

Please do not cite without author's permission.

*Agents of the state: Language and the construction of juror responsibility
in death penalty decisions*

**Robin Conley
Law & Society 2013**

In the emotionally traumatic context of a capital trial, jurors engage in a transformation of sorts. When answering a call to jury duty, potential jurors enter the courtroom and immediately begin reconciling their own, often varied senses of morality with the state's request to participate in a process that could end a person's life. Language facilitates this transformation; it is through highly structured conversations with attorneys and judges that jurors negotiate the this request and their subsequent construction as moral and legal agents in the death penalty process. By mining grammatical constructions of agency during voir dire and jurors' written instructions, this paper argues that jurors' ability to sentence another human being to death is facilitated, in part, by their socialization into authoritative models of sentencing that depersonalize the act. This renders a potentially morally impossible task rationalized and thus conceivable.

Agency and the death penalty

A tremendous amount of time and a wide array of actors contribute to accomplishing an execution in the United States. An execution is thus not one act, but an amalgam of tasks carried out by a great number of people. Throughout the process of taking an offender's life, jurors, judges, and prison staff often find themselves differentially accountable for the event as a whole. Many limit their involvement to specific contributory acts, such as strapping the prisoner's right arm to the gurney, or reading a sentencing verdict aloud to a courtroom's occupants. A complex question consequently remains: who is responsible for putting someone to death in a state-sanctioned execution? Capital jurors' responsibility for an offender's death is especially ambiguous, as they are greatly removed, physically, temporally, and institutionally, from the

Please do not cite without author's permission.

actual execution.

Processing one's position on the "path of death" (Osofsky et al. 2005:385), at whatever stage, often requires "mechanisms of moral disengagement" (ibid.:372; cf. Haney____, Milgram 1974, etc.). Avoiding responsibility for another's death in any context is an arguably ubiquitous impulse (Eisenberg et al. 1996:339). Specific aspects of Texas death penalty law, in conjunction with attorneys' and judges' interpretations of them, aid jurors in fabricating this moral disengagement. This process reflects a much broader phenomenon of rationalization and bureaucratization that legitimates and makes possible state killing in many contexts (cf. Sarat 1995).

Agency and jurors' instructions

Models of who is responsible for death sentences are conveyed most explicitly to jurors in their written instructions. In response to a 1976 constitutional challenge to the death penalty as arbitrarily administered, Texas adopted a sentencing scheme that relies on so-called "special issue questions." According to this scheme, Texas capital jurors do not vote directly for a life or death sentence. Rather, they are instructed to answer two "special issue questions" at the conclusion of the sentencing trial. These special issue questions read as follows:

- 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?
- 2) 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

Please do not cite without author's permission.

imprisonment rather than a death sentence be imposed?

Jurors thus never vote directly to sentence a defendant to life or death. The jury foreman merely signs his name on the verdict sheet next to “yes” or “no” for each of the special issue questions. The jury then processes into the courtroom, after which the judge reads the verdict sheet aloud and pronounces a sentence on the defendant – either death by lethal injection or life without parole. Thus by its very design, this sentencing scheme introduces ambiguity as to jurors' roles in sentencing defendants to death.

What kind of person are you?: Voir dire as socialization

In addition to receiving their explicit instructions, jurors infer ways to theorize their sentencing decisions by engaging in courtroom interactions (Ochs 2002). During voir dire in particular, jurors are socialized into their role in the legal system, through which they learn, among other things, their obligations, what actions are valued or condemned in court, and how to think and talk like a juror. The voir dire process, therefore, does not *select* jurors, but *creates* them (Balch et al. 1976:280). Linguistic constructions of agency facilitate the socialization of venire persons into the institutional role of capital juror. This includes adopting a framework of “role responsibility” (Eisenberg et al. 1996), which can mitigate jurors' sense of “autonomous moral agency” (Osofsky et al. 2005:371) in sentencing defendants.

In a capital case, the law requires a jury that can vote for the death penalty, which many have criticized as stacking capital juries in favor of death. Most people come into jury selection admitting that sentencing another person to death would be very troublesome. Attorneys and judges provide these venire persons with linguistic frameworks through which this act becomes more conceivable. Some people, however, admit from the beginning that they would not be able to sentence someone to death under any circumstances and are thereby ineligible to fill the role

Please do not cite without author's permission.

of capital juror.

The capital voir dire is unique in its extensive individual questioning of venire persons, which often takes longer than the trial itself. I present two brief excerpts from such questioning in order to examine the linguistic socialization potential jurors undergo regarding their role in sentencing defendants. These are representative of a much larger corpus of capital trial data I analyze elsewhere. The first of these is a venire person who believes strongly in the death penalty. While being questioned by the prosecutor, however, he admits that imposing a death sentence himself would be extremely hard:

J: I was thinking to myself it would be awful hard to **sentence somebody to death**. I would really have to think about everything.

Here, the juror, while not positioning himself as the direct agent of the act -- using the infinitive instead (it would be awful hard to sentence...) -- explicitly refers to the death sentence, a relatively rare linguistic choice for jurors. The prosecutor continues to question him about his ability to give death:

P: It's a real serious decision. I agree with you completely. Do you think **that's something that you're capable of?**

J: Yes. it would be hard but, you know, I feel **I could do it**.

P: You feel a little more comfortable after the judge explained these issues...**you're basically answering the question**. Do you feel a little bit better about knowing that?

