK: Oxford University Press.
- Conley, R. (2013). Living with the decision that someone will die: Linguistic distance and empathy in jurors' death penalty decisions. *Language in Society*, 42, 503–526.
- Dixon, R. M. W. (1994). *Ergativity*. New York, NY: Cambridge University Press.
- Duranti, A. (1984). The social meaning of subject pronouns in Italian conversation. *Text* 4, 277–311.
- Ehrlich, S. (2001). *Representing rape: Language and sexual consent*. London, UK: Routledge.
- Fleury-Steiner, B. (2002). Narratives of the death sentence: Toward a theory of legal narrativity. *Law and Society Review*, 36, 549–576.
- Garvey, S. P. (2000). The emotional economy of capital sentencing. *New York University Law Review*, 75(1), 26–73.
- Grossman, D. (2009). *On killing: The psychological cost of learning to kill in war and society*. New York, NY: Back Bay Books.

- Haney, C. (2004). Condemning the other in death penalty trials: Biographical racism, structural mitigation, and the empathic divide. *DePaul Law Review*, 53, 1557–1589.
- Haney, C., Sontag, L., & Costanzo, S. (1994). Deciding to take a life: Capital juries, sentencing instructions, and the jurisprudence of death. *Journal of Social Issues*, 50, 149–176.
- Henley, N. M., Miller, M., & Beazley, J. (1995). Syntax, semantics, and sexual violence: Agency and the passive voice. *Journal of Language and Social Psychology*, 14, 60–84.
- Hollan, D. (2001). Developments in person-centered ethnography. In C. C. Moore & H. F. Mathews (Eds.), *The psychology of cultural experience* (pp. 48–67). Cambridge, UK: Cambridge University Press.
- Kelman, H. C. (1973). Violence without moral restraint: Reflections on the dehumanization of victims and victimizers. *Journal of Social Issues*, 29, 25–61.
- LaFrance, M., & Hahn, E. (1994). The disappearing agent: Gender stereotypes, interpersonal verbs and implicit causality. In C. Roman, S. Juhasz, & C. Miller (Eds.), *The women and language debate: A sourcebook* (pp. 348–362). New Brunswick, NJ: Rutgers University Press.
- Lakoff, R. (1974, April). *Remarks on this and that*. Paper presented at the Tenth Regional Meeting of the Chicago Linguistic Society, Chicago, IL.
- Lifton, R. J. (1986). *The Nazi doctors: Medical killing and the psychology of genocide*. New York, NY: Basic Books.
- Lyons, J. (1977). *Semantics*. Cambridge, UK: Cambridge University Press.
- Madeira, J. (2012). *Killing McVeigh: The death penalty and the myth of closure*. New York, NY: New York University Press.
- Milgram, S. (1974). *Obedience to authority: An experimental view*. New York, NY: Harper & Row.
- Nussbaum, M. C. (2004). *Hiding from humanity: Disgust, shame, and the law*. Princeton, NJ: Princeton University Press.
- Ostman, J. (1995). Recasting the deictic foundation, using physics and Finnish. In M. Shibatani & S. A. Thompson (Eds.), *Essays in semantics and pragmatics* (pp. 247–278). Amsterdam, The Netherlands: John Benjamins.
- Recording, Listening To, or Observing Proceedings of Grand or Petit Juries While Deliberating or Voting, 18 U.S.C. § 1508 (2000).
- Sarat, A. (1995). Violence, representation, and responsibility in capital trials: The view from the jury. *Indiana Law Journal*, 70, 1103–1135.

Cases Cited

- Caldwell v. Mississippi, 472 U.S. 320 (1985).
- Furman v. Georgia, 408 U.S. 238 (1972).
- Gregg v. Georgia, 428 U.S. 153 (1976).
- Jureck v. Texas, 428 U.S. 262 (1976).
- Kansas v. Carr, 136 U.S. 633 (2016).
- Lockett v. Ohio, 428 U.S. 586 (1978).
- Penry v. Johnson, 532 U.S. 782 (2001).
- Penry v. Lynaugh, 492 U.S. 302 (1989).
- U.S. v. Sampson, Crim. Act. No. 01-10384 (D. Mass. 2016).
- U.S. v. Wilson, 967 F. Supp. 2d 673 (E.D. N.Y. 2013).
- Woodson v. North Carolina, 428 U.S. 280 (1976).

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