J: a little bit better. it's clear -- you know, it cleared it up.

[lines omitted]

J: I guess if -- if -- **how do I say it -- the conditions warranted** the facts of the case- **if it cries out**, you know, **for more justice** than life in the penitentiary, I guess that would be the only thing that -- I guess that would be the-

P: that would be the basis for **it** for you?

J: yes.

The prosecutor first asks whether this potential juror could sentence someone to death, "do you think that's something you're capable of?", to which the juror directly answers, "yes." The juror then places himself as agent and subject of the act -- *I could do it*, using the pronoun "it" rather

Please do not cite without author's permission.

than naming the sentence explicitly as he did previously. The prosecutor reminds the juror, however, that he's "basically answering the question," thus reformulating the act the juror began the exchange with ("sentence[ing] somebody to death").

Following this reminder, the juror begins to recast the potential death sentence in line with the prosecutor's model. In a suggestive metalinguistic move, he voices his uncertainty about how to word what he's going to say (*how do I say it*), thus marking the evolution his thinking is undergoing. He then evidently adopts the legal framework he's been given from the judge and attorneys so far: he cites "the conditions" of the case as warranting a particular sentence. He further claims that a death sentence would be appropriate "if it [the facts of the crime, I assume] "cries out...for more justice." The agent carrying out the death sentence has thus transformed into a non-human entity imbued with human attributes. Through this subtle manipulation of language, the potential juror begins his transformation; the death sentence is converted from an act of individual agency to an institutional, depersonalized act of interpreting and applying laws and facts.

This potential juror is then put through a common questioning sequence. The prosecutor asks him to look the defendant in the eye and once his gaze is turned upon the defendant, the attorney asks whether he could handle being "personally" responsible for a decision that would give this very person the death penalty. He again promptly answers yes:

P: **Take a look at Mr. Jackson** [the defendant] over here. Can you see him?

J: Yes.

P: Okay. What I'd like to know is whether or not you could **personally participate in a decision** where **these three questions are answered in such a way that he receive the death penalty?** Could you do that?

J: Yes.

In Text 3, a different venire person who expresses much greater trepidation with potentially

Please do not cite without author's permission.

sentencing someone to death is put through the same sequence of questions:

P: Now, believing in it and participating in it, that's two different things. I want you to take a look at Mr. Jackson over here. can you see him?

J: Yes.

P: What I'd like to know is whether or not you feel like if the evidence was appropriate if **you could personally participate in a decision where these questions are answered in such a way that Judge Burdette ordered the death of the defendant?** could you personally participate in that kind of process?

J: it would be hard but-

P: yes, sir. I understand that...do you think that's something you could do?

J: No.

P: you don't think you could participate in that process- personally participate in that process?

J: No, I don't.

The grammatical encoding of agency in these two similar lines of questioning contains a few subtle, but important differences. In the case of Juror 1, the act of sentencing is conveyed through a grammatically agentless construction: "personally participate in a decision where these three questions are answered in such a way that *he receive the death penalty?*" This linguistic framing puts the defendant himself in the subject position of the sentencing act, thereby eclipsing the juror's agency entirely. The juror, in this formulation, is relegated to participating in "a decision," while the defendant appears as the responsible party for his own death sentence. It is important to note that it is the special issue questions in particular that separate the decision from the penalty.

For Juror 2, the same underlying question takes the following grammatical structure: "personally participate in a decision where these questions are answered in such a way that **Judge Burdette ordered the death of the defendant?**" In this formulation, the juror's hypothetical decision is linked directly to this specific judge sitting in the courtroom as agent and subject in "ordering" the death sentence. Notice, additionally, that the first formulation highlights

Please do not cite without author's permission.

the penalty (“the death penalty”), while the second is formulated as a death (“the death of the defendant”). Juror 2, when confronted with this agentive construction, does not acquiesce, admitting that he could not impose a death sentence and thus could not fill the role of capital juror. He is promptly excused per agreement by both sides.

Conclusion

The socializing function of voir dire has been discussed, though minimally, in legal research; studies have focused almost exclusively, however, on explicit instructional content (Black et al. 1976). The analyses presented here have demonstrated tacit – though no less significant – lessons acquired through attorneys’, judges’, and jurors’ linguistic constructions used during jury selection. Differing formulations of agency, more specifically, reveal legal models of responsibility that transform jurors from individual moral agents to participants in a rationalized process that eventually leads to an execution.

Haney and others contend that capital sentencing structures used throughout the U.S. obfuscate the real nature of jurors’ decisions (Haney et al. 1994). The communicative practices described above in both written instructions and voir dire interactions provide jurors with potential emotional “shields” (ibid.:172) from the life and death consequences of their decisions. The constructions of agency illustrated here, moreover, are part of the interactional machinery by which “ordinary citizens,” according to Sarat, are enlisted as “authorizing agents for the law’s own lethal brand of violence” (1995:1103). Significantly, in the examples explored above, the mitigation of jurors’ individual moral agency seems necessary for them to qualify to sit on a capital jury. Socializing jurors into their institutional roles thus allows them to, as Cover argues, “act violently without experiencing...the normal degree of inhibition” that would regulate the behavior of autonomous individuals. The democratic administration of the death penalty would

Please do not cite without author's permission.

thereby appear to necessitate the process of socialization described here, in its rendering of state killing a “kind of violence which,” in Sarat’s words again, “can be approved and rationally dispensed” (ibid.:41).